

15-28 November 2007
Communication No. 307/2005

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Forty-Second Ordinary Session
15-28 November 2007

MR OBERT CHINHAMO

v.

ZIMBABWE

DECISION

BEFORE: CHAIRPERSON: Sanji Mmasenono Monageng
VICE CHAIRPERSON: Angela Melo
COMMISSIONERS: Reine Alapini-Gansou, Catherine Dupe Atoki,
Musa Ngary Bitaye, Zainabo Sylvie Kayitesi, Soyata Maiga, Mumba
Malila, Bahame Tom Mukirya Nyanduga, Pansy Tlakula, Yeung Kam
John Yeung Sik Yuen

Citation: Chinhamo v. Zimb., Comm. 307/2005, 23rd ACHPR AAR Annex III
(2007-2008)

Publications: (2007) AHRLR 96 (ACHPR 2007)

SUMMARY OF THE FACTS

1. The African Commission on Human and Peoples' Rights (the African Commission) received a complaint/communication on 26 September 2005, from Mr Obert Chinhamo, (also referred herein as the complainant) an employee of Amnesty International, Zimbabwe section and an active human rights defender. The complaint is submitted in accordance with

the provisions of article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

2. The complaint is submitted against the Republic of Zimbabwe, (also referred herein as the respondent state), a state party to the African Charter. [FN1] The complainant alleges among others that, through the acts of the agents of the respondent state his rights protected under the African Charter have been violated. Mr Chinhamo lists a number of separate incidents to justify his allegations.

[FN1] Zimbabwe ratified the African Charter on 30 May 19

3. The complainant alleges that on 28 August 2004, while investigating and documenting human rights abuses at Porta Farm, he was allegedly surrounded by more than ten uniformed police officers that assaulted him, poked his face with batons, shouted abusive language and accused him of working for a foreign organisation which works against the respondent state.

The complainant was then arrested, forcibly removed from the premises, detained at Norton Zimbabwe ratified the African Charter on 30 May 1986. police station, threatened and banned from returning to Porta Farm and other farms. Upon his release several hours later, the complainant declares that he was neither charged nor furnished with reasons for his arrest.

4. The complainant alleges further that he and two others were again arrested on 2 September 2004 while visiting Porta Farm and believes that this arrest was perpetrated in order to prevent them from documenting the human rights abuses occurring there. They were given no explanation for the arrest by the arresting officer but the complainant was later charged with incitement of public violence and released on one hundred thousand (100 000) Zimbabwean dollars bail. On 21 February 2005, the case was withdrawn for lack of evidence.
5. The complainant also alleges that provisions of the Public Order and Security Act were used, in contravention of the African Charter, to deny him access to Porta Farm, prevent the documentation of human rights abuses there and of holding meetings with residents, and to justify his arrest, detention and the threaten him against publishing reports and press releases about the human rights abuses discovered.
6. The complainant informs the Commission that in September 2004, all files were deleted from his laptop, while a number of Amnesty International-Zimbabwe section reports disappeared from his office. The complainant believes that there is a reasonable probability the respondent state, through its agents, invaded his right to privacy.
7. Prior to the withdrawal of the case against him, the complainant alleges that court remands were abused in order to deny him the right to be tried within a reasonable time limit, psychologically torture him and deplete his resources. He argues that members of the Central Intelligence Organisation (CIO) took pictures of him on several occasions, thereby intimidating him.
8. In addition, the complainant notes that the conditions in which he was detained caused him to suffer torture. These conditions, according to the complainant, include being

locked up in an extremely small, unhygienic cell, infested with parasites where he was denied blankets, denied permission to visit the toilet or to bath. According to him, all of these caused him to develop a cold, breathing problems and a cough which lasted for about six months.

9. The complainant further alleges that after his release on bail, he was tracked by security agents and received several threats, including death threats against himself and his brother, which caused him to fear for his life and the safety of his family. Due to this fear, he fled the country in January 2005 "forcing him to abandon his studies and his job" and is currently residing in the Republic of South Africa as an asylum seeker. He added that the respondent state continues to refuse to issue passports to his family members so that they can join him in South Africa.

THE COMPLAINT

10. The complainant alleges that articles 5, 6, 7, 8, 9, 11, 12, 16, 17 and 18 of the African Charter on Human and Peoples' Rights have been violated.

THE PROCEDURE

11. By letter ACHPR/LPROT/COMM/ZIM/307/2005/ARM of 4 October 2005, the Secretariat of the African Commission acknowledged receipt of the communication and informed the complainant that the matter would be considered for seizure at the 38th ordinary session of the African Commission, scheduled from 21 November - 5 December 2005, in Banjul, Gambia.
12. During the 38th ordinary session held from 21 November - 5 December 2005, the African Commission considered the communication and decided to be seized thereof.
13. On 15 December 2005, the Secretariat of the African Commission informed the parties accordingly, and requested the respondent state to submit its arguments on the admissibility of the communication. The Secretariat of the African commission forwarded a copy of the complaint to the respondent state.
14. On 13 March 2006, a reminder was sent to the respondent state requesting it to submit its arguments on the admissibility of the communication.
15. On 10 April 2006, the Secretariat received the complainants' submissions on admissibility.
16. During the 39th ordinary session held from 11 - 25 May 2006, the African Commission decided to defer consideration of the communication on admissibility to its 40th ordinary session scheduled to take place from 15 - 29 November 2006, pending the respondent state's submission on admissibility.
17. By letter of 14 July 2006, the Secretariat of the African Commission informed the parties of the Commission's decision.

18. During the 40th ordinary session held from 15 - 29 November 2006, the African Commission decided to defer consideration of the Communication on admissibility to the 41st ordinary session.
19. On 24 November 2006, the Secretariat received the respondent state's submission on admissibility.
20. By letter dated 11 December 2006, both parties were informed of the Commission's intention to consider the communication on admissibility during its 41st ordinary session.
21. On 3 May 2007, the Secretariat received additional submissions on admissibility from the complainant in response to the respondent state's submission on admissibility.
22. During the 41st ordinary session of the African Commission held from 16 - 30 May 2007, the African Commission decided to further defer to its 42nd ordinary session a decision on admissibility to enable the Secretariat prepare a draft decision.

SUMMARY OF PARTIES' SUBMISSIONS ON ADMISSIBILITY

SUMMARY OF COMPLAINANT'S SUBMISSION ON ADMISSIBILITY

23. The complainant submits that he has locus standi before the Commission as the communication is brought by himself, a citizen of Zimbabwe. Regarding compatibility, the complainant submits that the communication raises prima facie violations of the Charter, committed by the respondent state.
24. He submits further that in accordance with article 56(4), the evidence he has submitted reveal that the communication is not based exclusively on news disseminated by the mass media, adding that it is based on first hand evidence from him, including reports by reputable human rights organizations.
25. On the requirement of exhaustion of local remedies in accordance with article 56(5), the complainant states that the remedy in his particular circumstance is not available because he cannot make use of local remedies, that he was forced to flee Zimbabwe for fear of his life after surviving torturous experiences in the hands of the respondent state due to his activities as a human rights defender. The complainant submits that the onus is on the respondent state to demonstrate that remedies are available; citing the Commission's decisions on communications 71/92 [FN2] and 146/96.[FN3]

[FN2] Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia [(2000) AHRLR 321 (ACHPR 1996)].

[FN3] Jawara v The Gambia [(2000) AHRLR 107 (ACHPR 2000)]

26. The complainant draws the African Commission's attention to its decision on *Rights International v Nigeria* [FN4] where the Commission held that a complainant's inability to pursue local remedies following his flight for fear of his life to Benin, and was subsequently granted asylum, was sufficient to establish a standard for constructive exhaustion of local remedies. He concludes by noting that considering the fact that he was no longer in the respondent state's territory where remedies could be sought, and the fact that he fled the country against his will due to threat to his life, remedies could not be pursued without impediments.

[FN4] Communication 215/1998, [(2000) AHRLR 254 (ACHPR 19990)]

27. The complainant also challenges the effectiveness of the remedies, noting that remedies are effective only where they offer a prospect of success. He claims the respondent state treats court rulings that go against it with indifference and disfavour, and says he does not expect that in his case, any decision of the court would be adhered to. He says there was a tendency in the respondent state to ignore court rulings that went against it and adds that the Zimbabwe Lawyers for Human Rights has documented at least 12 instances where the state has ignored court rulings since 2000. He cites the ruling of the High court in the *Commercial Farmers Union* case and the *Mark Chavunduka and Ray Choto* case where the duo were allegedly abducted and tortured by the army. He concludes that given the prevailing circumstances in the respondent state, the nature of his complaint, and the respondent state's well publicized practice of non-enforcement of court decisions, his case has no prospect of success if local remedies were pursued, and according to him, not worth pursuing.

28. The complainant submits further that the communication has been submitted within a reasonable time as required by article 56(6) and concludes that the communication has not been settled by any other international body.

SUMMARY OF RESPONDENT STATE'S SUBMISSION ON ADMISSIBILITY

29. The respondent state briefly restates the facts of the communication and indicates that the facts as submitted by the complainant 'have a number of gaps'. The state submits that the complainant makes general allegations without substantiating, citing for example, the complainant's allegation that he was assaulted, abused and was denied access to the toilet when remanded. The state wonders why the complainant did not bring all these alleged degrading treatment to the attention of the Magistrate when he was brought before the latter. The state also questions why the complainant or his lawyer did not raise the alleged threats to the complainant's life before the Magistrate when he made four appearances before the latter. The state concluded that the complainant has failed to substantiate his alleged fear and threats to his life and is of the opinion that the complainant left the country on his own volition and not as a result of any fear occasioned by any of its agents.

30. On the question of admissibility, the state submits that the communication should be declared inadmissible because, according to the state, it is not in conformity with article 56(2), (5) and (6) of the Charter.
31. The state submits further that the communication is incompatible because it makes a general allegation of human rights violations and does not substantiate the violations, adding that the facts do not show a prima facie violation of the provisions of the Charter, noting that 'basically the facts and issues in dispute do not fall within the rationae materiae and rationae personae of the jurisdiction of the Commission'.
32. On the exhaustion of local remedies under article 56(5), the state submits that local remedies are available to the complainant, citing section 24 of its Constitution which provides the course of action to be taken where there are allegations of human rights violations. The state adds that there is no evidence to prove that the complainant pursued local remedies. The state further indicates that in terms of Zimbabwean law, where one is engaged in acts that violate the rights of another person, that other person can obtain an interdict from the court restraining the violator from such act.
33. On the effectiveness of local remedies, the state submits that the Constitution provides for the independence of the judiciary in the exercise of its mandate in conformity with both the UN Principles on an Independent Judiciary, and the African Commission's Guidelines on the right to a fair trial.
34. The state dismisses the complainant's argument that his case is similar to those brought by Sir Dawda Jawara against the Republic of The Gambia, and Rights International (on behalf of Charles Baridorn Wiwa) against the Federal Republic of Nigeria, adding that in the latter cases, there was proof of real threat to life. The state goes further to indicate instances where the government has implemented court decisions that went against it, adding that even in the present case involving the complainant, the government respected the Court's decision.
35. The state further indicates that in terms of Zimbabwe law, it is not a legal requirement for a complainant to be physically present in the country in order to access local remedies, adding that, both the High Court Act (Chapter 7:06) and the Supreme Court Act (Chapter 7:05) permit any person to make an application to either court through his/her lawyer. The state adds that in the Ray Choto and Mark Chavhunduka case, the victims were tortured by state agents and they applied for compensation while they were both in the United Kingdom, and succeeded in their claim. The state concludes that the complainant is not barred from pursuing remedies in a similar manner.
36. The state also argues that the Communication does not comply with article 56(6) of the Charter which provides that a communication should be lodged within a reasonable time after exhaustion of local remedies, but where complainant realises that local remedies shall be unduly prolonged he/she must submit the complaint to the Commission immediately. According to the state, although the Charter does not specify what constitutes a reasonable time, the Commission should get inspiration from the other jurisdictions, including the InterAmerican Commission which has fixed six months as

reasonable time, adding that even the draft protocol merging the African Court of Justice and the African Court on Human and Peoples' Rights provides for a six months period.

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

THE LAW ON ADMISSIBILITY

COMPETENCE OF THE AFRICAN COMMISSION

38. In the present communication, the respondent state raises a preliminary question regarding the competence of the African Commission to deal with this communication. The state avers that: 'basically the facts and issues in dispute do not fall within the *rationae materiae* and *rationae personae* of the jurisdiction of the Commission'. This statement questions the competence of the African Commission to deal with this communication. The Commission will thus first deal with the preliminary issue of its competence raised by the respondent state.
39. Black's Law Dictionary defines *rationae materiae* as 'by reason of the matter involved; in consequence of, or from the nature of, the subject-matter'. While *rationae personae* is defined as 'by reason of the person concerned; from the character of the person'.
40. Given the nature of the allegations contained in the communication, notably, allegations of violation of personal integrity or security, intimidation and torture, the Commission is of the view that the communication raises material elements which may constitute human rights violations, and as such it has competence *rationae materiae* to entertain the matter, because the communication alleges violations to human rights guaranteed and protected in the Charter. With regards to the Commission's competence *rationae personae*, the Communication indicates the name of the author, an individual, whose rights under the African Charter, the respondent state is committed to respecting and protecting. With regard to the state, the Commission notes that Zimbabwe, the respondent state in this case, has been a state party to the African Charter since 1986. Therefore, both the complainant and the respondent state have *locus standi* before the Commission, and the Commission thus has competence *rationae personae* to examine the Communication before it.
41. Having decided that it has competence *rationae materiae* and *rationae personae*, the Commission will now proceed to pronounce on the admissibility requirements and the contentious areas between the parties.

THE AFRICAN COMMISSION'S DECISION ON ADMISSIBILITY

42. The admissibility of communications before the African Commission is governed by the requirements of article 56 of the African Charter. This article provides seven requirements which must all be met before the African Commission can declare a communication admissible. If one of these conditions/requirements is not met, the

African Commission will declare the communication inadmissible, unless the complainant provides justifications why any of the requirements could not be met.

43. In the present communication, the complainant avers that his complaint meets the requirements under article 56 sub-sections 1 - 4, 6 and 7. He indicates that he did not attempt to comply with the requirement under article 56(5) dealing with the exhaustion of local remedies, because of the nature of his case and the circumstances under which he left the respondent state, and since he is presently living in South Africa, the exception rule should be invoked. He states that his inability to exhaust local remedies was due to the fact that he had to flee to South Africa for fear for his life.
44. The state on the other hand argues that the complainant has not complied with the provisions of article 56 sub-sections 2, 5 and 6 of the Charter, and urges the Commission to declare the communication inadmissible based on the non-fulfilment of these requirements.
45. The admissibility requirements under article 56 of the Charter are meant to ensure that a communication is properly brought before the Commission, and seek to sieve frivolous and vexatious communications before they reach the merits stage. As indicated earlier, for a communication to be declared admissible, it must meet all the requirements under article 56. Therefore, if a party contends that another party has not complied with any of the requirements, the Commission must pronounce itself on the contentious issues between the parties. This however does not mean that other requirements of article 56 which are not contested by the parties will not be examined by the Commission.
46. Article 56(1) of the African Charter provides that communications will be admitted if they indicate their authors, even if they request anonymity. In the present case the author of this communication is identified as Mr Obert Chinhamo, he has also not requested that his identity be hidden. The respondent state has also been clearly identified as the Republic of Zimbabwe. Therefore the provision of article 56(1) has been adequately complied with.
47. Article 56(2) of the African Charter provides that a communication must be compatible with the Charter of the OAU or with the African Charter on Human and Peoples' Rights. In the present communication, the respondent state argues that the communication does not comply with this requirement, that is, the communication is not compatible with the provisions of the Constitutive Act of the African Union or the African Charter itself. The state asserts in this regard that, for a complaint to be compatible with the Charter or the Constitutive Act, it must prove a prima facie violation of the Charter.
48. Compatibility according to Black's Law Dictionary denotes 'in compliance with' and 'in conformity with' or 'not contrary to' or 'against'. In this communication, the complainant alleges, among others, violations of his right to personal integrity and being subjected to intimidation, harassment and psychological torture, arbitrary detention, violation of freedom of movement and loss of resources occasioned by the actions of the respondent state. These allegations do raise a prima facie violation of human rights, in particular, the right to the security of the person or personal integrity and freedom from torture guaranteed in the Charter. Complainants submitting communications to the Commission

need not specify which articles of the Charter have been violated, or even which right is being invoked, so long as they have raised the substance of the issue in question. Based on the above, the African Commission is satisfied that in the present Communication, the requirement of article 56(2) of the African Charter has been sufficiently complied with.

49. Article 56(3) of the Charter provides that communications will be admitted if they are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organisation of African Unity (African Union). In the present case, the communication sent by the complainant does not, in the view of this Commission, contain any disparaging or insulting language, and as a result of this, the requirement of article 56(3) has been fulfilled.
50. Article 56(4) of the Charter provides that the Communication must not be based exclusively on news disseminated through the mass media. This Communication was submitted by the complainant himself and is his account of his personal experience with the law enforcement agents of the respondent state. For this reason he has fulfilled the provision of this sub-article of article 56.
51. Article 56(5) provides that communications to be considered by the African Commission must be sent after local remedies have been exhausted. The respondent state contends that the complainant has not complied with this requirement. The state argues that there are sufficient and effective local remedies available to the complainant in the state, and the complainant has not sought these remedies before bringing the present communication before the Commission. On the other hand, the complainant argues that since he had to flee the country due to fear for his life, he could not come back to the country to pursue these local remedies.
52. The rationale for the exhaustion of local remedies is to ensure that before proceedings are brought before an international body, the state concerned must have the opportunity to remedy the matter through its own local system. This prevents the international tribunal from acting as a court of first instance rather than as a body of last resort. [FN5]

[FN5] See communications 25/89 [Free Legal Assistance Group and Others v Zaire (2000) AHRLR 74 (ACHPR 1995)], 74/92 [Commission Nationale des Droits de l'Homme et des Libertés v Chad (2000) AHRLR 66 (ACHPR 1995) and 83/92 [Degli and Others v Togo (2000) AHRLR 317 (ACHPR 1995)]

53. Three major criteria could be deduced from the practice of the Commission in determining compliance with this requirement, that is: the remedy must be available, effective and sufficient.
54. In *Jawara v The Gambia* [FN6], the Commission stated that

'[a] remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint'.

In the Jawara communication, which both parties have cited, the Commission held that:

The existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.

[FN6] Communication 149/96

55. The complainant in the present communication claims that he left his country out of fear for his life due to intimidation, harassment and torture. He said due to the nature of his work, the agents of the respondent state started tracking him with a view to harming and/or killing him. He has also described how he was treated while in detention, noting that he was denied food, he was not attended to when he complained of headache, he was refused visit to the toilet, that the conditions in the holding cells were bad - smelling, small, toilets could not flush, toilets were overflowing with urine and other human waste, the cells were infested with parasites such as mosquitoes which sucked complainant's blood for the duration of his stay and made sleep impossible for the complainant, the cell had a bad stench and was very cold, resulting in the complainant contracting breathing problems and a cough which lasted for six months, complainant was refused a blanket during the night and further refused permission to take his bath. According to the complainant, all these constituted torture and inhuman and degrading treatment.

56. The complainant alleged further that the respondent state used court remands to deny him of a trial within a reasonable time, thus psychologically torturing him and depleting his resources. According to the complainant, the matter was remanded at least five times " from 20 September 2004 - 21 February 2005 (within a period of six months), and he noted that these remands were calculated to harass and psychologically torture him. He said most of the time, the Central Intelligence Organization would come and take pictures of him, thus, intimidating him.

57. Complainant added that when he continued publishing the respondent's human rights abuses in Porta Farm, the respondent state sent its security agents to trail him and on various occasions, attempts were made to harm him. According to the complainant, on 12 September

2004, 'a man suspected to be a CIO official driving a white Mercedes went to the complainant's family and left threatening messages of death to complainant's brother'. The message from the CIO official, according to the complainant was that the complainant was an enemy of the state and will be killed. Complainant was forced to call his brother to stay with him for security reasons. In another incident, the same man, this time accompanied by three others, paid a second visit and issued similar threats to the complainant.

58. He indicated that on 30 September 2004, he was stopped by men driving a blue Mercedes Benz who again threatened him. He said because this later incident took place near his house, it was enough reason for him to be afraid for his life. He added that in August 2004, on several occasions he received numerous telephone calls where some of the callers threatened him with death and one caller said: 'We are monitoring you. We will get you. You are dead already'. He said he informed the board of Amnesty International Zimbabwe, the Zimbabwe Lawyers for Human Rights and his lawyer about the threatening calls. He added that vehicles with people acting strangely were observed parking around his residence and work place during what he termed odd hours, until he decided to go into hiding and subsequently fled to South Africa. He says he suspects the respondent state wanted to abduct and kill him, adding that there are many cases in which people have been abducted and never seen again.
59. Other incidences which, according to complainant, gave him reason to believe his life was threatened, include the fact that in January 2005 the respondent state refused to issue passports to his family, even though he applied since November 2004. Because of this he was forced to leave his family behind who still reside in Zimbabwe.

As at the time of submission of this communication, they had not been given passports. He also indicated that he was forced to abandon his studies with the Institute of Personnel Management of Zimbabwe (IPMZ) and at the Zimbabwe Open University. He said, in October 2004, his daughter had to abandon school when the whole family went into hiding. He said at the end of September 2004, he received a great shock when he found all files in his laptop deleted, and suspected the disappearance of the files was linked to respondent's agents.

60. He concluded that 'by reason of the arbitrary arrests and detentions, torture, inhuman and degrading treatment, delays in charging and trying him, surveillance by the respondent's agents and others cited in the afore-mentioned incidents, the complainant submits that the respondent flagrantly violated his rights and freedoms and those of his family ...'.
61. From the above submissions of the complainant, the latter seeks to demonstrate that through the actions of the respondent state and its agents, a situation was created which made him to believe that the respondent was out to harm and/or kill him. He thus became concerned about his safety and that of his family. Due to the fear for his life, he claims, he went into hiding and eventually fled into a neighbouring country, South Africa, from where he submitted this communication.
62. In a complaint of this nature, the burden of proving torture and the reasons why local remedies could not be exhausted rests with the complainant. The complainant has the responsibility of proving that he was tortured and describing the nature of the torture or the treatment he underwent, and the extent to which each act of torture, intimidation or harassment alleged, instilled fear in the complainant to cause him to be concerned for his life and those of his dependants, to the extent that he could not attempt local remedies but preferred to flee the country. It is not enough for the complainant to claim he was tortured or harassed without relating each particular act to the element of fear. If the complainant discharges this burden, the burden will then shift to the respondent state to

show the remedies available, and how in the particular circumstance of the complainant's case, the remedies are effective and sufficient.

63. To support his case, the complainant cited the African Commission's decisions in the Jawara case, the cases of Abubakar v Ghana [FN7] and Rights International v Nigeria [FN8] in which he said the Commission found that the complainants in these cases could not be expected to pursue domestic remedies in their country due to the fact that they had fled their country for fear of their lives.

[FN7] Communication 103/1993 [(2000) AHRLR 124 (ACHPR 1996)].

[FN8] Communications 215/1998

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

65. In the Jawara case, the Commission concluded that:

The complainant in this case had been overthrown by the military, he was tried in absentia, former ministers and members of parliament of his government have been detained and there was terror and fear for lives in the country...

There is no doubt that there was a generalised fear perpetrated by the regime as alleged by the complainant. This created an atmosphere not only in the mind of the author but also in the minds of right-thinking people that returning to his country at that material moment, for whatever reason, would be risky to his life. Under such circumstances, domestic remedies cannot be said to have been available to the complainant.

The Commission finally noted that '[i]t would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies.'

66. In the Abubakar case, it should be recalled that Mr Alhassan Abubakar was a Ghanaian citizen detained for allegedly co-operating with political dissidents. He was detained

without charge or trial for over seven years until his escape from a prison hospital on 19 February 1992 to Côte d'Ivoire. After his escape, his sister and wife, who had been visiting him in Côte d'Ivoire, were arrested and held for two weeks in an attempt to get information on the complainant's whereabouts. The complainant's brother informed him that the police have been given false information about his return, and have on several occasions surrounded his house, searched it, and subsequently searched for him in his mother's village.

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

68. In *Rights International v Nigeria*, the victim, a certain Mr Charles Baridorn Wiwa, a Nigerian student in Chicago, was arrested and tortured at a Nigerian Military Detention Camp in Gokana. It was alleged that Mr Wiwa was arrested on 3 January 1996 by unknown armed soldiers in the presence of his mother and other members of his family, and remained in the said military detention camp from 3 -9 January 1996. While in detention, Mr Wiwa was horsewhipped and placed in a cell with forty-five other detainees. When he was identified as a relative of Mr Ken Saro-Wiwa he was subjected to various forms of torture. Enclosed in the communication was medical evidence of Mr Wiwa's physical torture. After five days in the detention camp in Gokana, Mr Wiwa was transferred to the State Intelligence Bureau (SIB) in Port Harcourt. Mr Wiwa was held from 9 -11 January 1996, without access to a legal counsel or relatives, except for a five minutes discussion with his grandfather. On 11 January 1996, Mr Wiwa and 21 other Ogonis were brought before the Magistrates' Court 2 in Port-Harcourt, charged with unlawful assembly in violation of section 70 of the Criminal Code Laws of Eastern Nigeria 1963. Mr Wiwa was granted bail, but while out on bail some unknown people believed to be government agents abducted him and threatened his life by forcing him into a car in Port Harcourt. On the advice of human rights lawyers, Mr Wiwa fled Nigeria on 18 March 1996 to Cotonou, Republic of Benin, where the UN High Commissioner for Refugees declared him a refugee. On September 17 1996, the US government granted him refugee status and he has been residing in the United States since then.

69. In this case, the African Commission declared the communication admissible on grounds that there was a lack of available and effective domestic remedies for human rights violations in Nigeria under the military regime. It went further to assert that the standard for constructive exhaustion of domestic remedies [is] satisfied where there is no adequate or effective remedy available to the individual. In this particular case, the Commission found that Mr Wiwa was unable to pursue any domestic remedy following his flight for

fear of his life to the Republic of Benin and the subsequent granting of refugee status to him by the United States of America.

70. The communication under consideration must also be distinguished from *Gabriel Shumba v Republic of Zimbabwe*.^[FN9] In the *Shumba* case, the complainant, Mr Gabriel Shumba, alleged that, he, in the presence of three others, namely Bishop Shumba, Taurai Magayi and Charles Mutama was taking instructions from one of his clients, a Mr John Sikhala in a matter involving alleged political harassment by members of the Zimbabwe Republic Police (ZRP). Mr John Sikhala is a Member of Parliament for the Movement for Democratic Change (MDC), which is the opposition party in Zimbabwe. At about 11.00 pm riot police accompanied by plain-clothes policemen and personnel identified to be from the Central Intelligence Organization stormed the room and arrested everyone present. During the arrest, the complainant's law practicing certificate, diary, files, documents and cell phone were confiscated and he was slapped and kicked several times by, among others, the Officer in Charge of Saint Mary's police station.

[FN9] Communication 288/2004.

71. Mr Shumba and the others were taken to Saint Mary's police station where he was detained without charge and denied access to legal representation. He was also denied food and water. The complainant claims that on the next day following his arrest, he was removed from the cell, a hood was placed over his head and he was driven to an unknown location where he was led down what seemed like a tunnel, to a room underground. The hood was removed, he was stripped naked and his hands and feet were bound in a foetal position and a plank was thrust between his legs and arms. While in this position, the complainant was questioned and threatened with death by about 15 interrogators. The complainant further alleged that he was also electrocuted intermittently for eight hours and a chemical substance was applied to his body. He lost control of his bodily functions, vomited blood and he was forced to drink his vomit. The complainant submitted a certified copy of a medical report describing the injuries found on his body. Following his interrogation at around 7pm of the same day, the complainant was unbound and forced to write several statements implicating him and several senior MDC members in subversive activities. At around 7.30 pm he was taken to Harare Police Station and booked into a cell. On the third day of his arrest, his lawyers who had obtained a High Court injunction ordering his release to court were allowed to access him. The complainant was subsequently charged under section 5 of the Public Order and Security Act that relates to organising, planning or conspiring to overthrow the government through unconstitutional means. He then fled Zimbabwe for fear of his life.

72. In the four cases cited above, there is one thing in common " the clear establishment of the element of fear perpetrated by identified state institutions, fear which in the *Jawara* case, the Communication 288/2004. Commission observed that 'it would be reversing the clock of justice to request the complainant to attempt local remedies'. In the *Abubakar* case, the complainant's sister and wife were arrested to force the complainant to return, his house was regularly surrounded and searched, and his mother's village was visited by state agents looking for him. In the *Shumba* case, the state never refuted the allegations of torture or the

authenticity of the medical reports, but simply argued that complainant could have seized the local courts for redress.

73. In the case under consideration, the complainant, Mr Obert Chinhamo, has presented a picture of the conditions of detention, which without prejudice to the merits of the communication, can be termed inhuman and degrading. He also pointed out instances of alleged intimidation and harassment by state agents.

74. Every reasonable person would be concerned and afraid for their life if they had state security agents prying into their everyday activities. Complainant had every reason to be concerned for his safety and that of his family. However, it should be noted that complainant did not identify any of the men tracking him to be state agents. According to his submissions, the people harassing him were anonymous, unknown or suspected IO officials, and in some cases, he simply observed some strange men around his home and his place of work. In none of the instances of alleged harassment or intimidation mentioned by the complainant did he identify his alleged persecutors as agents of the respondent state. He based his fear on suspicion, which was not corroborated.

75. Of particular importance here is to note that in spite all the threats, harassment, intimidations, threatening phone calls and alleged tracking by respondent states' agents, complainant chooses not to report the matter to the police. From his submissions, he was harassed and intimidated for over six months, that is, from August 2004 when he claims he was first arrested, to January 2005, when he left the country. In his submissions, he did not indicate why he could not submit the matter to the police for investigation but preferred reporting to his employers and his lawyers. In the opinion of the Commission, the complainant has not substantiated his allegations with facts. Even if, for example, the detention of the complainant amounted to psychological torture, it could not have been lifethreatening to cause the complainant flee for his life. Apart from the alleged inhumane conditions under which he was held, there is no indication of physical abuse like in the Shumba and Wiwa cases. Torture could not have been the cause for the complainant's fleeing the country because the alleged inhumane and degrading or torturous treatment occurred in August/September 2004, and the complainant remained in the country until January 2005, and even made court appearances on at least four occasions to answer charges brought against him. The alleged intimidation and threat to the complainant's life occurred between August and October 2004. This means that by the time the complainant left for South Africa in January 2005, the alleged threats and intimidation had ceased. There is therefore no evidence to prove that his leaving the respondent state was as a result of fear for his life occasioned by threats and intimidation, or that even if he was threatened and intimidated, this could be attributed to the respondent state.

76. The complainant has simply made general allegations and has not corroborated his allegations with documentary evidence or testimonies of others. He has not shown, like in the other cases mentioned above, the danger he found himself in that necessitated his fleeing the country. Without concrete evidence to support the allegations made by the complainant, the Commission cannot hold the respondent state responsible for whatever harassment, intimidation and threats that the complainant alleges he suffered, that made him flee the country for his life. This is even so because complainant never bothered to report these incidences to the police or raise them with the Magistrate when he appeared four times in the

respondent court. If the intimidation and threats were not brought to the attention of the state for investigation, and if the state was not in a position to know about them, it would be inappropriate to hold the state responsible.

77. Having said that, the question is, could the complainant still have exhausted local remedies or better still, is he required to exhaust local remedies, even outside the respondent state?

78. The first test that a local remedy must pass is that it must be available to be exhausted. The word 'available' means 'readily obtainable; accessible';[FN10] or 'attainable, reachable; on call, on hand, ready, present ... Convenient, at one's service, at one's command, at one's disposal, at one's beck and call'.[FN11]

[FN10] Webster's encyclopedic unabridged dictionary of the English language (1989) 102.

[FN11] Longman synonym dictionary (1986) 82.

79. According to this Commission, a remedy is considered to be available if the petitioner can pursue it without impediments or if he can make use of it in the circumstances of his case.[FN12] Were there remedies available to the complainant even from outside the respondent state?

[FN12] *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)].

80. The state indicates that in terms of its laws, a complainant need not be physically present in the country in order to access local remedies, adding that both the High Court Act and the Supreme Court Act permit any person to make an application to either court through his/her lawyer. In support of this, the state cites the Ray Choto and Mark Chavhunduka case where the victims were tortured by state agents, and they applied for compensation while they were both in the United Kingdom and succeeded in their claim. The state concluded that the complainant is not barred from pursuing remedies in a similar manner.

81. The complainant does not dispute the availability of local remedies in the respondent state, but argues that in his particular case, having fled the country for fear of his life, and now out of the country, local remedies are not available to him.

82. This Commission holds the view that having failed to establish that he left the country involuntarily due to the acts of the respondent state, and in view of the fact that under Zimbabwe law, one need not be physically in the country to access local remedies; the complainant cannot claim that local remedies are not available to him.

83. The complainant argues that even if local remedies were available, they were not effective because the state has the tendency of ignoring court rulings taken against it, citing among others the High Court decision in the Commercial Farmers Union case and the Ray

Choto and Mark Chavhunduka case, and added that the Zimbabwe Lawyers for Human Rights has documented at least 12 instances where the state has ignored court rulings since 2000.

84. It is not enough for a complainant to simply conclude that because the state failed to comply with a court decision in one instance, it will do the same in their own case. Each case must be treated on its own merits. Generally, this Commission requires complainants to set out in their submissions the steps taken to exhaust domestic remedies. They must provide some prima facie evidence of an attempt to exhaust local remedies. This position is supported by other human rights bodies around the globe. The UN Human Rights Committee, for example, has stated that the mere fact that a domestic remedy is inconvenient or unattractive, or does not produce a result favourable to the petitioner does not, in it, demonstrate the lack or exhaustion of all effective remedies. [FN13] In the Committee's decision in *A v Australia*, [FN14] it was held that 'mere doubts about the effectiveness of local remedies or prospect of financial costs involved did not absolve the author from pursuing such remedies'. [FN15]

[FN13] *TK v France*, communication 220/1987, *MK v France*, communication 222/1988, *JG v The Netherlands*, 306/1988.

[FN14] Communication 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

[FN15] See also *L Emil Kaaber v Iceland*, communication 674/1995, UN Doc CCPR/C/58/D/674/1995 (1996). See also *Ati Antoine Randolph v Togo*, communication 910/2000, UN Doc CCPR/C/79/D/910/2000 (2003).

85. The European Court of Human Rights on its part has held that even if the applicants have reason to believe that available domestic remedies and possible appeals will be ineffective, they should seek those remedies since 'it is generally incumbent on an aggrieved individual to allow the domestic courts the opportunity to develop existing rights by way of interpretation'. [FN16] In *Article 19 v Eritrea*, [FN17] the Commission held that it is incumbent on the complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the state due to isolated incidences.

[FN16] Philip Leach, *Taking a case to the European Court of Human Rights* (2001) 79 (quoting *Earl Spencer and Countess Spencer v United Kingdom*, app nos 28851/95, 28852/95 (European Commission on Human Rights, 1998).

[FN17] Communication 275/2003 [(2007) AHRLR 73 (ACHPR 2007

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

87. The third issue of contention between the complainant and the respondent state is the requirement under article 56(6) of the Charter which provides that:

Communications ... received by the Commission, shall be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized of the matter.

88. The present communication was received at the Secretariat of the Commission on 26 September 2005. It was considered on seizure by the Commission in November 2005, that is, ten months after the complainant allegedly fled from the country. The complainant left the country on 12 January 2005.

89. The Commission notes that the complainant is not residing in the respondent state and needed time to settle in the new destination, before bringing his complaint to the Commission. Even if the Commission were to adopt the practice of other regional bodies to consider six months as the reasonable period to submit complaints, given the circumstance in which the complainant finds himself, that is, in another country, it would be prudent, for the sake of fairness and justice, to consider a ten months period as reasonable. The Commission thus does not consider the Communication to have been submitted contrary to sub-section 6 of article 56 of the Charter.

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

The African Commission finds that the complainant in this communication, that is, communication 307/05, Obert Chinhamo v the Republic of Zimbabwe, has not fulfilled the requirement under Article 56(5) of the African Charter, and therefore declares the Communication inadmissible.

Done in Brazzaville, Republic of Congo, at its 42nd Ordinary Session held from 14 - 28 November, 2007.