Communication 295/04: Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum v Zimbabwe

Summary of the Complaint:

1. The Complaint is filed by the Zimbabwe Human Rights NGO Forum (the Complainant) – a coalition of 16 NGOs working in the field of human rights in the Republic of Zimbabwe. The Complaint is filed on behalf of Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (the Victims) and relates to allegations of wrongful killings through the use of excessive force and unjust compensation for the death of four persons in Zimbabwe (the Respondent State).

Beavan Tatenda Kazingachire

2. The Complainant submits that on 10 January 2001 at about 23:30 hours, Mr. Noah Kazingachire was driving his car along Mafurira Road. His wife, Patience Kazingachire and son Beavan Tatenda Kazingachire were passengers in the car. It is alleged that the car developed a mechanical problem forcing the driver to stop. The Complainant alleges further that the driver saw a car coming from behind and he switched on the hazard lights to warn of the danger posed by the stalled car. The car coming from behind, a Toyota Venture, which was unmarked then pulled alongside his.

3. The Complainant alleges that four men who later proved to be police officers jumped out of the Toyota Venture and, without identifying

themselves, peeped into Mr. Kazingachire's stalled car. Thinking that they were carjackers, Mr. Kazingachire started his car intending to drive off.

4. The Complainant submits that one of the men from the Toyota Venture pulled out a firearm and fired a shot at Mr. Kazingachire's car. Mr. Kazingachire's son, Beavan T Kazingachire, who was in the back seat, was shot. Mr. Kazingachire persuaded the men to take his son to hospital. He was pronounced dead on arrival at the hospital. A pathologist who conducted the post mortem on the son concluded that Beavan T Kazingachire died of "severe haemorrhage secondary to gunshot wound injuries".

5. The Complainant alleges that it was at the hospital that Mr. Kazingachire learnt that the men were policemen after they produced their identity cards. The Complainant argues that the shooting was unlawful and a display of excessive use of force.

Munyaradzi Never Chitsenga

6. The Complainant submits that Munyaradzi Never Chitsenga (the deceased) was a motor mechanic. It alleges that on 14 March 2001, the deceased was working on a motor vehicle, a Toyota Cressida brought for repairs by one Sydon Chiwindi. The deceased was test-driving the car on the same day along Badza Street in Zengeza when he met policemen in a Land Rover truck who fired at the Toyota Cressida. The deceased then abandoned the car and tried to seek refuge at a nearby house by jumping over the fence.

7. The Complainant alleges that a police officer pulled the deceased down from the fence and shot him in the head at point blank range. According

to witnesses at the house, the policemen allegedly shot the deceased while holding his hand. The Complainant submits that the police used unlawful and excessive force.

Lameck Chemvura

8. The Complainant submits that 23 years old Lameck Chemvura (deceased), a disabled second year University of Zimbabwe student, was travelling by train from Harare to Mature on 25 November 2001.There were army officers in uniform on the train going to Grand Reef just outside Mature for a training exercise. The Complainant submits that six army officers asked for identity cards from passengers. They discovered that the deceased was a student at the University of Zimbabwe and one of the officers remarked that the deceased was a member of the opposition political party (the Movement for Democratic Change) that they were looking for.

9. The Complainant alleges that the army officers assaulted the deceased with their fists, kicked him with their boots, strangled him and pressed him against the floor until he died. The Complainant further alleges that the army officers, in the full view of other passengers then pulled his body and threw it out of the window of the moving train.

Batanai Hadzisi

10. The Complainant submits that on 8 April 2001, there were disturbances at the University of Zimbabwe which continued until 9 April 2001. The police and university security officers were called to control the disturbances. The Complainant alleges that Police officers stormed into the residence halls of students spraying teargas. Police officers pursued 21 years old Batanai Hadzisi and one Tafadzwa Mungure into a room in

Manfred Hodson Hall where there were three other students. It is alleged that upon entering the room, the police officers beat the students with truncheons and Batanai Hadzisi was taken to the hospital with injuries sustained from the assault. The Complainant alleges that Batanai Hadzisi was pronounced dead on arrival at the hospital.

11. The Complainant submits that an inquest was held with respect to Batanai Hadzisi, and the Magistrate ruled that the police were to blame for the death of the deceased. The Complainant submits that a police officer, Tobias Sharara, was charged with the murder of the deceased.

12. The Complainant argues that under Zimbabwean law, there is a limited number of causes of action which arise out of the death of a person by the wrongful act of another. It states that the legal heir of the deceased person can claim medical, hospital and funeral expenses. The Complainant further states that the dependents of the deceased can also claim compensation for the pecuniary loss they have suffered in consequence of the death of a person who maintained or had an obligation to maintain them. It states that there is absolutely no possibility of arguing for the extension of the existing law to afford *solatium* damages to relatives of the deceased person.

13. The Complainant submits that in the present case, the parents and heirs of deceased persons are not able to institute court action against the police and claim damages for the loss of their children in consequence of the position of the law in the Respondent State. The Complainant submits that a cause of action for damages in cases of bereavement can only be established through legislative intervention. The Complainant further submits that the failure of the Respondent State to pass legislation or to

cause the necessary changes to the law in order to enable the parents of the deceased to claim damages for bereavement amounts to a violation of Articles 1 and 4 of the African Charter on Human and Peoples' Rights (the African Charter).

14. The Complainant alleges further that the shootings by the police officers in the circumstances described above amount to extra-judicial or summary killings and are therefore a violation of Article 4 of the African Charter.

15. The Complainant attaches the following documents in support of their case: copies of the notice of death of a person; application for post mortem examination; correspondence from the Attorney General's Office; affidavits and medical records.

Articles alleged to have been violated

16. The Complainant alleges violation of Articles **1** and **4** of the African Charter by the Respondent State.

17. The Complainant prays the African Commission to:

- make a declaration that the Respondent State is in breach of Articles 1 and 4 of the African Charter;
- make a recommendation asking the Respondent State to comply with its obligations under the African Charter by passing legislation in order to create an action for bereavement damages; and
- make a recommendation asking the Respondent State to pay the sum of US$40, 000, 000.00 as compensation to the parents or duly appointed heirs of the deceased persons.

Procedure

18. The Complaint was received at the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) on 21 October 2004.

19. On 25 October 2004, the Secretariat wrote to the Complainant acknowledging receipt of the Complaint and informing the latter that the Complaint will be considered at the 36th Ordinary Session of the African Commission.

20. At its 36th Ordinary Session held in Dakar, Senegal from 23 November to 7 December 2004, the African Commission considered the Communication and decided to be seized thereof.

21. By Note Verbale dated 13 December 2004 and by letter of the same date, the Parties were notified of the decision and requested to submit their arguments on Admissibility within three months.

22. By Note Verbale dated 28 February 2005 and by letter of the same date, the Parties were reminded to send their arguments on Admissibility before 13 March 2005.

23. By letter of 10 March 2005, the Complainant submitted its arguments on Admissibility.

24. On 14 March 2005, the Secretariat received a letter from the Office of the Attorney General of Zimbabwe dated 14 March 2005 requesting the African Commission to defer consideration of the Communication,

including three other Communications against Zimbabwe to the 38th Ordinary Session of the African Commission. The Communication was then deferred to the 38th Ordinary Session pending submissions on Admissibility from the Respondent State.

25. Reminders dated 24 May 2005, 2 September 2005, and 18 October 2005, were sent to the Respondent State to submit its arguments on Admissibility.

26. On 23 November 2005, during the 38th Ordinary Session of the African Commission, the Respondent State submitted its arguments on Admissibility, and a copy was given to the Complainant.

27. At its 39thOrdinary Session, the African Commission considered the Communication and decided to declare it admissible and both Parties were notified.

28. On 28 August 2006, the Secretariat received the submissions on Merits of the Complainant. The Complainant also informed the Secretariat that a copy of the same has been forwarded to the Respondent State.

29. On 28 August 2006, the Secretariat received the Respondent State's submissions on Merits, and forwarded the same to the Complainant.

30. At its 40th, 41st, 42nd, 43rd, 44th, 45th and 46th, Ordinary Sessions, the African Commission deferred the Communication to its 47th Ordinary Session pending supplementary submissions on the Merits from the Respondent State.

31. On 22 May 2009, the Respondent State forwarded its Supplementary Submissions on Merits to the Secretariat, which was transmitted to the Complainant.

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

The Law on Admissibility

Submissions of the Complainant on Admissibility

33. With respect to Article 56(1) of the African Charter, the Complainant submits that the author of the Communication, Zimbabwe Human Rights NGO Forum, has been revealed. It notes that the contact details of the author have also been provided.

34. According to Article 56(2) of the African Charter, for purposes of Seizure and Admissibility, the Complainant submits that it only needs to present a *prima facie* case. It notes that once this is done, the burden shifts to the Respondent State to submit specific responses and evidences refuting each and every one of the assertions contained in the Complainant's written submissions.

35. The Complainant argues that the Communication is compatible with the African Charter, noting that the Communication alleges a violation of Article 4 of the Charter and *a fortiori* Article 1 thereof. The Complainant indicates that the violations alleged in the Communication derive from the lack of adequate remedies, reparations or just satisfaction for wrongful

death in the Zimbabwean jurisdiction. The Complainant submits that the right to remedies or reparation is a well-established principle of international law.

36. Regarding Article 56(3) of the African Charter, the Complainant avers that the Communication is not written in disparaging or insulting language directed to the Respondent State.

37. Concerning Article 56(4) of the African Charter, the Complainant indicates that the violations alleged are not based on reports gathered from press reports. It notes that the alleged violations are based on reports received from the families of the deceased and official documentation, as well as communications from the prosecuting authorities.

38. The Complainant notes that Article 56(5) requires that Communications shall be admissible only if the petitioner has exhausted the remedies available domestically, provided these are not unduly prolonged. It further notes that in practice and through its jurisprudence, the African Commission has three other conditions that must be satisfied for the rule to apply, namely, the remedy must be available, effective and sufficient.

39. The Complainant avers that it has successfully discharged the *onus* to prove that in Zimbabwe there are no adequate and effective remedies that the Complainant or the victims on whose behalf this Communication is filed could be required to exhaust before approaching the African Commission.

40. The Complainant submits that the present Communication alleges a violation of Articles 1 and 4 of the African Charter. It notes that the basis of these violations is that Zimbabwean Law does not provide for adequate

remedies, reparations or just satisfaction for a violation of the right to life enshrined in Article 4 of the African Charter.

41. The Complainant avers that the relatives of the deceased were unable to sue for adequate compensation for the wrongful deaths because that remedy is not recognized under Zimbabwean law.

42. The Complainant states that the burden therefore shifts to the Respondent State to proof that remedies exist, and relate the remedies to the circumstances of this case, showing clearly how the remedies might provide adequate redress under such circumstances.

43. Finally, with respect to Article 56(7) of the African Charter, the Complainant submits that the matter is not pending in another proceeding, nor does it duplicate any petition already examined by the African Commission, or any other international tribunal.

The Respondent State's Submissions on Admissibility

44. The Respondent State argues that the Communication is improperly brought before the African Commission for two reasons – first, that it is incompatible with the African Charter and secondly, that the Complainants have not exhausted local remedies.

45. On the question of incompatibility with the African Charter, the Respondent State notes that the deprivation of life is justifiable under the Constitution of Zimbabwe and an acceptable derogation under international law. The Respondent State argues that the actions that led to the death of the deceased persons and the reaction of the Respondent State thereto were in no way in contravention of the laws of Zimbabwe and

international law and as such the Respondent State cannot be said to have violated Articles 1 and 4 of the African Charter. For these reasons, the Respondent State submits that the Communication is incompatible with the African Charter.

46. On the exhaustion of local remedies, the Respondent State notes that the Complainant is asking the African Commission to recommend that the Respondent State adopts a law that does not exist in any jurisdiction in the world, save for the English Fatal Accident Act of 1976. The Respondent State argues that if the Complainant was sincere in its desire to see that a law is put in place to cater for the scenario mentioned in its Complaint, it would have lobbied organizations that share its views for the passing of such a law. Since this was not done, it is the Respondent State's contention that it is improper for the Complainant to approach the African Commission to request the latter to recommend the Respondent State to adopt such a law.

47. The Respondent State finally notes that since the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (Draft Principles) is not yet law, the issues of damages has no foundation yet. For the above reasons, the Respondent State submits that the African Commission should dismiss the Communication.

Analysis of the African Commission on Admissibility

48. Article 56 (2) requires Communications submitted for consideration by the African Commission to be "*compatible with the Charter of the Organization of African Unity … or with the present Charter*". The facts as presented to the African Commission suggests that the Complainant is seeking a

declaration from the Commission to the effect that Zimbabwean law does not provide for adequate remedies, reparations or just satisfaction for a violation of the right to life enshrined in Article 4 of the African Charter.

49. The facts also suggest that the Respondent State's compensation regime for Victims who lose their lives as a result of actions caused by state officials is inadequate and does not provide effective relief and thus a violation of the African Charter. It is the view of the African Commission that the facts as submitted by the Complainant do raise a *prima facie* case for human rights violations that warrants consideration by the African Commission.

50. Furthermore, the assertion by the Respondent State that the deprivation of the right to life is justifiable under the Constitution of Zimbabwe and that it is an acceptable derogation of human rights under international law is not a matter to be analyzed at the Admissibility stage but rather at the Merits stage of the proceedings. Suffice at this stage of the proceedings to indicate that although the African Charter does not expressly provide for the right to adequate remedy, reparation or compensation; this right is a well-established principle of international law.

51. Therefore, the African Commission does not regard the present Communication as incompatible with the [Constitutive Act of the African Union] or the African Charter, and holds that the Communication meets the requirement of Article 56 (2) of the African Charter.

52. With respect to the exhaustion of local remedies under Article 56(5) of the African Charter, in order to meet its initial burden, the Complainant has provided details of cases reported to it of individuals who were killed by

state agents. The relatives of the deceased persons were unable to sue for adequate compensation for the wrongful deaths since that remedy is not recognized under Zimbabwean law. The Complainant has also attached documentation to prove the deaths.

53. In addition, the Complainant extensively quotes the remarks by Professor Geoff Feltoe, a leading authority on tort law in Zimbabwe. The Complainant also makes reference to authors and case law from the English jurisdiction showing how they changed their law, which was similar to Zimbabwean law, in order to correct this anomalous and inequitable position of the law. The Respondent State has not undertaken similar action through Parliament and thus the inequitable position remains. It is submitted that in the circumstances of this case there are no available domestic remedies for the Complainant to exhaust.

54. The Complainant adds that in order to meet its burden of proof under the domestic remedies rule, the Respondent State in the present case needs to produce evidence of the availability and accessibility of the domestic remedies in practice. The Respondent State will need to relate any remedy that it alleges to the circumstances of this case, showing clearly how the remedy might provide adequate redress in the circumstances of the case.[1]

55. The Respondent State does not deny the fact that there is no domestic recourse available to the Complainant, but rather argues that the latter is seeking for the passing of a law that does not exist in any jurisdiction in the world and that the Complainant should lobby other organizations that share its views so that such a legislation could be adopted. The assertion by the Respondent State that the question of remedies to parents has no legal basis because the Draft Principles are not yet law is unfounded.

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1 See Communication 458/91 - *Mukong v Cameroon (1991)*

56. In view of the above, the African Commission decides to declare the Communication Admissible with respect to Article 56 of the African Charter.

The Merits

Complainant's Submissions on the Merits

57. The Complainant recalls that in terms of Article 60 of the African Charter, the African Commission "is urged to draw inspirations from international law", and that the matter before the African Commission involves the concept of wrongful death, a concept drawn from English law, especially Section 1(1) of the Fatal Accidents Act according to which

> "[i]f a death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

58. The Complainant also notes that the proceedings that would have been instituted by the deceased if he had not died can be initiated by his dependants. The Communication further alleges that Zimbabwean law makes no room for compensation in case of wrongful death, except funeral expenses reimbursement and loss of support to children or the surviving spouse. There is no provision for bereavement damages. It is submitted that this lacuna is a violation of Articles 1 and 4 of the African Charter.

59. The Complainant alleges that the deceased persons referred to in the Communication, namely Beaven Tatenda Kazingachire, Munyaradzi Never Chitsenga, Lameck Chemvura and Batanai Hadzisi were unlawfully, wantonly and willfully shot or beaten to death by the police. The Complainant notes that other persons who were with the deceased when they

were assaulted by the police got compensation, and that if the deceased persons did not die, they would also have received compensation.

60. The Complainant further notes that the right to a remedy or reparation in the event of a human rights violation is well-entrenched in international law. They make reference to the *Draft Articles on Responsibility of the State for Internationally Wrongful Acts* prepared by the International Law Commission, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) which provide for a right to an effective remedy and compensation. The Complainant relies on the jurisprudence of the Inter-American Court of Human Rights in the *Velasquez Rodriguez case* where the Court ruled that "every violation of an international obligation which results in harm creates a duty to make adequate reparations", and the decision of the African Commission in *Embga Mekong Louis v Cameroon* where the African Commission granted compensation to the legal heirs and next of kin of a deceased victim for human rights violations.

61. The Complainant submits that the relatives of the deceased persons named in this Communication "were psychologically traumatized and emotionally torn by the circumstances of these killing." The Complainant argues that in not making it possible for the victims' next of kin to seek reparations, the Respondent State is in violation of Article 1 of the African Charter which direct State parties to "adopt legislative or other measures to give effect to the rights protected under the Charter."

62. The Complainant further recalls the position adopted by the African Commission in its decision in *Jawara v The Gambia*[2] where it held that violation of any other right automatically amounts to a violation of Article 1 of the African Charter.

[2]Communications 147/95, 149/96

63. The Complainant submits that the Respondent State is in violation of Article 4. It relies on international human rights standards (including the European Convention), the decision of the European Court in *Hugh Jordan v United Kingdom*[3] condemning arbitrary infringement of the right to life. The European Court in the *Hugh Jordan* case held that death caused by the use of permitted force is a violation of the right to life. The Complainant urges the African Commission to adopt this stance, as it is in sync with the concept of wrongful death.

64. The Complainant further alleges that the death of the deceased persons was caused by unlawful, wanton and willful use of force by law enforcement officials and members of the national army of the Respondent State. Munyaradzi Never Chitsenga was shot at close range and died on the spot; the firing of gun shots at the Kazingachire family was not preceded by a warning shot; Batanai Hadzisi was beaten to death in a tiny university room; Lameck Chemvura was beaten to death and his body thrown out of a moving train.

65. The Communication further makes reference to the jurisprudence developed in *MacCann(1995)*[4]*; Assenov vs Bulgaria (1998)*[5]*; and Hugh Jordan v United Kingdom* that shootings by law enforcement agents is a violation of the right to life. The Cases found the killings to be unlawful, warranting judicial investigations and appropriate punishment.

66. The Complainant also notes the decision of the African Commission in *Amnesty International on behalf of Orton and Vera Chirwa v Malawi*[6]that "shootings by police officers is a violation" of the right to life.

[3] *Hugh Jordan v United Kingdom* (2001) ECHR (Application No. 24746/94)
[4] *21 EHRR 97*
[5] *28 EHRR 662*
[6] Communications 68/92 and 78/92 respectively

67. The Complainant alleges that the Respondent State failed to perform its obligation to protect human rights by not making remedies available to the victims. In the case of Munyaradzi Never Chitsenga, the criminal inquest finds that no one was to be prosecuted. The Complainant submits that the verdict of the criminal inquest would not have precluded proceeding with a compensatory claim had the law been in place. Similarly even if a criminal prosecution has been instigated against soldiers who killed Lameck Chemvura, that would not have precluded a claim for wrongful death had such a remedy been available, in as much as a civil claim for loss of support would have been made against the soldiers had the deceased been married. The Complainant argues that it is thus no defence that criminal remedies have been or are being pursued.

68. Based on the above, the Complainant prays the African Commission to find the Respondent State to be in breach of Articles 1 and 4 of the African Charter. The African Commission is called upon to request the Respondent State to take corrective measures, including complying with its obligations under the African Charter by passing legislation in order to create an action for bereavement damages; and to afford just compensation to be divided equally between the parents or duly appointed heirs of the deceased in the sum of US$40, 000, 000.00.

Respondent State's Submission on the Merits

69. In the case of Beavan Tatenda Kazingachire, the Respondent State submits that police officers were on patrol on the night of 12 January 2001. They were on follow-up of notorious armed robbers. One of the robbers had been arrested and volunteered to indicate to police his accomplices. The arrested robber pointed out a Nissan Sunny car as one of the vehicles used by one of

the criminals. The Respondent State alleges that police officers surrounded the car and identified themselves.

70. The Respondent State also alleges that the driver of the Nissan Sunny car suddenly drove off at high speed. The Respondent State submits that the police officers fired warning shots, but the car did not stop. One shot was then directed at the car and it stopped. On checking the car, the police officers realized that there was a child, Beavan Tatenda Kazingachire, who was sleeping at the back seat and he had been fatally shot.

71. The Respondent State submits that Constable Shamu was charged with the murder of a minor. By a letter dated 11 September 2002, the Civil Division of the Attorney General's Office paid the sum of Z$97,000.00 in an out of court settlement for funeral expenses "on a purely without prejudice basis and without admission of responsibility on the part of the police".

72. The Respondent State alleges that on 14 March 2001 Munyaradzi Never Chitsenga (the deceased) was driving a Toyota Cressida and was signaled to stop by police officers. Instead of stopping, the car sped off and a chase then ensured.

73. The Respondent State submits that the deceased was eventually caught when the Toyota Cressida ran into a ditch. He was then handcuffed and placed in a police car. The Respondent State also submits that somehow the deceased managed to escape and started to run away.

74. The Respondent State submits that warning shots were fired but the deceased did not stop. He was then shot and killed. The Respondent State alleges that the deceased's conduct in trying to flee twice from the police raised the reasonable suspicion that he was a robber.

75. An inquest was conducted by a Magistrate. The Magistrate ruled that death was caused by a gunshot wound but that "nobody is to be prosecuted as the accident was justified". The Attorney General confirmed the magistrate's decision and closed the case.

76. In the case of Lameck Chemvura, the Respondent State submits that the army officer suspected to have been part of the group of soldiers that caused his death was arrested and is going to be prosecuted in accordance with the law. The Respondent State further submits that it is not responsible for the death of Lameck Chemvura as the incident was as a result of the unsanctioned activities by the members of the army.

77. The Respondent State notes that the deaths of the four persons mentioned in this Communication in one way or another was as a result of action on the part of state security officers, i.e. the police and army. According to the Respondent State, it is not an issue that the deaths of Beaven Tatenda Kazingachire, Munyaradzi Never Chitsenga, and Batanai Hadzisi occurred as a result of police actions whilst they were carrying out their duties. Neither is it an issue that the death of Lameck Chemvura is alleged to have been as a result of actions taken by members of the army. Furthermore it is not an issue that the Government of Zimbabwe took action against the Government officers whose actions resulted in the deaths of the four persons. It is the Respondent State's submission that the officers involved were all arrested and would be prosecuted in accordance with the laws of Zimbabwe.

78. The Respondent State submits that since the officers have not yet been prosecuted it would therefore be improper to conclude that the deaths of the four deceased persons were wrongful as no court has pronounced a judgment on the lawfulness or otherwise of the actions of the government officers. According to the Respondent State, the issue of the wrongfulness of the

deaths of the four persons only arises after a competent court has pronounced that the actions by the state agents exceeded reasonable force that would have been applied in the circumstances and in the case of Lameck Chemvura it must first be proved that it was indeed the army officer arrested whose actions resulted in his unfortunate death.

79. The Respondent State notes that in the case of Beaven Tatenda Kazingachire, the State accepted responsibility and paid out compensation in accordance with the laws of Zimbabwe 'on an without prejudice basis'. The Respondent State further notes that the actions of the state agents are however yet to be determined by a competent court on whether they were lawful, or not in the criminal trial.

80. The Respondent State points out that the death of Lameck Chemvura does not involve the issue of whether reasonable force was used or not against the deceased but is a question of the identification of the assailants whose actions were criminal and it is upon the conviction of the assailants that the issue of compensation may arise.

81. The Respondent State makes reference to G. Feltoe's book "A Guide to the Zimbabwean Law of Delict" (Second Edition) which authoritatively states the law regarding compensation for wrongful death. According to the Respondent State, it is clear that the law on claim for damages does not support claims for the wrongful death of a person *per se.* The Respondent State submits that for one to succeed in a claim for damages situations where persons are wrongfully killed, the claimant must prove loss of support.

82. The Respondent State points out that the domestic law provides for compensation for the loss of support and funeral expenses, but does not provide for loss of companionship or bereavement as is the case with the United Kingdom's Fatal Accident Act of 1976. It notes that in Zimbabwe,

compensation is only made to those that suffer loss and such loss is quantifiable. That is compensation is to restore the receiver of such compensation to the position he would be before the deceased died. The Respondent State submits that its domestic law caters for compensation of persons whose lives depended on the life of a person wrongfully killed by state agents.

83. According to the Respondent State, the issue of compensation only arises if the state agents are found to have acted outside the laws of Zimbabwe. It submits that the complaint has been prematurely brought before the African Commission as the state agents' actions have not yet been found to be wrongful.

84. The Respondent State notes that the desire by the Complainant to see Zimbabwe adopt laws similar to the Fatal Accident Act should not have been brought as a complaint to the African Commission but rather the Complainant should have used domestic procedures in lobbying for the legislation of such a law. The Respondent State also submits that the right to life is not absolute as claimed by the Complainant and that for all these reasons, the Complaint be dismissed.

Respondent State's Supplementary Submissions on the Merits

85. In making supplementary submissions on merits, the Respondent State draws guidance from the following provisions of national as well as international law. The Respondent State notes Section 93 of the Constitution of Zimbabwe which provides that:

"(1) There shall be a Police Force which, together with such other bodies as may be established by law for the purpose, shall have the function of preserving the internal security of and maintaining law and order in Zimbabwe".

86. The Respondent States also notes Section 42 of the Criminal Procedure and Evidence Act, [Chapter 9:07] provides that:

"(1) If any person who is authorized or required under this Act or any other enactment to arrest or assist in arresting another person attempts to make the arrest and the person whose arrest is attempted -

(a) resists the attempt and cannot be arrested without the use of force; or
(b) flees when it is clear that an attempt to arrest him is being made or resists the attempt and flees; the person attempting the arrest may, in order to effect the arrest, use such force as is reasonably justifiable in the circumstances of the case to overcome the resistance or to prevent the person concerned from escaping.

(2) Where a person whose arrest is attempted is killed as a result of the use of reasonably justifiable force in terms of subsection (1) the killings shall be lawful if the person was to have been arrested on the ground that he was committing or had committed, or was suspected on reasonable grounds of committing or having committed an offence referred to in the First Schedule."

87. At the international level, the Respondent State makes reference to the United Nations Basic Principles on the Use of Force and Fire Arms by Law Enforcement Officials adopted on 7 September 1990. It notes:

Paragraph 9

"…intentional use of firearms may only be made when strictly unavoidable in order to protect life."

Paragraph 10

"…law enforcement officials shall identify themselves as such and shall give a clear warning of their intent to use firearms, with sufficient time for the warnings to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

Paragraph 22

"Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances."

Paragraph 23

"… persons affected by use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependents accordingly."

88. The Respondent State recalls that law enforcement agents have a duty under the Constitution of Zimbabwe to preserve internal security and to maintain law and order. It notes that the Criminal Procedure and Evidence Act permits the use of reasonable force to subdue a person fleeing from arrest. The Respondent State submits that where such a person persists in fleeing, the subsequent killing by law enforcement agents is described as justifiable homicide.

89. The Respondent State submits that in the cases involving Beaven Tatenda Kazingachire and Munyaradzi Never Chitsenga, the law enforcement agents were carrying out their statutory duties of maintaining law and order, and therefore, the killings in respect of these were unintentional. The Respondent State submits that the action of these law enforcement agents was justifiable in the circumstances, as there was an honest belief that they had a valid reason for firing at the persons concerned. According to the Respondent State, they were trying to stop suspected criminals from fleeing.

90. The Respondent State further submits that the UK legislation cited by the Complainant does not fall into the category of conventions or international law envisaged under Articles 60 and 61 of the African Charter. Therefore, it is the Respondent State's contention that the African Commission should not make a recommendation as requested by the Complainant because it would be outside the mandate of the African Commission to do so. The Respondent

State makes reference to *McCann and Others v the United Kingdom*[7]where it was stated that an enquiry should be made whether a Convention does oblige Contracting Parties to incorporate its provisions into national law. It was held that it is not the role of Convention institutions to examine *in abstracto* the compatibility of national legislative or constitutional provisions with the requirements of the Convention. The Respondent State submits that in the present Communication, what the African Commission is referred to are provisions of national legislation of a country which is not party to the African Charter. The Respondent State notes that the provisions of the African Charter do not provide for the prayer requested by the Complainant.

91. The Respondent State mentions that Zimbabwean Common Law provides for compensation for damages for *acquillian* action or *actio injuriarum*. It does not provide damages for *solatium.* The rights, duties and freedoms enshrined in the African Charter do not specifically provide for compensation in that respect. The Respondent State therefore submits that there is no violation of Article 1 of the African Charter.

92. The Respondent State further submits that there is no violation of Article 4 of the African Charter flowing from the deaths of the persons. It notes that the law enforcement agents were executing their constitutional mandate in tracking down suspected criminals. The Respondent State claims that the deaths occurred after proper identification by the police and the firing of warning shots. According to the Respondent State, the killings were unintentional which therefore means that there was no arbitrariness in the action of the law enforcement agents.

93. Finally the Respondent State submits that the damages cited by the Complainant have not been properly quantified as the deceased persons were

[7](21 EHRR) 97

of different ages; it is not clear whether the claim in respect to the child would be equal to the claim in respect to an adult within the group. According to the Respondent State, the damages are not due because there is no violation of Articles 1 and 4 of the African Charter by the Respondent State.

African Commission's analysis on Merits

94. Before the African Commission delves into analyzing whether there has been a violation of Articles 1 and 4 of the African Charter or not, the African Commission will first establish whether the four deceased persons referred to in the Communication were killed by agents of the Respondent State in circumstances amounting to wrongful death, summary executions or extra-judicial killings through an excessive use of force.

95. There is no clear provision in the African Charter that defines the concepts of wrongful death, summary executions or extra-judicial killings. However Article 60 of the African Charter urges the Commission to draw inspirations from international law on human and peoples' rights, as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations of which the parties to the Charter are members.

96. The Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the Principles) according to which extrajudicial, summary and arbitrary executions shall "not be carried out under any circumstances including, but not limited to situations of internal armed conflict, excessive use of force by a public official or other person acting in official capacity or by a person acting at the instigation, or with the consent or acquiescence of such a person, and situations in which deaths

occur in custody."[8] These Principles are relevant in determining the scope of what constitutes unlawful deprivations of life.

97. Therefore the situations of wrongful killings, summary executions or extra-judicial killings which the African Commission can examine include all acts and omissions of State agents that constitute a violation of the general recognition to the right to life embodied in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the African Charter.

Alleged violation of Articles 1 and 4

98. Article 1 provides that:

> The member states of the Organization of the African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

99. The Complainant alleges that the Respondent State is in violation of Article 1 of the African Charter. They argue that the primary duty of States in terms of this article follows from the fourfold obligations to "respect, protect, promote and fulfill" the rights contained in the African Charter.

100. The Complainant states that the duty to respect imports a negative obligation for the State not to interfere with the right while the duty to protect refers to a positive obligation on the State to ensure that third parties do not interfere with an individual right. The duty to promote and to fulfill imposes a positive obligation to advance human rights enjoyment by creating an enabling environment where a culture of human rights can thrive.

[8]ECOSOC RES. 1989/65: Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions para. 1

101. The Complainant submits that the Respondent State has violated Article 1 in that it has failed to "adopt legislative or other measures" to ensure that there is compensatory damages in Zimbabwean Law to give just satisfaction to victims of wrongful death particularly close family and relatives who are bereaved because of such deaths. The Complainant further argues that the Respondent State has failed to fulfill the obligation to "promote and respect" human rights in that families that are robbed of a close relative through killings that amount to extra-judicial killings have no recourse to the national law. This is as a result of the absence of a law providing for such a remedy at the national level.

102. To rebut the allegation of a violation of Article 1 of the African Charter, the Respondent State argues that the Common Law position on entitlement to compensation is that dependents of a deceased can claim such compensation for the pecuniary loss they have suffered in consequence of the death of a person who maintained or had an obligation to maintain them. Therefore Zimbabwean Common Law provides for compensation for damages for *acquillian* action or *actio injuriarum*. It does not provide damages for *solatium*. This means generally in Zimbabwe, no compensation is payable for the wrongful death of a person, as it is not an injury to the surviving person. The only damages that are available are loss of support to dependents of the deceased and funeral expenses.

103. The Respondent State further argues that it would be outside the mandate of the African Commission to make a recommendation as requested by the Complainant that the Respondent State complies with its obligations under the Charter by passing legislation in order to create an action for bereavement damages. The Respondent State in addition argues that the Complainant has not shown what provisions of the Charter provide for such compensation, except the national legislation of the United Kingdom. This, the Respondent

State notes, does not fall within international law or conventions, which the African Commission may draw inspiration from as provided for in Article 60 of the African Charter.

104. The Complainant submits that the relatives of the deceased persons "were psychologically traumatized and emotionally torn by the circumstances of these killings." They hold that in not making it possible for the victims' next of kin to seek reparations, the Respondent State is in violation of Article 1 of the Charter which direct State parties to "adopt legislative or other measures to give effect to" the rights protected under the Charter.

105. The African Commission will now address the deaths of Beavan Tatenda Kazangachire and Munyaradzi Never Chitsenga. The two cases involved the use of firearms by law enforcement agents. A pathologist who conducted the post mortem ruled that Beavan Tatenda died of "severe haemorrhage secondary to gunshot wound injuries." The police on a "without prejudice basis" accepted responsibility and provided for all the funeral expenses for the burial of the child. The police officer who fired the fatal shot is facing a charge of culpable homicide under Chitungwiza CR419/01/01. The matter at the time of the submission on merits was described as awaiting trial.

106. In the case of Munyaradzi Never Chitsenga an inquest was conducted by a Magistrate for the province of Mashonaland East sitting at Chitungwiza. The Magistrate ruled that death was caused by a gunshot wound and that "nobody is to be prosecuted as the accident was justified."

107. Regarding the use of force by law enforcement officials, The African Commission notes the report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions. [9] According to the report, lethal (or deadly) force in the course of law enforcement may occur in

[9] UN Doc. A/66/330

the context of arrest, demonstrations and private defence. Lethal force entails force that has the potential, and in some cases is certain, to cause death.[10]

108. There are several reasons why the use of lethal force by the police, also in the context of arrest, should be viewed as a matter of the utmost gravity, and be based on a solid ethical and legal framework. These include the fundamental nature of the right to life; the irreversible nature of death; the potential of errors of fact and judgement; the effect on the legitimacy of the police and the State; and the trauma suffered by everyone involved when a life is ended through violence.[11]

109. However, in some cases of urgency, law enforcement officials are given the power by law to use coercive measures and even in exceptional cases to take life-and-death decisions on the spot. This is the case with section 42 of the Criminal Procedure and Evidence Act [Chapter 9:07] of the Respondent State mentioned above. It should be kept in mind that law enforcement officials have a legal duty to perform their functions. Not giving the police the proper scope to protect the public and themselves could compromise the safety of the public as well as members of the police force. A system that is seen as too protective of the rights of suspects is unlikely to be effective in practice. The challenge clearly is to find the right balance between overly permissive and overly restrictive. The starting point is that life should not be taken by the State, and any action that seeks to fall in the narrow confines of exceptions to this rule requires strong motivation.[12]

110. The authoritative statements of international law that set out the principles on the use of force by the police are to be found in the Code of

[10] Id, Para 3
[11] Id, Para 9
[12] Id, Para 15

Conduct for Law Enforcement Officials[13] (the Code) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[14] (the Basic Principles). The essence of these instruments is reflected in the "protection of life" principle.

111. Article 3 of the Code is brief, limiting the use of force by law enforcement officials to only that which is "strictly necessary" in order to carry out their duties. The commentary included in the Code, however, expands upon this article, posing the standard that the use of force must be "reasonably necessary" and comply with the requirement of "proportionality", and in paragraph (c) sets out the bounds within which firearms are to be used. It states that the use of firearms is an extreme measure and is to be limited to the exceptional circumstances where "a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender". It can be deduced that it is not the fact that someone suspected of having committed a crime stands to be arrested as such that justifies the use of firearms but rather the danger that this person poses to life.[15]

112. The Basic Principles flesh out the provisions set out in the Code. The Basic Principles contain provisions regarding the steps to be employed prior to the use of firearms, including issuing warnings, [16]the conditions to be observed when firearms are used[17]and, in the event that firearms are utilized, steps to

[13] UNGA Res. 34/169, annex
[14] See *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990*: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2, chap. I, sect. B).)
[15] See UN Doc. A/66/330, Para. 37
[16] Principle 10
[17] Principle 5

be followed subsequent to the use of such force (providing medical assistance and submitting a report).[18]

113. Principle 5 contains provisions requiring that restraint must be exercised so that force is limited to the minimum. Force is to be used as a last resort and the force used must be within the bounds of necessity and proportionality. Principle 7 provides that: "Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law."

114. Principle 9 states unequivocally that firearms may be used only in "self-defence or in the defence of others against the imminent threat of death or serious injury".

115. The immediate questions that the African Commission needs to address itself to are: whether the use of force by the law enforcement officials of the Respondent State leading to the death of Beavan Tatenda Kazangachire and Munyaradzi Never Chitsenga is proportional and necessary? Did the deceased persons offered armed resistance or otherwise jeopardized the lives of others? Were less extreme measures by the law enforcement officials not sufficient to restrain or apprehend the deceased persons? Was the use of firearms motivated by a situation of "self-defence of the law enforcement officials effecting the arrest or in the defence of other citizens against the imminent threat of death or serious injury"?

116. Proportionality requires that the rights of the person threatened (police officers in this case) are measured against those of the deceased persons (Beavan Tatenda Kazangachire and Munyaradzi Never Chitsenga) in an objective way, in the light of the prevailing circumstances at the time when

[18] Principle 6

the final decision on the use of lethal force is made. The potential taking of life (that of Beavan Tatenda Kazangachire and Munyaradzi Never Chitsenga) is placed on one side of the scale, and, since the right to life is at stake, only the protection of life (that of the police officials) will carry any weight, on the other.

117. From the facts of this Complaint, it is clear that police fired gun shots at Mr Noah Kazingachire's car leading to the death of Beavan Kazingachire. According to the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, firearms may be used only in "self-defence or in the defence of others against the imminent threat of death or serious injury."[19]It is also clear and not in dispute that the lives of the police officers who fired the gun shots were not threatened in any way at the time lethal force was used. As stated above, it is not the fact that someone suspected of having committed a crime stands to be arrested as such that justifies the use of firearms but rather the immediate danger that this person poses to life. Mr Noah Kazingachire did not pose any immediate danger to life.

118. Regarding Munyaradzi Never Chitsenga's case, it is not in dispute that he resisted arrest by fleeing from the police. It is also not in dispute that the police officer shot him in the head at point blank range after being apprehended the second time. According to the Respondent State's submissions, Munyaradzi Never Chitsenga was driving a car when he was signaled to stop by police officers. Instead of stopping, the car sped off and a chase then ensured. Munyaradzi Never Chitsengan was eventually caught. He was then handcuffed and placed in a police car. The Respondent submits that somehow he managed to escape and started to run away. He was then shot and killed

[19] Principle 9

119. It was obviously clear to the police officers that Munyaradzi Never Chitsenga was not armed and thus did not pose any immediate threat to the safety of the police officers or any other member of the public. Thus a lower level of force would have been sufficient to restrain or apprehend Munyaradzi Never Chitsenga.

120. As explained above, only under closely circumscribed conditions may lethal (or deadly) force be used by the police. Firing a gun at someone is regarded as the exercise of lethal force. The overriding logic of the situation remains the fact that the police have the power to use lethal force only as an exception, motivated by a situation of "self-defence or in the defence of others against the imminent threat of death or serious injury". If that rationale disappears, the foundation for the exceptional powers and consequently the powers as such disappear.[20] The sanctity of life requires that lives not be taken in the interest of the common good – for example the shooting of a fleeing suspect in order to promote the general respect for the law.[21]The African Commission notes its decision in *Amnesty International on behalf of Orton and Vera Chirwa v Malawi*,[22] where it held that shootings by police officers are a violation of the right to life.

121. The African Commission is of the view that the use of lethal force by police officers of the Respondent State was not within the bounds of the closely circumscribed conditions under which lethal force may be used as described above. The principle is that life should not be taken by the State, and any action that seeks to fall in the narrow confines of exceptions to this rule requires strong motivation. Furthermore, the Respondent fails to prove that the deceased persons were suspected criminals.

[20]UN Doc. A/66/330, Para 34
[21]Id, Para 24
[22]Communications 68/92 and 78/92 respectively

122. International human rights law proceeds from what is called the protection of life principle. This principle entails that while life may not be sacrificed to protect other values, under closely defined circumstances one life may be taken as a last resort in order to protect another life or lives.[23] The use of lethal force in the case of Beavan Tatenda Kazangachire and Munyaradzi Never Chitsenga was not done as an act of last resort to protect lives. Therefore the use of lethal force by the police was not justified.

123. From the above analysis, the African Commission is of the view that the use of lethal force by the law enforcement officials of the Respondent State leading to the death of Beavan Tatenda Kazangachire and Munyaradzi Never Chitsenga was not proportional and necessary in the given situation; and therefore it is arbitrary, excessive, wrongful and unlawful.

124. In the case of Batanai Hadzisi, the post-mortem report shows that the deceased had five broken ribs and the cause of death was "*asphyxiation secondary to bilateral lungs contusion and rib cage soft tissue injuries*". The Respondent State agrees to the fact that the death of Batanai Hadzisi occurred as a result of police actions whilst they were carrying out their duties. An inquest was held and the Magistrate ruled that the police were to blame for the death of the deceased. A police officer was charged with the murder of the deceased and police offered funeral expenses. The African Commission is therefore satisfied that Batanai Hadzisi died as a result of injuries sustained from police assault. The said policemen were called to disperse University of Zimbabwe students who were demonstrating.

125. In the case of Lameck Chemvura, the certificate of death shows cause of death as *"intra canial heamorhage secondary to assault*." Lameck Chemvura died

[23]UN Doc. A/66/330, Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Para 26

as a result of being beaten by members of the Zimbabwean National Army. It is not in dispute that the death of Lameck Chemvura is the result of actions taken by members of the army. The Respondent State arrested the army officer suspected to have caused the death of Lameck Chemvura and he is going to be prosecuted in accordance with the laws of the Respondent State. The Respondent State however argues that it is not responsible for the death of the deceased as the incident was as a result of the unsanctioned activities by the members of the army.

126. The issue here for the African Commission is to determine the question of the responsibility of the Respondent State in the deaths of Batanai Hadzisi and Lameck Chemvura; and secondly whether the Respondent State has to give just and satisfactory compensation to the close relatives of the deceased persons.

127. Human rights law and the international law on State responsibility require that individuals should have an effective remedy when their rights are violated, and that the State must provide reparations for its own violations. States must ensure that victims' families are able to enforce their right to compensation through judicial remedies where necessary.[24]

128. The African Commission recalls that according to the law of the Respondent State, the claim for damages does not support claims for the wrongful death of a person *per se.* In order for one to succeed in a claim for damages situations where persons are wrongfully killed, the claimant must prove loss of support.

129. According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International

[24] *See* ICCPR, art 2(3); Human Rights Committee, General Comment 31, "Nature of the General Legal Obligation on States Parties to the Covenant" (2004), para. 16

Human Rights Law and Serious Violations of International Humanitarian Law; remedies for gross violations of international human rights law include the victims' right to adequate, effective and prompt reparation for harm suffered.[25]

130. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law. A State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law.[26] Full and effective reparation should be provided to victims of violations of international human rights law as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

131. According to principle 20, compensation should be provided for "any economically assessable damage", such as "physical or mental harm"; "lost opportunities, including employment, education and social benefits"; "material damages and loss of earnings, including loss of earning potential"; "moral damage"; and "costs required for legal or expert assistance, medicine and medical services, and psychological and social services". Satisfaction includes a "public apology, including acknowledgement of the facts and acceptance of responsibility"

132. With respect to Lameck Chemvura who died as a result of unsanctioned activities by members of the national army of the Respondent State, there are, however, principles recognized by international law that attach legal responsibility to a State for acts committed by officials not acting on behalf of

[25] UNGA Res. 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
[26] Id, principle 15

a State. These principles include: *state agency*, i.e., a person is in fact acting on behalf of a State or exercises governmental authority in the absence of official authority, *state complicity* in wrongs committed by private persons and state *failure to exercise due diligence* in the control of private persons.[27]

133. The Respondent State is therefore not responsible for human rights violations carried out by members of its national army acting in their private capacity *per se.* But the Respondent State is bound to duly investigate, prosecute the assailants and compensate the victims. In the *Velasquez Rodriguez case*,[28] the Inter-American Court of Human Rights held that an illegal act which violates human rights and which initially is not directly imputable to the State, for example because it is an act of a private person, can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or respond to it.

134. The African Commission is of the opinion that the death of Lameck Chemvura is not directly imputable to the Respondent State as it is a result of the private act of a member of its national army. The African Commission however holds the Respondent State responsible in that it failed to properly respond to the death of Lameck Chemvura because of the lack of due diligence and the incapacity of the Respondent State to satisfactorily compensate the close relations of the deceased in as far as the current laws of the Respondent State obtain.

135. Regarding the case of Beaven Tatenda Kazingachire, the African Commission is further convinced that the payment of ZWD$97,000.00 made to the parents of the deceased to cover the funeral expenses is not satisfactory

[27]See eg. I. Brownlie, System of the law of nations: State responsibility part I (1983), 160-163; M. Kamminga, Inter-state accountability for violations of human rights (1992), 143.
[28]*Velásquez Rodríguez v Honduras* (1988) IACtHR (Ser. C) No. 4), para. 172

and does not effectively remedy the violations suffered (wrongful killing as a result of police assault).

136. The African Commission is therefore convinced that the relations of the deceased persons; Noah Kazingachire in his capacity as the father, legal heir and next of kin of the late Beaven Tatenda Kazingachire; John Chisenga in his capacity as the father, legal heir and next of kin of the late Munyaradzi Never Chitsenga; Elias Chemvura in his capacity as the brother, legal heir and next of kin of the late Lameck Chemvura; and the estate of the late Batanai Hadzisi are entitled to effective and satisfactory compensation. As noted above, the compensation shall cover any financially assessable damage and the satisfaction shall consist in an acknowledgment of the breach and a formal apology.

137. The right to life constitutes a norm of customary international law and is one of the central rights recognized in international human rights treaties. Article 4 of the African Charter provides that:

> "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".

Article 3 of the Universal Declaration of Human Rights states that "everyone has the right to life, liberty and security of person," while article 6 (1) of the International Covenant on Civil and Political Rights states that "every human being has the inherent right to life, [which] shall be protected by law, and [that] no one shall be arbitrarily deprived of his life."

138. In *Forum of Conscience v Sierra Leone*,[29] the African Commission held that "the right to life is the fulcrum of all other rights. It is the fountain through which all other rights flow and any violation of this right without due process

[29] Communication 223/98

amounts to arbitrary deprivation of life."[30]The right to life is therefore the foundational, or bedrock human right.[31]

139. International human rights law therefore requires the Respondent State to both respect and ensure the right to life. The Respondent State has an obligation to prevent the wrongful deaths of its citizens. The Respondent State has to ensure that its organs respect the life of persons within its jurisdiction. The African Commission is of the view that the Respondent State failed in its obligation of respecting and ensuring the right to life of Beavan Tatenda Kazangachire, Munyaradzi Never Chitsenga and Batanai Hadzisi. Their death was as a result of the use of excessive and wrongful force by the law enforcement agents of the Respondent State. Accordingly, the African Commission finds for the Complainant that the Respondent State has violated Article 4 of the African Charter.

140. In considering the alleged violation of Article 1, the African Commission notes its decision in *Jawara v The Gambia*[32] where it held that "Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of Article 1."

141. In the case of *Commission Nationale des Droits de l'homme et des Libertes v Chad,*[33] the African Commission stated that "the Charter specifies in article 1 that the state parties shall not only recognize the rights, duties and freedoms adopted by the Charter, but they should also undertake…measures to give effect to them. In other words, if a state neglects to ensure the rights in the

[30] Id, para 19
[31] General Comments Nos. 6 and 14 to the International Covenant on Economic, Social and Cultural Rights, see document HRI/GEN/1/Rev.8, pp. 166 and 178, respectively, para. 1
[32]Communications 147/95, 149/96, para 46
[33] Communication 74/92, para 20

African Charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation."

142. The African Commission also notes its decision in the case of *Amnesty International v Sudan*, where it stated that "ratification obliges a state to diligently undertake the harmonization of its legislation to the provisions of the ratified instrument."[34] It further stated that "article 1 of the Charter confirms that the government has bound itself legally to respect the rights and freedoms enshrined in the Charter and to adopt legislation to give effect to them."[35]

143. The African Commission is of the opinion that the existing legislation (at the time of the submissions) in the Respondent State is contrary to the spirit of Article 1 as it does not ensure that there is compensatory damages to give just satisfaction to victims of wrongful death particularly close family and relatives who are bereaved because of such deaths.

Decision of the African Commission on Merits

144. In view of the above, the African Commission finds that the Respondent State is in violation of Articles 1 and 4 of the African Charter.

Recommendations

145. The African Commission recommends that the Respondent State should:

(a) Undertake law reform to bring domestic laws on compensation in case of wrongful killings into conformity with the African Charter and other

[34]Communication 48/90, 50/91, 89/9, para 40
[35] Id, para 42

international standards, especially in respect to effective and satisfactory compensation as outlined above.

(b) Pay compensatory damages to the legal heirs and next of kin of the four deceased persons.

Done in Banjul, The Gambia during the 51st Ordinary Session of the African Commission on Human and Peoples' Rights, 18 April to 2 May 2012.