10-24 November 2010
Communication No. 305/2005

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Forty-Eighth Ordinary Session
10-24 November 2010

ARTICLE 19, THE MEDIA INSTITUTE OF SOUTHERN AFRICA (MISA) OF ZIMBABWE, THE INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT IN AFRICA, GERRY JACKSON AND MICHAEL AURET JR.

v.

REPUBLIC OF ZIMBABWE

DECISION

Citation: Article 19 v. Zimbabwe, Decision, Comm. No. 305/2005 (ACmHPR, Nov. 2010)

SUMMARY OF THE COMPLAINT

1. The Complaint is filed by ARTICLE 19, the Media Institute of Southern Africa (MISA) of Zimbabwe, the Institute for Human Rights and Development in Africa, Gerry Jackson and Michael Auret Jr. (herein after referred to as the Complainants) against the Republic of Zimbabwe (the Respondent State) in accordance with Article 55 of the African Charter on Human and Peoples' Rights (the Charter).

2. The Complainants aver that Capital Radio Private Limited (CRPL) is a private company incorporated in the Respondent State seeking to provide broadcasting services within Zimbabwe. They submit that despite repeated efforts, CRPL still cannot broadcast in Zimbabwe due to legal restrictions and political opposition that allows the state broadcaster to enjoy broadcasting monopoly.

3. It is further alleged that on 22 September 2000, the Supreme Court of Zimbabwe ruled, in a matter in which CRPL challenged the constitutionality of this monopoly, that Section 27 of the Broadcasting Act was unconstitutional on the grounds that it was inconsistent with Section 20(1) of the Constitution of Zimbabwe which guarantees the right of freedom of expression. The Supreme Court also struck down Sections 14(1) and 14(2) of the Radio-communication Service Act (RSA) on the same ground, and expressly pronounced that CRPL was legally entitled to broadcast in Zimbabwe and in accordance with the law can import any broadcasting equipment into Zimbabwe.

4. The Complainants aver that on 25 September 2000, the Respondent State publicly responded to the ruling of the Supreme Court by stating that the public broadcaster would continue its broadcasting monopoly and that a new legislation would be enacted to regulate the broadcasting sector[FN1].The Minister of State for Information and Publicity (the Minister) is said to have publicly announced that CRPL would not be permitted to broadcast[FN2].

[FN1] Media Rights Agenda, Media Right Monitor, November 2000 No 5(11) p 22 available at: http://mediarightsagenda.org . See also International Freedom of Expression Exchange (IFEX),'State broadcaster to continue with monopoly' 25 September 2000. http://www.ifex.org/en/content/view/full/11575 , submitted by the Media Institute of Southern Africa (MISA).
[FN2] IFEX Update 'Court Orders return of confiscated equipment' 6 October 2000 http://www.ifex.org/en/content/view/full/11680 submitted by the Committee to Protect Journalists (CPJ).

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5. Despite the statements by the Respondent State and the Minister in particular, CRPL proceeded to exercise its newly recognised right to broadcast. It imported broadcasting equipment into Zimbabwe and began broadcasting a test signal on 28 September 2000 from an office in Eastgate shopping centre Harare.

6. However, the Directors of CRPL quickly realised that the location was not ideal for broadcasting and thus, on the following day, 29 September, CRPL, relocated to alternative broadcasting premises at the Monomotapa Crowe Plaza Hotel and set up a broadcasting studio in one of the offices there.

7. A music signal was set up on a broadcasting loop while the scope of the coverage was tested and it was determined what additional equipment was required for an improved signal.

8. Following the commencement of CRPL's broadcast, the Respondent State is reported to have stated a number of times in the media that CRPL was operating illegally and referred to CRPL as a "pirate radio station"[FN3].

[FN3] See The Herald 'Move to Crackdown on Broadcasting Site of Pirate Radio Stations' 3 October 2000.

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9. On 1 October 2000, the Minister of State for Information stated in a Zimbabwe Broadcasting Corporation (ZBC) telecast that he would be "taking appropriate action" against CRPL.

10. On 3 October 2000, an article appeared in The Herald newspaper which indicated that the Inspector Division of the Posts and Telecommunications Corporation (PTC) considered that CRPL's broadcasting service may be in breach of Sections 12 and 13 of the Radio-communications Service Act (RSA)[FN4].

[FN4] Ibid
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11. Following this, on 4 October 2000, CRPL applied to the High Court for an order declaring that the RSA does not apply to CRPL's broadcast service and to restrain the Respondent State and police from interfering with its broadcasting on the alleged violation of the RSA[FN5].

[FN5] Brooks certificate of urgency and Auret's founding affidavit (Annex A6 & A7).
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12. On the same day, the Minister made an application to the High Court seeking an interdict prohibiting CRPL from broadcasting on the basis that it was contravening Sections 12 and 13 of the RSA. A search warrant was also issued by a magistrate on 4 October 2000 permitting the Assistant Police Commissioner to search CRPL's broadcasting premises and all related premises, and to seize its broadcasting equipment[FN6].

[FN6] Search warrant (Annex A8)
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13. The police sought to exercise the search warrant that day, arriving at CRPL's broadcasting premises that afternoon. Upon the arrival of the police, CRPL made an urgent ex-parte application to the High Court seeking a stay of execution of the search warrant.

14. The High Court heard the application immediately and granted the stay of execution, holding that the search warrant was invalid for a number of reasons[FN7]. In particular, the Court declared that there was no possibility of CRPL breaching Sections 12 and 13 of the RSA as these provisions did not apply to CRPL and, in any case, these provisions were no longer enforceable since the Supreme Court had ruled that Sections 12 and 13 of the RSA were secondary operative provisions to give effect to Sections 14(1) and 14(2).

[FN7] Court transcript of ex-parte application (Annex A9)
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15. The stay of execution of the search warrant was valid until 4:30pm of 5 October 2000. CRPL's lawyers at the Monomotapa Plaza reminded the police of the existence of the High Court order prohibiting the execution of the search warrant. In the evening of 5 October, the police raided CRPL's broadcasting studio and seized its broadcasting equipment. This brought CRPL's broadcasting to an end.

16. The police also surrounded the homes of the Directors of CRPL on 4 October 2000 in order to execute the search warrant. On the advice of their lawyer, the CRPL Directors went into hiding at this point. The Directors' homes continued to be surrounded and monitored for a number of days. The police camped outside Mr Auret's family home for a week and executed their search warrant on Ms Jackson's home during the week following 4 October.

17. Finally, in the afternoon of 4 October 2000, an emergency temporary legislation was enacted under the Presidential Powers (Emergency Regulations) Act[FN8]. The Regulations introduced a broadcast regulatory regime imposing a requirement to obtain a broadcast license and designating the Minister of State for Information as the licensing authority. The Regulations further provided that broadcasting licenses would only be granted in response to a call for a license application made by the Minister.

[FN8] Presidential Powers (Temporary Provisions) Broadcasting Regulations 2000 (the Regulations)
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18. The Regulations were not gazetted, and so did not become legally enforceable, until 5 October 2000.

19. After the raid on the CRPL's broadcasting premises, the Respondent State held a press conference on 5 October 2000, where they displayed the broadcasting equipment confiscated from the CRPL[FN9]. At this press conference, the Minister of Information stated that CRPL did not qualify for a broadcasting license under the Regulations[FN10].

[FN9] IFEX Update 6 October 2000, See also BBC News 'Radio Shut Down Defended' 5 October 2000.
[FN10] Ibid
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20. On 5 October 2000, the High Court ordered the police to return the confiscated equipment, which had been unlawfully seized. In addition to this order, Gwaunza J made a declaration confirming that Sections 12 and 13 of the RSA had no application to CRPL's functioning or broadcasting. The declaration also stated that CRPL should desist from broadcasting for ten days in order that its site and equipment (once returned) could be inspected and that CRPL should be granted a frequency[FN11].

[FN11] Gwaunza J Order (Annex (A10) police
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21. On 6 October 2000, CRPL's lawyer Mr Antony Brookes went to CRPL's broadcasting premises to oversee the return of the confiscated equipment by the police. Under the Regulations it was now an offence to possess a "signal transmitting station", that is, a station which is used for the purpose of transmitting a broadcast service. Accordingly, Mr Brookes stated to the police that CRPL would be taking possession of everything except CRPL's transmitter unit, as they were legally entitled to under the Regulations[FN12]. Despite this, the police proceeded to confiscate all the equipments[FN13]. CRPL continued to be liable for the hire charges on the equipments at the monthly charge of ZM $ 158,730.00 (approximately US $ 2,886.00 at the time)[FN14].

[FN12] Affidavit of Mr Antony Brooks dated 8 November 2000.
[FN13] The Herald 'Police return Capital Radio equipment then seize it again' 7 October

2000.
[FN14] Affidavit of Geraldine Jackson dated 8 November 2000.
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22. On or about 16 October 2000, the High Court held the Assistant Commissioner of Police in contempt of court for the raid on the evening of 4 October[FN15]. Neither the Assistant Police Commissioner nor the Police Commissioner denied that the stay of execution of the search warrant had been defied.

[FN15] Capitol Radio (Private) Limited v Minister of Information & Ors (3): In re Ndlovu 2000 (2) ZLR 289 (H).
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23. On 3 November 2000, CRPL's lawyers wrote a letter of demand to the Police Commissioner seeking the return of the equipment, except the transmitter unit, which had been seized on 6 October 2000 and indicating that if this equipment was not returned, court proceedings would be initiated[FN16]. No response to the letter of demand was received.

[FN16] Letter of demand
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24. On 8 November 2000, CRPL applied to the High Court for the return of the equipment seized on 6 October 2000, apart from the transmitter unit. The High Court ruled in CRPL's favour and ordered the return of the equipment within two days[FN17].

[FN17] Court Order from Gwaunza J November 2000.
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25. CRPL was not allocated a frequency or granted a broadcasting license. No broadcasting licenses were issued during the six month life span of the Regulations, thus keeping in place the State broadcast monopoly which had been ruled unconstitutional by the Supreme Court.

26. Upon the expiry of the Regulations in April 2001, the Respondent State enacted the Broadcasting Services Act 2001 (the Act), carrying over many of the provisions from the Regulations. The Parliamentary Legal Committee issued two reports – one regarding the Regulations[FN18] and the other regarding the Bill[FN19] - both of which declared several provisions of the Regulations and the Bill to be Unconstitutional. The Speaker of Parliament dismissed the report on the Bill on a technicality and the Bill was passed without amendment[FN20].

[FN18] Regulations Report.
[FN19] Bill Report.
[FN20] IFEX Update, 'Broadcasting Services Bill Passed into Law' % April 2001.
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27. CRPL then initiated proceedings in the Supreme Court to challenge the Constitutionality of the Broadcasting Services Act. Accordingly, in June 2001, CRPL applied to the Supreme Court to rule that key operative provisions of the Act were unconstitutional on the basis of being inconsistent with Section 20(1) of the Zimbabwean Constitution, guaranteeing the right of freedom of expression.

28. There was a significant delay in hearing the matter In the interim, the Broadcasting Authority of Zimbabwe (BAZ), which was established by the Act, made a call for satellite television license applications in 2002, although formally this fell within the Minister's ambit, not that of the BAZ. Four license applications were received but all were rejected[FN21]. This was the first ever call for license applications under the Regulations or the Act.

[FN21] IFEX Update 'Information Minister rejects applications for satellite broadcasting licenses' 12 July 2002.
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29. The Supreme Court handed down its judgment on 19 September 2003, ruling that the majority of the contested provisions were either constitutional or that CRPL did not have standing to challenge them[FN22]. The Court held four of the seventeen challenged provisions to be unconstitutional.

[FN22] Capitol Radio (Private) Limited v. the Broadcasting Authority of Zimbabwe, the Minister of State for Information and Publicity and the Attorney General of Zimbabwe. Judgment No S.C 128/02 (Capitol Radio). Judgment was handed down on 19 September 2003.
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30. At the time of the Supreme Court's judgment, the Zimbabwean Government enacted the Broadcasting Services Amendment Act 2003 (Amendment Act). The Amendment Act repealed Section 6 of the Act (which designated the Minister as the broadcast licensing authority). The Amendment Act did not, however, repeal any of the other provisions which the Supreme Court had ruled were unconstitutional.

31. A second call for applications, this time for both radio and television, was made in March 2004. This would have been the first ever opportunity for CRPL or other aspirant radio broadcasters to apply for a license. Once again, all of the applications were denied[FN23]. It was announced in May 2005 that Munhumutape African Broadcasting Corporation (MABC) was short listed by the BAZ for further consideration for a license but in August 2005 the BAZ denied MABC's application[FN24].

[FN23] US Department of State Bureau of Democracy, Human Rights and Labour, Country Report Zimbabwe 2004, Section 2a.
[FN24] Zimbabwe Independent 'MABC denied license' 16 September 2005.
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32. In September 2004, the Zimbabwean Government enacted subordinate legislation

outlining the schedule of broadcast license fees for broadcasting licenses[FN25]. These license fees were prohibitively expensive given the increasingly difficult economic situation in Zimbabwe and hence constituted a further barrier to the feasibility of private broadcasting in Zimbabwe. The license fee for a 10-year national commercial radio broadcasting license was set at ZM$ 672 million (approximately US$ 159,620 at the time) coupled with a ZM$ 5 million (US$ 1,187) non-refundable application fee, and a frequency fee of ZM$ 800,000 (US$ 190) per month. For a 10- year national commercial television license, the fee was ZM$ 840 million (US$ 199,525), along with the application fee. For a local commercial radio license, the fee was ZM$ 14 million (US$ 3,325).

[FN25] Broadcasting Services (Licensing and Content) Regulations 2004, Statutory Instrument 185 of 2004.
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33. By the time this communication was filed before the Commission no private broadcasting license have been granted in Zimbabwe, leaving in place the State broadcasting monopoly.

ARTICLES ALLEGED TO HAVE BEEN VIOLATED

34. The Complainants allege violation of Articles 1, 2 and 9 of the African Charter[FN26].

[FN26] The Complainants also aver that the provisions of Article 9 of the African Charter should be read in light of the African Commission's Declaration of Principles on Freedom of Expression in Africa (Declaration), with Principles I, II, III, V, VII and XVI having particular bearing on this communication.

PROCEDURE

35. The Complaint dated 18 August 2005 was received at the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) on 19 August 2005.

36. The Secretariat acknowledged receipt of the same on 22 August 2005.

37. An amended version of the Complaint, dated 6 October 2005, was received by the Secretariat on 11 October 2005. On 11 October 2005, the Secretariat wrote to the Complainants acknowledging receipt thereof.

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

39. On 15 December 2005, the Secretariat notified the Respondent State of this decision and requested it to forward its written submissions on the admissibility of the matter.

40. On 30 January 2006, a similar notice was sent to the Complainants also requesting them to forward their written submission on the admissibility of the matter.

41. On 25 April 2006, the Secretariat received the written submissions of the Complainants on admissibility.

42. At its 39th Ordinary Session, the African Commission considered the communication and decided to defer it to its 40th Ordinary Session pending the Respondent State's submission on admissibility. The parties were notified accordingly.

43. At its 40th Ordinary Session, the African Commission considered the communication and deferred its decision thereof to the next session. The Complainant sent in further submissions on the communication and the Respondent State also made its submissions during the said session.

44. At its 41st Ordinary Session, the communication was further deferred to the 42nd Ordinary Session for a decision on admissibility and the parties were accordingly informed of the decision by a Note Verbale and letter dated 8 July 2007.

45. During the inter-session, the Secretariat on examining the Respondent State's submission on admissibility discovered that they had sent submissions on the merits instead of submissions on admissibility as requested.

46. By Note Verbale ACHPR/LPROT/COMM/305/ZIM/TN, dated 6 September 2007, the Secretariat informed the Respondent State of this and asked the later to make submissions on admissibility by 30 September 2007. The Secretariat also informed the Respondent State that if it wishes the African Commission to proceed on the Merits of the case, this should be indicated by the State.

47. During the 42nd Ordinary Session held from 15 - 28 November 2007 in Brazzaville, Republic of Congo, the Commission considered the communication and decided to defer the decision on admissibility to the 43rd Ordinary Session.

48. The parties were informed of the decision of the Commission by a Note Verbale and letter dated 19 December 2007.

49. At its 43rd, 44th and 45th Ordinary Sessions the Commission considered the communication and deferred its decision on admissibility as the Respondent State did not submit its arguments on admissibility.

50. By Note Verbale and letter dated 3 June 2009 the Secretariat informed the parties of the deferment of the Commission's decision on admissibility to its 46th Ordinary Session and further notified the Respondent State of the former's decision to proceed to decide on the communication if it fails to submit its arguments on admissibility.

51. On 19 August 2009 the Secretariat received the Respondent State's submission on admissibility of the communication.

52. During its 46th Ordinary Session the Commission considered the communication and deferred its decision to the 47th Ordinary Session to enable the Secretariat prepare a draft decision on admissibility.

53. During its 47th Ordinary Session held in Banjul, The Gambia, from 12 to 26 May 2010, the African Commission decided to defer its decision on admissibility to its 48th Ordinary Session.

54. In Note Verbale and letter dated 16 June 2010 the Respondent State and the Complainants respectively were informed of the above decision of the African Commission.

THE LAW ON ADMISSIBILITY

COMPLAINANTS' SUBMISSION ON ADMISSIBILITY

55. The Complainants submit that they have met all the admissibility requirements under Article 56 of the African Charter. They submit that the communication complies with Article 56(1) as the authors of the communication are listed as Article 19, Gerry Jackson, Michael Auret Jr., Media Institute of Southern Africa and the Institute for Human Rights and Development in Africa.

56. Regarding Article 56(2) of the Charter, the Complainants submit that the communication alleges violation by the Respondent State of Articles 1, 2 and 9 of the Charter. They submit that the Respondent State has violated Article 1 of the Charter by failing to adopt measures to give effect to its obligations under Article 9 of the Charter and this has the effect of denying the rights enshrined in this provision. They also argue that the specific actions of the Respondent State, particularly the Minister's official statement that CRPL would never be granted a license because of its predominately white ownership, discriminated against CRPL, thereby constituting a violation of Article 2 of the Charter. They therefore submit that these allegations establish a prima facie violation of the Charter and thus compatible with Article 56(2).

57. Regarding Article 56(3) of the Charter, the Complainants aver that the communication is written in a manner that is neither disparaging nor insulting to either the Respondent State or the Organization of African Unity (now the African Union).

58. With respect to Article 56(4) the Complainants submit that the communication is supported by firsthand experience of two of the Complainants, court rulings and other pertinent documents, which are annexed to the communication.

59. Concerning Article 56(5) of the Charter, the Complainants submit that the Supreme Court handed down its judgment on 19 September 2003, ruling that most of the impugned provisions it was challenging were either constitutional or that CRPL as a prospective broadcaster, lacked standing to challenge them. According to the Complainants, in respect of the provisions ruled constitutional (which constituted a number of the key operative provisions of the broadcast regulatory regime), it is well established that when the highest appellate court of a respondent state has pronounced on an issue in contention, it is settled that the remedy is exhausted[FN27].

[FN27] See for example A Concado Trindad The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights (1983) p 58.

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60. According to the Complainants, the Supreme Court ruled that four out of the seventeen provisions were unconstitutional[FN28]. This limited ruling of unconstitutionality would not, in their view, even if fully implemented, provide an effective solution to the violations of the Charter as it would not remedy the systematic Charter violations which are inherent in the broadcast regulatory regime as a whole. The Complainants believe that the predominant effect of the broadcast regulatory regime at present is to keep in place the State broadcasting monopoly, which, as a result of the Act, has continued uninterrupted by the Supreme Court's ruling.

[FN28] The Supreme Court of Zimbabwe ruled that Secs 6, 9(1), (2) & (3) were unconstitutional. Sec 6 designate [sic] the Minister as the licensing authority; Sec 9(1) restricts one national broadcasting license to each radio and television; Sec 9(2) restricts only one signal carrier license to be issued other than to public broadcaster; and Sec 9(3) prohibits a person holding both a broadcasting license and signal carrier license.
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61. Furthermore, they aver that the Amendment Act largely ignored the Supreme Court's ruling on unconstitutionality and no further legislation has been enacted to implement these rulings. Accordingly, the Complainants argue, the limited remedy provided by the Supreme Court was rendered ineffective.

62. It is submitted that the Amendment Act responds to only one of the rulings of unconstitutionality of the Supreme Court judgment, but even such minor compliance with the Supreme Court's judgment fails to address the fundamental issue of the Minister's ability to exert significant influence over the licensing process and the broadcast regulatory regime. The Complainants are of the view that a broadcast licensing process which is not independent of government control is inconsistent with the right to freedom of expression, an argument which remains unaffected by both the Supreme Court's ruling and the Amendment Act.

63. The Complainants allege that by allocating formal regulatory responsibility to the BAZ and at the same time reserving significant powers of intervention and direction to the Minister, the Amendment Act fails to address the primary arguments put forward both at the Zimbabwean Supreme Court and in the present communication.

64. In conclusion, the Complainants contend that by pursuing to completion the Supreme Court proceedings, CRPL has exhausted available domestic remedies.

65. Concerning the admissibility requirement under Article 56(6) of the Charter, the Complainants submit that the communication was filed before the Commission in August 2005, but September 2003, the date on which the Supreme Court rendered its judgment, should not be taken as the correct point for purposes of exhaustion of local remedies, because according to the Complainants, it was reasonable to wait and see how the Supreme Court judgment would be implemented and whether any broadcasting license would be issued.

66. According to the Complainants, this is supported by the fact that a call for application

for satellite television broadcasting licenses had been made in 2002, although all four applicants were in fact rejected. Furthermore, a call for national radio and television broadcasting license applications as well as local commercial radio licenses was made some months after the Supreme Court judgment, in March 2004, and the period for submitting radio license applications was extended until January 2005. In May 2005, they submit, the BAZ announced that of the five applicants, only one had been short-listed. In August 2005, it was announced that even this applicant, MABC, would not be given a license.

67. Following the denial of all the applications after the March 2004 call, which made it clear that the authorities were not implementing even the very flawed broadcasting regime set out in the Act in good faith, the Complainants claim that they decided to file the communication with the Commission.

68. The Complainants also submit that this communication has not been submitted to any other international body in accordance with Article 56(7) of the Charter.

69. For these reasons, the Complainants submit that the Complaint satisfies each of the requirements for admissibility.

RESPONDENT STATE'S SUBMISSION ON ADMISSIBILITY

70. The Respondent State contends that non-compliance with even a single requirement under Article 56 of the Charter renders a communication inadmissible, and that Article 56(5) on exhaustion of local remedies has not been complied with by the Complainants.

71. The State avers that the record shows that CRPL approached the Supreme Court in 2000 in the case CRPL v Ministry of information, Posts and Telecommunications SC99/2000 and was successful in having Section 27

of the Broadcasting Act and Sections 14(1) and 14(2)

of the Radio Communications Services Act declared unconstitutional.

72. In the same year, the State submits, CRPL was granted an order by the High Court of Zimbabwe to have its confiscated property returned to it, which was accordingly returned. The Respondent State further submits that CPRL was ordered not to carry out broadcasting services until properly licensed and in order for the license to be issued and the air waves allocated, CPRL was required by the Court order to submit its equipment and site for inspection. The latter was not done, and hence, the State argues, CRPL itself has contributed to the failure to comply with the full court order and that CRPL has not satisfied this requirement to date.

73. The Respondent State submits that in 2002 CRPL approached the Supreme Court, which as provided by the national law is the first court of instance in matters relating to constitutional cases or matters relating to the Bill of Rights. The Court considered the application on the merits and declared that Sections 6, 9(1), (2) & (3) were unconstitutional, and declared Sections 8(1), (2) and (5), 11(4), 12(1)(f), 12(2), 12(3), 15, 16 and 22(2) constitutional. The Sections that were declared unconstitutional, according to the Respondent State, were repealed or amended to be in conformity with the Constitution. This record of proceedings, the Respondent State argues, shows that CRPL was never

without a remedy.

74. The Respondent State claims that having declared some sections of the RSA unconstitutional, and the state having amended those provisions accordingly, its broadcasting monopoly was removed and CRPL could have taken that opportunity, but the latter failed to apply for a license on both the first and the second calls made in 2002 and 2004 respectively. Previously, the Respondent State alleges, other aggrieved parties in similar circumstances sought relief from the High Court and were granted licenses as in Retrofit v Minister of Information, Posts and Telecommunications.

75. The Respondent State avers that if CRPL had applied for and was not granted the license then it should have taken the matter to court as the remedy has been proven not only to be available but effective.

76. With respect to Article 56(6) of the Charter the Respondent State submits that even if the Commission were to find that local remedies were exhausted, the communication was submitted after an unduly prolonged period of time as it was filed with the Commission after more than two years.

COMMISSION'S ANALYSIS ON ADMISSIBILITY

77. Article 56 of the Charter provides for seven requirements on the basis of which the admissibility or otherwise of communications is determined. Accordingly, the Commission proceeds to assessing the submissions of both parties against the requirements under the said provision.

78. Although the Respondent State challenges the admissibility of the present communication only on two grounds, that is Article 56(5) and (6) of the Charter, the Commission finds it necessary to analyze the admissibility of the communication against all the seven requirements under Article 56 of the Charter.

79. Article 56(1) requires communications to indicate the authors even if the latter wants to remain anonymous. With respect to this requirement, the Complainants have indicated their names as: 19, Article 19, Gerry Jackson, Michael Auret Jr, Media Institute of Southern Africa and the Institute for Human Rights and Development in Africa together with their contact addresses. The Respondent State has not raised any objection on this issue. Accordingly, since the communication clearly lists the names and contact details of the Complainants (authors), the Commission holds that the communication meets the requirement under Article 56(1) of the Charter.

80. The second admissibility requirement provided under Article 56(2) states that communications should be compatible with the Constitutive Act of the African Union (AU) or with the African Charter. The Complainants submit that the Respondent State has violated Articles 1, 2 and 9 of the Charter. They have also briefly narrated the series of events and acts that they allege have caused the violation of those provisions of the Charter. The Respondent State however does not challenge the admissibility of this communication on this ground. The Commission is of the view that the facts described in this communication reveal a prima facie violation of the Charter, and the communication is brought by persons within the jurisdiction of a State Party to the Charter. Based on the above, the Commission is satisfied that the requirement under Article 56(2) has been met.

81. Article 56(3) provides that for a communication to be admissible it must not be written in a language which is insulting or disparaging to the AU or the Respondent State or its institutions. The Complainants contend that the communication is written in a manner that is neither disparaging nor insulting to either the Respondent State or the OAU (present AU). The Respondent State is again silent on this claim which is taken as acceptance. Having studied the communication, the Commission does not find it disparaging in any way. The Commission therefore concurs with the Complainants that the communication complies with Article 56(3) of the Charter.

82. Article 56(4) of the Charter requires communications not to be based exclusively on news disseminated by the media. The Complainants submit with respect to this requirement that the communication is based on personal experiences and testimonies of two of the Complainants and the rulings and proceedings of the High Court and Supreme Court of Zimbabwe. They have also attached the relevant Acts, Parliamentary Legal Committee report and numerous reports of NGOs. This claim is not contested by the Respondent State. Thus, the Commission is of the view that this Complaint is not solely based on news disseminated by the media and hence complies with Article 56(4) of the Charter.

83. Article 56(5) requires that communications should be brought to the Commission after exhausting all local remedies, if any, unless it can be shown that the procedure of exhausting local remedies have been unduly prolonged. The Complainants submit that CRPL challenged the constitutionality of seventeen provisions of the Broadcasting Services Act 2001, and the Supreme Court in its 19 September 2003 judgment ruled that four out of the seventeen provisions of the Act were unconstitutional, and the rest were found to be constitutional or that CRPL, as a prospective broadcaster, lacked standing to challenge them.

84. The Supreme Court is the court of original and final jurisdiction on matters relating to the constitutionality of laws and the Bill of Rights. No appeal lies from the decision of the Supreme Court. Thus, having approached the Supreme Court of the Respondent State the Complainants are still not satisfied with the judgment and hence they were left with no other local remedy. It is the Commission's view that with respect to this communication, the Complainants have exhausted the domestic remedies available to them.

85. The Respondent State's argument that the repeal or amendment of certain provisions that were found to be unconstitutional by the Supreme Court provided the CRPL with domestic remedy is noted, but does not deny the fact that the Complainants exhausted local remedies.

86. The Respondent State is of the view that after the ruling of the Supreme Court and the subsequent amendment of the provisions of the regulatory framework found to be unconstitutional, CRPL should have applied for a license using the two calls for application made by BAZ in 2002 and 2004. According to the Respondent State, had CRPL applied for, and not been granted a license then it should have taken the matter to Court. The position of the Respondent State is that by not applying for a license there is an available and effective domestic remedy left to be pursued.

87. The Commission wishes to state with respect to the above submissions by the Respondent State that the matter before this Commission is the compatibility of the

provisions of the Broadcasting Services Act with the African Charter. The CRPL petitioned the Supreme Court of Zimbabwe arguing that seventeen provisions of the Act are unconstitutional (and restrict the enjoyment of freedom of expression). The Supreme Court ruled that four of the seventeen provisions are indeed unconstitutional. However, the Complainants are not satisfied with the decision of the Supreme Court, nor are they satisfied with the measures taken by the State to amend some of the provisions found to be unconstitutional. They have thus approached the Commission challenging those same provisions as contravening Articles 1, 2 and 9 of the African Charter. Nowhere in their submissions have the Complainants indicated that they were before the Commission because they could not apply for a license or that they have been denied a broadcasting license. The State can therefore not rely on an issue that is not before this Commission to argue that local remedies have not been exhausted. Therefore, this communication has complied with Article 56(5) of the Charter.

88. Article 56(6) stipulates that a communication should be submitted within a reasonable period of time after exhausting local remedies or from the date the Commission is seized with the matter.

89. In the present communication the Supreme Court rendered its judgment on 25 September 2003 and the Complainants submitted the Complaint with the Commission on 19 August 2005, which is almost two years after exhausting local remedies.

90. The question here is, can this period be considered as 'reasonable' in terms of Article 56(6) of the Charter?

91. Unlike the European Convention on Human Rights and Fundamental Freedoms[FN29] and the American Convention on Human Rights [FN30], which provide a specific time limit for the submission of communications, which is six months, the African Charter only provides that communications should be submitted 'within a reasonable period' which is not defined. The Commission thus treats each case on its own merit to ascertain the reasonableness of the time[FN31].

[FN29] Art 26.
[FN30] Art 46 American Convention on Human Rights.
[FN31] Communication 310/05 - Darfur Relief and Documentation Centre v Republic of Sudan (2009) para 74
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92. Thus, in Darfur Relief and Documentation Centre v Republic of Sudan[FN32] the Commission stated that the lapse of two years and five months or twenty nine months without any reason or justification was considered as unreasonable. The Commission noted further that 'where there is a good and compelling reason why a Complainant does not submit his complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a Complainant an opportunity to be heard'.

[FN32] Darfur Relief and Documentation Centre v Republic of Sudan para 77.
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93. In the present communication, it took the Complainants two years after the exhaustion of local remedies to bring the matter to the Commission. The reason advanced by the Complainants for this delay in submission is that they wanted to wait and see how the Supreme Court's judgment would be implemented and whether any broadcasting licenses would be issued.

94. Is the reason advanced by the Complainants 'good and compelling'?

95. The issue brought before the Supreme Court by CRPL was that seventeen provisions of the broadcasting regulatory regime (the BSA) were unconstitutional. The Supreme Court held that four of the provisions were indeed unconstitutional and the others were constitutional and that CRPL had no standing before the Court. The Court's decision was not appealable as the Supreme Court is the highest court in Zimbabwe. CRPL was not satisfied with the Court's ruling as it insisted that the provisions restrict the enjoyment of freedom of expression. So why was it necessary for the Complainants to 'wait and see' how the Supreme Court's decision would be implemented, and whether any broadcasting license would be issued?

96. The reason advanced by the Complainants for the delay is neither good nor compelling. The CRPL itself did not apply for a license. It was 'waiting to see' whether others who applied would be granted the license. In any case the matter before the Commission is not the refusal to grant licenses, it is rather the incompatibility of provisions of the BSA with the African Charter. The Complainants knew as far back as September 2003 that they had reached 'a dead end' at domestic level. They could have within a reasonable time seized the Commission with the matter. Waiting for two years with no compelling reason is not justifiable.

97. For the above reasons the Commission finds that the communication was not filed within a reasonable time after the exhaustion of local remedies and hence does not comply with Article 56(6) of the Charter.

98. Article 56(7) of the Charter states that a communication submitted to the Commission should not be one already settled by states involved according to the principles of the Charter of the United Nations, or the Charter of the OAU or the provisions of the African Charter. The Complainants submit that the communication has not been submitted to any other international body for settlement and the Respondent State has not contested this claim. Thus, the Commission holds that the communication fulfils the requirement under Article 56(7) of the Charter.

DECISION OF THE COMMISSION ON ADMISSIBILITY

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

1. To declare this communication Inadmissible as it does not comply with the requirement of Article 56(6) of the African Charter;

2. To give notice of this decision to the parties; and

3. To include this decision in its Report on communications.

Done in Banjul, The Gambia, during the 48th Ordinary Session of the African Commission, 10 - 24 November 2010.