

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Fifty-First Ordinary Session
18 April – 2 May 2012

GABRIEL SHUMBA

v.

REPUBLIC OF ZIMBABWE

DECISION

Citation: Shumba v. Zimbabwe, Decision, Comm. No. 288/2004 (ACmHPR, May 2012)

SUMMARY OF FACTS

1. The Complainant Gabriel Shumba and his counsel David Padilla submit this communication against the Republic of Zimbabwe, which is a State Party to the African Charter. The Complainant is a citizen of the Republic of Zimbabwe and is a human rights lawyer currently undertaking a Doctor of Laws Degree at the Centre for Human Rights University of Pretoria, South Africa.
2. The Complainant and his Counsel present the facts of the case as follows: On 14th January 2003, the Complainant in the presence of 3 others, namely Bishop Shumba, TauraiMagayi 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.
3. At about 11:00 p.m. riot police accompanied by plain-clothes policemen and personnel identified to be from the Central Intelligence Organization stormed the room and arrested everyone present.
4. 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.
5. The Complainant and the others were taken to Saint Mary's Police Station where he was

detained without charge and denied access to legal representation. He was also denied food and water.

6. 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.

7. While in this position, the Complainant was questioned and threatened with death by about 15 interrogators. The Complainant further alleges that he was also electrocuted intermittently for 8 hours and a chemical substance was applied to his body. He lost control of his bodily functions, vomited blood and he was forced to drink his vomit.

8. The Complainant has submitted a certified copy of the medical report describing the injuries found on his body.

9. Following his interrogation at around 7pm of the same day, the Complainant was unbound and forced to write several statements implicating himself and several senior MDC members in subversive activities. At around 7.30pm he was taken to Harare Police Station and booked into a cell.

10. The Complainant states that 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 fled Zimbabwe to South Africa for fear of his life.

COMPLAINT

11. The Complainant alleges that Articles 4, 5, 6, 7(c) and (d), 10(1) and 14 of the African Charter on Human and Peoples' Rights have been violated.

PROCEDURE

12. The communication was received by the Secretariat of the African Commission on 24th May 2004.

13. On 16th June 2004, the Secretariat acknowledged receipt of the communication and informed the Complainant that the matter had been scheduled for consideration by the African Commission at its 36th Ordinary Session.

14. During its 36th Ordinary Session held in Dakar Senegal from 22 November to 7 December 2004 the African Commission decided to be seized of the communication.

15. On 13 December 2004, the Secretariat informed both parties that the Commission had been seized of the communication and requested them to submit arguments on admissibility within three months from the date of notification.

16. On 28 February 2005 the Secretariat having not received the submissions on

admissibility from both parties reminded them to submit their arguments by 13 March 2005.

17. On 8 March 2005, the Republic of Zimbabwe wrote to the Secretariat of the African Commission requesting the Commission to indulge the State on the grounds that it had not yet completed preparing its arguments on admissibility on the communication. The State thus sought a postponement of the communication to the 38th Ordinary Session.

18. On 15 March 2005, the Secretariat received a submission of amicus curiae brief on the communication from the Institute for Human Rights and Development in Africa on behalf of the Clinical Advocacy Project, Human Rights Program of Harvard University.

19. On 17 March 2005, the Secretariat received the Complainant's submissions on admissibility in which he prayed the African Commission to declare the communication admissible.

20. On 18 March 2005, the Secretariat wrote to the State Party, noting that it still had some ample time to submit arguments on admissibility on the communication and extended the date the State should make its submission on admissibility by thirty days. It required the State to make its submissions by April 18 2005.

21. By Note Verbale of 21 March 2005, the Secretariat transmitted the Complainant's arguments on admissibility including the amicus curiae brief to the State. This was sent by DHL.

22. At its 37th Ordinary Session held in Banjul, The Gambia, the African Commission deferred consideration on admissibility of the communication pending the Respondent State's submission of its arguments.

23. By Note Verbale of 24 May 2005, the Respondent State was notified of the Commission's decision and requested to submit its arguments within three months of the notification. By letter of the same date, the Complainant was notified of the Commission's decision.

24. By Note Verbale of 2 September 2005, the Respondent State was reminded to send its arguments of admissibility of the communication.

25. By Note Verbale of 18 October 2005, the Respondent State was reminded to send its arguments of admissibility of the communication before 31 October 2005.

26. On 1 November 2005, the Secretariat received a Note Verbale from the Respondent State indicating that the latter's submissions with regards to six communications brought against it were ready for submission but due to logistical problems beyond its control, the transmission of the submissions had been slightly delayed.

27. At its 38th Ordinary Session held from 21st November to 5th December 2005, in Banjul, The Gambia, the African Commission heard oral submissions from the parties in respect of admissibility of the communication and decided to defer further consideration thereof to the 39th Ordinary Session.

28. By Note Verbale and a letter dated 15th December 2005, the Respondent State and the

Complainant were respectively notified of the African Commission's decision.

29. At its 39th Ordinary Session held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the Communication and decided to defer further consideration on the admissibility to its 40th Ordinary session.

30. By Note Verbale and by letter dated 31 May 2006, the decision of the Commission was sent to both parties.

31. At its 40th Ordinary Session held from 13 to 30 November 2006 in Banjul, The Gambia, after a lengthy deliberation, it was agreed that the Communication be deferred to the 41st Session to give Commissioners more time to study the legal arguments closely.

32. By Note Verbale and by letter dated 10 February 2007, both parties were duly informed of the Commission's decision to defer the communication to the 41st Ordinary Session to be held in Accra, Ghana from 16 to 30 May 2007.

33. By Note Verbale and by letter dated 20 June 2007, both parties were duly informed that at the 41st Ordinary Session held in Accra, Ghana, from 16 to 30 May 2007, the African Commission considered the above mentioned communication and declared it admissible.

34. On 7 November 2007, the Complainant submitted its arguments on the Merits. The Respondent State is yet to submit on the Merits. The Secretariat is yet to study the submission and give a copy to the Respondent State.

35. On 8 January 2008, the Complainant was informed of the Commission Decision's to defer the Communication to the 43rd Ordinary Session to allow the State submit on the Merits.

36. By Note Verbale of 8 January the Respondent State was informed that it had to submit on the Merits. A copy of the Complainant's submission was also forwarded to Respondent State.

THE LAW

ADMISSIBILITY

37. The Admissibility of communications brought pursuant to Article 55 of the African Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a Complainant in order for a communication to be declared admissible.

38. Of the seven conditions, the Respondent State claims that the Complainant has failed to fulfil two, namely, Article 56(5) and (6). Consequently, these are the only two provisions of Article 56 that are contentious between the parties in respect of the question of admissibility of the communication. The African Commission will therefore focus on the said provisions only.

39. Article 56(6) of the African Charter 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 with the matter.

40. The Complainant submits that the communication was submitted within a reasonable time in conformity with Article 56(6) of the African Charter.

41. However, the Respondent State argues that the communication cannot be said to have been submitted within a reasonable period from the time domestic remedies were exhausted. The Respondent State asserts that the African Commission has not specified what a reasonable period is, although Information Sheet No. 3 prepared by the Secretariat of the African Commission on Communication Procedures advises that the communication should be submitted 'as early as possible', which begs the question 'what is as early as possible?'

42. The Respondent State therefore requests the African Commission, when determining the question of what is a reasonable period to draw inspiration from Article 32 of the Inter-American Convention which specifies 6 months as the period within which a complaint should be filed.

43. In that case the Respondent State argues, the Complainant's matter would be time barred, as the alleged violations are said to have been committed on 23rd February 2003 and yet the Complainant only brought the communication before the African Commission 16 months later.

44. Indeed, as the Respondent State has noted, the African Commission has not specified what a reasonable period is but it is apparent from its practice that it has tended to be flexible and as such, determines this question on a case-by-case basis. For instance, in several communications, the African Commission has admitted communications that have been brought before the African Commission more than 16 months after the violation is reported to have taken place or domestic remedies were exhausted. Consequently, the African Commission believes that the Complainant in the present communication having filed the communication 16 months after the violation took place, met the conditions laid down in Article 56(6) of the African Charter.

45. The Complainant puts forward the argument that the exception to the rule in Article 56(5) is applicable in this communication because local remedies are unavailable, ineffective and would be unduly prolonged.

46. Article 56(5) of the African Charter provides that Communications ... received by the Commission shall be considered if they: are sent after exhausting domestic remedies, if any, unless it is obvious that this procedure is unduly prolonged.

47. Making reference to communication 71/92, the Complainant argues that the onus is on the Respondent State to demonstrate that local remedies are available. He submits that the African Commission in communications 147/95 and 146/96, noted that a remedy is considered available only if the Complainant can make use of it in the circumstances of his case. The Complainant avers that in the particular circumstances of his case, he is unable to utilise the local remedies mainly because he was forced to flee Zimbabwe for fear of his life. He claims that because of his political affiliation and human rights activism, he was subjected to torturous experiences at the hands of the Respondent State which he survived. Thereafter, he fled to South Africa following threats to his life by the Respondent State. The

Complainant argues that the fact that he did not collect his belongings is indicative of the urgency with which he left the country, emphasising that he did not leave the country voluntarily.

48. The Complainant further argues that he is still living in a state of fear as the threat to his life did not stop when he left Zimbabwe. As such, the Complainant contends, considering the nature of the complaint, it would not be logical for the African Commission to ask him to return to Zimbabwe and seek remedy from the national courts. The Complainant notes that reports in the newspaper - the Government Chronicle, have inaccurately ascribed treasonous activities to him, an indication that, his life would still be in danger were he to return to Zimbabwe. The Complainant states that his wife and child have since fled the country and are now on temporary permits in South Africa.

49. The Complainant goes on to submit that considering the fact that he fled the country against his will and as such he is no longer in Zimbabwe where the remedies ought to be sought, then it would not be possible to pursue domestic remedies without impediments and consequently, they should be considered unavailable. In coming to this conclusion, the Complainant relies on communications decided by the African Commission along similar lines including, communications 232/99, 215/98 and 103/93. In those cases the African Commission granted admissibility based on the principle of constructive exhaustion of local remedies.

50. Furthermore, the Complainant submits that in order for him to exhaust local remedies they should be effective, which means that the remedy should be able to offer a prospect of success. He notes however, that the remedies available in Zimbabwe are ineffective. This is because, the trend prevailing in Zimbabwe is that government does not comply with court orders; and as such, it is doubtful whether the existence of local remedies will be sufficient not only in theory but also in practice. The Complainant submits further that, because his case also relates to his activities as a member of the opposition, the prospect of success in this respect is likely to not only be onerous and but also untenable. He therefore concludes that given the nature of his case and the government's trend of non-compliance with court decisions, he has no prospect of success in pursuing local remedies in Zimbabwe.

51. In addition, the Complainant states that he is a student in South Africa, earning a stipend only and therefore not in a position to employ a lawyer to pursue his case in Zimbabwe. He also notes that although he lodged a complaint in February 2003 with the police in respect of the torture that he had suffered, to date, no one has been arrested even though the police were provided with the names of the alleged perpetrators of the torture.

52. In response to the Complainant's submissions, the Respondent State contends that the Complainant's absence from Zimbabwe is deliberate, and not as a result of any threats to his life. The Respondent State contends that the Complainant's claims that his life is threatened, and his inability to return to Zimbabwe and utilise the available domestic remedies are unfounded. The Respondent State notes that the Complainant first left Zimbabwe for South Africa sometime between the 17th January and 4th February 2003, and returned. On 5th February 2003, he appeared in court, subsequently left Zimbabwe and did not return. On both these occasions, the Complainant left his wife and child in Zimbabwe. Consequently, the Respondent State argues, that the said actions by the Complainant do not seem to indicate that the Complainant's life is under threat. The Respondent State submits instead that the actual reason as to why the Complainant left Zimbabwe was to prevent the State

from pursuing a criminal case against him.

53. The Respondent State further argues that not in all cases should residence outside of the jurisdiction be taken to suggest that the Complainant is not required to exhaust local remedies and refers the African Commission to its decision in Communication 219/98 where it stated that a victim did not have to be physically present in a country to avail himself of available domestic remedies as such, could be done through his counsel.

54. Rather than approach the African Commission first, the Respondent State argues that the Complainant could have utilised the very NGOs that are assisting him publicise his case to petition the courts. The Respondent State drew the attention of the African Commission to the possibility of utilising this avenue by quoting the case of Ray Choto and Meldrum who are presently outside Zimbabwe but have been able to access remedies through the courts in Zimbabwe. Making reference to the letter of 28 February 2003 addressed to the police by the Complainant's advocates Selemani, stating he would sue the State for torturing the Complainant, the Respondent State argues that by this very act, the Complainant's advocate, demonstrates that he was fully aware that domestic remedies could be pursued in the absence of the Complainant.

55. As regards the claim by the Complainant that the domestic remedies in Zimbabwe are ineffective, the Respondent State denies that it is in the habit of disobeying court orders but has instead appealed against those orders that it did not agree with. The Respondent State argues that the judiciary in Zimbabwe is independent and judgements are implemented, or enforced without any recriminations on the part of the judiciary. A suspicion of lack of independence on the part of the judiciary is not synonymous to lack of independence.

56. The African Commission has held in several of its decisions that the rationale of the rule to exhaust local remedies is to allow the State concerned an opportunity to remedy a grievance through its own domestic legal system. However, the African Commission has gone ahead to state that it will not hold this requirement to apply literally in cases where it is impracticable or undesirable for the Complainant to seize the domestic courts. Accordingly, the African Commission in *Dawda Jawara v The Gambia* stated that for a Complainant to be able to exhaust local remedies, such remedies must meet three basic criteria - they must be available, effective and sufficient. The African Commission went on to state with respect to that case that, if the availability of a remedy is not evident it 'cannot be invoked by the State to the detriment of the Complainant'.

57. In the present communication, the Complainant argues that local remedies are not only unavailable, but even if available would be ineffective and insufficient. A remedy is considered available if the petitioner can pursue it without impediment. In the *Jawara* case, the African Commission held that a remedy is considered available only if the Complainant can make use of it in the circumstances of his case. It is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.

58. The availability 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 Complainant cannot turn to the judiciary of his or her country because of generalised fear for his or her life (or even those of his or her relatives), local remedies would be considered to be unavailable to him or her.

59. The Complainant in this case alleges that he was tortured by the Security apparatus of the Respondent State. He claims further that he was forced to sign several statements implicating himself. He was then released and 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' which is a treasonable offence carrying the death penalty. The Complainant claims that he fled the country against his will after the incident, fearing for his life.

60. Admittedly, the Complainant is currently outside the jurisdiction of the Respondent State. But does his absence outside the Respondent State's jurisdiction make domestic remedies unavailable to him? Would the principle of unavailability of domestic remedies to the complainant be negated by the Respondent State's allegation that the complainant had fled the country because of criminal charges, and not because of fear for his life? In other words would the criminal charges pending against the complainant disqualify him from the benefit of the enjoyment of the exception to Article 56(5)?

61. The question, which remains to be answered, in view of the questions posed above is whether or not the remedies were available or unavailable, and further if they were available, were they effective?

62. The African Commission has made a number of decisions on the exception to Article 56(5), in respect of unavailability of domestic resources on account of a complainant being outside his/her country. In the Jawara case, the African Commission held that there is no doubt that the Complainant (Jawara); '.....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. It would be an affront to common sense and logic to require the Complainant to return to his country to exhaust local remedies.' The African Commission went on to say that, '.....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'.

63. In the present case, the Complainant has stated that he fled from the jurisdiction of the domestic courts when he was allegedly tortured and charged with a treasonable offence. The state has not disputed the allegation by the complainant that he was tortured. Indeed it confirms that he was charged with treasonable charges, under the Public Order and Security Act. The State argues that local remedies are available, that the Complainant would have pursued the local remedies, and further that he fled Zimbabwe for reasons other than for fear of his life. What remains is for the Commission to determine whether or not the complainant's apprehension of fear for his life, would qualify as an exception to Article 56 (5) based on the constructive exhaustion of local remedies rule.

64. The African Commission was informed by the Respondent State (a claim the Complainant has not denied or challenged) that the Complainant left Zimbabwe on or about 17 January 2003. He returned to Zimbabwe on the 4th February 2003. He made a court appearance on 5 February 2003 and subsequently left Zimbabwe on the same day and never returned. The Respondent State argues that, the Complainant left his wife and child in Zimbabwe. It states further, the fact that he returned to Zimbabwe cast doubts to the claim

that he feared for his life, and that these are not actions of a man whose life is in danger. The State states that the complainant was never under threat from the time he was released from police custody. Regarding the fact that the Complainant's family remained in Zimbabwe, the Commission states that it is not relevant for determination of the issue of availability of remedies or otherwise, for the simple reason that the family was not, and ought not to have been implicated or held responsible for the action of the Complainant. In fact the State has a duty to protect the family under Article 18 of the Charter.

65. This sequence of facts in this complaint distinguishes the Complainant case from the Jawara case, which found that "in the mind of any right thinking person returning to the country at that material moment, for whatever reason, would be risky to his life."

66. The question, which remains to be answered, is whether or not the remedies were available, and further if they were available, were they effective? The African Commission is of the view that the Complainant was apprehensive of the integrity of the Respondent State's ability to render justice. In the view of the Commission, this was not an unjustified apprehension by the Complainant. The state has not stated whether it had taken any measures to investigate the Complainant's allegations against torture. It has not denied the allegations either, thus it cannot be expected to have inspired confidence in the complainant not to flee for the second time on the 5th February 2003. The two day presence by the complainant in Zimbabwe, much as they might appear to be actions of a person, other than "a right thinking person," in the view of the Commission, did not negate the constructive exhaustion of remedies rule.

67. The Complainant stated that he is no longer in Zimbabwe where the remedies would be sought and that he fled the country against his will, because the remedies could not be pursued without impediments and hence unavailable. The Commission needs to determine in the present case, what would amount to be an impediment to pursue domestic remedies, to warrant being considered unavailable?

68. The Respondent State argued that NGOs, which had publicised the Complainants case and addressed letters to the President of Zimbabwe, would have prosecuted his case. It gave examples of the Ray Choto case, whereby he was successfully awarded damages by Zimbabwe courts pursuant to a claim made while outside Zimbabwe. Commenting on the Ray Choto case the Complainant stated that Zimbabwe suffers from non enforcement of judgements concerning cases decided by the Zimbabwe judiciary, including the Mark Chavunduka and Ray Choto case, a torture case, whereby police investigations ordered by the Supreme Court failed to proceed. The State did not refute this specific submission by the complainant.

69. On the other hand, the Complainant argues that the issue of exhausting local remedies in respect of this offence should not arise at all because torture is not an offence that is recognised by Zimbabwean law. The Complainant asserts that because torture is a heinous crime, to bring a case on the grounds of assault, which is the only offence available under the laws of the Respondent State, would amount to trivialising the gravity with which the African Commission has always regarded torture. The African Commission does not intend to address itself on this issue at his point in time, since it touches on the merits, which could only be discussed once it has determined whether or not this communication is admissible.

70. The African Commission is aware that Article 15(1) of the Constitution of Zimbabwe

which forms part of the Declaration of Rights, and specifically prohibits torture. The said provision stipulates: that no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

71. Article 24 of the same Constitution goes on to provide for the enforcement of its protective provisions, of which Article 15(1) is part. For purposes of this communication the relevant provisions would be Article 24 (1) and (4) and they provide:

1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress. 4) The Supreme Court shall have original jurisdiction — (a) to hear and determine any application made by any person pursuant to subsection (1) or to determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious; and (b) to determine any question arising in the case of any person which is referred to it pursuant to subsection (2);

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights:

Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of this Constitution or under any other law.

72. Articles 15 and 24 of the Constitution of Zimbabwe provide for the prohibition of torture and the legal procedure for enforcement mechanism against torture. The procedure is very clear. It establishes the judicial body responsible for the enforcement of, as well as its powers, and the parameters of its jurisdiction. In that respect, the African Commission had to look into the Zimbabwe Constitution to determine whether or not the remedy was available. Indeed it finds that a remedy was available to the Complainant in the form of the Supreme Court, but states that the remedy was not effective, under the circumstances. The ineffectiveness of the Supreme Court to enforce its investigation orders against the police in the Mark Chavunduka and Ray Choto case leaves a lot to be desired for the top most judicial body in Zimbabwe. Indeed that was a clear indicate for an impediment as well as ineffectiveness of the remedy.

73. The Jawara case stated the following; “...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.” It states further that “...The Commission has stressed that, remedies the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant” “....The existence of a remedy must be sufficiently certain, not 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 the generalised fear for his life (or even those of relatives) local remedies would be considered to be unavailable.”

74. What is stated in the above quotation is a clear indication that the remedy was not available, it would not have redressed the complaint, and it did not inspire any prospect for success. Similarly, the Complainant could not avail himself of the same remedy due to the principle of constructive exhaustion of local remedies, by virtue of being outside the country, due to the fear for his life. The Complainant is the only person entitled to decide who shall represent him, in the event that he wished to invoke the domestic remedies, should they have been available. It is not for the state to determine the complainant's legal representation by NGOs or any other counsel. The African Commission has adopted Guidelines on fair trial, elaborating Article 7(c) of the Charter, which states that, "[e]very individual shall have the right to have his cause heard. This comprises: the right to defence, including the right to be defended by a counsel of his choice."

75. The African Commission therefore finds that even though in theory the domestic remedies were available, they were not effective, and could not be pursued without much impediment. The two day presence in Zimbabwe by the Complainant does not dispel the fear he was labouring under, since he was a victim of torture, and thus the constructive exhaustion of remedies would still apply to him.

76. In the Rights International/Nigeria Case, the African Commission stated that; "...the Commission interpreted the standard for constructive exhaustion of domestic remedies to be 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 then subsequent granting of refugee asylum in the United States of America."

77. Indeed what the African Commission is saying herein-above is that there can be particular circumstances which justify the application of the constructive exhaustion of domestic remedies rule to an individual, where it is established that the remedies are neither adequate, effective nor available. In this particular case, in spite of the complainant's two day presence in Zimbabwe, and in view of the allegation of torture, it is abundantly clear that bearing the experience by the said Mark Chavunduka and Ray Choto, the remedies available to the complainant are inadequate, ineffective, unavailable and would not be accessed without a lot of impediments, including the possible incarceration of the complainant for the criminal charges which in all fairness would have taken precedence over his personal claim against torture. Had he remained in Zimbabwe, there was no guarantee that he would not have been arrested, nor would he be subjected to the same treatment he had been subjected to the previous time, thus fleeing after the two days brought him within the constructive exhaustion rule.

Action required: Decision on the Merits

RECOMMENDATION

78. The Secretariat recommends dial the African Commission defer the Decision on the Merits to the 44th Ordinary Session in order to allow the Respondent State to submit on the Merits. The Complainant has indicated its willingness during the present 43rd Ordinary Session, if the Respondent State is agreeable, to give oral arguments on the Merits.

SUBMISSIONS ON MERITS

COMPLAINANTS' SUBMISSION ON THE MERITS

79. The arguments below are the submissions of the Complainant, taking also into consideration all their written submissions, including letters and supporting affidavits.

80. The Complainant bases his claims against the Respondent State on the violations of Articles 4, 5, 6, 7(c) and (d), 10(1) and 14 of the African Charter.

ALLEGED VIOLATION OF ARTICLE 4

81. The Complainant states that Article 4 of the African Charter guarantees that every human being is entitled to respect for his life and the integrity of his person and that any harm inflicted against any person constitutes a violation of the physical integrity of that person. He states that the electrocution of the Victim by the Respondent State agents acting in the scope and course of their employment, namely one Garnet Sikhova, Makedenge, Masvimbo and other members of the Law and Order Section of the Zimbabwe Republic Police, the Central Intelligence Organisation and the Army, constitutes an egregious violation of the right to physical integrity. He states that it should be recalled in the facts before the African Commission as well as subsequent oral averments, that the Victim was subjected to prolonged electric shocks in the mouth, genitals, fingers, toes and other parts of the body. He informs the African Commission that medical affidavits from among others, a government doctor tend to support the Victim's testimony.

ALLEGED VIOLATION OF ARTICLE 5

82. The Complainant also state that a chemical substance was applied onto the Victim's body, in contravention of the Victim's right to physical integrity Article 5 (inhumane and degrading treatment). He states that during his torture, the Victim was also forced to drink his own blood and urine apart from being urinated upon by his tormentors while they chanted 'this is humiliation, this is humiliation...'. He states that all these facts were not contested by the Respondent State during oral argument, as the Respondent State representatives conceded that they could not say what kind of torture the Victim suffered in police custody, and could not deny that the torture of the Victim occurred. He concludes that the above acts manifestly contravene Article 5 of the African Charter, which proscribes the perpetration of torture, cruel, inhumane and degrading treatment.

83. The Complainant observes that the prohibition of all forms of exploitation and degradation of man particularly slavery, slave trade, torture, inhuman or degrading treatment is provided for under Article 5 of the Charter. He states that it is well known that the Respondent State commits torture with impunity, and the Victim's case is one of the many cases that bear testimony to this fact. He states that other cases have been widely reported on, for example, the severe torture and beatings of the top Zimbabwe Congress of Trade Unions and Opposition Movement for Democratic Change officials as occurred on 11 March 2007 (Morgan Tsvangirai, Sekai Holland and Grace Kwinjeh were amongst the activists who were allegedly beaten up). He argues that a Fact-finding Mission Report produced by the African Commission after it visited the Respondent State cited the Victim's torture as one of the most serious of violations by the Respondent State. He states that it should be observed that this Mission was undertaken by respected experts who were on the ground in the Respondent State.

84. The Complainant argues that by subjecting the Victim to conditions of physical and mental harm with such practices as electrocution, beating and denial of food and water, the Respondent State subjected the Victim to torture or otherwise cruel, inhuman and degrading treatment in contravention of the provisions of Article 5 of the African Charter.[FN1]

[FN1] See Communications 27/89, 46/91, 49/91 and 99/93, Organisation Mondiale Contre la Torture and Association Internationale des Juristes Démocrates, Commission Internationale des jurists (CIJ), Union Interafricaine des Droits de l’Homme v. Rwanda, Tenth Annual Activity Report 1996 — 1997.

85. The Complainant states that consequent to the Victim’s incarceration, the Victim suffered severe physical injuries and psychological trauma as a result of the torture, requiring the Victim to receive treatment for physical injuries and psychological trauma from Parirenyatwa Avenues and Dandaro Hospital and clinics in Zimbabwe. He states that when the Victim fled to South Africa, he was still suffering from physical injuries, severe depression, nightmares, temporary impotence, that he had to receive further treatment and counseling for trauma at the Centre for Studies of Violence and Reconciliation for at least one year. He states that during this period the Victim was on anti-depressants and other medication, which contributed to the disruption of his family.

86. The Complainant informs the African Commission that he has already submitted medical evidence which was filed with the African Commission proving that the Victim suffered the above injuries. The Complainant also states that in the event that the Respondent State disputes these submissions, and makes an undertaking to reimburse the Victim for expenses incurred if the latter wins this, he will call for further verbal testimony from medical practitioners who attended the Victim.

ALLEGED VIOLATION OF ARTICLE 6

87. The Complainant avers that according to Article 6 of the Charter everyone has ‘the right to liberty and to the security of his person’. He argues that this right is aimed against arbitrary arrest and detention.[FN2] He states that the Victim’s right to liberty was contravened when he was detained as was shown in the facts of the case. He argues that the Victim’s arrest was made worse, despite a release order from the High Court. He states that the Victim was detained beyond the stipulated 48 hours.

[FN2] C. Heyns, ‘Civil and political rights in the African Charter’, in M. Evans and R. Murray (eds) *The African Charter on Human and People’s Rights: The system in practice 1986 - 2000*, 153.

ALLEGED VIOLATION OF ARTICLE 7

88. The Complainant avers that Article 7 guarantees what are ordinarily referred to as fair trial rights. He states that under paragraph (c) of Article 7, it is declared that the right includes ‘the right to defence, including the right to be defended by counsel of his choice’. He argues that the fact that the Victim was denied access to legal representation during his

detention, and was only allowed access on the day he appeared in court constitutes a contravention of his right to fair trial, in that this refusal limited his ability to adequately prepare himself for Court beforehand.

ALLEGED VIOLATION OF ARTICLE 10

89. The Complainant argues that Article 10(1) the African Charter guarantees the right to freedom of association and prohibits any physical attack against any person on the basis of his affiliation with any association. He argues that the arrest and the consequent acts of torture perpetrated against the Victim owing to his alleged affiliation with the opposition party by representing members of the party in legal matters is contrary to the right to freedom of association.

90. The Complainant argues that the right to property is guaranteed under Article 14 of the African Charter. He says that it prevents interferences with the enjoyment of his right, and by the Respondent State taking away his belongings including documents; the Respondent State violated the Victim's right by its act of taking the diary, other documents and cell phone.

91. In conclusion the Complainant prays for the following relief:

That the Respondent State be declared to have violated the Victim's right to physical integrity in contravention of Article 4 of the African Charter.

That the Respondent State violated the Victim's right not to be tortured, or to be subjected to cruel, inhumane and degrading treatment or punishment, in contravention of Article 5 of the African Charter.

That the Respondent State violated the Victim's right to protection against arbitrary arrest, fair trial, freedom of association, property and work.

That an inquiry and investigation be carried out to bring those who perpetrated the violations to justice.

That the Respondent State makes a public statement committing itself to the respect of human rights in general, and in particular the independence of legal practitioners and the judiciary to operate freely without harassment or fear of torture.

That the Respondent State pays reasonable compensation for the physical pain, psychological trauma, medical expenses, loss of job and lack of access to family suffered by the Victim. Respondent State Rebuttal

92. The Respondent State argues that the Complainant has based his submissions on his arrest which took place on 14 January 2003. It argues that the Victim was arrested together with three (3) others at Nyamutamba Hotel, Chitungwiza for contravening section 5(2) (a) (1) of the Public Order security Act (chapter 11:17) (POSA). The Respondent State avers that the Victim was brought to court on 16 January 2003 and advised to apply to the High Court for bail because of the seriousness of the charges he was facing. It says that the Victim was subsequently granted bail by the High Court. The Respondent State draws the attention of the African Commission that one of the accused persons arrested together with

the Victim was Job Sikhala, who was the Member of the Parliament for St. Mary's Constituency.

93. The Respondent State also states that it is important to note that the African Commission's Ordinary Session held in Accra, Ghana, the African Commission attempted to have the Respondent State attend hearing where certain evidence was to be given against it. It says that the Respondent State informed the African Commission that the notice of the hearing had not been formally brought to its attention and therefore would not attend the hearing. The Respondent State says it later learnt that the African Commission went ahead and received certain information which had allegedly occurred in Respondent State's territory. It says the above incident is cited because the Victim avers that he gave oral evidence at that juncture and alleges that the "Government's representatives conceded that they could not say what kind of torture the Victim suffered in police custody." [FN3]

[FN3] See Respondent State Merit Brief.

94. The Respondent State submits that this statement is incorrect in so far as it purports to prove that the Respondent State attended that hearing. The Respondent State submits that were the African Commission to accept that as evidence, it would be procedurally incorrect due to the fact that the hearing was not specifically for Communication 288/2004. It says that it was a general hearing about the situation obtaining in the Respondent State country. The Respondent State further submits that the references made to that hearing should not be taken as evidence before the African Commission for the purposes of this Communication "when regard is made to the provisions of Rules 116, 117, 118, 119 and 120 of the African Charter [sic]." [FN4]

[FN4] See Respondent State submission on the Merit.

RESPONDENT STATE REBUTTAL OF ARTICLE 4

95. The Respondent State argues that the Victim alleges that he was tortured at the hands of the police and further uses the word 'electrocution'. It also says that the Victim avers that he was subjected to prolonged electric shocks in the mouth, genitals, fingers, toes and other parts of the body. The Respondent State notes that the Victim was arrested on 14 January 2003 and brought to court on 16 January 2003, which it argues is within the statutory limit of forty-eight (48) hours. It argues that if indeed the Victim was tortured to the extent he describes, this should clearly have been visible on his first day in court. It also requests the African Commission to note that the Victim's Lawyer, Advocate Selemani, did not inform the court on Victim's first court appearance of the alleged torture for the court to order an investigation into the matter and an examination of the Victim. It states that the graphic details of torture which has been submitted to the African Commission were not given to the court of first instance. It states that to this date, the Respondent State has not been availed the detailed medical reports showing the injuries the Victim allegedly suffered as a result. It submits that "in the absence of documentary evidence, the allegations remain Complainant's say-so". [FN5]

[FN5] Ibid.

RESPONDENT STATE REBUTTAL OF ARTICLE 5

96. In terms of Article 5, the Respondent State says that the Victim alleges that he was “forced to drink his own blood” without specifying the nature of the injury and where the blood came from. It states that the injuries sustained were not brought to the attention of the court on 16 January 2003 when the Victim first appeared when it is expected they were still fresh and visible. It submits that the nature of injuries sustained by Victim had to be serious if any blood was oozing from them to the extent of it being of sufficient quantities to be ‘drunk’ by the Victim. It states that no medical reports, detailing the injuries, have been availed to give credence to these allegations.

97. The Respondent State also states that the Complainant states: “all these facts were not contested by the Government during oral argument as the Government’s representatives conceded that they could not say what kind of torture the Complainant suffered in police Custody.”[FN6] The Respondent State wants the African Commission to know and put on record that no such concessions were ever made by the Respondent State. It also draws the attention of the African Commission that there was no oral argument held in this Communication and if it was held in the absence of the Respondent State, this was procedurally irregular. The Respondent State asserts that it received the Complainant’s submissions on Admissibility after seizure and responded.

[FN6] Ibid.

98. It states that the African Commission ruled that the Communication was to be Admissible and advised the Respondent State to this effect calling on it to file its submissions on the Merits. The Respondent State says that it has not submitted itself to any hearing where oral argument was presented in respect of this Communication. The Respondent State says that the Complainant intends to mislead the African Commission on this aspect. It urges the African Commission to make a finding that, in respect of this Communication as provided for in the Rules of the Charter, that the Complainant has not provided any evidence to support the allegations.

99. The Respondent State also states that the Complainant mischievously alleges that the Respondent State commits torture with impunity and proceeds to cite persons he alleges were tortured. It submits that these are personal views which should not be taken as evidence. It also states that it would appear that these allegations on persons allegedly tortured as stated by Complainant are based on newspaper reports which are specifically barred in terms of Article 56 (4) of the Charter.

100. The Respondent State submits that in the absence of evidence (either tangible or documentary) the allegations that the Respondent State violated Article 5 of the Charter should be dismissed. It also states that it is trite law that ‘he who alleges must prove.’ The Respondent State argues that the Complainant has dismally failed to substantiate the allegations of torture by providing evidence and a finding should be made that Respondent

State did not violate the article in question.

101. The Respondent State also argues that the fact that Victim is said to have received counseling for trauma at the Centre for Studies for Violence and Reconciliation in South Africa is not proof that he was tortured. It admits that the Victim was arrested and detained for a crime and brought to court within the statutory period and that the Victim did not make any report or complaint to the magistrate about the alleged torture. It states that perhaps it could be the fact that the Victim's arrest may have traumatized him and not because of any ill treatment. It states that the police were carrying out their duties when they arrested the Victim and the nature of the offence was of such a serious nature that the circumstances required that Victim be placed in custody. The Respondent State submits that the arrest was lawful.

RESPONDENT STATE REBUTTAL OF ARTICLE 6

102. In terms of Article 6, the Respondent State argues that this article protects persons from arbitrary arrest. It goes on to define 'arbitrary' as stated in the Oxford English Dictionary thus: "To be decided by one's liking; dependent upon will or pleasure; at this discretion or option of any one; derive from mere opinion or preference; not based on the nature of things; hence capricious, uncertain, varying." The Respondent State argues that the Victim was arrested on 14 January 2003 and brought to court on 16 January 2003 for contravening section 5(2) (a) (1) of the Public Order Security Act (Chapter 11:17). It states that on his first day in court, he was legally represented and the charges were read in open court and no challenge was made as to the appropriateness of the charges. It states that the Criminal Procedure and Evidence Act (Chapter 9:07) allows a police officer to arrest: "any person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in the first schedule."

103. The Respondent State argues that it is up to the court to make a finding as to whether the arrest by the police officer was reasonable in the circumstances. It goes on to say that when the court placed the Victim on remand and advised him to apply for bail in the High Court, it was confirming that there existed reasonable grounds for the Victim's arrest. It concludes that the arrest therefore, cannot be described as arbitrary in the circumstances. It also argues that the reckoning of time by Victim is flawed for a person with legal training. It states that Section 33(2) of the Interpretation Act, (Chapter 1:01) provides: "Where in an enactment a period of time is expressed to begin on or to be reckoned from a particular day, that day shall not be included in the period." The Respondent State argues that the Victim was arrested on 14 January 2003 and brought to court on 16 January 2003 and therefore the statutory limit of forty-eight (48) hours had not elapsed. It states that the facts, as agreed to by Complainant, shows that Victim was brought to Court within the stipulated statutory period and there was no arbitrariness in his arrest and therefore the allegation of a violation Article 6 should be dismissed.

RESPONDENT STATE REBUTTAL OF ARTICLE 7

104. The Respondent State says that the Complainant alleges a denial of access to legal representation. It submits that this is not factually correct. It argues that the Victim requested for legal representation and his lawyer was contacted and the Victim briefed him and subsequently went to court on 16 January 2003 with that lawyer. The Respondent State urges the African Commission to consider that the Victim was detained for two (2) nights

and factually weigh the possibilities of such denial taking into account the fact that “he who alleges, must prove.” The Respondent State avers that the Victim was not denied legal representation as the lawyer attended when the Victim made the request. It concludes that the Complainant has just made a bare allegation when factually the evidence shows otherwise. It urges the African Commission to make a finding that Article 7 (c) of the African Charter was not violated.

RESPONDENT STATE REBUTTAL OF ARTICLE 10(1)

105. Responding to the alleged Violation of Article 10(1), the Respondent State argues that the Victim’s arrest was for contravening a section of POSA following the discovery of a written document on his person. It states that the three other persons in his company at the time of the arrest denied authoring the document. It states that the Victim was not arrested for his association with a political party, but rather on the State informs the African Commission that the Attorney General later withdrew charges before plea to enable investigation to be carried as to who the author of the document found in Victim possession was. However, it avers, the Victim refused to submit to handwriting samples and disappeared to South Africa. The Respondent State states that the Victim was arrested on the basis that there was reasonable suspicion that he had committed an offence and he was brought before a court of competent jurisdiction, competent in law to hear the case and had jurisdiction over the subject matter. It argues that this, therefore, could not have been in pursuit of an agenda to deny the Victim his freedom of association. The Respondent State submits that the Complainant has failed to show that the arrest of the Victim was perpetrated in an effort to deny him his freedom of association.

RESPONDENT STATE REBUTTAL OF ARTICLE 14

106. The Respondent State submits that no violation of Article 14 occurred as the documents seized from the Victim were being used to investigate a suspected crime. It says that the Complainant should be aware that derogation from the provision of the African Charter in respect of this Article is provided where deprivation is “in the interest of public need or in the general interest of the community and in accordance with the provisions of the appropriate laws. Citing Section 49 of the Criminal Procedure and Evidence Act, (Chapter 9:07) it states that:

"The State may in accordance with this part, seize any article-

(b) which it is on reasonable grounds believed may afford evidence of the commission or suspected commission of an offence, whether within Zimbabwe or elsewhere; or..."

107. The Respondent State, therefore, submits that the seizure of documents in the Victim’s possession was not for the purpose of depriving him of his property, but for providing evidence pertaining to offences allegedly committed by him and his accomplices. It says that the allegation of a violation of this Article should therefore be dismissed.

108. Respondent State requests the African Commission to dismiss the Complaint. It also states that the Complainant in paragraph 17 of its Merit submission have not stated as to who should carry out the inquiry and investigations in terms of which provisions of the law. In terms of paragraph 18 of the Complainants’ Merit submission, it says that the prayer is outside the purview of possible decisions that may be given by the African Commission. It

also states that the Complainant did not state the legal basis for this prayer.

109. The Respondent State concludes by saying that the submission by the Complainant lack any merit due to the absence of evidence to substantiate allegations of violations of the African Charter, either individually or collectively. It urges the African Commission to make a finding that no violations of the African Charter took place. It states that it would set a dangerous precedent were the African Commission to rely on mere say-so by Complainants and rule that violations have taken place when no evidence is adduced to prove the allegations.

COMPLAINANT SUPPLEMENTARY SUBMISSIONS ON THE RESPONDENT STATE'S RESPONSE ON THE MERITS

110. The Complainant states that this supplementary submission addresses key arguments made in the Respondent State response on the Merits. He argues that while the Respondent State raises issues in relation to the Complainant's contention that Articles 6, 7, 10(1) and 14 have been violated, the Complainant does not respond to these points in this submission as they are fully addressed in the Merits. He said that the rejoinder is made without prejudice to these points.

111. The Complainant argues that the thrust of the Respondent State's Submission is that the Victim's allegations of torture and other cruel, inhuman and degrading treatment or punishment ('other ill-treatment') are unsubstantiated. In response, the Complainant submits that the allegations made are well-founded and substantiated by a range of sources, including detailed personal testimony attached to the original Communication, setting out the date, places (where known) and nature of his torture and other ill-treatment and the effects therein, three medical and three psychological reports; a report by the U.S. State Department; reports by non-governmental organizations specialized in the investigation and documentation of human rights abuses; and media reports submitted with the original Communication.

112. The Complainant submits that the range of sources before the African Commission establishes that Article 5 of the African Charter has been violated by the Respondent State. The Complainant further points out that the Respondent State has provided no evidence or documentation to the contrary. He further submits that the Magistrate recorded the hearing in writing. He also states that as the Victim was forced to flee the territory of the Respondent State as a result of the violations set out in the submission, he cannot access the court registry in order to provide the African Commission with the court record of this hearing. He argues that in the same way that the African Commission will not require a Victim to exhaust domestic remedies where it would be a threat to his or her life to do so, in the instant matter, the Victim cannot reasonably be required to return to the territory of the Respondent State in order to furnish the African Commission with this information, particularly as it is within the Respondent State's power to access and obtain these records. The Complainant points out, however, that the Respondent State has not provided the African Commission with the court record or any other supporting material to substantiate its claim.

113. In response to the Respondent State's submission that the allegations are unsubstantiated and lack evidentiary proof, the Complainant attaches reports of two medical examinations that were carried out the day after the Victim was first produced in court. The

first is by Dr. P. Mwazani of the Accident and Emergency Department of the State-owned Parirenyatwa Group of Hospitals and the second is by Dr. Douglas Gwatizo of the private Avenues Clinic in Harare. He states that both of these reports were attached to the original Communication and re-submitted with this submission for the African Commission's convenience.

114. The Complainant also submits a medical and psychological report carried out by Professor Han Petter Hougen, Chief Forensic Pathologist at the University of Copenhagen, Denmark and Dr. Onder Ozkalipci, MD Forensic Physician and Medical Director at the International Rehabilitation Council for Victims of Torture in Denmark; a psychological report carried out by Mr. Malose Langa, a Lecturer at the school of Human and Community Development at the University of Witwatersrand in South Africa, and a Consultant Psychologist at the Trauma Clinic at the Center for Studies for Violence and Reconciliation in South Africa who has been providing counselling to the Complainant and an affidavit by Dr Anthony Reeller, a Psychologist and Director of the Research and Advocacy Unit in Harare.

115. He argues that the findings of all three medical reports and three psychological reports are consistent with the Victim's allegations that he was subjected to torture and other ill-treatment. The Complainant states that the medical report of the State-owned Parirenyatwa Group of Hospital of 17 January 2003 recorded several injuries, including tenderness, a laceration and scratches on the Complainant's right and left forearm; tenderness of both calf muscles, his left foot, neck and orally; and urinary tract infection (UTI). He states that the medical report prepared by Dr. Gwatidzo of the privately-run Avenues Clinic, Harare of 17 January 2003 recorded a burnt nail of the second toe of the Complainant's left foot; bruises on his left forearm; as well as a periodontal erythema on his second and third right upper molar teeth. The Complainant states that Dr. Gwatidzo writes in his report that these injuries were mostly caused by trauma, burns and several blows - that the level of force used to inflict such injuries as 'severe' and the permanent injuries as 'serious'. The Complainant further states that the medical and psychological examination of the Victim carried out by Prof. Dr. Hans Petter Hougen and Dr. Onder Ozkalipci at the Department of Forensic Medicine of the Faculty of Health Sciences at the University of Copenhagen on 26 April 2010 documents a number of scars on the Victim's head, chest and forearms, left wrist and left thigh. He states that among the report's findings are the following conclusions:

116. That, 'the psychological symptoms that Gabriel Shumba shows are consistent with all criteria for post traumatic stress disorder, PTSD which is a disorder that regularly appears after torture'.

117. That the psychological report by Mr. Malose Langa is based on the provision of counseling services to the Complainant over a period of two years. The Complainant argues that the report sets out in detail the continuing psychological impact of the violations alleged by the Victim, including the observation that, 'it was also evident in our therapy sessions that Mr Shumba's sense of self-worth, dignity and respect has been damaged'. He states that Mr. Langa sets out that in terms of his clinical assessment, Mr. Shumba met the diagnostic criteria for Posttraumatic Stress Disorder (PTSD) with strong features of depression, anxiety, and alcohol abuse. He states that Mr Shumba was put on medication to help him deal with some these symptoms. He further states that it was evident in seeing Mr. Shumba for therapy that torture is an inhumane act that has deleterious effects, both physical as well as psychological, on the person being tortured.

118. The Complainant further states that Dr. Anthony Reeler, who worked with and knew the Victim prior to his alleged torture and ill-treatment and was involved with his treatment in South Africa, found that 'on the basis of my lengthy experience in the field of torture, as well as my clinical observation of Mr. Shumba before and after his return to Zimbabwe, I can state with very high degree of confidence that he exhibited most of the symptoms of Post-Traumatic Stress Disorder (PTSD) consonant with his story of being tortured'.

119. The Complainant argues that the medical and psychological reports refute the Respondent State submission that 'in the absence of the documentary evidence' his allegations of torture 'remain say-so'. He avers that the African Commission and the Respondent State in particular have repeatedly emphasized the probative value of medical and psychological evidence in determining whether torture and other ill-treatment has taken place.

120. The Complainant's avers that the allegations are further supported by a range of reports by the United States Government; non-governmental organizations specialized in the investigation and documentation of human rights violations; and the reports of international and national media houses. He states that these sources were included with the original submission and additional sources are attached to this Submission.

121. In an attempt to rebut the Respondent State arguments, that it would appear that allegations about persons allegedly tortured as stated by the Complainant, are based on newspaper reports which are specifically barred in terms of Article 56(4) of the Charter, the Complainant states that Complainants may not rely exclusively on the mass media. The Complainant submits that the U.S. State Department report and the reports of non-governmental organizations are not reports of the mass media, but reports by independent entities and experts in human rights investigation and reporting. He further argues that media reports can and are routinely accepted as evidence by the African Commission when used in conjunction with other evidences. He avers that Article 56(4) of the Charter only prohibits the exclusive reliance on such sources. The Complainant state that in this case, the Victim does not rely solely on media sources, but submits them along with the governmental and non-governmental reports of his treatment; personal affidavits; and extensive medical and psychological documentation.

122. The Complainant submits that he has provided more than adequate evidence to support the Victim's allegations of torture and ill-treatment He notes that in seeking to refute the Complainant's allegations, it is not sufficient for the Respondent State to simply argue that they are unsubstantiated when they are supported by range of documentation. Rather, he argues, the Respondent State must provide evidence to the contrary. In this case, the Complainant points out that the Respondent State arguments are not accompanied by any supporting documentation or evidence and do not advance any alternative explanation to counter the Victim's allegations.

123. In conclusion the Complainant request that the African Commission, in line with its long-standing and established practice, accept the Victim's allegations and find that the Respondent State violated Article 1 of the African Charter red in conjunction with Article 4, 5, 6, 7 and 10(1).

124. He avers that in meeting its obligations under the African Charter and international law

generally that the Respondent State provides an effective remedy, full and adequate reparation that is appropriate and proportionate to the gravity of the crimes committed and the physical and mental harm that the Victim has suffered. He further requests that the African Commission direct the Respondent State to provide the Victim with:

- a) Compensation for his material and moral damages (including loss of earnings through not being able to practice law in exile and separation from his children);
- b) Rehabilitation;
- c) Satisfaction and guarantees of non-repetition, including a full and public apology to the Complainant; acknowledging the wrongdoing and guaranteeing that the Complainant can return to the territory of the Respondent State without fear of arrest, prosecution, harassment or intimidation; and
- d) Carrying out a full, thorough and independent investigation capable of leading to the identification and punishment of those responsible.

African Commission's Decision on the Merits

125. The Complainant bases his claims against the Respondent State on the violations of Articles 4, 5, 6, 7(c) and (d), 10(1) and 14 of the African Charter.

Alleged Violation of Article 4 - Inviolability of the human being

Article 4 of the African Charter states:

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.

126. Before addressing this article, the Respondent State has raised what looks like a Preliminary Objection. The Respondent State informs the African Commission that its 42nd Ordinary Session held in Accra, Ghana, the African Commission had attempted to have the Respondent State attend hearing where a certain evidence was to be given against it.[FN7]

[FN7] See paras of this.....

127. The African Commission notes the objection of the Respondent State., However, but it has decided to examine the Communication on its Merits, because from its ruling on Admissibility, it notes that "at its 38th Ordinary Session held from 21 November to 5 December 2005, in Banjul, The Gambia, the African Commission heard oral submissions from the parties in respect of the Admissibility of the Communication and decided to defer further consideration thereof to the 39th Ordinary Session."

128. The Admissibility decision sent to both the Complainant and the Respondent State stated that "by Note Verbale and by letter dated 20 June 2007, both parties were duly informed that at the 41st Ordinary Session held in Accra, Ghana, from 16 to 30 May 2007, the African Commission considered the above mentioned Communication and declared it

Admissible. The Respondent State was informed of the African Commission's Admissibility decision based on the oral submissions of both parties and duly informed both parties to submit arguments on the Merits - to which the Respondent State also complied with and submitted its arguments on the Merits. The African Commission finds it extraordinary that the Respondent State will now state that it was not part of the Admissibility Oral Hearing at the 41st Ordinary Session.

129. Before going into the analysis of Article 4 and whether the Respondent State violated it, the African Commission will determine the interpretation of Article 4, especially the meaning of 'the right to life' - as a phrase that describes the belief that a human being has an essential right to live, particularly that a human being has the right not to be killed by another human being. The concept of a right to life is central to debates on the issues of capital punishment, disappearances, euthanasia, self defense and war.

130. The jurisprudence of the African Commission indicates that the right enshrined in Article 4 "is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life"[FN8] - that states not only have to refrain from intentional and unlawful deprivation of life, but must also take appropriate steps to safeguard the lives of those within their jurisdiction.[FN9] The right enshrined in this article is the supreme right of the human being. It follows that the deprivation of life by the authorities of the state is a matter of the utmost gravity. The requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State.

[FN8] Communication 223/98 — Forum of Conscience v Sierra Leone.

[FN9] See for example, the consolidated Communications 54/91-61 91-96/93-98/93-164/97_196/97-210/98 : ; Communications 27/89-46/91-49/91-99/93 : Organisation mondiale contre la torture, Association internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme/Rwanda.

131. The jurisprudence of the African Commission further indicates that in terms of Article 4 of the African Charter, every person deprived of his or her liberty has the right to live in detention conditions compatible with his or her personal dignity, and the state must guarantee to that person the right to life and to humane treatment. Consequently, since the state is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners.[FN10] In the instant case, the Victim was detained for not more than forty eight hours. The African Commission notes the allegation of torture which (could lead to death) is addressed in its analysis of Article 5. However, it also notes that the Complainant has not given enough evidence that during those two days the Victim was facing eminent death.

[FN10] Ibid.

132. The African Commission also notes the response of the Respondent state, in its rebuttal of any violation of Article 4, but will collapse some of its response under its analysis of the

alleged violation of Article 5 since some of these responses speak to allegations of torture. Suffice it to say that in Communication 48/90-50/91-52/91-89/93: Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan,[FN11] the African Commission stated that its long-standing practice, in cases of human rights violations, is that the burden of proof rests on the government.[FN12] In those Communications, the African Commission had stated that if the government provides no evidence to contradict an allegation of human rights violation made against it, the African Commission will take it as proven, or at the least probable or plausible. But that should not be taken to mean that Complainants have a right to make unsubstantiated statements.

[FN11] 13th Activity Report: 1999-2000.

[FN12] (See, ACHPR/59/91. ACHPR/60/91. ACHPR/64/92. 68/92. 78/92. ACHPR/87/93. ACHPR/101/93).

133. In the consolidated Communications 54/91-61/91-96/93-98/93-164/97_196/97-210/98: Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania,[FN13] the African Commission notes that the November 1987 trial, which already violated the provisions of Article 7, three army lieutenants were sentenced to death and executed. The African Commission stated that the trial itself constituted a violation of the African Charter. Furthermore, the African Commission was of the view that the executions that followed the said trial constituted a violation of Article 4. It also said that denying people food and medical attention, burning them in sand and subjecting them to torture to the point of death point to a shocking lack of respect for life, and constitutes a violation of Article 4. It also said that other evidences point to various arbitrary executions that took place in the villages of the River Senegal valley and stress that people were arbitrarily detained between September and December 1990. The African Commission considered that there were repeated violations of Article 4. In the instant case, the Victim was in custody for less than three days and at no time did he say he was facing imminent death.

[FN13] 13th Activity Report: 1999-2000.

134. Similarly, in Communication 25/89-47/90-56/91-100/93, Free Legal Assistance Group, Lazvyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v DRC[FN14], the African Commission had showed what could amount to a violation of Article 4. It stated that the Government of the DRC had violated Article 4 of the African Charter when 15 persons were extensively and repeatedly tortured by a Military Unit, on or about 19 January 1989, at Kinsuka near the Zaire River and also because of the mistreatment of several people protesting their mistreatment, after they were detained and held indefinitely.[FN15] In the instant case the Complainant has not adduced sufficient evidence to show that the Victim was facing death.

[FN14] 9th Activity Report: 1995-1996.

[FN15] See also Communication 64/92-68/92-78/92_8AR: Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi where the African also found a violation of Article 4. In those communications Amnesty International petitioned the African Commission on behalf of Orton and Vera Chirwa. Orton Chirwa had been a prominent political figure in Malawi before independence, but had been living in exile in Zambia with his wife since 1964 because of differences with Malawi's President Banda. In 1981, the Malawi security officials took them into custody and they were subsequently sentenced to death for treason at a trial in the Southern Regional Traditional Court. They claimed at this trial that they had been abducted from Zambia. They were denied legal representation. The sentences were upheld by the national traditional Appeals Court, although the Appeals Court criticized many aspects of the conduct of the trial. After international protest, the sentences were commuted to life imprisonment. The Chirwas were held in almost complete solitary confinement, given extremely poor food, inadequate medical attention.

135. The Complainant also alleges that the Victim suffered prolonged electric shocks in the mouth, genitals, fingers, toes and other parts of the body and that medical affidavits from among others, a government doctor, tend to support Complainant's testimony on this score. The African Commission will also collapse that statement under the Complainant's alleged violation of Article 5 which properly deals with torture, cruel, inhuman or degrading punishment and treatment.

136. International jurisprudence has also shed some light in the interpretation of the right to life.[FN16] For instance in the case of *Kaya v. Turkey* (1998) at the European Court of Human Rights,[FN17] the Court recalled that the obligation to protect the right to life under Article 2, read in conjunction with the state's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State. The Court also observes that the procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the state for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances. In other words in all instances, the right to life would invariably involve death or extreme mistreatment that threatens the life of the Complainant.

[FN16] The following treaties enshrine in their instruments the right to life. See Article 4 African Charter on Human and Peoples' Rights; Article 4 American Convention on Human Rights; Second Protocol to the American Convention on Human Rights to Abolish the Death Penalty; Inter-American Convention on the Forced Disappearance of Persons; Article 2 European Convention for the Protection of Human Rights and Fundamental Freedoms; Protocol Nos. 6 and 13 European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 6 International Covenant on Civil and Political Rights (ICCPR); Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty; Article 9 Convention on the Protection of the Rights of Migrant Workers and Members of their Families; Article 6 Convention on the Rights of the Child; Convention on

the Prevention and Punishment of the Crime of Genocide; International Convention of the Suppression and Punishment of the Crime of Apartheid; Geneva Conventions I, II, III and IV of 12 August 1949, Common Article 3 and Protocols I and D; Article 3 Universal Declaration on Human Rights; Article 1 American Declaration of the Rights and Duties of Man; Article 6 Arab Charter on Human Rights; General Comment 6, adopted by the Human Rights Committee, Sixteenth session, 1982; General Comment 14, adopted by the Human Rights Committee, Twenty-third session, 1984; General Comment 29, adopted by the Human Rights Committee, Seventy-second session, 2001; Code of Conduct for Law Enforcement officials, adopted by the UNGA Resolution 34/169 of 17 December 1979; Declaration on the Protection of All Persons from Enforced Disappearances, UNGA Resolution 47/33 of 18 December 1992; Safeguards Guaranteeing Protection on the Rights of Those Facing the Death Penalty, ECOSOC Resolution 1984/50 of 25 May 1984; United Nations Basic Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ECOSOC Resolution 1989/65 of 24 May 1989; United Nations Basic Principles in the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990.

[FN17] In the case of *Kaya v Turkey* at the European Court of Human Rights, Application Nos. 158/1996/777/978, Judgement of 19 February 1998.

137. The African Commission is aware that regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the state is not unlimited, nor may the state resort to any means to attain its ends. The state is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any state action. Article 4, which safeguard the right to life, ranks as one of the most fundamental provisions in the African Charter, to which no derogation is permitted. Together with Article 5, it also enshrines one of the basic values of democratic societies. The circumstances in which deprivation of life may be justified must, therefore, be strictly construed. The object and purpose of the African Charter as an instrument for the protection of individual human beings also requires that Article 4 be interpreted and applied so as to make its safeguards practical and effective. However, in the instant case the Complainant has not adequately demonstrated that the Respondent State's agents used lethal force to subjugate the Victim that will lead to a violation of Article 4.

138. As the African Commission has held on many occasions, Article 4 of the Charter enshrines one of the most fundamental values of a democratic society.[FN18] It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behavior. However, the African Commission is of the view that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 4 of the African Charter.[FN19] The assessment of this minimum level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[FN20] Furthermore, in considering whether treatment is "degrading" within the meaning of Article 4, the African Commission will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 4.

[FN18] See also Communication 64/92-68/92-78/92 8AR: Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi; Communication 48/90-50/91-52/91-89/93: Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan.

[FN19] See also Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000-1V, where the European Court also set a threshold as to what may constitute a violation to the right to life.

[FN20] See also the ECHR case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, p. 65, § 162, where a principle is also mentioned.

139. The African Commission will take into consideration that the suffering and humiliation involved must in any event exceed the inevitable element of suffering or humiliation connected with a legitimate deprivation of liberty. Nevertheless, in the light of Article 4 of the African Charter, the state must ensure that a person is detained (especially those who are to be executed) under conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, the person's health and well-being are adequately secured, with the provision of the requisite medical assistance and treatment. When assessing conditions of detention, account will be taken of the cumulative effects of these conditions, as well as the specific allegations made by the Complainant.

140. To reiterate in the instant matter, the African Commission is aware of its longstanding practice that the burden of proof rests on the government in cases of human rights violations.[FN21] If the government provides no evidence to contradict an allegation of human rights violation made against it, the African Commission will take it as proven, or at the least probable or plausible. But in the absence of concrete proof from the Complainant, the African Commission cannot hold the Respondent State to be in violation of Article 4. In this regard, the African Commission is relying on its decision in Communication ACHPR/60/91: 27 where it held that "without specific information as to the nature of the acts themselves, the African Commission is thus unable to find a violation of Article 4."

[FN21] (See, ACHPR/59/91, ACHPR/60/91, ACHPR/64/92, 68/92, 78/92, ACHPR/87/93, ACHPR/101/93).

The African Commission,

141. Declares that the Respondent State has not violated the right to life recognized in Article 4 of the African Charter.

Alleged Violation of Article 5- Inviolability of the human being

[FN22] Article 5 of the African Charter states:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man

particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

[FN22] Relevant human rights treaties on prevention of torture: Article 5 African Charter on Human and Peoples' Rights; Article 5 American Convention on Human Rights; Inter-American Convention to Prevent and Punish Torture; Article 3 European Convention for the Protection of Human Rights and Fundamental Freedoms; European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment; Article 7 and 10 International Covenant on Civil and Political Rights; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Geneva Conventions I, II IV of 1949, Common Article 3 and Protocols I and II.

142. Before examining Article 5 in relation to the instant matter, the African Commission will make a few remarks as regards allegations of torture and its absolute stand against it. With the risk of oversimplification the reasons are clear why the African Commission takes an uncompromising stand against torture: torture not only degrades and corrupts the society that allows it, it is also highly unreliable. But more importantly where should the line be drawn? If hanging in an upside down position or sodomizing an inmate do not work, should we as a society progress to removing toe nails with pliers or branding with red-hot irons and beating to a pulp? It is not a mistake that along with genocide, torture is the only crime that every state must punish, no matter who commits it or where.

143. But what is this creature called torture? While taking due note of the many international law instruments that absolutely prohibits torture, let's look at provisions from the perspectives of the African Charter and the African Commission. In Communication 279/03-296/05: Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan, the African Commission stated that while the African Charter does not define the meaning of the words, or the phrase "torture or degrading treatment or punishment, Article 5 is aimed at the protection of both the dignity of the human person, and the physical and mental integrity of the individual..." It cites Article 1 of the United Nations Convention against Torture which defines, the term 'torture' to mean "...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

144. The African Commission further went to state in Communication 279/03-296/05 that torture constitutes the intentional and systematic infliction of physical or psychological pain and suffering in order to punish, intimidate or gather information. It says that it is a tool for discriminatory treatment of persons or groups of person who are subjected to torture by state or non-state actors at the time of exercising control over such person or persons, with the intention of controlling such populations by destroying individuals, their leaders and frightening entire communities.

145. The Commission has undertaken extensive work on freedom from torture, cruel,

inhumane or degrading treatment or punishment in recognition of the need to take concrete measures to further the implementation of the existing provisions of the Charter. At its 32nd Ordinary Session in October 2002, the Commission adopted a Resolution on the subject and also adopted the “Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhumane or Degrading Treatment or Punishment in Africa” (Robben Island Guidelines).

146. The Resolution establishes a Committee entrusted with the task of disseminating the Guidelines, developing strategies to promote and implement the Guidelines and to submit a progress report at each Ordinary Session of the Commission. States Parties are encouraged to disseminate, and implement them and to bear the Guidelines in mind in the preparation of their Initial and Period Reports. The Guidelines deal with three broad issues namely: prohibition of torture, prevention of torture and responding to the needs of victims.

147. With regard to the prohibition of torture the Robben Island Guidelines recommend the ratification of all the regional and international instruments prohibiting torture - particularly the UN Convention Against Torture, with a declaration accepting the jurisdiction of the Committee Against Torture, international, cooperation to combat impunity and ensure the punishment of offenders.

148. In Communication 279/03-296/05, the Complainants had submitted that the various incidences of armed attacks by the military forces of the State of Sudan, using military helicopters and the Janjaweed militia, on the civilian population, forced eviction of the population from their homes and villages, destruction of their properties, houses, water wells, food crops and livestock, and social infrastructure, the rape of women and girls and displacement internally and outside national borders of the State of Sudan, constitute violation of the various cited articles of the African Charter, including Article 5. The Complainants had argued that the totality of the violations amounted to both psychological and physical torture, degrading and inhuman treatment, involving intimidation, coercion and violence. The African Commission agreed.

149. In the instant case the Complainant state that he was subjected to prolonged electric shocks in the mouth, genitals, fingers, toes and other parts of the body. He states that medical affidavits from among others, a government doctor tend to support the Victim’s testimony on this score. The Complainant also submitted that a chemical substance was applied onto Victim’s body, in contravention of Article 5. He states that the Victim was forced to drink his own blood and urine apart from being urinated upon by his tormentors while they chanted ‘this is humiliation, this is humiliation.’ He further stated the Respondent State did not deny or argue this point, as the Respondent State’s representatives conceded that they could not say what kind of torture the Victim suffered in police custody, and could not deny that it in fact occurred.

150. The Complainant also states that consequent to the Victim’s incarceration, the Victim suffered severe physical injuries and psychological trauma resultant from the torture. He states that the Victim received treatment for physical injuries and psychological trauma from Parirenyatwa, Avenues and Dandaro Hospital and clinics in Zimbabwe. He further states that when he fled to South Africa, the Victim was still suffering from physical injuries, severe depression, nightmares, temporary impotence so much so that he had to receive further treatment and counseling for trauma at the Centre for Studies of Violence and Reconciliation for at least one year. During this period he was on anti-depressants and

other medication. This also contributed to the disruption of his family, according to Complainant.

151. The Respondent State denies all the allegations, but the African Commission notes that the Respondent State has not responded fully to the specific allegations levied against it.[FN23] For example, the Complainant in his rebuttal to the Respondent State submission on the Merits, state that both he and his legal counsel when he appeared in the Magistrate Court, the issue of the Victim's torture and ill-treatment was brought up by his legal counsel. The Complainant state that the Magistrate ordered that the court room be cleared so that he could take a look at the injuries of the Victim sustained as a result of the torture, including the Victim's genitals. The Complainant state that as a result, the Magistrate ordered that the Victim be taken to the hospital for treatment. The Magistrate order and the hospital admission form were all transmitted to the Respondent State. The Respondent State chose not to address that issue.

[FN23] See Merits submission of the Respondent state.

152. The African Commission, in several previous decisions, has set out the principle that where allegations of human rights abuse go uncontested by the Government concerned, the African Commission must decide on the facts provided by the Complainant and treat those facts as give.[FN24] This principle conforms with the practice of other international human rights adjudicatory bodies and the Commission's duty to protect human rights. Since the Respondent State did not fully respond to all the allegations the African Commission must, regrettably, come to a conclusion based on the facts and opinions submitted by the Complainant.

[FN24] See. e.g., the Commission's decisions in communications 59/91, 60/91, 64/9, 68/92, 78/92, 87/93 and 101/93.

153. It is also instructive to note a number of judgments from other jurisdiction as regards individuals who alleged torture whilst in custody. Some of these cases mention the inadequacies prevailing in many States with regard to medical and legal investigation and documentation, and advise that the Principles of the Istanbul Protocol are followed during investigation and documentation of torture. The first elaboration on the Istanbul Protocol, for example, is found in the case of Bah and others v. Turkey, June 2004.[FN25] The case concerns about fifteen people detained (some were also arrested) in February 1996. All the persons complained that they were tortured and one had a miscarriage as a result of torture during their period in custody. All detainees, except two, had various medical reports supporting their allegations of torture and ill treatment. The Court concluded that the Protocol contains full practical instructions for assessing persons who claim to have been victims of torture or ill treatment, for investigating suspected cases of torture and for reporting the investigation's findings to relevant authorities. The Court stressed the purposes of an effective investigation and documentation of torture and other forms of ill treatment. It found inter alia that "the Turkish authorities could not be considered to have acted with sufficient promptness or with reasonable diligence, with the result that the main perpetrators of acts of violence have enjoyed virtual impunity, despite the existence of

incontrovertible evidence against them.”[FN26]

[FN25] See the case of *Balti and Others v Turkey*, ECHR. 33097/96 and 57834/00, 3 June 2004. See also see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV; *Aerts v. Belgium* judgment of 30 July 1998 Reports 1998-V, p. 1966.

[FN26] *Balti and Others v Turkey*, ECHR, 33097/96 and 57834/00, 3 June 2004.

154. In the instant matter, despite extensive medical evidences supplied by the Complainant, the Respondent State did nothing to investigate and document the allegations. The African Commission notes that, apart from its usual channels of communication with the Respondent State, its Secretariat also hand delivered (which was signed by the Respondent State) the Complainant’s rejoinder (containing extensive medical documents and pictures) of the response of the Respondent State. The Respondent State decided not to comment on all of the allegations made against it, apparently relying on its initial Merit submissions.

155. In that Merit submission the Respondent State says that the Victim allege that he was “forced to drink his own blood” without specifying the nature of the injury and where the blood came from. It states that the injuries sustained were not brought to the attention of the court on 16 January 2003 when the Victim first appeared when it is expected they were still fresh and visible. However, the allegations have since been brought to the attention of the Respondent State when the Complaint was first lodged with the African Commission in May 2004. The African Commission informed the Respondent State of the very serious allegations made against it on 13 December 2004 and subsequent communications with the Respondent State. What did it do to investigate and bring the perpetrators to justice if the allegations were true? The African Commission is not aware of any investigations undertaken by the Respondent State to (dis)prove the very serious allegations made against it.

156. The Respondent State also submit that the nature of injuries sustained by Victim had to be serious if any blood was oozing from them to the extent of it being of sufficient quantities to be ‘drunk’ by the Victim. It states that no medical reports, detailing the injuries, have been availed to give credence to these allegations. The African Commission rejects that statement as incorrect. As the African Commission has stated supra, it has incontrovertible proof that the Respondent State is aware of the serious allegations made against it and did receive from the Secretariat of the African Commission all the supporting medical documents and affidavits made available by the Complainant. It chose not to address in detail all the allegations of torture and ill-treatment allegedly meted out to the Victim.

157. Rather curiously, the Respondent State request the African Commission to discountenance the Victim’s allegation that he had been receiving counseling for trauma at the Centre for Studies for Violence and Reconciliation in South Africa as not evidence that he was tortured. The Respondent State admits that the Victim was arrested and detained for a crime and brought to court within the statutory period. It states that perhaps it could be the fact that his arrest may have traumatized him and not that he was ill-treated. The African Commission is at a loss with that statement. Attached to the Complainant’s allegations that the Victim was tortured and ill-treated by agents of the Respondent State are medical statements and affidavits including two medical reports that the Complainant said were

carried out the day after the Victim was first produced in court. The first is by Dr. P. Mwazani of the Accident and Emergency Department of the State-owned Parirenyatwa Group of Hospitals and the second is by Dr. Douglas Gwatizo of the private Avenues Clinic in Harare. Both of these reports were also hand delivered to the Respondent State (which it duly signed) by the Secretariat of the African Commission.

158. The Complainant also submitted a medical and psychological report carried out by Professor Han Petter Hougen, Chief Forensic Pathologist at the University of Copenhagen , Denmark and Dr. Onder Ozkalipci, MD Forensic Physician and Medical Director at the International Rehabilitation Council for Victims of Torture in Denmark; a psychological report carried out by Mr. Malose Langa, a Lecturer at the school of Human and Community Development at the University of Witwatersrand in South Africa, and a Consultant Psychologist at the Trauma Clinic at the Center for Studies for Violence and Reconciliation in South Africa who has been providing counseling to the Complainant and an affidavit by Dr Anthony Reeller, a Psychologist and Director of the Research and Advocacy Unit in Harare.

159. The African Commission agrees that the Complainant has submitted more than adequate evidence to support the Victim's allegations of torture and ill-treatment, which at least should have prompted an official investigation. The African Commission also agrees with the Complainant that in seeking to refute the allegations, it is not sufficient for the Respondent State to simply argue that they are unsubstantiated when they are supported by range of documentation. Rather, the Respondent State must provide evidence to the contrary.

160. In Communications 64/92-68/92-78/92_8AR: Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chinoa) v Malawi, the African Commission stated that acts of beating and torture that took place in prisons in Malawi was in contravention of the African Charter. It also stated that aspects of the treatment of Vera and Orton Chirwa such as excessive solitary confinement, shackling within a cell, extremely poor quality food and denial of access to adequate medical care, were also in contravention of Article 5.

161. Similarly in Communications 48/90-50/91-52/91-89/93: Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan,[FN27] the African Commission stated that the Government of Sudan has failed to deal with the very serious allegations of torture and mistreatment made against it. The African Commission stated that since the acts of torture alleged have not been refuted or explained by the Government of Sudan, the African Commission finds that such acts illustrate, jointly and severally, the Government's responsibility for violations of the provisions of Article 5 of the African Charter. The African Commission went on to note that it appreciates the fact that the Government brought some officials to trial for torture, but the scale of the Government's measures is not commensurate with the magnitude of the abuses. The African Commission stated that punishment of torturers is important, but so also are preventive measures such as halting of incommunicado detention, effective remedies under a transparent, independent and efficient legal system, and ongoing investigations into allegations of torture.[FN28] In the instant case, the African Commission has not been given any evidence by Respondent State that any sort of investigation took place.

[FN27] 13th Activity Report, 1999-2000.

[FN28] See also 13th Activity Report: 1999 - 2000.

162. In Communications 54/91-61/91-96/93-98/93-164/97_196/97-210/98 Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania, the communications detail instances of torture, and cruel, inhuman and degrading treatments. During their time in custody, the detainees were beaten, they were forced to make statements, and they were denied the opportunity of sleeping. Both during the trial as well as the period of arbitrary detention, some of the prisoners were held in solitary confinement. The conditions of detention were, at the very least, bad: the prisoners were not fed; they were kept in chains and locked up in overpopulated cells lacking hygiene and access to medical care; some were burnt or buried in sand and left to die a slow death; electrical shocks were administered to their genital organs and they had weights tied on to them; their heads were plunged into water to the point of provoking suffocation; pepper was smeared on their eyes and some were permanently kept in small, dark (or underground) cells which got very cold at night.

163. The African Commission noted that the Government of Mauritania did not produce any argument to counter these facts. The Commission said taken together or in isolation, these acts are proof of widespread utilization of torture and of cruel, inhuman and degrading forms of treatment and constitute a violation of Article 5.

164. In the present matter the African Commission wishes to state that every individual should have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. The prohibition of torture, cruel, inhuman or degrading treatment or punishment is absolute. It notes that Principle 1 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides: All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person. Further, Principle 6 states: No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment. It is worth noting that the term 'cruel, inhuman or degrading treatment or punishment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental. Article 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience.

165. The treatment, thus, meted out to the Victim in the matter under consideration constitutes a breach of the provision of Article 5 of the African Charter and the relevant regional and international human rights instruments. The African Commission also notes the response of the Respondent State on page 2 of its Merit submissions that if indeed the Victim was tortured to the extent he describes, this should clearly have been visible on his first day in court. Is it an admission that the Victim was tortured, but not to the extent described by the Complainant?

166. In Communications 137/94-139/94-154/96-161/97: International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria,[FN29] International PEN alleges that Ken Saro-Wiwa was kept in leg irons and handcuffs and subjected to ill-treatment including beatings and being held in cells which were airless and dirty, then denied medical attention, during the first days of his arrest. There was no evidence of any violent action on his part or escape attempts that would justify holding him in irons. The Government of Nigeria made no written submission in these cases, and has not refuted these allegations in its oral presentation. The African Commission stated that it is well-established jurisprudence of the Commission that where allegations go entirely unchallenged[FN30], it will proceed to decide on the facts presented.[FN31] The African Commission held a violation of Article 5 of the Charter.

[FN29] 12th Activity Report: 1998 – 1999.

[FN30] Italics for emphasis.

[FN31] See the Commission’s decisions in communications 59/91, 60/91, 64/92, 68/92, 78/92,87/93 and 101/93. See also Communications 275/03: Article 19 v Eritrea, 22nd Activity Report: Nov 2006 - May 2007. Eritrea did not deny the Complainant’s contention that the detainees are being held incommunicado, with no access to legal representation or contact with their families, and as the [African] Commission has enunciated in many of its previous decisions, where allegations are not disputed by the State involved, the Commission may take the facts as provided by the Complainant as a give. Nor does the political situation described by Eritrea excuse its actions, as Article 5, permits no restrictions or limitations on the right to be free from torture and cruel, inhuman or degrading punishment or treatment. The Commission thus finds that Eritrea has violated Article 5, by holding the journalists and political dissidents incommunicado without allowing them access to their families.

The African Commission,

167. Declares that the Respondent State has violated the right of the Victim not to be tortured and ill-treated as recognized in Article 5 of the African Charter.

Alleged Violation of Article 6 - right to personal liberty and protection from arbitrary arrest.

Article 6 of the African Charter states:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

168. The Complainant argues that the Victim’s right to liberty was contravened when he was unlawfully detained and the fact that in spite of an order of the High Court, the Victim was detained beyond the stipulated 48 hours. The Complainant does not provide any evidence of the order of the High Court.

169. The Respondent State denies the allegation. Defining the meaning of ‘arbitrary’ (from the Oxford English Dictionary) to mean: “To be decided by one’s liking; dependent upon will or pleasure; at this discretion or option of any one; derive from mere opinion or

preference; not based on the nature of things; hence capricious, uncertain, varying,” it argues that the Victim was arrested on 14 January 2003 and brought to court on 16 January 2003 for contravening section 5(2) (a) (1) of the Public Order Security Act (Chapter 11:17). It states that on his first day in court, he was legally represented and the charges were read in open court and no challenge was made as to the appropriateness of the charges. The Respondent State further argues that Zimbabwe’s Criminal Procedure and Evidence Act (Chapter 9:07) allows a police officer to arrest: “any person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in the first schedule.” The African Commission notes that the Complainant has not challenged that statement.

170. The Respondent State argues that it is up to the court to make a finding as to whether the arrest by the police officer was reasonable in the circumstances. It goes on to say that in fact when the court placed the Victim on remand and advised him to apply for bail in the High Court, it was confirming that there existed reasonable grounds for Victim’s arrest. The Complainant in his rejoinder did not address this statement of the Respondent State. The Respondent State avers that the arrest, therefore, cannot be described as arbitrary in the circumstances. It also argues that the reckoning of time by the Victim is flawed. It states that Section 33(2) of the Interpretation Act, (Chapter 1:01) provides: “Where in an enactment a period of time is expressed to begin on or to be reckoned from a particular day, that day shall not be included in the period.” The Complainant has not addressed this argument of the Respondent in his rejoinder. The Respondent State inform the African Commission that the Victim was arrested on 14 January 2003 and brought to court on 16 January 2003 and therefore the statutory limit of forty-eight (48) hours had not elapsed. The Complainant did not also address this argument in his rejoinder.

171. It is instructive to note that in the Jawara case, the African Commission cited its decision on Communication 101/93; Civil Liberties Organization (in respect of Nigeria Bar Association) v Nigeria wherein it had laid down a general principle with respect to freedom of association that “competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution or international human rights standards.” This principle, therefore, applies not only to freedom of association but also to all other rights and freedoms. For a State to avail itself of this plea, it must show that such a law is consistent with its obligations under the African Charter. In the instant matter, the African Commission notes that the Victim was in custody for only two days and appeared in court on the second day of his arrest.

172. The African Commission has also stated that simply because an arrest is carried out does not necessarily amount to a violation of Article 6. In Communication 48/90-50/91-52/91-89/93: Amnesty International, Comité Loosli Bachelard, Lawyers’ Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan,[FN32] the African Commission stated that this article must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to the security forces in a democratic society. In the instant matter, the African Commission is of the view that following the arrest of the Victim, he was charged with a recognizable offence, allowed to contact a lawyer of his choice and granted bail after two days in custody. That cannot amount to a violation of Article 6. However, the Complainant had the opportunity to deny the statement and detailed response of the Respondent State, as far as the violation of this article is concerned it chose not to do. As the Commission said supra, where an allegation

goes on unchallenged the African Commission will infer that allegation is indeed true. In its Resolution on the Right to Recourse Procedure and Fair Trial, the African Commission had, in expounding on the guarantees of the right to fair trial under the African Charter observed thus:

"... the right to fair trial includes, among other things, the following:

(b) Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them.

[FN32] 13th Activity Report 1999-2000.

173. According to the African Commission's settled case-law, the presumption under Article 6 is in favour of release.[FN33] As established in the Jawara case the second limb of Article 6 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, s/he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable.

[FN33] See Jawara case. Communication 101/93; Civil Liberties Organization (in respect of Nigeria Bar Association) v Nigeria.

174. Continued detention can only be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 6 African Charter. The African Commission has repeatedly stated that the responsibility falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned demand of public interest, hi the instant case the African Commission notes that the Victim spent only two days in custody before being granted bail, which in its view cannot amount to a violation of Article 6 within the circumstances of the case.[FN34]

[FN34] See also the ECHR decisions in Letellier v. France, 26 June 1991, § 35, Series A no. 207, and Yagci and Sargm v. Turkey, 8 June 1995, § 50, Series A no. 319-A). In this connection, the Court reiterates that the burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting his release (see Ilijkov v. Bulgaria, no. 33977/96, § 85, 26 July 2001).

The African Commission,

175. Declares that the Respondent State has not violated the Victim's right to personal liberty and protection from arbitrary arrest as provided in Article 6 of the African Charter.

Alleged Violation of Article 7 - right to have ones cause heard

Article 7(c) and (d) of the African Charter states:

(c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

176. The Complainant avers that the Victim was denied access to legal representation during his detention, and was only allowed access on the day he appeared in court constituting a contravention of his right to fair trial in that this refusal limited his ability to adequately prepare himself for Court beforehand. The African Commission notes that the Complainant have not advanced cogent evidence how the Respondent State violated Article 7(c) and (d) of the African Charter. It also notes that the Complainant have not addressed Article 7(d).

177. The Respondent State refutes the allegation. It argues that the Victim requested for legal representation and his lawyer was contacted and he briefed him and subsequently went to court on 16 January 2003 with that lawyer. The Respondent State avers that the Victim was detained for two nights, which cannot amount to a denial of access to legal representation. The Complainant did not address this issue in his rejoinder.

178. The African Commission has expounded in a number of cases what could constitute a violation of Article 7 of the African Charter. In the Jawara Case, for example, the African Commission stated that given that the Minister of Interior could detain anyone without trial for up to six months, ... the victims will be at the mercy of the Minister who, in this case, will render favour rather than vindicating a right. This power granted to the Minister renders valueless the provision enshrined in Article 7(1)(d) of the African Charter. Similarly in Communication 64/92-68/92-78/92_8AR: Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chinua), Amnesty International (on behalf of Orton and Vera Chinua) v Malawi the African Commission stated that the fact that Vera and Orton Chirwa were tried before the Southern Region Traditional Court without being defended by a counsel constitutes a violation of Article 7(1) (1) [sic]. In the instant matter, the African Commission is aware that the Victim did not immediately have legal representation following his arrest, but such a representation came at least two days later.

179. The African Commission notes that the efficiency of justice is a major component of fair trial and of affective remedies. It is aware that a person charged with an offence must also have adequate time and facilities to prepare a defence and be given the possibilities of a proper examination of materials and witnesses. Moreover, adequate legal and translation assistance must be provided, hi that regard it notes what the Human Rights Committee stated in General Comment 13 on 13 April 1984:

180. Sub-paragraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that

the trial will proceed “without undue delay”, both in first instance and on appeal.

181. The African Commission also wishes to state that the ‘reasonable time’ standard set forth in Article 6 of the African Charter is a subjective one which may differ for civil and for criminal matters. In the instant matter, the African Commission does not accept the arguments of the Complainant that his case was not heard and unduly delayed.

The African Commission,

182. Declares that the Respondent State has not violated the Victim’s right to a have ones cause heard as provided in Article 7(1) (c)(d) of the African Charter.

Alleged Violation of Article 10 (1) - right to free association.

Article 10(1) of the African Charter states: Every individual shall have the right to free association provided that he abides by the law.

183. The Complainant argues that Article 10(1) the African Charter guarantees the right to freedom of association. He argues that the arrest and the consequent acts of torture perpetrated against the Victim owing to his alleged affiliation with the opposition party by representing members of the party in legal matters is contrary to the right to freedom of association.

184. The Respondent State disagrees. It argues that the Victim’s arrest was for contravening a section of POSA following the discovery of a written document on his person. The African Commission is not told what this ‘written document’ is by both parties. Nevertheless, the Respondent State avers that the Victim was not arrested for his association with a political party but rather on the reasonable suspicion of his having contravened the law. It further informs the African Commission that the Attorney General later withdrew charges before plea to enable investigation to be carried as to who the author of the document found in Victim possession was. The Complainant does not deny that statement in its rebuttal. The Respondent State says that the Victim was arrested on the basis that there was reasonable suspicion that he had committed an offence and he was brought before a court of competent jurisdiction, competent in law to hear the case and had jurisdiction over the subject matter. It argues that this, therefore, could not have been in pursuit of an agenda to deny the Victim his freedom of association.

185. In Communication 101/93: Civil Liberties Organization (in respect of the Nigerian Bar Association) v Nigeria, the African Commission stated that freedom of association is enunciated as an individual right and is first and foremost a duty for the state to abstain from interfering with the free formation of associations. It said that there must always be a general capacity for citizens to join, without state interference, in associations in order to attain various ends. In the instant matter, can the arrest and Respondent State? The Victim has not conclusively informed the African Commission that he was arrested for being a member of the MDC. In his initial Complaint he informs the African Commission that on 14 January 2003, he was taking instructions from a Mr Job Sikhala, a Member of Parliament in Zimbabwe for legal representation in a matter involving alleged political harassment by members of the Zimbabwe Republic Police, when riot police stormed the room and arrested him and four others in the room.[FN35] Even though, he inferred that he was at one time a student activist of the MDC, the Respondent State says that the Victim was arrested on the

basis that there was reasonable suspicion that he had committed an offence and he was brought before a court of competent jurisdiction.

[FN35] Para 8 initial Complaint.

186. In reaching a conclusion as to whether Article 10 has been violated by the Respondent State, the African Commission is of the considered opinion that a legitimate government do have the right to effect an arrest if there is reasonable suspicion that a crime is being planned or being committed, as long as due process is followed and reasonable force used to effect such arrest. In Communication 101/93: Civil Liberties Organization (in respect of the Nigerian Bar Association) v Nigeria, the African Commission stated that in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international human rights standards.

187. Nothing in the submissions of the Complainant suggests that the Respondent State has interfered with such a right.[FN36] In the above mentioned Communication, the African Commission found a violation of Article 10 against Nigeria because the body of Benchers was dominated by representatives of the government and has wide discretionary powers. This interference with the free association of the Nigerian Bar Association, the African Commission said, was inconsistent with the preamble of the African Charter in conjunction with the UN Basic Principle on the Independence of the Judiciary thereby constitutes a violation of Article 10 of the African Charter. The African Commission takes the view that freedom of association not only concerned the right to form a political party, but also guaranteed the right of such a party, once formed, to carry on its political activities freely. However, nothing in the Complainants file suggest that this right has been infringed by the Respondent State.

[FN36] See also Communication 251/02: Lawyers of Human Rights v Swaziland, where the African Commission stated that the Respondent State should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international standards; and that the regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter. This principle does not apply to freedom of association alone but also to all other rights and freedoms enshrined in the [African] Charter, including, the right to freedom of assembly.

The African Commission,

188. Declares that the Respondent State has not violated the Victim's right to free association as provided in Article 10 of the African Charter.

Alleged Violation of Article 14 - The Right to Property

Article 14 of the African Charter states: The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the

community and in accordance with the provisions of appropriate laws.

189. The Complainant states that because agents of the Respondent State took away the Victim's belongings including documents, and cell phone, the Respondent State violated Article 14.

190. The Respondent State submits that no violation of Article 14 occurred as the documents seized from Victim were being used during the course of investigation. The African Commission agrees. It flies in the face of logic and common sense that if a suspect is arrested by the police on the reasonable ground that an offence is being committed, then to prevent the police from searching the suspect and seizing all documents and belongings in his or her possession on the ground that such a search and confiscation of the belongings may violate some laws is quite illogical. All states in the world have provisions in their laws that allow the properly constituted and competent authorities, especially in the interest of public need or in the general interest of the community to conduct a dignified search of a suspect. In the instant matter the Respondent State has cited Section 49 of the Criminal Procedure and Evidence Act, (Chapter 9:07) which empowers it to seize any article which it believes may afford evidence of the commission or suspected commission of an offence, within Zimbabwe. The African Commission notes that in its rejoinder the Complainant has not contested the arguments of the Respondent State.

191. But on a more substantive point of law, what is a 'property right' (within the context of this matter) that accords with regional and international law? "Property rights" have an autonomous meaning under regional and international human rights law, which supersedes national legal definitions. In *Malawi African Association and Others v. Mauritania*, the African Commission considered land, houses etc as 'property' for the purposes of Article 14 of the African Charter.[FN37] The African Commission in the *Ogoni* case also found that the 'right to property' includes not only the right to have access to one's property and not to have one's property invaded or encroached upon,[FN38] but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.[FN39]

[FN37] *Malawi African Association and Others v. Mauritania*. African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), para. 128. See also *Communications 54/91 et al v Mauritania*, 13th Activity Report, para. 128.

[FN38] *The Ogoni Case* (2001), para. 54.

[FN39] *Communication No. 225/98 v Nigeria*, 14th Annual Report, para. 52.

192. The African Commission also notes that the ECHR have recognized that 'property rights' could also include the economic resources and rights over the common land of the applicants.[FN40] Similarly, both the European Court of Human Rights (ECHR) and Inter American Court of Human Rights have examined the specific facts of individual situations to determine what should be classified as 'property rights', like registered title.[FN41] The case of *Dogan and others v Turkey*[FN42] is instructive in the instant Communication. Although the Applicants were unable to demonstrate registered title of lands from which they had been forcibly evicted by the Turkish authorities, the European Court of Human Rights observed that; [T]he notion 'possessions' in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and

interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’ for the purposes of this provision.[FN43] The African Commission is certain that in the minds of the framers of the African Charter, they did not envisage the temporary seizure of a mobile phone or diary as part of the property rights that should be robustly defended by Article 14.

[FN40] Dogan and Others v. Turkey, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paras. 138-139.

[FN41] See The Mayagna Awas Tingni v. Nicaragua, Inter-American Court of Human Rights, (2001), para. 146 (hereinafter the Awas Tingni Case 2001). The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law.

[FN42] Dogan and Others v. Turkey, European Court of Human Rights, Applications 8803-881 and 8815-8819/02 (2004). paras 138-139.

[FN43] Dogan and Others v. Turkey, European Court of Human Rights, Applications 8803-881 and 8815-8819/02 (2004). para 138-139.

The African Commission,

193. Declares that the Respondent State has not violated the Victim’s right to property as provided in Article 14 of the African Charter.

RECOMMENDATIONS

194. In view of the above, the African Commission finds that the Respondent State is in violation of Article 5 of the African Charter. The African Commission recommends that the Respondent State:

1. Pay adequate compensation to the Victim for the torture and trauma caused.
2. That an inquiry and investigation be carried out to bring those who perpetrated the violations to justice.
3. Report on the implementation of these recommendations within three months from the date of notification.

Done in Banjul, The Gambia, at the 51st Ordinary Session of the African Commission on Human and Peoples’ Rights, from 18 April - 2 May 2012.