Communication 409/12 – ***Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others***

Summary of the Complaint:

1. The Communication was originally submitted by Mr. Norman Tjombe (the Complainant) on behalf of Mr. Luke Munyandu Tembani and Mr. Benjamin John Freeth (the Victims) against the Republic of Angola (First Respondent), the Republic of Botswana (Second Respondent), the Democratic Republic of Congo (Third Respondent), the Kingdom of Lesotho (Fourth Respondent), the Republic of Malawi (Fifth Respondent), the Republic of Mauritius (Sixth Respondent), the Republic of Mozambique (Seventh Respondent), the Republic of Namibia (Eight Respondent), the Republic of Seychelles (Ninth Respondent), the Republic of South Africa (Tenth Respondent), the Kingdom of Swaziland (Eleventh Respondent), the United Republic of Tanzania (Twelfth Respondent), the Republic of Zambia (Thirteenth Respondent) and the Republic of Zimbabwe (Fourteenth Respondent) (collectively the Respondent States) as well as the Summit of Heads of State of the Southern African Development Community (SADC) and the Council of Ministers of SADC (SADC Council).

2. The African Commission on Human and Peoples' Rights (the Commission) however became seized of, and has considered this Communication against the fourteen (14) named Respondent States in their capacities as State Parties to the African Charter on Human and Peoples' Rights (African Charter).[1]

3. By virtue of affidavits deposed to by the Victims, supported by various evidentiary documents (altogether comprising the Communication), the

[1] Please refer to para 17 below for the details of the Seizure decision.

Complainant alleges that the First Victim, a Zimbabwean, had acquired a registered title to agricultural land in 1995, in which he invested considerable resources on farming facilities, and that he has now been deprived of his title and forced to leave the same, consequent upon an executive action by the Government of Zimbabwe. This matter was taken to the Tribunal of the SADC (the Tribunal), which made a ruling in favour of the First Victim, upholding the latter's contention that the deprivation of his land was in conflict with Zimbabwe's Treaty obligations and hence in violation of international law.[2]

4. The Complainant submits that the judgement of the Tribunal has not been complied with by Zimbabwe, and that this has been the case with other judgements handed down by the Tribunal against Zimbabwe, including the award in favour of what has now been termed the Campbell applicants[3] , which was issued by the Tribunal in the case of ***Mike Campbell (PVT) Limited and Others v. The Republic of Zimbabwe***[4] **(the Campbell Case)**. The Second Victim was one of the Campbell Applicants, who now acts on behalf of the Campbell applicants[5] in the present Communication.

5. The Complainant also states that a series of further applications were made by the Victims to the Tribunal, seeking a referral of Zimbabwe's defiance to the Summit of Heads of State of the SADC (SADC Summit) for measures to be taken against Zimbabwe as a member State and that these were also granted, but similarly defied.

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[2] The relevant judgement is attached as Annexure A to the Communication.
[3] Being the late William Michael Campbell, a private company where he was a director and 75 other farmers.
[4] Case No. SADC (T) 11/08), Annexure C to the Communication.
[5] Please see the Founding Affidavit of William Michael Campbell, Annexure D to the Communication, p10-29 (141-161 of the Communication compilation) and paragraph 2 of the Confirmatory Affidavit of Benjamin John Freeth, Annexure L to the Communication (p. 348 of the Communication compilation).

6. The Complainant alleges that by a decision taken by the SADC Summit, comprising the Respondent States as decision-makers, between 16 to 17 August 2010 (the "First Decision"), the Tribunal has now been suspended and its decisions cannot be enforced. The Victims sought to address this issue of suspension by filing an application to the Tribunal in March 2011, seeking a declaration *inter alia* that the SADC Summit was bound to support and facilitate the continued functioning of the Tribunal;[6] however, the Tribunal could/has not been convened to deal with these matters because it is suspended by virtue of a further decision (the "Second Decision") taken by the SADC Summit (and allegedly by implication, the Respondent States) on 20 May 2011.[7]

7. The Complainant asserts that the Second Decision perpetuates the indefinite paralysis of the Tribunal by failing to ensure the appointment of judges, and reiterating the moratorium on receiving any new cases or hearings by the Tribunal until the SADC Protocol on the Tribunal has been reviewed and approved. It is also alleged that the Second Decision did not take into account the First Decision of the SADC Summit which had left open, enforcement applications and ancillary applications to matters already heard, and pending applications.

8. The Complainant avers that the SADC Summit's decision to suspend the Tribunal was motivated by ulterior motives, stating that instead of giving effect to the decision of the Tribunal against Zimbabwe as a Member State of SADC, the SADC Summit gave effect to the wishes of Zimbabwe to be absolved from its responsibilities as declared by the Tribunal, by suspending the latter; an act

[6] See Annexure D to the Communication.
[7] Marked Exhibit F in the Founding Affidavit of Luke Muyandu Tembani, annexed as p4-17 of the Communication compilation.

which allegedly does not provide any remedy for the human rights violations which the Tribunal has pronounced upon.

9. The Complainant also submits that the suspension of the Tribunal violates the African Charter and the SADC Treaty and Protocol, and that the decision to suspend the Tribunal, is irrational, arbitrary, and motivated by extraneous considerations, and otherwise unlawful.

10. The Complainant submits that the Victims in this Communication are seeking remedy from the African Commission on Human and Peoples' Rights (the Commission) because since the Tribunal has been suspended, the decision of the Tribunal in their favour has not been complied with. In this regard, they and their families continue to suffer.

11. The Complainant claims that the decisions and actions of the SADC Summit, and thereby each Member State of SADC, that is, the Respondent States, in assenting thereto, as well as the consequential failures to ensure that the Tribunal continues to function, constitute a violation of the rights of the Victims under the African Charter, as well as the provisions of the SADC Treaty (Articles 4 and 6) and SADC Protocol.

Articles alleged to have been violated

12. The Complainant alleges violations of Articles 7 and 26 of the African Charter.

Prayers

13. In his original Complaint, the Complainant prayed that:
    a. the Commission should refer the Communication to the African Court on Human and Peoples' Rights (the Court):

b. for declarations that:

(i) the decisions taken by the SADC Summit (that is, comprising the Respondent States as decision-makers) to suspend the functions of the Tribunal, infringe the African Charter, the SADC Treaty and principles of international law binding on the Respondent States;

(ii) the Respondent States should lift, with immediate effect, the purported suspension of the Tribunal's functions, and do all such things necessary in order to support and facilitate the Tribunal and its functions, including:

A. re-appointing the members of the Tribunal whose terms of office were allowed to expire pursuant to the decision to suspend the Tribunal;

B. providing the necessary funding for the Tribunal's continued operations;

C. refraining from taking any measures likely to jeopardise the functioning of the Tribunal; and;

D. abstaining from any measures likely to detract from the independence, impartiality, effectiveness, accessibility and status of the Tribunal.

(iii) the Respondent States should give effect to the rulings by the Tribunal, including the orders referred to the SADC Summit by the Tribunal, and implement the recommendations made in the Final Report by the Experts on the review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal, dated 6 March 2011.

Procedure:

14. The Complaint dated 27 July 2011, was received at the Secretariat on 28 December, 2011 and processed for seizure consideration. During its 11th Extra-Ordinary Session held in Banjul, the Gambia, from 21 February 2012 to 01 March 2012, the Commission was seized of the Communication and decided not to refer the Communication to the Court because it does not meet the requirements for referral as provided for the Commission's Rules of Procedure.

15. On 6 March 2012, the Complainant was informed of the decisions of the Commission to be seized of the Communication "*with respect to the fourteen (14) named States only*",[8] and not to refer the same to the Court. The Complainant was further invited to submit his arguments on the Admissibility of the Communication against the fourteen (14) states before the Commission. On 13 March 2012, *Notes Verbale* were sent to all the fourteen (14) Respondent States, informing them about the Complaint and attaching the same.

16. Between 18 April 2012 and 14 May 2012, the Complainant submitted its arguments on the Admissibility of the Communication in the official languages of all the Respondent States, and these were transmitted by the Secretariat to all the Respondent States, by Notes Verbales dated 18 May 2012.

17. On 15 July 2012, Botswana wrote to the Secretariat to request for a three (3) months extension period to make its submissions on Admissibility and the Commission granted a one (1) month extension period only.

18. On 24 July 2012, the Secretariat received Tanzania's arguments on Admissibility and forwarded the same to the Complainant on 3 August 2012.

[8] See letter referenced ACHPR/LPROT/COMM/409/12/SADC/0.1/194/12.

19. On 25 July, 2012, the Secretariat received a request from Mauritius for a one (1) month extension period to make its submissions on Admissibility, and this was granted by the Commission.

20. By a Note Verbale dated 18 July 2012, Seychelles reacted to the Complainant's Admissibility submissions and the same was transmitted to the Complainant.

21. On 03 September, 2012, the Complainants sent supplementary submissions on Admissibility further to the Government of Tanzania's submission on Admissibility.

22. At its 52nd Ordinary Session, held in Yamoussoukro, Côte d'Ivoire, from 9 to 22 October, 2012, the Commission considered the Admissibility of the Communication and declared the same admissible.

23. On 16 November, 2012, the Secretariat informed the Complainant and the Respondent States, respectively, of the decision on Admissibility, and the Complainant was requested to forward his arguments on the Merits within sixty (60) days of notification, in accordance with Rule 108 (1) of the Commission's Rules of Procedure.

24. Between 24 December 2012 and 16 January 2013, the Secretariat received the Complainant's submissions on the Merits of the Communication with amended prayers, which was duly acknowledged and transmitted to the Respondent States on 22 January 2013. The States were also requested to forward their written submissions on the Merits and/or observations on the Complainant's submission within sixty (60) days of notification, in accordance with Rule 108 (1) of the Commission's Rules of Procedure.

25. On 18 February 2013, South Africa requested for a three (3) months extension of the deadline for making its submissions on the Merits, in response to which the Commission granted a one (1) month extension of time, in line with Rule 113(2) of its Rules of Procedure. Notice of the extension of time was provided to both South Africa and the Complainant on 19 February, 2013.

26. On 28 February 2013 and 11 March 2013, Mauritius informed the Secretariat that it only received the latter's Note Verbale transmitting the Complainant's submissions on the Merits on 28 February, 2013, and therefore requested for an extension of the deadline for its submission on the Merit.

27. On 11 March 2013, the Commission informed Mauritius that it would, in line with Rule 108(1) of its Rules of Procedure, compute the deadline for submission on the Merits by Mauritius from the actual date on which it received the Complainant's submission on the Merits, and that the issue of extension of deadline did as suggested by Mauritius, did not, in fact, arise. Notice of this decision was also provided to the Complainant by letter of the same date.

28. In response to a request from Tanzania, on 29 April 2013, the Secretariat forwarded the decision on Admissibility to Tanzania; informed the latter that the Complainant had filed submissions on the Merits of the Communication and attached copies of its earlier Note Verbale and transmittal note forwarding the said submission to Tanzania. Tanzania was reminded that in line with the Commission's Rules of Procedure, the deadline stipulated for it to forward its written submissions on Merits to the Secretariat had expired.

29. On 29 April 2013, the Secretariat received the submissions on the Merits of the Communication from Mauritius, which was duly acknowledged and transmitted to te Complainant on the same date.

30. Between 4 June and 10 June 2013, the Secretariat received the Complainant's response to the submissions on the Merits by Mauritius, in line with Rule 108(2) of the Commission's Rules of Procedure.

31. On 12 June 2013, Mauritius requested for the text of the Admissibility decision, which was transmitted by the Commission on 25 June 2013.

32. On 20 June 2013, South Africa informed the Commission that it would not be making any submission on the Merits of the Communication, and will abide by the decision of the Commission on the Communication. This information was duly acknowledged by the Secretariat and notified to the Complainant.

33. On 30 June, the Complainant forwarded to the Secretariat for its reference, a judgment handed down by the Constitutional Court of South Africa against Zimbabwe, on 27 June, 2013.

34. By Note Verbale dated 15 August 2013, which was received by the Secretariat on 19 August 2013, Lesotho requested the Commission to provide it with information regarding the status of the Communication, and also requested to know whether it is permissible for the Respondent States to make submissions regarding the Communication at this stage. On 20 August 2013, the Secretariat informed Lesotho of the status of the Communication, and also indicated that since the deadline stipulated for Lesotho to forward its written submissions on Merits to the Secretariat had expired in line with Rule 108(1), it could no longer make any submissions.

35. At its 54th Ordinary Session, held in Banjul, The Gambia, 22 October to 5 November, 2013, the Commission considered the Merits of the Communication.

The Law on Admissibility

Complainant's Submission on Admissibility

36. The Complainant submits that all the criteria for Admissibility enumerated under Article 56 of the African Charter are satisfied and that therefore, the Communication should be declared Admissible.

37. With respect to Article 56(1) of the African Charter, the Complainant states that in compliance with the relevant provision, the present Communication clearly indicates the names and identities of the applicants, as well as that of their authorized legal representative.

38. The Complainant also states that the provision of Article 56(2) of the African Charter has been complied with as the Communication clearly establishes all four *ratione jurisdictionis* required for the Commission to have the competence to consider the complaint, being personal, material, temporal and territorial jurisdiction.

39. The Complainant also avers that the Communication complies with Article 56(3) of the African Charter, as it has not been written in a disparaging language aimed at the Respondent States, and the language used in the same is entirely appropriate, concise, clear and competently sets out the cause of complaint.

40. The Complainant asserts that this Communication complies with Article 56(4) of the African Charter as it is not based on mass-media reports, but instead, is fully supported by direct evidence, including objective and reliable official records. He further asserts that the evidence supporting the Communication is reliable, indisputable, objective and independent.

41. Relying on the previous jurisprudence of the Commission, the Complainant also submits that this Communication complies with Article 56 (5) of the African Charter, as the applicants have fully satisfied the requirement to exhaust domestic remedies, seeing that there is no prospect of achieving any domestic remedy. They compare the facts of the present Communication to those of ***Sir Dawda K Jawara vs. The Gambia***[9]**.**

42. According to the Complainant, because the very complaint in the present Communication is the suspension of the Tribunal (which means that it cannot be approached to rule on the legality of its own suspension), in the circumstances of the present complaint, there is no remaining domestic remedy. He also contends that the applicants' attempt to approach the said Tribunal itself demonstrates beyond any doubt that there was (and still is) no prospect of achieving any domestic remedy.

43. The Complainant also states that this Communication complies with Article 56(6) of the African Charter as the applicants have lodged this Communication duly, sought to expedite its processing by the Secretariat and Commission, and complied with every Rule, directive or request by the Commission within the required time.

44. The Complainant states that this Communication complies with Article 56 (7) because the suspension of the Tribunal (the ground of the complaint) has still not been lifted, despite the Expert Report's recommendations and the public outcry by NGOs, SADC lawyers' associations and even the international community. Furthermore, the Complainant avers that there is no provision under either the African Charter or the UN Charter which authorises the paralysis of the

[9] Communication 147/95 & 149/96 - *Dawda K Jawara vs. The Gambia* (2000) ACHPR, paras 31- 34.

Tribunal, or the perpetuation of the paralysis, nor is there any lawful mechanism whereby the complaint can be "settled".

Respondent States' Submissions on Admissibility

45. Out of the fourteen (14) Respondent States which were provided with all the relevant submissions of the Complainant relating to this Communication, only Tanzania and Seychelles reacted to the Admissibility submissions of the Complainant.

Seychelles' Submissions on Admissibility

46. Seychelles sent a one-paged Note Verbale, reacting to the complaint and Admissibility submissions of the Complainant by indicating that it is not a direct party to the issues raised in the Communication and further indicating that it would "*adopt the submissions made by the 1st Respondent (the Summit of the Heads of State or the Governments of SADC) and the 2nd Respondent (Council of Ministers of SADC) on the issue of admissibility.*"[10]

Tanzania's Submissions on Admissibility

47. On its part, Tanzania provided a detailed counter-argument on the Admissibility of the Communication, on the basis of the requirements under Article 56 of the African Charter, contending that the Communication has not fulfilled the provisions of the same.

Preliminary Objection raised by Tanzania regarding the Commission's jurisdiction ratione personae and ratione materiae

[10] Para 2, Note Verbale from Seychelles to the Commission, Ref. MFA/353/132/1 and dated 18th July, 2012, as referenced in para 25 above.

48. As a preliminary issue, Tanzania requires the Commission to address whether, as an organ of the AU, it can determine a complaint filed against another sub-regional organ and its members and consequently, whether it has a mandate to proceed to issue an order against SADC and its member States. Tanzania therefore prayed the Commission to dismiss the Communication for lack of jurisdiction.

Submissions under Article 56

49. Concerning Article 56(1) of the Charter, Tanzania contends that while the authors' names have been indicated in the Communication, the relevance of the latter author to the Communication- Benjamin John Freeth, has not been clearly established and that neither his nationality nor profession/occupation is known.

50. Regarding Article 56(2) of the African Charter, Tanzania disputes the fact that the Complainant has met all requirements related to the compatibility of the African Charter in so far as the material, personal, temporal and territorial jurisdiction is concerned. Tanzania contends that the provisions of the African Charter alleged to have been violated are irrelevant to the facts *g*iving rise to the Complainant and do not in any way, establish any *prima facie* violation of either the African Charter or Principles of the OAU Charter, as the referenced articles deal with criminal law procedures and national courts, as opposed to the SADC Tribunal which is a sub-regional organ of the Community. It also submits that the format adopted by the Complainant, that is, in the form of affidavits, is incompatible with the one prescribed by the Commission, and that the Communication transgressed the Guidelines on Communications by including the SADC Summit and the SADC Council which are not by definition, States Parties to the African Charter.

51. Tanzania argues that the Commission is not mandated to deal with the claims of the Complainant, either by the express provision of the African Charter or by any necessary implication. Relying on the decision of the African Court in the case of ***Femi Falana vs. The African Union***[11], it contends that neither SADC nor its organs which have been joined in the Communication are parties to the African Charter to be able to invoke the jurisdiction of the Commission or mandate to deal with the Communication. It further argues that the obligations of Tanzania arising under the SADC Treaty are completely different from those arising under the African Charter and as such, the Complainant may not use facts arising from SADC to file a Communication under the African Charter.

52. With respect to the material jurisdiction (*ratione materiae*) of the Commission, Tanzania avers that the issues raised by the Complainant regarding access to the Tribunal are issues which can be raised and dealt with at the level of the SADC as an international organisation and a sub-regional organ, which has been given exclusive jurisdiction to deal with such community issues. In support of its argument, Tanzania relies on the case of ***The matter of Efoua Mbozo'o Samuel vs. the Pan African Parliament***[12].

53. Tanzania argues that in view of all the foregoing, the Complainant is inviting the Commission to deal with an issue, which falls outside of the latter's material, personal, temporal and territorial jurisdiction.

54. Tanzania further contends that the requirement of Article 56(3) of the African Charter has not been met as the Communication "*is full of disparaging or insulting*

[11] Application No.001/2011.
[12] Application No.010/2011.

language, directed at the member states of SADC". It submits that the Complainant/Victims employed political rhetoric and vulgar language.

55. Tanzania relies on the decisions of the Commission in ***Communications 65/92 – Ligue Camerounaise des Droits de l'Homme vs. Cameroon***[13] and ***Communications 322/2006 – Tsatsu Tsikata vs. Ghana***[14], in asking the Commission to find the language of the Communication insulting and disparaging, and non-compliant with Article 56(3) of the African Charter. Furthermore, it cited ***Communication 263/02 – Kenya Section of the International Commission of Jurists, Law Society of Kenya, Kituo Cha Sheria vs. Kenya***[15]**.**

56. Regarding Article 56(4), Tanzania argues that much as the Communication is not based on news disseminated through the media, it is based exclusively on allegations premised on the decisions of both the SADC Summit as well as the Tribunal which are entirely outside the scope of the Commission's intervention and entirely a different sub-regional grouping with its own mechanisms for resolving disputes. It also submits that the Complainant/Victims have not thoroughly investigated and ascertained the truth of the facts and where to refer their claim before resorting to the Commission.

57. Tanzania submits that the Communication has not fulfilled the provisions of Article 56(5) of the African Charter, regarding exhaustion of local remedies. It argues that the suspension of the SADC Tribunal is not a warrant for the Victims not to have exhausted local remedies in individual SADC states such as Tanzania and that the facts provided by the Complainant/Victims only indicate how the

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[13] Communications 65/92 – *Ligue Camerounaise des Droits de l'Homme vs. Cameroon* (1997) ACHPR.
[14] Communications 322/2006 – *Tsatsu Tsikata vs. Republic of Ghana* (2006) ACHPR.
[15] Communication 263/02 – *Kenya Section of the International Commission of Jurists, Law Society of Kenya, Kituo Cha Sheria vs. Kenya* (2004) ACHPR.

Victims have pursued the matter in the domestic courts of Zimbabwe before proceeding to the Commission. Relying on ***Communication 333/2006 – Southern Africa Human Rights NGO Network and Others vs. Tanzania***[16] and the earlier referenced ***Communication 263/02***[17], it contends that the Victims have not pursued their claims before the domestic courts of Tanzania and as such, the State has not been given the opportunity to address the alleged wrong, in line with the international law principle relating to the exhaustion of local remedies.

58. Tanzania claims that it would be very unfair and unjust for the Commission to usurp its jurisdiction as against Tanzania in this matter, while its municipal bodies were not or have not even been given an opportunity to provide a solution on the matter. It further counters the argument of the Complainant by submitting that there are remedies for the Victims which are available, effective and sufficient within the SADC. Relying on the decision of the European Court of Human Rights in ***Earl Spencer and Countess Spencer vs. United Kingdom***[18] and that of the Commission in ***Communication 275/2003 – Article 19 vs. Eritrea***[19], it asserts that it was incumbent on the Victims/Complainant to take all necessary steps to exhaust, or at least, attempt the exhaustion of local remedies, even if they have reasons to believe that the same would be ineffective.

59. Furthermore, on the requirement of exhaustion of local remedies, Tanzania submits that the suspension of the Tribunal is an issue that is still being dealt with at the level of SADC, and in respect of which a final decision is yet to be given, as a final report on the process of the review of the relevant SADC legal instruments is expected to be submitted to the summit in August 2012.[20] Tanzania also submits that the reference by the Victims against Zimbabwe, is

[16] Communication 333/2006 – *Southern Africa Human Rights NGO Network and Others vs. Tanzania* (2010)ACHPR, paras 55-66.
[17] n19 above.
[18] App. Nos. 28851/95, 28852/95 (Eur. Comm'n on HR 1998).
[19] Communication 275/2003 – *Article 19 vs. Eritrea* (2007) ACHPR.
[20] Paras 13 & 44 of Tanzania's submissions on Admissibility..

also still being dealt with by the SADC Summit (within its time frame and schedule of work) which is yet to give its decision thereon and that the Complainants are bound by the provisions of Article 32(5) of the Protocol of the SADC Tribunal, requiring the SADC Summit to take its appropriate action once a Tribunal has established that its decision has not been honoured. Accordingly, Tanzania contends that the Complainant/Victims have acted impetuously in bringing this Communication.

60. On Article 56(6), regarding the submission of the Communication within a reasonable time from the time local remedies were exhausted, Tanzania argues that since it contends that the Victims did not exhaust any local remedy in Tanzania, the issue of submission of the Complaint within a reasonable period does not and cannot arise. It also argues that since the alleged matters are yet to be concluded at the level of SADC, time has not begun to run such as to afford the Complainant the opportunity to bring forth his Complaint.

61. Alternatively, Tanzania submits that if the Commission should find that the Victims have exhausted local remedies, then it argues that the Communication has not been brought within a reasonable time from the time local remedies were last exhausted in Zimbabwe and South Africa as indicated in the Communication. It argues that while the Complaint does not clearly show when exactly the Victims attempted to enforce the awards in the local courts, the same indicates that the Complainant/Victims in their submissions had stated that the First Decision of the SADC Summit in August 2010 had the practical effect of ousting the Tribunal's ability to hear their applications to the Tribunal for the reference to the Summit of Zimbabwe's refusal to implement the decision of the Tribunal. It therefore argues that the Complainants could have filed their Communication immediately after August 2010, when their cause of action arose, that is when the First Decision was taken, rather than waiting until 27th

July, 2011, almost a year after the last event which ousted the ability of the Tribunal to hear the matter, which period is not reasonable.

62. In this regard, it urges the Commission to draw inspiration from and align with the practice and jurisprudence of the European and Inter-American human rights system in finding "six months" a reasonable time within which to file a Communication after exhausting local remedies.

63. Finally, on Article 56(7), Tanzania argues that the Communication deals with a case which is currently being dealt with in another international/sub regional organ- SADC, and therefore the Communication has no legs to stand on.

Complainant's Supplementary Submissions on Admissibility

64. The Complainant in his supplementary submission on Admissibility argues that the suggestion that the legal processes to enforce rights under the African Charter should give way to ongoing political processes was never one rooted in the principle of legal policy. He argues that the purported scrutiny or consideration of the jurisdiction of the Tribunal by the Summit constituted an unlawful usurpation of the Tribunal's exclusive jurisdiction – the very illegality complained of under the Communication. Furthermore, he contends that such an argument would also mean that there would never be access to justice for a violation of a continuous nature.

65. The Complainant argued further that the Communication is instituted against the Respondent States not by "merely being a member of SADC"[21], but as decision-makers, who unanimously resolved to suspend the Tribunal, and who are also all "members of the African Union, and accordingly, subject to the

[21] Complainant's Supplementary Submission on Admissibility, para 22.

jurisdiction of the Commission".[22] He also submits that the case of ***Femi Falana vs. The African Union***[23] referenced by Tanzania is of no relevance to the Communication, of which the Commission has already been seized, in relation to the fourteen Respondent States, while that of ***Efoua Mbozo'o Samuel vs. the Pan African Parliament***[24]actually confirms the Commission and the Court's jurisdiction over the matter.

66. He further submits that the "*exclusive jurisdiction*" over the issue of the suspension of the Tribunal which the State alleges is founded on the SADC Protocol, is required by the said Protocol (in Article 15(1)) to be exercised by the same Tribunal, whose jurisdiction has been ousted; being the violation of the African Charter alleged by the Complainant/Victims.[25]

67. Finally on the issue of jurisdiction, the Complainant disputes the argument of Tanzania that the suspension of the Tribunal does not support a cause of action under the African Charter and asserts that, while this is an issue to be dealt with on the merits, the facts alleged clearly indicate a violation of Articles 7 and 26 of the African Charter.

68. Regarding Tanzania's objection under Article 56(1) about the relevance of the second author, he argues that Article 56(1) merely requires that the authors of a Communication be named.

69. The Complainant also argues that Tanzania's contention that the Communication transgressed the Guidelines on Communications is misplaced, as the Guidelines are not immutable, and more importantly, all material information has been clearly provided in the application/Communication.

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[22] Ibid.
[23] n14 above.
[24] n15 above.
[25] Fn 27, para 23.

70. The Complainant also disputes Tanzania's allegation that the language of the Communication does not comply with Article 56(3), and asserts that all the terms identified as "vulgar" are "standard legal terminology" and that Tanzania's contention that these words are "not…appropriate" and "too strong" fail to establish the high threshold under Article 56(3). He also denies that the Communication includes "speculations as well as extraneous matters with a political rhetoric touch". He asserts that the contents complained of are not speculative but "incontrovertible, historical facts (borne out *inter alia* by documentary evidence), deposed to under oath."[26] He also asserts that the facts relate to Zimbabwe, which Tanzania has opted to draw its own inferences from and the latter "cannot invoke its own inferences to stymie the hearing on the merits".[27] Furthermore, he states that the content of the Communication complained of, find on a reasonable apprehension of bias, as individuals in the position of the Victims are routinely brought before the Zimbabwean courts on criminal charges for seeking to exercise their rights as pronounced by the Tribunal, and that as a result of the "impugned decision", these individuals have no other legal forum in which to protect their rights.

71. Relying on the Commission's decision in ***Tsatsu Tsikata v Republic of Ghana***,[28] he submits that the Commission would only uphold an argument based on Article 56(3) in exceptional circumstances, because the cause of action necessarily requires to be pleaded in terms which cast some aspersion on the entities concerned. He argues that by its argument, Tanzania is effectively contending that Communications be cast in terms hardly capable of conveying a cause of action, and which would fetter even the Commission in formulating findings of fact and conclusion of law.

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[26] Id, para 44.
[27] Ibid.
[28] n18 above.

72. Regarding Tanzania's argument on the requirement of Article 56(4), the Complainant argues that there is no further need for verifying the truth of the facts underlying the allegations, the veracity of which is demonstrated by the text of formal resolutions, and in respect of which "none of the Respondent States has sought to present contrary evidence, dissociate themselves from the impugned decision, qualify it or cast it in a different light.[29]

73. He also submits regarding the exhaustion of local remedies that the Victims exhausted every necessary legal remedy and that the suspension of the Tribunal also frustrated their attempt to exhaust domestic remedies (by approaching the Tribunal). In response to Tanzania's contention that the Victims failed to pursue domestic remedies in the municipal courts of the Respondent States, including Tanzania, he argues that the breach of international law obligations are only justiciable in an international forum of competent jurisdiction. Further that the municipal courts of Tanzania are not "domestic" to the Victims and Article 56(5) cannot be interpreted to contemplate absurdity as the import of Tanzania' argument would be that the Complainant would be required to pursue local remedies in the fourteen Respondent States.

74. Relying on the jurisprudence of the Commission,[30] the Complainant contends that the Commission will not hold the requirement of exhaustion of local remedies to apply literally in cases where it is believed that this exercise would be futile.

75. Regarding Tanzania's argument that the Victims are bound by Article 32(5) of the SADC Protocol to await the decision of the SADC Summit regarding their

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[29] Fn 27, para 51.

[30] Communication 275/2003 (n24 above) para 75, Communications 137/94, 139/94, 154/97 and 161/97 - *International PEN, et al (on behalf of Ken Saro-Wiwa Jr) vs. Nigeria* (1999) ACHPR paras 74-76 and Communication 245/02 - *Zimbabwe Human Rights NGO Forum vs. Zimbabwe*(2006) ACHPR, para 72.

reference on Zimbabwe, the Complainant reiterates that the Victims' complaint is that the Tribunal has been suspended, not that Zimbabwe repudiated its rulings.

76. The Complainant also disputes Tanzania's contention that the Communication has not been submitted within a reasonable time as required under Article 56(6) of the African Charter and submits that the "*final [sic] decision suspending the Tribunal*"[31] was taken on 20 May, 2011, and not August 2010, as stated by Tanzania, and that in effect, the Communication had been submitted about two months after the Victims' cause of action arose.

77. Finally, the Complainant submits that Tanzania misconstrues the Admissibility requirement under Article 56(7) by stating that this requirement has not been met as the subject matter of the Communication is currently being dealt with in another international/sub regional organ - SADC. He submits that Article 56(7) does not apply to matters which are "still under consideration", but matters which have already been settled by the States involved "in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter". Furthermore, he submits that the SADC Summit's purported "review" of the matter is not in accordance with the principles of the referenced international instruments as none of them allow for the review, suspension or termination of an international court's jurisdiction by the executive arm of the same organisation, especially as an independent judiciary is an essential branch of the organisation as established by its constitutive instrument.

Decision of the Commission on the preliminary issue of its *jurisdiction ratione personae and ratione materiae*

[31] Fn 27, para 66.

78. Tanzania raises objections to the Commission's exercise of jurisdiction *ratione personae and ratione materiae* and requests the Commission to determine as a preliminary issue, whether as an organ of the AU, it can consider a complaint filed against another sub-regional organ and its members and consequently, whether it has a mandate to proceed to issue an order against SADC and its member States. Tanzania argues that neither SADC, its summit, Council of Ministers nor Tanzania are parties to the African Charter by merely being a member of SADC, such as to entitle the Complainant/Victims to accrue any cause of action against its organs or member states.

79. From the submissions of Tanzania, the Commission observes that the argument of Tanzania in relation to the jurisdictional objection relates only to the Commission's jurisdiction *ratione personae.* Nonetheless, the Commission wishes to note that all of the four *rationes jurisdictionis* required for it to have the competence to consider the Communication are contended by Tanzania in its arguments on Article 56(2) of the Charter[32] and that all of these are addressed in the Commission's analysis on Admissibility below.

80. With specific reference to the preliminary objection raised on the Commission's jurisdiction *ratione personae,* the Commission notes that the complaint, in its original format, listed the "*Summit of Heads of State or Government of SADC*", the "*Council of Ministers of SADC*" and the individual Respondent States as respondents. However, the Commission is well aware that it has no jurisdiction over intergovernmental organizations and their organs such as the SADC and its Summit of Heads of State or Government or its Council of Ministers. Therefore, the Commission became seized of the present Communication only in relation to the fourteen Respondent States, in their individual capacities as State parties to the African Charter.

[32] Para 31 of Tanzania's submissions on Admissibility.

81. Consequent to the above, the Commission holds that the present Communication is not being considered as having been filed against SADC, its Summit or Council of Ministers. It is also not being considered as having been filed against Tanzania by merely being a member of SADC, but as a State party to the African Charter by virtue of its due ratification of the same in the year 1984.

Analysis of the Commission on Admissibility

82. It is to be noted that in conformity with Article 57 of the African Charter, all of the fourteen (14) Respondent States were provided with all the relevant submissions of the Complainant relating to this Communication. Article 57 of the African Charter has been interpreted by the Commission to "*implicitly indicate… that the State Party to the … Charter against which the allegation of human rights violations are levelled, is required to consider them in good faith and furnish the Commission with all information at its disposal to enable the latter come to an equitable decision*."[33] Notwithstanding the import of this provision and the notifications to all of the Respondent States, only Tanzania submitted an argument on the Admissibility of the Communication.

83. On its part, Seychelles expresses the view that it is not a direct party to the issues raised in the Communication and makes no other submission other than relying on any submissions that the SADC organs should have submitted were they parties. Accordingly, Seychelles will be bound by any decision taken by the Commission on the basis of the facts and evidence presented before it.

84. Despite being given ample opportunity to forward their submissions on Admissibility on the matter, Botswana and Mauritius have not provided their

[33] Communication 159/96 - *Union interafricaine des droits de l'Homme, Fédération internationale des ligues des droits de l'Homme,RADDHO, Organisation nationale des droits de l'Homme au Sénégal and Association malienne des droits de l'Homme vs. Angola* (1997) ACHPR, para 10.

Admissibility submissions and the Commission, regrettably, has no option but to proceed with considering the Admissibility of the Communication based on the information at its disposal.

85. The other ten (10) respondents namely *Angola, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, and Zimbabwe* neither reacted to the Complainant's submissions nor sent any submissions or correspondence to the Commission regarding the Complaint. The Commission would like to emphasize that the absence of reactions from the relevant Respondent States does not absolve them from the decision that the Commission will arrive at in the consideration of the Admissibility of this Communication, as the relevant States had, by ratifying the African Charter, indicated their commitment to cooperate with the Commission and to abide by all decisions taken by the latter.[34]

86. Article 56 provides seven requirements which must be cumulatively met before the Commission can declare a Communication admissible. If one of the conditions/requirements is not met, the Commission will declare the Communication inadmissible, unless the Complainant provides sufficient justifications as to why any of the requirements could not be met.

87. In relation to Article 56(1) of the African Charter, the Commission notes that the Communication indicates the Victims as Luke Munyandu Tembani and Benjamin John Freeth, and Norman Tjombe as their legal representative and author of/Complainant in the Communication.[35] The Commission notes that the

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[34] See Communication 227/99 – *Democratic Republic of Congo vs. Burundi, Rwanda, Uganda* (2003) ACHPR, paras 51-53.

[35] Please note that according to the *Editorial Policy on Standardizing Decision Writing for the African Commission on Human and Peoples' Rights*, which is an internal working document of the Commission, if a complainant/author is not the victim of the alleged violations, then the author/complainant (being the party submitting the complaint to the Commission) is distinguished from the victim. Thus, in naming the

reasons for the requirement under Article 56(1) are"*…that the Commission must receive communications with adequate information with a certain degree of specificity concerning the victims*"[36] and to ensure that the "*Commission must be in communication with the author, to know his identity and status, to be assured of his continued interest in the communication and to request supplementary information if the case requires it*".[37]

88. Accordingly, the Commission finds that the Victims in this Communication as well as the author/Complainant, are clearly stated as required. It therefore holds that the requirement under Article 56(1) of the African Charter is fulfilled.

89. Concerning Article 56(2) of the African Charter, the Commission notes that the compatibility requirement under Article 56(2) relates to: (i) the rights-holders by whom and duty-bearers against which Communications may be brought, (ii) the substantive issues that may be invoked, (iii) the time period within which, and (iv) the place where the violation must have occurred.[38] In the case of ***Kevin Mgwanga Gunme et al vs. Cameroon***,[39] the Commission held that

[the condition relating to compatibility with the African Charter basically requires that the Communication should be brought against a State party to the Charter; the Communication must allege prima facie violations of rights protected by the African Charter; the Communication should be brought in respect of violations that occurred after [the] State's ratification of the African Charter; or where the violations began

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Communication, the name of the victim is reflected against that of the State Party, with the name of the complainant/author in parentheses, as in the present case.

[36] Communication 104/94-109/94_126/94 – *Centre of the Independence of Judges and Lawyers vs. Algeria*, (1995)ACHPR para 3.

[37] Communication 108/93 - *Monja Joana vs. Madagascar* (1997)ACHPR para 6. See also Communication 62/91 - *Committee for the Defence of Human Rights (in respect of Ms. Jennifer Madike) vs. Nigeria* and Communication 70/92 - *Ibrahima Dioumessi, Sekou Kande, Ousmane Kaba vs. Guinea*, which were closed by the Commission as a result of lack/loss of contact with the complainants.

[38] Frans Viljoen, International Human Rights Law in Africa (2012), 311.

[39] Communication 266/03- *Kevin Mgwanga Gunme et al vs. Cameroon* (2009) ACHPR, paras 71.

before the State Party ratified the African Charter, have continued after such ratification.

90. In the light of these requirements, the Commission observes that the present Communication alleges a denial of access to justice and sets out, *prima facie*, that Articles 7 and 26 of the African Charter have been violated. The Commission also notes that the Communication is brought against States Parties to the African Charter, and alleges the violation of the rights of citizens of Zimbabwe. All the Respondent States are subject to the jurisdiction of the Commission and their territories are governed by the African Charter. The relevant Decisions of the SADC Summit which are alleged to have been collectively taken by the Respondent States and which form the basis of the alleged ongoing violation of the denial of access to justice, were adopted in Namibia and Mozambique, respectively, and operate in the territories of all the Respondent States; all of which are governed by the African Charter. The African Commission therefore holds that the requirements under Article 56(2) have been fulfilled.

91. With respect to Article 56(3) of the African Charter, the Commission notes Tanzania's submission that paragraphs 21, 22, 24 - 26 and 29 of the Communication is written in "*disparaging language or insulting language directed at the member states of SADC".* The Commission refers to its interpretation of these terminologies in ***Communication 268/03 - Ilesanmi / Nigeria***[40] and ***Communication 284/03 - Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe / Zimbabwe***[41], where it held respectively that "*… disparaging means "to speak slightingly of... or to belittle and insulting means to abuse scornfully or to offend the self respect or modesty of...". The language must be aimed at undermining the integrity and status of the institution and bring (sic) it into*

[40]Communication 268/03 - *Ilesanmi vs. Nigeria* (2005) ACHPR paras 37-40.
[41]Communication 284/03 - *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe / Zimbabwe* (2009)ACHPR, paras 83-97.

disrepute"[42] and "*insulting means to abuse scornfully or to offend the self respect or modesty of…*"[43]

92. Furthermore, the Commission has held in the above referenced ***Communication 284/03,***[44] *inter alia* that:

> *in determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute. To this end, Article 56(3) must be interpreted bearing in mind Article 9(2) of the African Charter which provides that 'every individual shall have the right to express and disseminate his opinions within the law'. A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression*.[Emphasis added].[45]

93. In view of the above interpretation, it is the opinion of the Commission that the terminologies challenged by Tanzania in the present Communication are not insulting or disparaging in the manner contemplated by the provision of Article 56(3). Words such as "*ulterior purpose*", "*violator*" and "*irrational and that is has*

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[42] n60 above, para 39.
[43] n61 above, para 88.
[44] n61 above.
[45] Ibid, para 91.

been made in bad faith" would be nothing but mere allegations, depicting, as they perceive it, the Complainant/Victims' perception of the facts which form the basis of the allegations and fears upon which the Communication is founded. They have been used to describe a situation which has been condemned and which would be difficult to describe differently.[46]

94. In this light, the Commission wishes to distinguish the words used in the present Communication, for instance, from those used in the case of ***Ligue Camerounaise des Droits de l'Homme v Cameroon***[47], referenced by Tanzania, where the Commission condemned the use of words such as "*Paul Biya must respond [sic] to crimes against humanity*"; "*30 years of the criminal neo-colonial regime incarnated by the duo Ahidjio/Biya*"; "*regime of torturers*"; and "*government barbarisms*", as insulting language.[48] On the basis of the foregoing, the Commission holds that the requirement under Article 56(3) has been complied with.

95. In relation to Article 56(4) of the African Charter, the Commission has explained in the case of ***Dawda K Jawara vs. The Gambia***[49] that the *raison d'être* for this requirement is to determine whether the facts of a Communication are based "exclusively" on news disseminated through the mass media, without more. Consequently, the Commission has perused the appendices to the Communication and observed that they contain relevant official documents that are not collected from the mass media. Therefore, in the Commission's view, the Communication meets the requirement of Article 56(4).

96. Regarding Article 56(5) of the African Charter, the Commission notes Tanzania's contention that the Victims failed to pursue domestic remedies in the municipal

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[46] See Communications 262/02 - *Mouvement ivoirien de droits de l'Homme (MIDH) vs. Cote d'Ivoire* (2008)ACHPR paras 47-48 & 260/02- *Bakweri Land Claims Committee vs. Cameroon* (2004) ACHPR para 48.
[47] n17 above.
[48] Ibid, para 13.
[49] n9 above, paras 23-27.

courts of the Respondent States, including Tanzania. The exhaustion of local remedies rule, codified under Article 56(5) of the African Charter, is a principle under international law of permitting a State to have an opportunity to redress the wrong that has occurred there, within the framework of its own domestic legal order, before its international responsibility is called into question at the international level. It is a well established rule of customary international law that before international proceedings are instituted, the various remedies provided by the State should have been exhausted.[50]

97. The Commission has expounded on this principle in its jurisprudence[51] and has held that "*the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice*"[52], and that "the *internal remedy [to] which article 56(5) refers entails remedy sought from courts of a judicial nature…*"[53] Furthermore, the Commission's *Information Sheet No. 3*[54], also states that "[*t]he author [of a Communication] must have taken the matter to all the available domestic legal remedies. That is, he or she must have taken the case to the highest court of the land*."

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[50] See also Nsongurua Udombana, So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights (2003) *97 AJIL No. 1,* p. 2 available at < http://www.asil.org/ajil/udombana.pdf> (accessed on 03 August 2012) ; Silvia D'Ascoli and Katherine Maria Scherr, "The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection," European University Institute, EUI Working Papers Law 2007/02, p15.

[51] There is a plethora of decisions of the Commission on this subject. For ease of reference, see the Compilation of Decisions on Communications of the African Commission on Human & Peoples' Rights: 1994-2001', (2002) *Institute for Human Rights & Development*, p.429-430; Decisions of the African Commission on Human & Peoples' Rights on Communications: 2002-2007' (2008) *Institute for Human Rights & Development*, p.421-424.

[52] Communication 242/01- *Institute of Human Rights and Development in Africa and Interights vs. Mauritania* (2004) ACHPR para 27.

[53] Communication 221/98 - *Alfred B. Cudjoe vs. Ghana* (1999) ACHPR para 14.

[54] Communications Procedure, available at <http://www.achpr.org/communications/procedure/> (accessed on 26 September 2012).

98. The import of the foregoing is that Article 56(5) contemplates the exhaustion of the ordinary remedies of common law that exist in the judicial courts of the Respondent States.

99. Notwithstanding this general rule, the African Commission has held in previous Communications that:

> "*… the local remedies rule is not rigid. It does not apply if: local remedies are inexistent; local remedies are unduly and unreasonably prolonged; recourse to local remedies is made impossible; from the face of the complaint there is no justice or there are no local remedies to exhaust, for example, where the judiciary is under the control of the executive organ responsible for the illegal act; and the wrong is due to an executive act of the government as such, which is clearly not subject to the jurisdiction of the municipal courts*." [55]

100. Furthermore, the Commission has held that:

> *[Article 56] of the African Charter requires that Complainants exhaust local remedies before the Commission can take up a case, unless these remedies are as a practical matter unavailable or unduly prolonged… [and that] the Commission has never held the requirement of local remedies to apply literally in cases where it is impractical or undesirable for the Complainant to seize the domestic courts in the case of each violation*."[56][Emphasis added].

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[55]Fn 24, para 48.

[56] Communication 25/89-47/90-56/91-100/93 - *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah vs. DRC* (1996)(ACHPR). See also Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98 - *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme / Mauritania* (2000), ACHPR, para 85; Communication 27/89-46/91-49/91-99/93 - *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme/Rwanda* (1997) ACHPR, para 18; Communication 73/92 - *Mohammed Lamin Diakité vs. Gabon* (2000)(ACHPR) para 16 & Communication 71/92 - *Rencontre africaine pour la défence des droits de l'Homme (RADDHO) vs. Zambia* (1997)(ACHPR) para 11.

101. Similarly, the European Court of Human Rights has held, in cases "*where requiring the applicant to use a particular remedy would be unreasonable in practice and would constitute a disproportionate obstacle to the effective exercise of the right of individual application under Article 34 of the Convention*", that the applicant is dispensed from that requirement.[57]

102. The Commission notes that the *fora* for exhausting local remedies contemplated under Article 56(5) of the Charter do not include the Tribunal, which is a supra-national court and sub-regional treaty body[58] and not a "judicial court" of any of the Respondent States. As a result, it would be incorrect to state that "domestic remedies" could not be exhausted as a result of the suspension of the Tribunal.

103. Nevertheless, the Commission is convinced by the argument of the Complainant that Article 56(5) cannot be interpreted to contemplate that the Victims/Complainant would be required to pursue local remedies, if at all there is any, in all of the fourteen (14) Respondent States before approaching the Commission. On this issue, the Commission is guided by its jurisprudence in cases where it has, in view of the vast and varied scope of the violations alleged and the large number of victims involved, held that local remedies need not be exhausted because it would involve seizing the domestic courts in respect of each violation and/or victim, which would in effect unduly prolong the process of exhausting local remedies in such cases.[59]

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[57] European Court of Human Rights – Practical Guide on Admissibility Criteria, Council of Europe/European Court of Human Rights (2011), available at < http://www.echr.coe.int/NR/rdonlyres/B5358231-79EF-4767-975F-524E0DCF2FBA/0/ENG_Guide_pratique.pdf > (accessed on 25 September, 2012). [Emphasis added].

[58] Article 2, SADC Tribunal available at < http://www.sadc.int/index/browse/page/163> (accessed on 03 August 2012).

[59] Communications 25/89-47/90-56/91-100/9, 54/91-61/91-96/93-98/93-164/97-196/97-210/98 & 27/89-46/91-49/91-99/93; fn76 above.

104. The Commission notes that the implication of a rigid application of Article 56(5) to the present Communication would be the same as that which the Commission sought to avoid in the referenced past decisions. In this regard, the Commission takes cognizance of the fact that the present Communication has been filed against fourteen different States, who are alleged to have collectively taken a decision which violates the rights of the Victims as protected under the African Charter (the merits of which is yet to be examined by the Commission) and that each State has its unique legal jurisdiction and court systems. On this basis, the Commission considers that a rigid application of Article 56(5) to the present Communication by requiring the Victims/Complainant to exhaust domestic remedies in all of the fourteen (14) Respondent States by filing court applications against each State[60], would, as argued by the Complainant, occasion a paralysing delay and costs to the Complainant/Victims.

105. On the basis of the foregoing, the Commission is persuaded to conclude that exhaustion of local remedies, even if available, is neither practicable nor desirable in the present case, especially as it would be unduly prolonged, and therefore holds that the Complainant is dispensed from the requirement under Article 56(5) of the African Charter.

106. With respect to Article 56(6) of the African Charter, the Commission notes that the African Charter does not specifically state what it means by "reasonable time", as opposed to Article 46(1(b) of the *American Convention on Human Rights* and Article 35(1) of the *European Convention on Human Rights* which provide for a

[60] Notably, the Complainant cannot file an application in Tanzania (or any other Respondent State for that matter) against the other Respondent States, as the national courts of Tanzania have no jurisdiction over the other Respondent States. See Communication157/96 - *Association pour la sauvegarde de la paix au Burundi / Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia* (2004) ACHPR para 65.

six months period. In the absence of this specification, the Commission has always ruled based on the contexts and characteristics of each case.[61]

107. Furthermore, the requirement under Article 56(6) provides for two events from which the timeline within which a Communication has been submitted may be computed, being: (i) "*from the time local remedies are exhausted*"; or (ii) "*from the date the Commission is seized with the matter*". From the Commission's analysis on Article 56(5) in the preceding paragraphs, domestic remedies were not (required to be) exhausted in the present case, consequent to which the timeline for the submission of the Communication may not be computed "*from the time local remedies are exhausted*". This leaves us with the second limb of the provision, that is, "*from the date the Commission is seized with the matter*". Notably, this second limb of Article 56(6) has not been pronounced upon in the Commission's jurisprudence.

108. In this regard, the Commission notes that while the term "seized" or "seizure" has acquired a technical meaning in its Communications handling procedure, meaning "the decision by the Commission to consider a Communication",[62] this technical meaning of seizure is clearly not what is contemplated under the second limb of Article 56(6). This is because, for a seizure to technically occur, the Communication must have first been submitted to the Commission, while on the other hand Article 56(6) contemplates that a Communication must be submitted "after" and within a timeline "*from the date the Commission is seized with the matter*".

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[61] Communication 333/06 (n21 above), para 68. See also Communication 310/05 - *Darfur Relief and Documentation Centre vs. Sudan* (2009)ACHPR, para 75.

[62] See Article 55(1) & (2) of the Charter. See also Comm. 65/92 - *Ligue Camerounaise des Droit de l'Homme vs. Cameroon* (1997) ACHPR, para 10.

109. In the Commission's view, the jurisdiction of the Commission began in relation to the facts of the present Communication on the date on which the alleged cause of action under the African Charter arose. In this regard, the Commission observes from the appendices to the Communication that while the First Decision of the SADC Summit of August 2010 allowed members of the Tribunal to remain in office but imposed a moratorium on the receipt of new cases by the Tribunal, pending the decision of the Extra-Ordinary Summit on the status, roles and responsibilities of the Tribunal,[63] the Second Decision of 20 May, 2011[64] reaffirmed the moratorium and[65] set out the resolution of the Summit not to reappoint members of the Tribunal whose terms of office had expired.[66]

110. Taking all the facts into account, the Commission notes that the Tribunal could not convene, as a result of the Second Decision of May 2011 not to reappoint the Tribunal judges whose terms had expired. It is therefore clear that it was this latter decision that foreclosed the chances of the Victims approaching the Tribunal. Consequently, this date, would therefore, in the view of the Commission, be the date on which the alleged cause of action under the African Charter arose and the time period of the jurisdiction of the Commission began, in relation to the facts of the present Communication. Accordingly, the Commission finds that this Communication was submitted within at least, two (2) months from the date in which the time period of the jurisdiction of the Commission began in relation to the facts of the present Communication and thus, the requirements of Article 56(6) have been fulfilled.

111. Concerning Article 56(7) of the Charter, the Commission notes that the provision codifies the *non bis in idem* rule[67] which ensures that no State may be

[63] Ibid, paras.9.4., 33 & 10.2(i) &(iii).
[64] Annexure E to the Communication, p171-174.
[65] Id, para8.
[66] Id, para 7.
[67] Also known as the Principle or Prohibition of Double Jeopardy.

sued or condemned more than once for the same alleged human rights violations, and seeks to uphold and recognize the *res judicata*[68] status of decisions issued by international and regional tribunals and/or bodies.

112. The import of this requirement is that the matter in contention, which must relate to the same facts and parties, must have been "*settled*" – it must no longer be under consideration under an international dispute-settlement procedure.[69] Also, the prior settlement of the matter must have been by a body "*capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations*"[70]; that is, "*an international adjudication mechanism, with a human rights mandate*".[71]

113. There is no evidence before the Commission to show that this Communication has been "*settled*" by any *"international adjudication mechanism"*, in accordance with the referenced international instruments and as such, the Commission holds that the requirements of Article 56(7) have been met.

114. In view of the analysis above, the African Commission declares the Communication admissible.

Consideration of the Merits

Summary of the Complainant's Submission

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[68] The principle that a final judgment of a competent court or tribunal is conclusive on the parties in any subsequent litigation involving the same cause of action.
[69] See Communication 40/90 – *Bob Ngozi Njoku V. Egypt* (1997)ACHPR, paras 54-56. See also Viljoen, n 53 above, p320.
[70] Communication 279/03, 296/05 (joined), *Sudan Human Rights Organisation and the Centre on Housing Rights and Evictions vs. Sudan* (2010)ACHPR, para 105. See also, Viljoen, n53 above, p321.
[71] Id, para 104. See also, Viljoen, n53 above, p321.

115. The Complainant submits that that the suspension and permanent ouster of the Southern Africa Development Community (SADC) Tribunal (SADC Tribunal) is unlawful because it violates binding provisions of the African Charter, the SADC Treaty and the International Covenant on Civil and Political Rights (ICCPR) in that the ouster infringes on the right of access to court, interferes with the independence, competence and institutional integrity of the SADC Tribunal, terminated existing proceedings and vested remedies, violated the rule of law and trespassed on the doctrine of separation of powers. The Complainant submits further that the suspension and permanent ouster of the SADC Tribunal is procedurally irregular for interfering with the existence and functioning of the SADC Tribunal, "an essential Treaty organ" and constitutes an "irrational and arbitrary exercise of executive powers" because "it is in bad faith and motivated by extraneous considerations".

116. It is the Complainant's contention that the suspension and subsequent permanent ouster of the SADC Tribunal by the Respondent States is a violation of the Victim's right of access to court as guaranteed in Articles 7 and 26 of the African Charter read together with the Commission's Resolution on the Right to Recourse and Fair Trial.[72] The Complainant relies on the Commission's jurisprudence in *Civil Liberties Organisation v Nigeria* in support of this point.[73]

117. The Complainant argues further that the acts and omissions of the Respondent States amount to a violation of the independence, competence and institutional integrity of the SADC Tribunal and by extension, the doctrine of separation of

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[72] Adopted at the 11th Ordinary Session of the African Commission held in Tunis, Tunisia from 2 to 9 March 1992

[73] Communication 129/94 *Civil Liberties Organisation v Nigeria* (1995)(ACHPR) para 13. The Complainant also relies on Communication 143/95, 150/96 – *Constitutional Rights Project & Civil Liberties Organisation v Nigeria* (1999) (ACHPR); Communications 137/94, 154/96, 161/97 – *International PEN, Constitutional Rights Project, Civil Liberties Organisation & Interights (On behalf of Ken Saro-Wiwa Jnr) v Nigeria* (1999) (ACHPR).

powers as applicable under the SADC framework. On this point, the Complainant cites the Commission's decision in *Lawyers for Human Rights v Swaziland*.[74]

118. The Complainant also submits that the totality of the acts and omissions of the Respondent State amount to a retrospective termination of extant proceedings and deprivation of accrued remedies in favour of the Victims since the SADC Tribunal is now unable to hear new or existing cases, including those instituted prior to the events complained of. The Complainant contends that by so doing, the Respondent States have violated Articles 3(2) and 7(1) of the African Charter, Articles 2(3) and 14 of the ICCPR and Article 27 of the Vienna Declaration and programme of Action. In support of this contention, the Complainant cites *Zimbabwean Human Rights NGO Forum v Zimbabwe*.[75]

119. Arguing that the principle of the rule of law is a fundamental doctrine in national and international law, the Complainant argues that the acts and omissions of the Respondent States is a violation of the principle of the rule of law. The Complainant contends that the Respondent States have violated the principle *per se* because their acts and omissions towards the SADC Tribunal precludes supervision of the executive organ of SADC by its judicial arm; ousts access to the court; removes a remedy before an independent and impartial court; and withholds the law's protection of individuals against states. This, according to the Complainant is compounded by the fact that the events occurred after Zimbabwe's disregard for the orders of both its national courts and the SADC Tribunal.

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[74] Communication 251/02 – *Lawyers for Human Rights v Swaziland* (2005) ACHPR paras 54 - 56. The Complainant also cites Communication 147/95, 149/96 –*Jawara v The Gambia* (2000)ACHPR and the Human Rights Committee's decision in Communication 468/1991- *Bahamonde v Equatorial Guinea* (1993) HRC

[75] Communication 245/02 - *Zimbabwean Human Rights NGO Forum v Zimbabwe* (2006) ACHPR para 215 ; In relation to the discontinuance of on-going cases, the Complainant refers to the Human Rights Committee's decision in Communication 547/1993 – *Mahuika v New Zealand* (2000) HRC

120. Concluding his Arguments on the Merit, under the heading 'Conclusion and appropriate remedy', the Complainant presents an amended set of prayers, requesting the Commission to :

a) Declare that the decisions of the Respondent States violate the African Charter, the SADC Treaty and other provisions of International Law binding the Respondents ;
b) Direct the Respondents to lift the purported suspension of the SADC Tribunal and do all things necessary to restore its jurisdiction and operation ;
c) Direct the Respondent States to give effect to the rulings by the SADC Tribunal ; and
d) Direct the Respondent States to implement the recommendations made in the final report on the review of the role, responsibilities and terms of reference of the SADC Tribunal (dated 6 March 2011).

Summary of Respondent State's Submission

121. Although the Complainant's Submissions on the Merit were transmitted to all the fourteen (14) Respondent States, only the Sixth (6th) Respondent State (Mauritius) has made its Submission on the Merit.

Mauritius' Submission on the Merit

122. The Sixth Respondent's Submission is divided into two main parts. One part contains the Sixth Respondent State's observations on the Admissibility while the other part contains the arguments on the merit. On Admissibility, the Sixth Respondent State argues that the Communication does not satisfy the requirements for Admissibility in Articles 55 and 56 of the African as supplemented by Rule 103 of the Commission's Rules of Procedure.

123. In relation to the merits, the Sixth Respondent State contends that since by Article 3 of the SADC Treaty, that organisation is an international organisation with separate legal personality from its member states, the Sixth Respondent State cannot be held liable for the acts and omissions of SADC. In view of SADC's international legal personality, the Sixth Respondent State submits that the African Commission cannot interfere with the workings of SADC which is not a party to either the Constitutive Act or the African Charter. The Sixth Respondent State argues further that it has no power of direction as regards SADC and its institutions.

124. It is the Sixth Respondent State's further contention that the SADC Tribunal cannot be considered as a domestic tribunal since it is established by an international Treaty. It is argued further that decisions of the SADC Tribunal cannot be enforced by additional judicial means but by reference to the political organs of SADC. Contending that there is no averment that it has breached its obligations under the Constitutive Act of the AU or the African Charter, the Sixth Respondent State submits that it has not violated any provision of the African Charter.

Complainant's Supplementary Submission

125. In response to the Sixth Respondent State's Submission on the Merit, the Complainant cites the case *of Falana v The African Union*[76] to argue that the recognition of the international legal personality of an international organisation is not the same as saying that the legal personality, rights and duties of the organisation are the same as those of a state. The Complainant submits that SADC cannot be considered as a representative of its member states in respect of their international Treaty obligations.

[76] Application N° 001/2011 – *Falana v African Union* (2012) ACtHPR

126. The Complainant argues further that by Articles 61(1) and 62(1) of the Draft Articles on the Responsibility of International Organisations as well as by General Principles of International Law, the Respondent States cannot escape liability for breach their international responsibilities by the mere fact that they have established an international organisation, especially if the wrongful act of the International Organisation would have constituted a breach of international human rights obligations were they perpetuated by the states themselves.[77] The Complainant contends further that the Respondent States cannot rely on their own wrongful act of suspending and ousting the Tribunal as a defence to the present action.

The African Commission's analysis on the Merits

127. In considering the Communication, the Commission notes that in his Arguments on the Merit, the Complainant has submitted an amended set of prayers in which the Complainant seeks certain reliefs directly from the Commission and drops the request for the Communication to be transmitted to the Court for a decision on the Merit. The Commission will therefore address the Communication on the basis of the amended set of prayers submitted by the Complainant.

128. The Commission will first address the Sixth Respondent State's observation on the Admissibility of the Communication. From its decision on the Admissibility of the present Communication, the Commission recalls that all the relevant documents and submissions of the Complainant were transmitted to all the fourteen (14) Respondent States along with the required request for the

[77] The Complainant relies on the authority of *Waite and Kennedy v Germany* (1999) ECtHR Application No26083/94 and Case C-84/95 *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v Ireland* (1996) ECR (Bosphorus case) in support of this argument.

Respondent States to submit their respective observations on the Admissibility of the Communication.[78] However, only two out of the fourteen Respondent States submitted their observations on the Admissibility of the Communication. The Submissions by those two Respondent States were accordingly considered by the Commission in its determination of the Admissibility of the Communication. The Commission notes that under its operative Rules of Procedure, it can only review a decision of inadmissibility.[79] Accordingly, the Commission will not reopen or review its decision on Admissibility at this stage.

129. On the Merits of the Communication, the Commission notes with regret the fact that only one out of the fourteen Respondent States has submitted its arguments. In line with its Rules of Procedure, the Commission proceeds to make its determination on the basis of the Complainant's submission and the single Respondent State submission available.

130. The Commission notes the Complainant's contention that the acts and omissions of the Respondent States that have led to the suspension and subsequent permanent ouster of the SADC Tribunal amount to a violation of the provisions of the African Charter but also of the SADC Treaty and the ICCPR. Recalling Article 45(2) of the African Charter which provides that one of the functions of the Commission shall be to "Ensure the protection of human and peoples' rights under conditions laid down by the present Charter", it is the Commission's view that its competence is limited to facilitating State Party implementation of the rights guaranteed in the African Charter.

131. Although, Articles 60 and 61 of the Charter permit the Commission to draw inspiration from other sources of international human rights law in the

[78] See para 96 above.
[79] See Rule 107 of the African Commission's Rules of Procedure.

execution of its mandate and functions, those provisions do not authorise the Commission to supervise the application and implementation of other international treaties such as the SADC Treaty. Accordingly, the Commission will restrict itself to a determination of the responsibility of the Respondent States arising from the provisions of the African Charter that have been invoked by the Complainant.

132. The Complainant argues that the acts and omissions of the Respondent States vis-à-vis the SADC Tribunal amount to a violation of Articles 7 and 26 of the African Charter in the sense that they restrict the Victims' right of access to court as guaranteed in those provisions of the Charter. In order to properly address the Complainant's submission, the Commission needs to first engage the Sixth Respondent State's argument that it does not bear responsibility for the alleged wrongs because it has a separate legal personality from SADC and it has no power of direction as regards SADC and its organs and institutions. The Commission agrees with the Complainant that the correct position of contemporary international law is that in appropriate cases, Member States of an International Organisation could bear direct responsibility for the wrongful acts and omissions of that International Organisation especially where the rights of third parties are involved.[80]

133. The Commission recalls that the international responsibility of a state is invoked where the state acts or omits to act in spite of the fact that the action or omission violates an international obligation that the state had taken on either by Treaty or by any other source of International Law. On the basis of its argument that it has not itself breached any obligation under the Constitutive Act of the AU or the African Charter, the Sixth Respondent State seeks to avoid

[80] In this regard, the Commission aligns with the position of the African Court on Human and Peoples' Rights (African Court) in its judgment in *Falana v Nigeria* (n 101 above) that the recognition of the international legal personality of an international organisation is not the same as saying that the legal personality, rights and duties of the organisation are the same as those of a state.

any direct responsibility for the alleged violations on the grounds that if any violations have occurred, those violations have been occasioned by SADC as an International Organisation.

134. In the opinion of the Commission, the current trend in International Law is that where states transfer sovereign powers to an International Organisation and in the course of carrying out the functions assigned to it the International Organisation occasions wrongs that would have invoked the international responsibility of the Member States individually had they acted on their own, the States can individually bear responsibility for those wrongful acts and omissions of the International Organisation.[81] The Complainant has made compelling and uncontested arguments that the Respondent States are collectively responsible for the acts and omissions that constitute the alleged violations of Articles 7 and 26 of the Charter. The question that needs to be resolved is whether the alleged acts and omissions constitute a violation of any obligation under the African Charter.

Alleged violation of Articles 7 and 26 of the African Charter

135. The Complainant's contention that the Respondent States have violated the right of access to court is hinged on the understanding that such a right of access to the SADC Tribunal can be founded on a combined reading of Articles 7 and 26 of the Charter. The Commission will analyse the two articles to determine whether such a right and a correlative obligation on the Respondent States can be sustained.

136. Article 7(1)(a) which is the portion relevant to the Communication provides that "Every individual shall have the right to have his cause heard. This

[81] *Bhosphorus* case, n 102 above;

comprises: (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and custom in force".[82] The Complainant's contention is that these provisions guarantee the Victims a right of access to court and that this includes the right of access to the SADC Tribunal. In the Complainant's view, this translates into a correlative international obligation on the part of the Respondent States to ensure unrestricted access to the SADC Tribunal *inter alia*, in matters alleging violation of human rights. The Complainant refers to the jurisprudence of the Commission in support of this argument.

137. As the Commission has previously noted, "the right to be heard requires that the Complainant has unfettered access to a tribunal of competent jurisdiction to hear his case".[83] The Commission also understands that the right to be heard "requires the matter to be brought before a tribunal with competent jurisdiction to hear the cases".[84] In the opinion of the Commission, the claim of a right of access to court is consistent with the right to fair hearing under Article 7 of the Charter.

138. The language of Article 7(1)(a) of the Charter itself is a clear indication that the provision envisages the right of individuals to access court at the national level. Accordingly, the Commission understands Article 7(1)(a) of the Charter to embrace both a right of access to court and a right to an effective remedy at the domestic level in the event of a violation of the rights guaranteed in the Charter. A denial of the right of access to a national judicial forum will amount to a definite and inexcusable violation of Article 7(1)(a) of the Charter. In this regard, the Commission notes its established jurisprudence as cited by the

[82] Art 7(1) (b) – (d) & (2) mostly deal with the right to fair hearing in criminal cases and does not apply to the present Communication.
[83] Communication 313/05 - *Kenneth Good v Botswana* (2010) ACHPR para 139
[84] Ibid

Complainant that in appropriate cases the ouster of the jurisdiction of the courts constitutes a restriction of access to court and therefore amounts to a violation of Article 7(1)(a) of the Charter.[85] However, as is clearly laid out in the Charter itself, the access envisaged in Article 7(1)(a) of the Charter is access to national courts within the domestic legal system of the State Parties to the Charter.

139. In the view of the Commission, although a teleological interpretation of Article 1 of the Charter permits State Parties to the African Charter to adopt appropriate measures, including cooperation at intergovernmental levels, to give effect to the rights guaranteed in the Charter, the primary obligation undertaken by State Parties in Article 7(1)(a) of the Charter is to ensure access to national courts. Accordingly, the Commission has consistently interpreted Article 7 of the Charter as imposing an obligation on State Parties to ensure the right to a fair trial at the national level.[86]

140. The view of the Commission coincides with the position of the European Court of Human Rights (ECtHR) whose jurisprudence can be of inspirational value to the Commission to by virtue of Articles 60 and 61 of the African Charter. Dealing with a question of access to court in relation to Article 13 of the European Convention of Human Rights (ECHR), the ECtHR stated in the case of *Maksimo v Russia* that "...the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the

[85] Communication 129/94 – *Civil Liberties Organisation v Nigeria* for instance is indicative of this jurisprudence.

[86] All the decisions cited by the Complainant relate to national courts. Also see Communications 140/94-141/94-145/95 - Constitutional *Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* (1999) ACHPR and Communication 225/98 - *Huri - Laws / Nigeria* (2000) ACHPR

domestic level".[87] This means that the ECtHR also understands the right of access to court to mean a right of access to domestic courts of the state parties to an international human rights Treaty.

141. The claim presented by the Complainant is that a procedural right granted on the platform of SADC has been withdrawn by the Respondent States. The Commission notes that the Complainant has not alleged that access to the national courts of the Respondent States in cases of alleged violation of Charter rights have been withdrawn. In fact, instead, the Complainant has supplied a decision of the Constitutional Court of South Africa which upholds the rights of the Victims.

142. The Commission notes further that in the event of a failure of the national courts to protect the rights of the Victims, access to alternative forums such as the African Commission remains intact. The Commission therefore, takes the view that Article 7(1)(a) of the Charter does not impose an international legal obligation on the Respondent States to ensure access to the SADC Tribunal and thus finds that there has been no violation of Article 7(1)(a) of the Charter.

143. In relation to Article 26 of the Charter, apart from the contention that when read together with Article 7 of the Charter, it guarantees a right of access to the SADC Tribunal, the Complainant argues that it imposes a duty on the Respondent States to ensure the independence, competence and institutional integrity of the SADC Tribunal. Article 26 of the Charter provides that "State Parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and

[87] (Application no. 43233/02) - *Maksimo v Russia* (2010) ECtHR. Also see the judgment of the ECtHR in the case of Application no. 7051/06 *Golha v The Czech Republic* (2011) ECtHR para 71.

protection of the rights and freedoms guaranteed by the Present Charter". The question that needs to be answered is whether Article 26 of the Charter imposes an obligation on the Respondent States vis-à-vis the SADC Tribunal.

144. The Commission agrees with the Complainant that Article 26 of the Charter should be read together with Article 7 of the Charter. In that regard, the Commission takes the view that reference to "the Courts" in Article 26 of the Charter cannot be reference to an international court but is akin and related to the national judicial organs mentioned in Article 7 of the Charter. The Commission notes that its established jurisprudence on the meaning and implications of Article 26 of the Charter apply to the national courts which exercise compulsory jurisdiction over individuals who have no possibility of opting out of the coverage of the judicial authority of those courts. Accordingly, the Commission does not find any Charter obligation on the Respondent States to guarantee the independence, competence and institutional integrity of the SADC Tribunal.

145. Having failed to find the existence of an obligation to ensure access to the SADC Tribunal in the separate analysis of Articles 7 and 26 of the Charter, the Commission is of the opinion that even a combined reading of the two provisions does not create an obligation to ensure access to the SADC Tribunal.

Decision of the African Commission

146. In view of the reasoning above, the African Commission finds no violation of Articles 7 and 26 of the African Charter by the Respondent States.

Done in Banjul, the Gambia during the 54th Ordinary Session of the African Commission on Human and Peoples Rights, 22 October to 5 November 2013.