**Communication 308/2005 – Michael Majuru/Zimbabwe**

**Summary of Facts**

1. The Complainant, Michael Majuru (hereinafter called the Complainant), submitted this Communication against the Republic of Zimbabwe, (hereinafter called the Respondent State), a State Party to the African Charter on Human and Peoples' Rights (the African Charter). The Complainant is a citizen of the Respondent State and is currently residing in the Republic of South Africa.

2. The Complainant submits that the Respondent State has committed gross violations of human rights and fundamental freedoms against him through acts committed by the Minister of Justice, Legal and Parliamentary Affairs and the Central Intelligence Organisations (CIO) under the Office of the President and Cabinet.

3. The Complainant alleges further that that in committing the gross violations, the aforementioned organisations, individuals and organs of the state were acting in the course and scope of their employment as Respondent State's agents.

4. The Complainant submits further that his rights were abused because of his role as a presiding Judge in a case in which the Associated Newspaper Group of Zimbabwe (ANZ), a publishing house in the Respondent State, sought to challenge, before the Administrative Court, the Respondent State's act of banning ANZ from publishing its two newspapers, the Daily News and the Daily News on Sunday. The matter was lodged before the Administrative Court on or about 23 September 2003 and he presided over the matter.

5. The Complainant states that following his decision in favour of the ANZ, he became a target of human rights abuses wrought upon him by agents of the Respondent State and recounts the chronology of events that depict incidents in which the Respondent State allegedly violated his human rights.

6. The first incident is reported to have occurred on or about 24 September 2003. It is alleged that the Minister of Justice, Legal and Parliamentary Affairs, the Hon. Patrick Chinamasa invited the Complainant's workmate, who was also a Judge at the Administrative Court (Justice Chipo Machaka) to his office to issue instructions that the matter relating to the ANZ case that was to be presided over by the Complainant should be conducted in a manner that the said Minister was going to dictate. Justice Machaka was instructed by the Minister to convey these instructions to the Complainant, with an order that Complainant should comply with such

orders.

7. It is further alleged that the Minister also instructed that the Administrative Court should delay the court proceedings until February 2004, noting that the ANZ did not deserve impartial treatment by the Judiciary because it was a front of western nations and 'other imperialists'. Secondly, Justice Machaka is alleged to have been told that if the ANZ were granted its application for an urgent appeal hearing and thereafter allowed publication at that stage this would jeopardize continuing negotiations between ZANU PF and the Movement for Democratic Change (MDC), (the biggest opposition party in Zimbabwe), which according to the Minister, had reached a delicate stage. As proof of this delicate relationship between ZANU PF and MDC, Justice Machaka was shown a draft constitution agreed upon between the two parties and some other supporting documents.

8. The Complainant submits that he disregarded the aforesaid instructions and upon considering the ANZ's application on its merits ruled in favour of the ANZ by granting the application for an urgent appeal hearing on or about 27 September 2003. From 15 to 19 October 2003, the Complainant presided over the appeal hearing between the two parties. He adjourned the matter for judgment to 24 October 2003.

9. Subsequently, the Complainant states that he was summoned by Enoch Kamushinda, a suspected member of the CIO for a meeting at Kamushinda's office on 22 October 2003. This information was conveyed through another CIO operative with instructions that the Complainant should dismiss the ANZ appeal. As a reward for dismissing the ANZ appeal, Kamushinda promised the Complainant a fully developed farm in Mashonaland West Province.

10. The Complainant further states that on 23 October 2003 at around 21:00 hours, the Minister of Justice, Legal and Parliamentary Affairs, Hon. Patrick Chinamasa, telephoned and enquired from the Complainant whether he had finalised the judgment in the ANZ matter and what decision he had reached. The Complainant advised him that he was in the process of finalising the judgment and that he was going to allow the appeal. The Complainant states that the Minister expressed his displeasure with the said decision and further attempted to unduly influence and/or threaten the Complainant.

11. The Complainant claims that he went ahead to deliver the judgment in favour of ANZ at about 1600 hours on 24 November 2003. Subsequently, at about 2130 hours, Hon. Chinamasa in an angry telephone call to the Complainant, accused the latter of pre-determining the matter and berated him for delivering a judgment dictated by British agents and other

imperialist forces.

12. Subsequently, the Media and Information Commission (MIC) appealed to the Supreme Court against the decision of the Administrative Court. ANZ on the other hand decided to approach the Administrative Court seeking an order that its original decision be rendered operative notwithstanding the institution of an appeal by the MIC.

13. The Complainant claims that upon the lodging of this application by the ANZ, the Complainant was placed under immense pressure from agents of the Respondent State urging him to desist from dealing with the matter. The Complainant claims that the Respondent sent members of the CIO to track, trail and monitor the Complainant's movements and interactions with other people.

14. The Complainant alleges that on several occasions he was approached by Ben Chisvo, a suspected CIO informer, a former ruling ZANU PF Councillor of the City of Harare and also a war veteran. Chisvo sought to persuade the Complainant to recuse himself from presiding over the matter, claiming that the case was serious and sensitive and that President Mugabe did not want the ANZ to be registered. Chisvo further indicated that the President had set up a team led by a senior assistant commissioner of Zimbabwe, Changara, to monitor the proceedings in the ANZ matter and confirmed that the Complainant was being monitored by state security agents.

15. On 23 November 2003, at around 2300 hours, the Complainant received a telephone call from Chisvo in which he claimed that his car had had a puncture close to the Complainant's residence and requested for assistance. Upon meeting the Complainant, Chisvo demanded to know whether the former would preside over the ANZ matter or recuse himself as previously ordered. The Complainant informed Chisvo that he would be presiding over the ANZ matter.

16. The Complainant further alleges that, on 24 November 2003, following the Complainant's postponement of the ANZ matter upon the request of the two parties to the case, he received a telephone call from Hon. Chinamasa at around 21:00 hours. The Complainant states that the Minister alleged that he had information linking the Complainant to British agents and other imperialists and that the complainant was under investigation for these alleged links with the British agents and imperialists. The Minister also indicated that he was aware through his informants that the ANZ was going to succeed in the second matter which was pending before the Complainant. Shortly thereafter, Justice Machaka phoned the Complainant

and advised him that the Minister of Justice had also phoned her ordering her to meet him at his office the following morning. She informed the Complainant that the Minister wanted to be advised on how the Complainant intended to decide the ANZ matter in order for him to brief the Cabinet that morning. Soon after this telephone call from Justice Machaka, the Minister telephoned the Complainant once again ordering that they meet the following morning at his office at 0800 hours.

17. On 25 November 2003, the Complainant met with the Minister as instructed. The Minister wanted to know what the Complainant's decision in the ANZ matter would be but the Complainant declined to inform him stating that he had not yet heard the parties' arguments on the matter and was therefore in no position to know the outcome. The Complainant alleges that the Minister informed him that the Police Commissioner Augustine Chihuri had approached him the previous night with information that the Complainant was under investigation for colluding with British agents over the ANZ matter and was considering arresting him.

18. The Minister is also reported to have shown the Complainant the Herald newspaper which carried an article on its front page alleging that the Complainant was under probe over the ANZ matter. The Minister also produced an affidavit, which he said had been obtained from Chisvo by the Police Commissioner. In the said affidavit, Chisvo had made statements to the effect that the Complainant had informed Chisvo that the ANZ matter was predetermined.

19. The Complainant claims that as a result of such sustained and relentless pressure he had no other option but to recuse himself from the matter. Notwithstanding the recusal, the Complainant remained under surveillance by state security agents.

20. The Complainant states that on 1 December 2003, he received a telephone call from a member of the legal fraternity and the Police informing him that the Respondent State was fabricating a case against him and that he was to be arrested and incarcerated on unspecified charges as punishment for defying the Respondent's orders.

21. The Complainant alleges that fearing for his safety and security; he decided to go into hiding until 9 December when he fled to South Africa, where he remains in exile.

22. The Complainant submits that he is not the only member of the Judiciary who has been persecuted but that there is a systematic, consistent and sustained pattern of interference with the Judiciary by the Executive in the Republic of Zimbabwe.

**Complaint**

23. The Complainants allege that **Articles 3, 5, 8, 9, 14, 15, 16, 18 and 26** of the African Charter on Human and Peoples' Rights have been violated.

24. The Complainant requests that the African Commission should:-

    a. Urge the Respondent State to institute an inquiry and investigation that should result in the Government of Zimbabwe bringing those who perpetrated the violations to justice
    b. Order the Respondent State to pay compensation for the physical pain, psychological trauma, loss of earnings and job and access to family suffered by the Complainant.

**Procedure**

25. The Communication is dated 2 November 2005 and was sent by email to the Secretariat, and was received on 8 November 2005.

26. On 17 November 2005, the Secretariat acknowledged receipt of the Communication and informed the Complainant that the Communication would be scheduled for consideration by the African Commission at its 38th Ordinary Session.

27. At its 38th Ordinary Session held from 21 November - 5 December 2005 in Banjul, The Gambia, the African Commission considered the Communication and decided to be seized of it.

28. By Note Verbale dated 8 December 2005, the Secretariat transmitted a copy of the Communication to the Respondent State by DHL and requested it to forward its submissions on admissibility within 3 months. The Complainant was also requested to send his submissions on admissibility within 3 months.

29. By letter and Note Verbale dated 20 March 2006, the parties to the Communication were reminded to forward their written submissions on admissibility of the Communication.

30. On 3 April 2006, the Secretariat received submissions on admissibility of the Communication from one Gabriel Shumba. By letter dated 12 April 2006, the Secretariat of the African Commission wrote to Gabriel Shumba informing him that the Communication had been brought before the African Commission by Michael Majuru who had never made any indication to the African Commission that Gabriel Shumba could make representations on his behalf. This letter was also copied to the Complainant- Michael Majuru.

31. As at the 40th Ordinary Session there had been no reply from the Complainant. The Communication was therefore deferred to the 41st Ordinary Session pending the reply of the Complainant and Mr. Shumba, as well as the Respondent State's submission on admissibility.

32. By letter and Note Verbale dated 11 December 2006, written to the Complainant and Respondent State respectively, the parties were informed by the Secretariat, about the decision of the African Commission during its 40th Session, to consider the admissibility of the Communication during its 41st Session. The parties were asked to send their Submissions on admissibility within 3 months of receiving the letters.

33. The Complainant sent an email on 18 December 2006, confirming that Zimbabwe Exiles Forum to which Gabriel Shumba is the Executive Director are his agents in the matter and that the Secretariat should acknowledge submissions made by them.

34. By Note Verbale dated 4 January 2007, the Secretariat reminded the Respondent State of the Commission's decision during its 40th Ordinary Session, and asked them to make their submissions on admissibility within 3 months of receipt of the notification. Another reminder by way of a Note Verbale dated 10 April 2007 was also sent to the Respondent State.

35. On 24 April 2007, the Secretariat received the Respondent State's submission on admissibility. The Respondent State's submission was forwarded to the Complainant by email and he was asked to make additional submissions (if any), in order to address some important points which were raised by the Respondent State in its submission.

36. During its 41st Ordinary Session, the African Commission decided to defer consideration of the Communication to its 42nd Ordinary Session for its decision on admissibility.

37. By letter ACHPR/LPROT/COMM/308/2005/ZIM/TN dated 20 July 2007 and by Note Verbale ACHPR/LPROT/COMM/308/2005/ZIM/RE, with the same date, the parties were informed of the decision of the African Commission to defer consideration of the Communication to its 42nd Ordinary Session.

38. At its 42nd Ordinary session held in Brazzaville, Republic of Congo, the Commission considered this communication and decided to defer further consideration into the 43rd ordinary session due to lack of time.

39. By note verbale of 19 December 2007 and letter of the same date, the Secretariat of the Commission notified both parties of the Commission's decision.

**Complainant's submission on admissibility**

40. The Complainant submitted that he has local standing before the African Commission as the Communication is brought by himself, a citizen of Zimbabwe, the Respondent State in this matter. Regarding compatibility, the Complainant submitted that the Communication raises a *prima facie* violation of the African Charter committed by the Respondent State. He submitted further that the evidence he has submitted reveals that the Communication is not based exclusively on news disseminated by the mass media, adding that it is based on first hand evidence – including reports by reputable human rights organizations.

41. On the exhaustion of local remedies, the Complainant submitted that the onus is on the State to demonstrate that remedies are available, citing the Commission's decisions in the cases of ***Rencontre Africaine pour la Defense des Droits de l'Homme*** **v. Zambia**[34] and **Sir Dawda K. Jawara v The Gambia**[35]. The Complainant added that the remedy in his particular circumstance is not available because he cannot make use of it, that he was forced to flee Zimbabwe for fear of his life and that of his immediate family, because of his work as a judge of the Administrative Court. That he fled to the Republic of South Africa following threats of arrest and unspecified harm by the Respondent State.

42. The Complainant drew the Commission's attention to its decision on **Rights International v Nigeria,**[36] where the Commission held that a complainant's inability to pursue local remedies following his flight for fear of his life to Benin, and was subsequently granted asylum was sufficient to establish a standard for constructive exhaustion of local remedies. He concluded by noting that considering the fact that he was no longer in the Respondent State's territory where remedies could be sought, and that he fled the country *against his will* due to threat to his life, remedies could not be pursued without impediments.

43. The Complainant also challenged the effectiveness of the remedies noting that remedies are effective only where they offer a prospect of success. He claimed the Respondent State's reaction to court rulings that go against it is well documented by reputable international and African NGOs, noting that the Respondent State treats court rulings that go against it with *indifference and disfavour,* **and that he does not expect that in his case,**

34 Communication 71/1992.
35 Communication 146/96.
36 Communication 215/98

**any decision of the court would be adhered to.** He said there was a tendency in the Respondent State to ignore court rulings that went against it and added that the Zimbabwe Lawyers for Human Rights had documented at least 12 instances where the State had ignored court rulings since 2000. He cited the ruling of the High Court in the **Commercial Farmers Union,** the **Mark Chavunduka and Ray Choto** cases, where, in the latter case, the duo were allegedly abducted and tortured by the army. He concluded that given the prevailing circumstances and the nature of his complaint and the Respondent State's well publicized practice of non-enforcement of court decisions, his case had no prospect of success if local remedies were pursued and according to him, not worth pursuing. Finally, the Complainant submitted that he could not have exhausted local remedies as any such exhaustion would have to comply with the States Liabilities Act which prevents the complainant from suing the Respondent State after the expiration of two months of the date of the incident complained of, if no prior notice has been given.

44. The Complainant further submitted that the Communication was submitted 22 months after the violation because he hoped that the situation in the country would improve to enable him utilize domestic remedies. He said there is instead a deterioration of the situation and hope of improvement is highly unlikely in the near future, adding that 'continuing to wait whilst the Complainant is undergoing tremendous psychological torture and suffering attributable to his persecution will undoubtedly cause irreparable harm'. The Complainant added that since he fled to South Africa he has been undergoing psycho-therapy and was not in a position to submit his Communication to the Commission.

45. The Complainant indicated other reasons that prevented him from submitting his complaint on time, including the fact that the judiciary abides by a code of conduct in terms of which they do not ordinarily speak out and take positions against the establishment, noting that out of eight or so members who have left Zimbabwe because of persecution, he is the only one who was speaking out. He added that he was afraid for the lives of members of his immediate family that were at risk of persecution because of him and that he was unable to submit immediately for want of resources and facilities, noting that the submission was made possible through the assistance and support of well wishers.

46. Finally, Complainant further submitted that the Communication had not been before any other international body for settlement as required by Article 56 (7).

**Respondent State's submission on admissibility**

47. The Respondent State briefly restated the facts of the Communication and indicated that it will attend to the matters of fact, pertaining to the complaint 'in order to put the Communication in proper perspective'. The State submitted that the Complainant was appointed to the Office of Administrative Court President in terms of Section 79 of the Constitution of Zimbabwe, read together with the Administrative Court Act. The State added that while performing his functions as a Magistrate, Presidents of the Administrative Court are not judges, noting that in essence, the Complainant was not a judge.

48. According to the State, the Complainant was supposed to be in a court in Bulawayo, but due to his poor health and his relationship with the Minister of Justice, he was appointed to the Administrative Court in Harare. The State noted that Complainant was a sick man throughout his whole duration at the court and added that 'in fact from the time of his appointment as a Court President, the Complainant used to travel to South Africa to seek medical attention'.

49. The State claims that Complainant applied for two weeks vacation from 9 – 31 December 2003 and went to South Africa for medical attention. That he then tendered his resignation on 14 January 2004. The State observed that even though the letter has a Zimbabwean address, an examination of the delivery slip showed that it had been dispatched from South Africa. The State concluded that the above circumstances which show how Complainant left the country do not amount to forced flight as he claims.

50. The State questioned why Complainant would take steps to regularize his absence from office by applying for vacation leave and tender his resignation to the Minister who was threatening him. Without producing any document, the state added that it is apparent from the documents available that he was maintaining dialogue with a government which he claims was persecuting him. The State observed further that the letter of resignation even showed the address Complainant was residing and 'assuming the government of Zimbabwe really wanted his life, it would have used the address he had volunteered to track him'. The State concluded by stating that the truth is that 'complainant was never threatened by anyone, anywhere both within and outside Zimbabwe'.

51. On the admissibility of the Communication, the State argued that the Communication be declared inadmissible for non-compliance with the provisions of Article 56 (2), (5) and (6) of the Charter.

52. The State argued that the Communication is not compatible as required by Article 56 (2) of the Charter, as it makes general allegations without substantiating, adding that, for a complaint to be compatible with the Charter or the Constitutive Act, it must prove a *prima facie* violation of the

Charter. According to the State, the facts raised in the Communication do not raise any violation of the Charter, noting that 'basically the facts and issues in dispute do not fall within the *rationae materae* and *rationae personae* of the jurisdiction of the Commission.

53. On the exhaustion of local remedies under article 56 (5), the State submitted that local remedies were available to the Complainant, citing section 24 of the Constitution of Zimbabwe which provides the course of action to be taken where there is human rights violation. The State added that there is no evidence to prove that the Complainant pursued local remedies. The State further indicated that in terms of Zimbabwe law, where one is engaged in acts that violate the rights of another person, that other person can obtain an interdict from the court restraining the violator from such act.

54. On the effectiveness of the remedies, the State submitted that the Constitution provides for the independence of the judiciary in the exercise of its mandate in conformity with both the UN Principle on an independent Judiciary and the African Commission's Guidelines on the right to a fair trial.

55. The State dismissed the Complainant's argument that his case is similar to those brought by Sir Dawda Jawara against The Gambia and Rights International (on behalf of Charles Baridorn Wiza) against Nigeria, adding that in the latter cases, there was proof of real threat to life. The State went further to indicate instances where the government has implemented court decisions that went against it.

56. The State further indicated that in terms of Zimbabwe law, it is not a legal requirement for a Complainant to be physically present in the country in order to access local remedies, adding that both the High Court Act and the Supreme Court Act permit any person to make an application to either court through his/her lawyer. The State added that in the Ray Choto and Mark Chavhunduka case, the victims were tortured by State agents and they applied for compensation while they were both in the United Kingdom and succeeded in their claim. The State concluded that the Complainant is not barred from pursuing remedies in a similar manner.

57. The State further submitted that since his resignation, the government of Zimbabwe continues to pay the Complainant his pension benefits and argued that the excuse raised by the Complainant of lack of resources to enable him submit his complaint on time is therefore without merit, adding that he could have instructed his counsel in Zimbabwe to attend to his claim on his behalf.

58. According to the State, the Complainant sought to mislead the Commission by claiming that under the State Liabilities Act, claims against the State are prescribed within a period of sixty days. The State indicated that section 6 of the Act is clear that the sixty days is in respect of a notice of intention to sue. The Act prescribes that a summons against a State in certain matters must be delivered sixty days after the notice of intention to sue, and according to the State, this would actually work well for the Complainant, adding that the period of proscription of claims is three years and complainant's claim was not yet three years and thus not proscribed.

59. The State also submitted that the complaint does not conform to article 56 (6) of the Charter indicating that the Communication should be lodged within a reasonable time after exhaustion of local remedies, but where Complainant realizes that local remedies shall be unduly prolonged, he/she must submit the complaint to the Commission immediately. According to the State, although the Charter does not specify what constitute a reasonable time, the Commission should get inspiration from the other jurisdictions, including the Inter-American Commission which has fixed six months as reasonable time, adding that even the draft protocol merging the African Court of Justice and the African Court on Human and Peoples' Rights provides for six months.

60. The State argued that the Communication was submitted 22 months after the alleged violation, which according to the State 'was filed well out of time'. On Complainant's submission that he had been seeking psycho-therapy treatment, the State argued that Complainant had been the centre of attraction in South Africa since 2004, demonizing the Respondent State, adding that articles published by Complainant in the South African press do not show someone with a psychological ailment. The State added that no proof had been given of the alleged treatment or an expert diagnosis of how such condition was acquired. On Complainants' claim that he had no resources, the State argued that he had his pension benefits which he could have used to submit his complaint to the Commission.

61. The state concluded its submissions by noting that 'no cogent reasons have been given for the failure to pursue local remedies or remedies before the Commission within a reasonable time', and as such the Communication should be declared inadmissible.

**LAW**

**Admissibility**

**Competence of the African Commission**

62. In the present Communication, the Respondent State raises a question regarding the competence of the African Commission to deal with this Communication. The State avers that: (quote) "…basically the facts and issues in dispute do not fall within the *rationae materae* and *rationae personae* of the jurisdiction of the Commission". This statement thus challenges the competence of the African Commission to deal with this Communication. The Commission will thus, first deal with the preliminary issue of its competence raised by the Respondent State.

63. Black's law dictionary defines ***rationae materae*** as **"by *reason of the matter involved; in consequence of, or from the nature of, the subject-matter"*** While ***rationae personae*** is defined as ***"By reason of the person concerned; from the character of the person".***[37]

64. Given the nature of the allegations contained in the Communication, such as allegations of violation of personal integrity or security, intimidation and torture, the Commission is of the view that the Communication raises material elements which may constitute human rights violation, and as such, it has competence *rationae materae* to deal with the matter, because the Communication alleges violations to human rights protected in the Charter. With regards to the Commission's competence *rationae personae,* the Communication indicates the name of the author, an individual, whose rights under the African Charter, the Respondent State is committed to respecting and protecting. With regards to the State, the Commission notes that Zimbabwe, the Respondent State in this case, has been a State Party to the African Charter since 1986. Therefore, both the Complainant and the State have *locus standi* before the Commission, and the Commission thus has competence *rationae personae* to examine the Communication.

65. Having decided that it has competence *rationae materae* and *rationae personae,* the African Commission will now proceed to pronounce on the admissibility requirements and the contentious areas between the parties.

**Decision of the African Commission on admissibility**

[37] HC Black , JN Nolan-Haley & JR Nolan Blacks LAW Dictionary (6 ed) 1990, 1262-1263. St Paul Minn. West Publishing Co.

66. The admissibility of Communications before the African Commission is determined by the requirements of Article 56 of the African Charter. This Article provides seven requirements which must all be met before the Commission can consider and declare a Communication admissible. If one of the conditions/requirements is not met, the Commission shall declare the Communication inadmissible, unless the complainant provides justifications why any of the requirements could not be met.

67. In the present Communication, the Complainant avers that his complaint meets the requirements under Article 56 (1) - (4), (6) and (7). He admits that he did not attempt to comply with the requirement provided under Article 56 (5) dealing with the exhaustion of local remedies, but added that given the nature of his case, and the circumstances under which he left the Respondent State, and is living in South Africa, the exception rule under this sub-section of Article 56, should be invoked.

68. The State on the other hand argues that the Complainant has not complied with the provisions of Article 56 (2), (5) and (6) of the Charter, and urges the Commission to declare the Communication inadmissible, based on non-compliance with these requirements.

69. The African Commission will thus examine each of the provisions under Article 56 of the African Charter, whether it is disputed or not, as the African Commission has a responsibility to ensure that every requirement in Article 56 has been fulfilled before admitting a Communication.

70. The requirements under Article 56 of the Charter are meant to ensure that a Communication is properly brought before the Commission, and seek to sieve frivolous and vexatious Communications before they reach the merits stage. Thus, declaring a Communication admissible does not mean the State Party concerned has violated the provisions of the Charter. It simply means that the Communication meets the requirements necessary for it to be considered on the merits. As indicated earlier, for a Communication to be declared admissible, it must meet all the requirements under Article 56. Therefore, if a party contends that another party has not complied with one of the requirements, the Commission must pronounce itself on the contentious issues between the parties, as well as the non-contentious issues.

71. **Article 56(1)** of the African Charter provides that Communications will be admitted if they indicate their authors, even if they request anonymity. In the present case the author of this Communication is identified as Michael Majuru, he has also not requested that his identity be hidden. The respondent State has also been clearly identified as the Republic of Zimbabwe. Therefore the provision of Article 56(1) has been adequately complied with.

72. **Article 56(2)** of the African Charter provides that a Communication must be compatible with the Charter of the OAU (now Constitutive Act of the African Union) or with the African Charter on Human and Peoples' Rights. In the present Communication, the Respondent State argues that the Communication does not comply with this requirement. The State asserts in this regard that, for a complaint to be compatible with the Charter or the Constitutive Act, it must prove a *prima facie* violation of the Charter.

73. Compatibility denotes 'in compliance' or 'in conformity with' or 'not contrary to' or 'against'.[38] In the present Communication, the Complainant alleges among others, violations of his right to personal integrity and being subjected to intimidation, harassment and psychological torture. He alleges further that agents of the intelligence service of the Respondent State constantly harassed him and prevented him from exercising his duties freely. These allegations do raise a *prima facie* violation of human rights, in particular, the right to the security of the person or personal integrity and the right to work under satisfactory condition as stipulated in the Charter. In the jurisprudence of this Commission, Complainants need not specify which articles of the Charter have been violated, or even which right is being invoked, so long as they have raised the substance of the issue in question. That, in the view of the Commission, has been established in this case. Based on the above, the African Commission is satisfied that the requirement of Article 56(2) of the African Charter has been sufficiently complied with.

74. **Article 56(3)** of the Charter provides that a Communication will be admitted if they are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity (now the African Union). In the present case, the Communication sent by the Complainant, does not, in the view of the African Commission, contain any disparaging or insulting language, and as a result of this, the requirement of Article 56(3) has been fulfilled.

75. **Article 56(4)** of the Charter provides that the Communication must not be based *exclusively* on news disseminated through the mass media. This Communication was submitted by the complainant himself and gives an account of his personal experience with the law enforcement agents of the Respondent State. As a result of this, the requirement of Article 56(4) has also been met.

76. **Article 56(5)** of the Charter provides that a Communication will be admitted only after all local remedies have been exhausted. The Respondent State contends that the Complainant has not brought his case before the courts of the State in compliance with this provision of the

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Charter. The State argues that there are sufficient and effective local remedies available to the Complainant in the State, and the Complainant has not sought these remedies before bringing the present Communication before the Commission. On the other hand, the Complainant argues that since he had to flee the country due to fear for his life, he could not come back to the country to pursue these local remedies.

77. The rationale for the exhaustion of local remedies is to ensure that before proceedings are brought before an international body, the State concerned must have the opportunity to remedy the matter through its own local judicial system. This prevents the international tribunal from acting as a court of first instance, rather than as a body of last resort.[39]

78. Three major criteria could be deduced from the practice and jurisprudence of the Commission in determining compliance with this requirement, namely: the remedy must be *available, effective* and *sufficient.*

79. In **Jawara v The Gambia**, the Commission stated that "*a remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint".* In the **Jawara** Communication, which both parties have cited, the Commission held that "*the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. …Therefore, if the applicant cannot turn to the judiciary of his country because of fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him".*

80. The Complainant in the present Communication claims that he left his country out of fear for his life due to intimidation, harassment and undue influence in the exercise of his duties. The Complainant has also alleged a history of non-compliance with the orders of the court of the Respondent, and alleges that a human rights NGO in Zimbabwe – the Zimbabwe Lawyers for Human Rights, has documented 12 cases since the year 2000, where the State has ignored court rulings that go against it. According to the Complainant, it is noteworthy that although local remedies may be available in the Respondent State, there is no assurance of its effectiveness or its implementation due to the fact that if the court rules in favour of the complainant, there is no guarantee that the ruling will be complied with by the State.

81. The Complainant cited the African Commission's decisions in the **Jawara case** and the cases of **Alhassan Abubakar v Ghana[40] and Rights**

[39] Communications 25/84, 74/92 and 83/92.

[40] Communication 103/93

**International/ Nigeria**[41] in which he said the Commission found that the Complainants in these cases could not be expected to pursue domestic remedies in their country due to the fact that they had fled their country and were in fact residing outside their country at the time the Communications were brought before the Commission.

82. Having studied the Complainant's submissions, and comparing it with the above cases cited in support of his claim, this Commission is of the opinion that the above cases cited by the Complainant are not similar to his case. In the **Jawara case** for example, the Complainant was a former Head of State who had been overthrown in a Military coup. Mr. Jawara alleged that after the coup, there was "blatant abuse of power by … the military junta". The military government was alleged to have initiated a reign of terror, intimidation and arbitrary detention. He further alleged the abolition of the Bill of Rights as contained in the 1970 Gambia Constitution by Military Decree No. 30/31, ousting the competence of the courts to examine or question the validity of any such Decree. The Communication alleged the banning of political parties and of Ministers of the former civilian government from taking part in any political activity. The Communication further alleged restrictions on freedom of expression, movement and religion. These restrictions were manifested, according to the Complainant, by the arrest and detention of people without charge, kidnappings, torture and the burning of a mosque.

83. In the **Jawara case,** the Commission concluded that "the Complainant in this case had been overthrown by the military, he was tried in absentia, former Ministers and Members of Parliament of his government have been detained and there was terror and fear for lives in the country. There is no doubt that there was a ***generalised fear perpetrated by the regime*** as alleged by the complainant. This created an atmosphere not only in the mind of the author but also in the minds of right thinking people that returning to his country at that material moment, for whatever reason, would be risky to his life. Under such circumstances, domestic remedies cannot be said to have been available to the complainant". The Commission finally noted that, "it would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies".

[41] Communications 215/98

84. In the **Alhassan Abubakar case**, it should be recalled that Mr. Alhassan Abubakar was a Ghanaian citizen who was arrested by the Ghanaian authorities in the 1980s for allegedly cooperating with political dissidents. He was detained without charge or trial for over 7 years until his escape from a prison hospital on 19 February 1992 to Cote d'Ivoire. After his escape, his sister and wife, who had been visiting him in Cote d'Ivoire, were arrested and held for two weeks in an attempt to get information on the Complainant's whereabouts. The Complainant's brother informed him that the police have been given false information about his return, and have on several occasions surrounded his house, searched it, and subsequently searched for him in his mother's village.

85. In the early part of 1993, the UNHCR in Côte d'Ivoire informed the Complainant that they had received a report on him from Ghana assuring that he was free to return without risk of being prosecuted for fleeing from prison. The report further stated that all those detained for political reasons had been released. Complainant on the other hand maintained that there is a law in Ghana which subjects escapees to penalties from 6 months to 2 years imprisonment, regardless of whether the detention from which they escaped was lawful or not. On the basis of the above**,** the Commission held that "considering the nature of the Complaint it would not be logical to ask the Complainant to go back to Ghana in order to seek a remedy from national legal authorities. Accordingly, the Commission does not consider that local remedies are available for the complainant".

86. In **Rights International v. Nigeria**[42]**,** the victim, a certain Mr. Charles Baridorn Wiwa, a Nigerian student in Chicago was arrested and tortured at a Nigerian Military Detention Camp in Gokana. It was alleged that Mr. Wiwa was arrested on 3 January 1996 by unknown armed soldiers in the presence of his mother and other members of his family and remained in the said Military detention camp from 3-9 January 1996. While in detention, Mr. Wiwa was horsewhipped and placed in a cell with forty-five other detainees. When he was identified as a relative of Mr. Ken Saro - Wiwa he was subjected to various forms of torture. Enclosed in the Communication was medical evidence of Mr. Wiwa's physical torture. After 5 days in the detention camp in Gokana, Mr. Wiwa was transferred to the State Intelligence Bureau (SIB) in Port Harcourt. Mr. Wiwa was held from 9-11 January 1996, without access to a legal counsel or relatives, except for a five minutes discussion with his grandfather. On 11 January 1996, Mr. Wiwa and 21 other Ogonis were brought before the Magistrate Court 2 in Port-Harcourt, charged with unlawful assembly in violation of Section 70

[42] Communication 215/98.

of the Criminal Code Laws of Eastern Nigeria 1963. Mr. Wiwa was granted bail, but while out on bail some un-known people believed to be government agents abducted him and threatened his life by forcing him into a car in Port-Harcourt. On the advice of human rights lawyers, Mr. Wiwa fled Nigeria on 18 March 1996 to Cotonou, Republic of Benin, where the UN High Commissioner for Refugees declared him a refugee. On September 17 1996, the US government granted him refugee status and he has been residing in the United States since then.

87. In this case, the African Commission declared the Communication admissible on grounds that there was lack of available and effective domestic remedies for human rights violations in Nigeria under the military regime. It went further to assert that "the standard for constructive exhaustion of domestic remedies is satisfied where there is no adequate or effective remedy available to the individual. In this particular case, … Mr. Wiwa was unable to pursue any domestic remedy following his flight for fear of his life to the Republic of Benin and the subsequent granting of refugee status to him by the United States of America".

88. The present Communication brought by Mr. Michael Majuru should also be differentiated from **Gabriel Shumba v Republic of Zimbabwe.**[43] In the Shumba case, the Complainant alleged that, he, in the presence of 3 others, namely Bishop Shumba, Taurai Magayi and Charles Mutama, was taking instructions from one of his clients, a Mr. John Sikhala, in a matter involving alleged political harassment by members of the Zimbabwe Republic Police (ZRP). Mr. John Sikhala is a Member of Parliament for the Movement for Democratic Change (MDC), which is an opposition party in Zimbabwe. At about 11:00 pm riot police accompanied by plain-clothes policemen and personnel identified to be from the Central Intelligence Organization (CIO) stormed the room and arrested everyone present. During the arrest, the Complainant's law practicing certificate, diary, files, documents and cell phone were confiscated and he was slapped and kicked several times by, among others, the Officer in Charge of Saint Mary's Police Station.

89. The Complainant and the others were taken to Saint Mary's Police Station where he was detained without charge and denied access to legal representation. He was also denied food and water. The Complainant claimed that on the next day following his arrest, he was removed from the cell, a hood was placed over his head and he was driven to an unknown

43 Communication 288/2004.

location where he was led down what seemed like a tunnel to a room underground. The hood was removed, he was stripped naked and his hands and feet were bound in a foetal position and a plank was thrust between his legs and arms. While in this position, the Complainant was questioned and threatened with death by about 15 interrogators. The Complainant further alleged that he was also electrocuted intermittently for 8 hours and a chemical substance was applied to his body. He lost control of his bodily functions, vomited blood and he was forced to drink his vomit. The Complainant submitted a certified copy of the medical report describing the injuries found on his body. Following his interrogation, at around 7pm of the same day, the Complainant was unbound and forced to write several statements implicating himself and several senior MDC members in subversive activities. At around 7.30pm he was taken to Harare Police Station and booked into a cell. On the third day of his arrest, his lawyers who had obtained a High Court injunction ordering his release to court were allowed to access him. The Complainant was subsequently charged under section 5 of the Public Order and Security Act that relates to organizing, planning or conspiring to overthrow the government through unconstitutional means. He then fled Zimbabwe for fear of his life.

90. In the above cases, there is one thing in common – the clear establishment of the element of fear perpetrated by identified state institutions, fear which in the **Jawara case**, the Commission observed that "it would be reversing the clock of justice to request the complainant to attempt local remedies".
91. In the Communication under consideration, however, Mr. Michael Majuru alleges that he fled the country for fear of his life, that he was intimidated and harassed by the Minister of Justice and by *suspected* state agents. He also indicated that he received 'a telephone call from a sympathetic member of the legal fraternity and the police that the Respondent State was fabricating a case against him and that he was to be arrested and incarcerated on unspecified charges as punishment for defying the Respondent's orders'.

92. In this Communication, it is clear that the Complainant has simply made general accusations and has not corroborated his allegations with documentary evidence, sworn affidavits or testimonies of others. He claims the Minister sent an instruction through a colleague of his but there is no way of ascertaining this fact. The applicant was the President of the Administrative Court, and has not show how the instruction purportedly sent by the Minister through the Complainant's colleague, who the Commission is not told the kind of influence he had over the Complainant, could have or did intimidate him. Apart from the direct telephone call the Complainant claims he received from the Minister on 23 October and 24 November 2003, all the alleged threats, intimidations and harassment he claims, were perpetrated by persons he suspects were government

agents. Most of his allegations are unsubstantiated. For example, he indicated in paragraph 2.5.4.7 of his submissions that "the Minister expressed his displeasure with the said decision and further attempted to unduly influence and/or threaten the Complainant". He fails to show how this attempted influence or threat by the Minister was carried out.

*93.* It is further observed by the Commission that the alleged threat or pressure claimed by the Complainant to have been meted by Enoch Kamushinda, who the complainant himself refers to as a *suspected Central Intelligence Organisation (CIO) operative*, has not been substantiated; neither has the purported pressure and entrapment alleged to have been made by Mr. Ben Chisvo, who according to the Complainant, is a *suspected CIO informer.* Furthermore, the Complainant alleged he received a telephone call from a sympathetic member of the legal fraternity and the police that the Respondent State was fabricating a case against him, and that he was to be arrested and incarcerated on unspecified charges as punishment for defying the Respondent's orders. All the above allegations are not substantiated. Take the latter for example, what if the 'sympathetic member of the legal fraternity' was a hoax? What if he was acting on his own or wanted to benefit from the misfortune of the Complainant? His or her name is not even known.

94. It is not possible for the Commission to determine the level of intimidation or harassment that is needed to instil fear in a person, to force that person to flee for their life. However, in the instant case, there is no concrete evidence to link the complainant's fear to the Respondent State.

95. It is therefore the opinion of the Commission that the Complainant has not sufficiently demonstrated that his life or those of his close relatives were threatened by the Respondent State, forcing him to flee the country, and as such, cannot hold that the Complainant left the country due to threats and intimidation from the State.

96. However, the question is, having left the country, could the Complainant still have exhausted local remedies or better still is he required to exhaust local remedies?

97. The first test that a local remedy must pass is that it must be available to be exhausted. The word "available" means "readily obtainable"; "accessible";[44] or "attainable, reachable; on call, on hand, ready, present; . . . convenient, at one's service, at one's command, at one's disposal, at one's beck and call."[45] According to the African Commission, a remedy is considered to be available if the petitioner can pursue it without

44 WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 102 (1989).

45 LONGMAN SYNONYM DICTIONARY 82 (1986).

impediments or if he can make use of it in the circumstances of his case.[46] In the present Communication, the question to be asked is whether there were remedies available to the Complainant even from outside the Respondent State?

98. The State indicates that in terms of its laws, a Complainant need not be physically present in the country in order to access local remedies, adding that both the High Court Act and the Supreme Court Act permit any person to make an application to either court through his/her lawyer. In support of this, the State cited the Ray Choto and Mark Chavhunduka case where the victims were tortured by state agents and they applied for compensation while they were both in the United Kingdom and succeeded in their claim. The State concluded that the Complainant is not barred from pursuing remedies in a similar manner. The State further argues that since his resignation, the government of Zimbabwe continues to pay the Complainant his pension benefits which he could have used to instruct his counsel in Zimbabwe to attend to his claim on his behalf.

99. The Complainant does not dispute the availability of local remedies in the Respondent State, but argues that in his particular case, having fled the country for fear of his life, and now out of the country, local remedies are not available to him.

100. The African Commission holds the view that having failed to establish that he left the country involuntarily, and in view of the fact that in Zimbabwe law, one need not be physically in the country to access local remedies, the Complainant cannot claim that local remedies were not available to him.

101. The Complainant argues that even if local remedies were available, they were not effective because the State has the tendency of ignoring court rulings taken against it, citing among others, the High Court decision in the Commercial Farmers Union and the Ray Choto and Mark Chavhunduka cases, and added that the Zimbabwe Lawyers for Human Rights has documented at least 12 instances where the state has ignored court rulings since 2000.

102. The Rules of Procedure of the African Commission provide that "[t]he Commission shall determine questions of admissibility pursuant to Article 56 of the Charter."[47] Generally, the rules require applicants to set out in their submissions the steps taken to exhaust domestic remedies. They must provide some *prima facie* evidence of an attempt to exhaust local remedies. The Human Rights Committee has stated that the mere fact that a domestic remedy is inconvenient or unattractive, or does not

46 Jawara v. The Gambia, supra.

47 See Rule 116 of the Rules of Procedure of the African Commission.

produce a result favorable to the petitioner does not, in itself, demonstrate the lack of exhaustion of all effective remedies.[48] In the Committee's decision on **A v Australia,**[49] it held that "mere doubts about the effectiveness of local remedies or prospect of financial costs involved did not absolve the author from pursuing such remedies."[50] In **Article 19 v Eritrea,** the Commission held that "it is incumbent on the Complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the Complainant to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences". The European Court of Human Rights on its part has held that even if the applicants have reason to believe that available domestic remedies and possible appeals will be ineffective, they should seek those remedies since "it is generally incumbent on an aggrieved individual to allow the domestic courts the opportunity to develop existing rights by way of interpretation."[51]

103. From the above analysis, this Commission is of the view that the complainant ignored to utilize the domestic remedies available to him in the respondent State, which had he attempted, might have yielded some satisfactory resolution of the complaint.

104. **Article 56(6)** of the Charter provides that *"Communications received by the Commission will be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter…"* The respondent State contends that the present Communication was not submitted on time by the complainant, as required by the African Charter.

105. The present Communication was received at the Secretariat of the Commission on 8 November 2005 (even though dated 2 November 2005). It was considered for seizure by the Commission in November 2005, that is, two years after the Complainant allegedly fled from the country. The Complainant never approached the courts of the Respondent State. He left the country in December 2003 and only seized the Commission twenty two months later. The Complainant submits without substantiating that he

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48 Nos. 220/1987, T. K. v. France; 222/1987, M. K. v. France; 306/1988, J. G. v. The Netherlands, *in* 2 Report of the Human Rights Committee 188, 122; 127, 130; 180, 182–83, UN Doc. A/45/40 (1990) [hereinafter HRC 1990 Report].

49 Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

50 See also L Emil Kaaber v Iceland, Communication No. 674/1995. UN Doc. CCPR/C/58/D/674/1995 (1996). See also Ati Antoine Randolph v. Togo, Communication No. 910/2000, UN Doc. CCPR/C/79/D/910/2000 (2003).

51 PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 79 (2001) (quoting Earl Spencer and Countess Spencer v. United Kingdom, App. Nos. 28851/95, 28852/95 (Eur. Comm'n on H.R. 1998)).

had been undergoing psychotherapy while in South Africa, and also indicated that he did not have the financial means to bring the case before the Commission. He also stated that he had hoped the situation in the country would improve to enable him utilize domestic remedies but there was instead a deterioration.

106. The Commission notes that the Complainant is not residing in the Respondent State and notes further that the Complainant indicated that he was prevented from submitting his complaint on time, because the judiciary abides by a code of conduct in terms of which they do not ordinarily speak out and take positions against the establishment, noting that out of eight or so members who have left Zimbabwe because of persecution, he is the only one who was speaking out. He added that he was afraid for the lives of members of his immediate family that were at risk of persecution because of him.

107. The State on its part argues that "no cogent reasons have been given for the failure to pursue local remedies or remedies before the Commission within a reasonable time'. The State submits that the Communication was submitted 22 months after the alleged violation, which according to the State 'was filed well out of time'. On Complainant's submission that he had been seeking psycho-therapy treatment, the State argued that Complainant had been the *centre of attraction* in South Africa since 2004 demonizing the Respondent State, adding that articles published by the Complainant do not show someone with a psychological ailment. The State added that no proof had been given of the alleged treatment or an expert diagnosis of how such condition was acquired. On Complainants' claim that he had no resources, the State argued that he had his pension benefits which he could have used to submit his complaint to the Commission.

108. The Charter does not provide for what constitutes "reasonable period". However, the Commission has the mandate to interpret the provisions of the Charter[52] and in doing so, it takes cognizance of its duty to protect human and people's rights as stipulated in the Charter. The provisions of other international/ regional instruments like the European Convention on Human Rights and Fundamental Freedoms and the Inter-American Convention on Human Rights, are almost similar and state that they ***… may only deal with the matter… within a period of six months from the date on which the final decision was taken"[53],*** after this period has elapsed the Court/Commission will no longer entertain the Communication.

[52] Article 45 (3) African Charter on Human and Peoples' Rights

[53] Article 26 European Convention on Human rights.

109. The Commission is urged in Articles 60 and 61 of the Charter to consider as subsidiary measures to determine the applicable principles of law "other general or special international instruments, laying down rules expressly recognized by member states of the African Union…". Going by the practice of similar regional human rights instruments, such as the Inter-American Commission and Court and the European Court, six months seem to be the usual standard. This notwithstanding, each case must be treated on its own merit. Where there is good and compelling reason why a Complainant could not submit his/her complaint for consideration on time, the Commission may examine the complaint to ensure fairness and justice.

110. In the present Communication, the arguments advanced by the Complainant as impediments for his late submission of the complaint do not appear convincing. The complainant does not supply the Commission with medical proof to indicate he was suffering from mental problems, he does not indicate what gave him the impression that things might improve in Zimbabwe, after he himself noted in his complaint that since 2000 there has been documented evidence to show that things were deteriorating, including the fact that the government does not respect court judgments. Even if the Commission accepts that he fled the country and needed time to settle, or that he was concerned for the safety of his relatives, twenty two (22) months after fleeing the country is clearly beyond a reasonable man's understanding of reasonable period of time. The African Commission thus holds that the submission of the Communication was unduly delayed and thus does not comply with the requirements under Article 56 (6) of the Charter.

111. **Article 56(7)** of the African Charter provides that the Communication must not deal with cases which have been settled by the States, in accordance with the principles of the United Nations, or the Charter of the OAU or the African Charter. In the present case, this case has not been settled by any of these international bodies, and as a result of this, the requirement of Article 56(7) has been fulfilled by the complainant.

The African Commission finds that in the present Communication, that is**, Communication 308/05 - Michael Majuru/Zimbabwe,** the Complainant has not complied with sub-sections (5) and (6) of Article 56 of the African Charter, and thus declares the Communication **inadmissible.**

***Adopted at the 44th Ordinary Session of the African Commission on Human and Peoples' Rights, 10 – 24 November 2008, Abuja, Nigeria.***