

# 245/02 : Zimbabwe Human Rights NGO Forum v Zimbabwe

## Summary of Facts

1. The communication is submitted by the Zimbabwe Human Rights NGO Forum, a coordinating body and a coalition of twelve (12) Zimbabwean NGO human rights based in Zimbabwe.

2. The Complainant states that in February 2000, the country held a Constitutional Referendum in which the majority of Zimbabweans voted against the new government drafted Constitution.

3. The Complainant alleges that following the Constitutional Referendum there was political violence, which escalated with farm invasions, by war veterans and other landless peasants. That during the period between February and June 2000 when Zimbabwe held its fifth parliamentary elections, ZANU (PF) supporters engaged in a systematic campaign of intimidation aimed at crushing support for opposition parties. It is alleged that violence was deployed by the party as a systematic political strategy in the run up to the Parliamentary elections.

4. The Complainant also alleges that in the 2 months before the Parliamentary elections scheduled for 24<sup>th</sup> and 25<sup>th</sup> June 2002, political violence targeted especially white farmers and black farmers workers, teachers, civil servants and rural villagers believed to be supporting opposition parties.

5. Such violence included dragging farm workers and villagers believed to be supporters of the opposition from their homes at night, forcing them to attend reeducation sessions and to sing ZANU (PF) songs. The Complainant alleges that men, women and children were tortured and there were cases of rape. Homes and businesses in both urban and rural areas were burnt and looted and opposition members were kidnapped, tortured and killed.

6. It is also alleged that ZANU (PF) supporters invaded numerous secondary schools; over 550 rural schools were disrupted or closed as teachers, pupils and rural opposition members numbering 10,000 fled violence, intimidation and political reeducation. Other civil servants in rural areas such as doctors and nurses were targeted for supposedly being pro-Movement for Democratic Change (MDC). Nyamapanda border post was closed for 2 days as civil servants fled ZANU (PF) supporters. Bindura University was closed by a student boycott after ZANU (PF) members were asked to EX.CL/322 (X) Page 55 produce a list of MDC supporters and one MDC supporter was kidnapped and assaulted by ZANU (PF) supporters/members posing as MDC.

7. It is also alleged that numerous activists including Morgan Tsvangirai - President of the main opposition party the MDC, Grace Kwinjeh, a journalist and a human rights activist, the Daily News Editor - Geoff Nyarota, an Anglican Priest - Tim Neill, MDC candidate from Chimanimani - Roy Bennet, Robin Greaves, a Nyamandlovu farmer and other farmers received death threats.

8. The Complainant alleges that there were reports of 82 deaths as a result of organised violence between March 2000 and 22<sup>nd</sup> November 2001.

9. The Complainant also allege that following the elections, MDC contested the validity of the outcome of the elections in 38 constituencies won by ZANU (PF) and this prompted another wave of violence.

10. The Complainant claims that human rights abuses were reported in most of those cases that were brought before the High Court. However, those individuals that testified in the elections challenges before the Harare High Court, were subjected to political violence on returning home and thus forcing some to refrain from testifying and others to flee their homes due to fear of being victimized.

11. The Complainant also states that in some cases MDC supporters were also responsible for minor assaults against some ZANU (PF) stalwarts.

12. The Complainant alleges that various officials of the ruling ZANU (PF) party condoned the use of violence for political gains and quotes statements made by President Mugabe, Josaya Hungwe of Masvingo Province, the Minister of Foreign Affairs - Stan Mudenge, war veterans Andrew Ndhlovu and Edmon Hwarare that reinforced the ongoing violence.

13. The Complainant also alleges that the primary instigators of this violence were war veterans who operated groups of militias comprising of ZANU (PF) youth and supporters. They also allege that the State was involved in this violence through Zimbabwe Republic Police (ZRP), the Zimbabwe National Army (ZNA) and the Central Intelligence Organisation (CIO) specifically through facilitating farm invasions.

**14.** The Complainant states that prior to the June 2000 parliamentary elections, the ZRP on numerous occasions turned a blind eye to violence perpetrated against white farmers and MDC supporters. It is alleged that the police forces have generally failed to intervene or investigate the incidents of murder, rape, torture or the destruction of property committed by the war veterans. Furthermore, a General Amnesty for Politically Motivated Crimes gazetted on 6<sup>th</sup> October 2000 absolved most of the perpetrators from prosecution. While the Amnesty excluded those accused of murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms or any offence involving fraud or dishonesty very few persons accused of these crimes have been prosecuted.

## Complaint

**15.** The Complainant alleges a violation of Articles 1, 2, 3, 4, 5, 6, 9, 10, 11 and 13 of the African Charter on Human and Peoples' Rights.

## Procedure

**16.** The communication was received at the Secretariat of the Commission on 3<sup>rd</sup> January 2002.

**17.** On 8<sup>th</sup> January 2002 the Secretariat acknowledged receipt of the communication and informed the Complainant that the matter would be scheduled for consideration by the Commission at its 31<sup>st</sup> Session.

**18.** During its 31<sup>st</sup> ordinary session held from 2<sup>th</sup> - 16<sup>th</sup> May 2002 in Pretoria, South Africa, the African Commission examined the complaint and decided to be seized of it.

**19.** On 29<sup>th</sup> May 2002 the parties to the communication were informed of the Commission's decision and requested to forward their submissions on admissibility to the Secretariat within 3 months.

**20.** At its 32<sup>nd</sup> Ordinary Session held from 17<sup>th</sup> - 23<sup>rd</sup> October 2002 in Banjul, The Gambia, the African Commission examined the communication and decided to defer its consideration on admissibility to the 33<sup>rd</sup> Ordinary Session and the parties to the communication were informed accordingly.

**21.** At its 33<sup>rd</sup> Ordinary Session held from 15<sup>th</sup> - 29<sup>th</sup> May 2003, in Niamey, Niger, the African Commission heard oral submissions from both parties to the communication and decided to defer its decision on admissibility to the 34<sup>th</sup> Ordinary Session.

**22.** On 10<sup>th</sup> June 2003, the Secretariat of the African Commission wrote informing the parties to the communication of the African Commission's decision and requested them to forward their written submissions on admissibility within 2 months.

**23.** At its 34<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 6<sup>th</sup> - 20<sup>th</sup> November 2003, the African Commission examined the communication and decided to declare the communication admissible.

**24.** By letter dated 4 December 2003, the parties to the communication were informed of the African Commission's decision and requested to submit their written submissions on the merits within 3 months.

**25.** At its 35<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 21<sup>st</sup> May - 4<sup>th</sup> June 2004, the African Commission examined the communication and decided to defer it to the 36<sup>th</sup> Ordinary Session for further consideration.

**26.** By Note Verbale dated 15<sup>th</sup> June 2004, and by letter bearing the same date, the Secretariat of the African Commission informed the parties accordingly.

**27.** At its 36<sup>th</sup> Ordinary Session held from 23 November - 7 December 2004, in Dakar, Senegal, the African Commission considered the communication and deferred its decision to the 37<sup>th</sup> Ordinary session.

**28.** By Note Verbale of 16 December 2004 and by letter of 20 December 2004, the Secretariat informed the State and the Complainant respectively of the decision of the African Commission.

**29.** At its 37<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 27 April to 11 May 2005, the African Commission deferred consideration of the communication due to lack of time.

**30.** By note verbale dated 24 May 2005 the State was notified of the decision of the African Commission. By letter of the same date the Secretariat of the African Commission notified the Complainant.

**31.** At its 38<sup>th</sup> ordinary session held from 21 November to 5 December 2005, the African Commission differed consideration on the merits to the 39<sup>th</sup> session.

**32.** By Note Verbale of 15 December 2005 and by letter of the same date, the Secretariat of the African Commission notified both parties of the African Commission's decision.

**33.** At its 39<sup>th</sup> Ordinary Session held from 11 - 25 May 2006, the African Commission considered the communication and found the Republic of Zimbabwe in violation of certain provisions of the African Charter.

**34.** By Note Verbale of 29 May 2006 and by letter of the same date, both parties were notified of the African Commission's decision.

**35.** The Commission took a decision on the merits of the communication during its 39<sup>th</sup> Ordinary Session, which was held from 11<sup>th</sup> to 25<sup>th</sup> May 2006 in Banjul, The Gambia.

## Law

### Admissibility

**36.** The law relating to 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 for a communication to be declared admissible.

**37.** In the present communication, the Respondent State submitted that the communication should be declared inadmissible by virtue of the fact that the communication did not satisfy the requirements contained in Articles 56(4) and (5) of the African Charter.

**38.** Article 56(4) of the African Charter provides that -: Communications ... received by the Commission shall be considered if they-: (4) are not based exclusively on news disseminated through the mass media

**39.** The Respondent State alleged that the statement of facts submitted by the Complainant was based on information disseminated through the mass media which information should be considered cautiously. They submit that the statements recorded by the Complainant in Appendix 1 are tailor-made to suit press reports. The State indicated that an illustration of such a case was when an independent newspaper, the Daily News on 23<sup>rd</sup> April 2002 published a story furnished by one Mr. Tadyanemhanda stating that his wife Brandina Tadyanemhanda had been decapitated by ZANU (PF) members in front of her children for the sole reason that she was a supporter of the MDC Party, noting that the story was later found to be false. That Mr. Tadyanemhanda's son, Tichaona Tadyanemhanda was listed as one of those persons whose death was reported to have occurred as a result of the political violence that took place from March 2000 to 30 November 2001. The Respondent State concluded that, as indicated by the Police, the death of Tichaona Tadyanemhanda was never political.

**40.** The Respondent State maintained that during the period prior to, during and following the Referendum, there was a concerted effort by the "so called independent press" and the international press to publish false stories in order to tarnish Zimbabwe's image. The State thus submitted that the media reports in Appendix 2 of the Complainant's submissions were not meant to buttress the accounts of eyewitnesses but that the statement of facts by the complaint was a presentation of the contents of newspaper articles.

**41.** In their submissions to the African Commission, the Complainant stated that the communication was not based solely on reports gathered from the press. They asserted that Appendix 1 contained statements made by victims, while Appendix 4 was a judgment of the High Court of Zimbabwe and Appendix 2 contained selected extracts of media reports and the information therein had been provided in order to buttress the statements made by victims. According to the Complainant, the newspaper reports were meant to corroborate the direct evidence provided by the victims.

**42.** The African Commission has had the opportunity to review the documents before it as submitted by the Complainant. While it may be difficult to ascertain the veracity of the statements allegedly made to the Complainant by the alleged victims, it is however evident through the judgment of the High Court of Zimbabwe that the communication did not rely "exclusively on news disseminated through the mass media" as the Respondent State would like the African Commission to believe.

**43.** Besides, this Commission has held in Communications 147/95 and 149/96 15, that "while it would be dangerous to rely exclusively on news disseminated through the mass media, it would be equally damaging if the African Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word 'exclusively'. Based on this reasoning, the African Commission is of the opinion that the communication is

not based "exclusively on news disseminated through the mass media. The operative term being "exclusively".

44. The other provision of the Charter in contention between the parties is Article 56(5) of the African Charter. This sub article provides that ...communications ... received by the Commission shall be considered if they-: (5) are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged

45. The Respondent State submitted in this regard that the Complainant failed to exhaust domestic remedies by virtue of failing to pursue the alternative remedy of lodging a complaint with the Office of the Ombudsman, which is mandated to investigate human rights violations. The African Commission holds that the internal remedy to which Article 56(5) refers entails remedies sought from courts of a judicial nature, and the Office of the Ombudsman is certainly not of that nature. <sup>1</sup>

## **Specific Case of Talent Mabikka**

46. With respect to the case of Tichaona Chiminya and Talent Mabika (Appendix 4), the Complainant claimed that they attempted to access domestic remedies as shown by the record of the High Court. In this case, the Judge ordered the transmission of the record of proceedings to the Attorney General with a view to instituting criminal proceedings against the murderers of Tichaona Chiminya and Talent Mabika. The Complainant stated that as at when the communication was lodged to the African Commission, no such prosecution had taken place.

47. The African Commission is in possession of a copy of the proceedings of the High Court of Zimbabwe relating to the Buhera North Election challenge and where Justice Devitte made an order with respect to the case of Chiminya and Mabika. From the proceedings, the High Court ordered that "in terms of Section 137 of the Act, the record of evidence must be transmitted by the Registrar to the Attorney General 'with a view to the institution of any prosecution proper to be instituted in the circumstances' and the attention of the Attorney General is drawn to the evidence on the killing of Chiminya and Mabika." The High Court Order was made on 2 March and 26 April 2001 and the Complainant argued that at the time of bringing the communication, about 8 months later, on 3 January 2002, there had been no prosecution of the suspected murderers.

48. The Respondent State argued that the order made by the High Court called upon the Attorney General to exercise his powers under Article 76 of the Constitution of Zimbabwe to direct the police to carry out investigations and depending on the outcome of those investigations prosecute the case. The Respondent State submitted that the Attorney General received the docket relating to the killing of Chiminya and Mabika from the police and that it was evident from the docket that it had been opened the very day that the incident in question had happened and that the recording of statements on the case had commenced immediately. However, after perusing the docket, the Attorney General referred the docket back to the police with directions on what further investigations should be conducted into the matter before the matter could be prosecuted. The Respondent State submitted that as at when the communication was submitted to the African Commission, the matter was still being investigated and that the Police had recorded 23 statements from witnesses.

49. The African Commission is of the view that with respect to the alleged murder of Chiminya and Mabika, the matter was still before the courts of the Respondent State and cannot be entertained by it.

50. However, the Commission is of the opinion that there are no domestic remedies available to all the persons referred to in Appendix 1, who as victims, were effectively robbed of any remedies that might have been available to them by virtue of Clemency Order No 1 of 2000. The Clemency Order granted pardon to every person liable to criminal prosecution for any politically motivated crime committed between 1 January 2000 and July 2000. The Order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period.

51. In terms of the Clemency Order, "a politically motivated crime" is defined as -: (a) Any offence motivated by the object of supporting or opposing any political purpose and committed in connection with: (i) The Constitutional referendum held on the 12<sup>th</sup> and 13<sup>th</sup> of February 2000; or (ii) The general Parliamentary elections held on 24<sup>th</sup> and 25<sup>th</sup> June 2000; whether committed before, during or after the said referendum or elections."

52. The only crimes exempted from the Clemency Order were murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty.

**53.** The Complainant averred that the exceptions in the Clemency Order were a hoodwink; that even where reports were made by victims of criminal acts not covered by the Clemency Order, arrests were never made by the police neither were investigations undertaken and therefore there was no prosecution of the perpetrators of the violence, concluding that, the Clemency Order was constructively, a blanket amnesty.

**54.** The Complainant argued further that it could not challenge the Clemency Order in a court of law because the President of Zimbabwe, who was exercising his prerogative powers in terms of the Constitution of Zimbabwe, ordered it.

**55.** Additionally, the Complainant argued at the 33<sup>rd</sup> Ordinary Session of this Commission, that it was not possible to exhaust domestic remedies during the period in question because there was pervasive violence; and gross and massive human rights violations took place on a large scale and more particularly, politically motivated violence. The Complainant referred the African Commission to Justice Devitte's judgment in *CFU v Minister of Lands & Others*, 2000(2) ZLR 469(s), in which the Judge summarised the extent of the violence that transpired during the period that the communication covered. In that judgment Justice Devitte stated that: "Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. The Government has flouted laws made by parliament. The activities of the past nine months must be condemned."

**56.** Furthermore, the Complainant argued that the violence was extended to some members of the Judiciary. The Complainant submitted that during the time in question, some members of the judiciary were threatened, several magistrates were assaulted while presiding over politically sensitive matters and several Supreme Court judges were forced to resign. According to the Complainant, there were instances where persons approached the courts and sought to interdict the government of Zimbabwe or the persons who had forcefully settled themselves on private properties; court orders were granted but subsequently they were ignored because the government of Zimbabwe said it could not allow itself to follow court decisions that went against government policy. The Complainant asserted that in the overall context of such a situation there was no realistic hope of getting a firm and fair hearing from judicial system that had been so undermined by the Respondent State.

## **State Party's Response**

**57.** Responding to the Complainant's submission relating to the effect of the Clemency Order, the Respondent State submitted that the victims of the criminal acts covered by the Clemency Order could have and could still institute civil suits and sought to be compensated, which according to the Respondent State, would be more beneficial to the victims than the imprisonment of the perpetrators of the crimes.

**58.** In its oral submissions during the 33<sup>rd</sup> Ordinary Session of the African Commission, the Respondent State argued that the Complainant could have sought alternative remedies under Section 24(1) of the Constitution of Zimbabwe. This provision accords aggrieved persons the right to seek redress from the Supreme Court where it is alleged that the Declaration of Rights has been, is being or is likely to be contravened in relation to them.

**59.** The Respondent State also submitted that the Complainant had the right and could have challenged the legality of the Clemency Order in Court. The Respondent EX.CL/322 (X) Page 62 State argued that there had been cases in Zimbabwe where persons had challenged the legality of the prerogative of the President and that such a challenge was before the courts of Zimbabwe. The Respondent State argued that challenging the legality of Clemency Order would have eventually paved the way for prosecuting the persons that committed those criminal acts covered by the Clemency Order; therefore by neglecting to challenge the legality of the President's prerogative, the Complainant had failed to exhaust local remedies. The Respondent State argued further that until the courts in Zimbabwe rule otherwise on the matter of the legality of the presidential prerogative, the Complainant could still utilise the courts in Zimbabwe to challenge the legality of the Clemency Order.

**60.** With respect to the situation prevailing during the period in question, the Respondent State admitted that of the numerous cases reported to the police, only a small percentage of the murder cases were committed to the High Court. The Respondent State argues that, at the time its criminal justice system could not have been expected to investigate and prosecute all the cases and ensure that remedies were given, bearing in mind the considerable number of cases that were reported.

**61.** The situation notwithstanding, the Respondent State argued that the Complainant could have attempted to ask the Attorney General to invoke his powers under Section 76(4a). Section 76(4a) of the

Constitution of Zimbabwe mandates the Attorney General to "require the Commissioner of Police to investigate and report to him on any matter which, in the Attorney General's opinion, relates to any criminal offence or alleged or suspected criminal offence, and the Commissioner of Police shall comply with that requirement". The Respondent State argued that except in the case of Tichaona Chiminya and Talent Mabika, the Complainant had made no attempts to request the Attorney General to invoke Section 76(4a) in relation to the reported cases neither did they seek to find out from the Attorney General what course of action had been taken with respect to those cases.

**62.** The Respondent State also submitted that if all else was not possible, the Complainant could have instituted private prosecutions against those persons alleged to have committed crimes and had not been prosecuted by the State in accordance with Section 76(4) of the Constitution of Zimbabwe.

## **African Commission's decision on admissibility**

**63.** The Complainant in this communication states that during the period in question, the criminal acts that were committed ranged from assault, arson, theft, torture, kidnap, torture, murder etc and these acts were directed towards persons perceived to be or known as supporters of the opposition and as such were politically motivated.

**64.** The African Commission holds the view that by pardoning "every person liable for any politically motivated crime ..." the Clemency Order had effectively foreclosed the Complainant or any other person from bringing criminal action against persons who could have committed the acts of violence during the period in question and upon which EX.CL/322 (X) Page 63 this communication is based. By so doing, the Complainant had been denied access to local remedies by virtue of the Clemency Order<sup>17</sup>.

**65.** Exhaustion of local remedies does not mean that the Complainants are required to exhaust any local remedy, which may be impractical or even unrealistic. Ability to choose which course of action to pursue when wronged is essential and clearly in the instant communication the one course of action that was practical and therefore realistic for the victims to pursue - that of criminal action was foreclosed as a result of the Clemency Order.

**66.** The Respondent State also submitted that the Complainant failed to exhaust domestic remedies when they did not challenge the legality of the President's prerogative to issue a Clemency Order.

**67.** The African Commission is of the view that asking the Complainant to challenge the legality of the Clemency Order in the Constitutional Court of Zimbabwe would require the Complainant to engage in an exercise that would not bring immediate relief to the victims of the violations. The African Commission is aware that the situation prevailing in Zimbabwe at the time in question was perilous and therefore required the State machinery to act fast and firmly in cases such as this in order to restore the rule of law. To therefore ask victims in this matter to bring a constitutional matter before being able to approach the domestic courts to obtain relief for criminal acts committed against them would certainly result into going through an unduly prolonged procedure in order to obtain a remedy, an exception that falls within the meaning of Article 56(5) of the African Charter.

**68.** It is argued by the Respondent State that before bringing this matter to the African Commission, the Complainant could have utilised the available domestic remedies by requesting the Attorney General to invoke his powers under Article 76(4a) or undertaken private prosecution of the persons alleged to have committed the said criminal acts under Article 76(4).

**69.** The African Commission believes that the primary responsibility for the protection of human rights in a country lies with the government of that country. In the instant case, the international community in general and the African Commission paid particular attention to the events that took place in the run up to the referendum in Zimbabwe in February 2000 right up to the end of and after the Parliamentary elections of June 2002. The Respondent State was sufficiently informed and aware of the worrying human rights situation prevailing at the time.

**70.** The responsibility of maintaining law and order in any country lies with the State specifically with the police force of that State. As such, it is the duty of the State to ensure through its police force that where there is a breakdown of law and order, the 17 Communications 54/91, 61/91, 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/Mauritania perpetrators are arrested and brought before the domestic courts of that country. Therefore any criminal processes that flow from this action, including undertaking investigations to make the case for the prosecution are the responsibility of the State concerned and the State cannot abdicate

that duty. To expect victims of violations to undertake private prosecutions where the State has not instituted criminal action against perpetrators of crimes or even follow up with the Attorney General what course of action has been taken by the State as the Respondent State seems to suggest in this matter would be tantamount to the State relinquishing its duty to the very citizens it is supposed to protect. Thus, even if the victims of the criminal acts did not institute any domestic judicial action, as the guardians of law and order and protectors of human rights in the country, the Respondent State is presumed to be sufficiently aware of the situation prevailing in its own territory and therefore holds the ultimate responsibility of harnessing the situation and correcting the wrongs complained of 18.

71. It is apparent to the African Commission that the human rights situation prevailing at the time this communication was brought was grave and the numbers of victims involved were numerous. Indeed the Respondent State concedes that its criminal justice system could not have been expected to investigate and prosecute all the cases reported and ensure that remedies are given. This admission on part of the Respondent State points to the fact that domestic remedies may have been available in theory but as a matter of practicality were not capable of yielding any prospect of success to the victims of the criminal assaults.

72. Thus, for the reasons outlined above, the African Commission declares this communication admissible and in coming to this conclusion, would like to reiterate that the conditions laid down in Article 56(5) are not meant to constitute an unjustified impediment to access international remedies. As such, the African Commission interprets this provision in light of its duty to protect human and peoples' rights and therefore does not hold the requirement of exhaustion of local remedies to apply literally in cases where it is believed that this exercise would be impractical or futile.

## **The Law**

### **Merits**

#### **Complainant's submissions on the Merits**

##### **Allegation of violation of Article 1 of the African Charter**

73. The Complainant submitted that in terms of Article 1 of the African Charter, the obligation of States Parties to respect the rights enshrined in the Charter entails an obligation to refrain from conducts or actions that contravene or were capable of 18 Communications 54/91, 61/91, 98/93, 164/97 & 196/97, 210/98 Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme & RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanienne des Droits de l'Homme/ Mauritania. See also 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/Sudan.

impeding the enjoyment of the rights and by so doing ensuring that human rights were protected. The Complainant submitted further that to recognise the rights and duties enshrined in the African Charter, States Parties also committed themselves to respect those rights and to take measures to give effect to them 19.

74. The Complainant went on to say that this duty pertains to the regulatory functions of the Member State to prevent violations of rights by both State agents and other persons or organisations that were not State agents. This, according to the Complainant, may necessitate the adoption of legislative, policy and administrative measures to prevent unwarranted interference with the enjoyment of these rights. Such measures include investigating allegations of violations as well as prosecuting and punishing those responsible for violations contained in the African Charter 20.

75. It is submitted by the Complainant that in the present communication State agents were directly involved in committing serious human rights violations such as in the case of the extra judicial execution of Tichaona Chiminya and Talent Mabika in Manicaland Province by an officer of the Central Intelligence

Organisation.

**76.** It is also claimed that violent acts were carried out by State agents acting under the guise of public authority. According to the Complainant, there were instances where police officers refused to record and investigate complaints of victims of various abuses thereby removing the protection of the law from the victims. Annexed to the communication as appendix one were statements allegedly made by alleged victims of violence stating that they made reports to the police but no action was taken, neither was any arrests made. Most of them claimed the Police refused to investigate their complaints because they were in the opposition MDC party.

**77.** The Complainant averred that the Government of Zimbabwe failed to provide security to members of opposition political parties thereby allowing serious or massive violations of human rights, adding that, the law enforcement agents on several occasions failed to intervene to prevent serious violations of human rights. The Complainant argued that it is the primary responsibility of the Government of Zimbabwe to secure the safety and the liberty of all of its citizens and to conduct investigations into allegations of torture, murder and other human rights violations<sup>21</sup>.

**78.** Regarding the Clemency Order No 1 of 2000 granting a general amnesty for politically motivated crimes committed in the period preceding the June 2000 general elections, the Complainant submitted that by failing to secure the safety of its citizens and by granting a general amnesty, the Respondent State had failed to respect the 19 Communication 204/97 - Mouvement Burkinabe des Droits de l'Homme et des Peuples/Burkina Faso and Communication 74/92 - Commission Nationale des Droits de l'Homme et des Libertes/Chad. <sup>20</sup> See Valesquez Rodriguez Case, Inter-American Court of Human Rights, Judgment of 29 July 1988 paragraphs 160 - 167. <sup>21</sup> Communication 74/92 - Commission Nationale des Droits de l'Homme et des Libertes/Chad. obligations imposed on it under Article 1 of the African Charter. Any violation of the provisions of the African Charter automatically means a violation of Article 1 of the African Charter and that goes to the root of the African Charter <sup>22</sup> since the obligations imposed by Article 1 of the African Charter are peremptory <sup>23</sup>.

Allegation of violation of Article 2 of the African Charter - Non-discrimination

**79.** The Complainant alleged a violation of Article 2 of the African Charter which provides that "every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status".

**80.** The Complainant submitted further that the Respondent State denied the victims their rights as guaranteed by the African Charter on the basis of their political opinions, and by so doing, the Respondent State violated Article 2 of the African Charter.

**81.** Article 2 of the African Charter guarantees enjoyment of the rights enshrined in the African Charter without distinction of any kind including political opinion <sup>24</sup> and the African Commission has held that the rights guaranteed in Article 2 are an important entitlement as the availability or lack of them affects the capacity of one to enjoy many other rights<sup>25</sup>. Allegation of violation of Article 3(2) of the African Charter

**82.** The Complainant also alleged a violation of Article 3(2) of the African Charter which provides that "every individual shall be entitled to equal protection of the law".

**83.** The Complainant asserted that the police selectively enforced the law to prejudice victims of gross violations of human rights. The Complainant argued that the statements appended as appendix one to the communication revealed that the police refused to record and investigate complaints filed by the victims in violation of Article 3(2) of the African Charter.

**84.** The Complainant requested the African Commission to have due regard to the Zimbabwe Supreme Court case of Chavunduka & anor v Commissioner of Police <sup>26</sup> <sup>22</sup> Consolidated communication 147/95 and 149/96 - Sir Dawda K. Jawara/The Gambia. <sup>23</sup> Communication 211/98 - Legal Resources Foundation/Zambia. <sup>24</sup> Consolidated communication 54/91, 61/91, 98/93, 164/97, 196/97, 210/98 - Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Inter africaine des Droits de l'Homme, RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme/Mauritania. <sup>25</sup> Communication 211/98 - Legal Resources Foundation/Zambia. <sup>26</sup> Chavunduka & anor v Commissioner of Police 2000(1) ZLR 418 (S).

when interpreting Article 3(2) of the African Charter, noting that the request was based on the African Commission's own jurisprudence which states that in interpreting the African Charter, the African Commission may have regard to principles of law laid down by States Parties to the African Charter and African Practices consistent with international human rights norms and standards. <sup>27</sup> In the Chavunduka matter, the Supreme Court held that the police have the public duty to enforce the law. Consequently the



entitlement of every person to the equal protection of the law embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator and the bringing of him or her before a court. Allegation of violation of Article 4 of the African Charter

**85.** The Complainant alleged a violation of Article 4 of the African Charter. Article 4 of the African Charter provides that "human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".

**86.** The African Commission considers 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."<sup>28</sup>

**87.** The Complainant claimed that numerous people were victims of extra-judicial or summary executions, attacks or attempted attacks against their physical integrity and acts of intimidation. Documents attached by the Complainant to support this claim include the judgment of the High Court of Zimbabwe in the Buhera North Election Petition; a list of persons who died between March 2000 and 31 December 2001 as a result of what it believed was politically motivated violence and extracts of newspaper articles.

**88.** The Complainant submitted further that some of the executions were carried out by ZANU (PF) supporters and war veterans but also that extra-judicial or summary executions carried out by any other State agents such as an officer of the Central Intelligence Organisation are also a violation of Article 4 of the African Charter.

**89.** The Complainant further asserted that whether all levels of the Government were aware of the acts complained of or that such acts were outside the sphere of the agent's authority or violated Zimbabwean law was irrelevant for the purpose of establishing whether the respondent State was responsible under international law for the violations of human rights as alleged in the communication. The Complainant maintained that the 27 Communication 218/98 - Civil Liberties Organisation, Legal Defence Centre, Legal Defence & Assistance Project/Nigeria; Communication 225/98 - HURILAWS/Nigeria; See also Article 61 of the African Charter. 28 Communication 223/98 - Forum of Conscience/Sierra Leone. State is required under Article 1, to take all reasonable measures to ensure that people within its jurisdiction were treated in accordance with international human rights norms and standards<sup>29</sup>.

**90.** Furthermore, the Complainant averred that the right to life read together with the State's general obligation required by implication that there should be some form of effective official investigation when there has been an extra-judicial execution. This obligation is not confined to cases where it has been established that the killing was caused by an agent of the State <sup>30</sup>.

**91.** The Complainant referred the Commission to the European Court decision in *Jordan v the United Kingdom* <sup>31</sup> which stated that "an effective official investigation must be carried out with promptness and reasonable expedition. The investigation must be carried out for the purpose of securing the effective implementation of domestic laws, which protect the right to life. The investigation or the result thereof must be open to public scrutiny in order to secure accountability. For an investigation into a summary execution carried out by a State agent to be effective, it may generally be regarded as necessary for the person responsible for the carrying out of the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence".

**92.** The Complainant submitted that in the present communication there were no effective official investigations carried out in cases of extra-judicial or summary executions noting that this was because the very police which was implicated in failing to intervene and stop the murders were responsible for carrying out the investigations. The Complainant referred the African Commission to its jurisprudence in several cases brought against Sudan with respect to the situation pertaining in that country between 1989 and 1993. In those communications, the African Commission held that "investigations into extra-judicial executions must be carried out by entirely independent individuals, provided with the necessary resources, and their findings must be made public and prosecutions initiated in accordance with the information uncovered"<sup>32</sup>. Allegation of violation of Article 5 of the African Charter

**93.** The Complainant also alleged a violation of Article 5 of the African Charter which provides that "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 <sup>29</sup> See *Valesquez Rodriguez Case*, Inter-American Court of Human Rights, Judgment of 29 July 1988 paragraphs 170, 177 and 183. <sup>30</sup> *Sabuktekin v Turkey* (2003) <sup>36</sup> EHRR 19. <sup>31</sup> *Jordan v United Kingdom* (2003) <sup>37</sup> EHRR 2. <sup>32</sup> Consolidated communication 48/90, 50/91, 52/91, 89/93 - Amnesty International, Comite Loosli Bacheland, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan; See also Resolution 1989/65 of

24 May 1989 of the Economic and Social Council of the United Nations EX.CL/322 (X) Page 69  
degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

**94.** The Complainant submitted that ZANU (PF) supporters acting in concert with war veterans subjected their victims to severe mental and physical suffering. They abducted and force-marched farm labourers to camps for political re-education meetings and to attend ZANU (PF) rallies as in the case of Robert Serengeti, Fungai Mafunga, Chamunorwa Steven Bitoni, Tazeni Chinyere, Champion Muleya, Bettie Muzondi and Misheck Muzondi. According to the Complainant, while in the political re-education meetings, some of the farm workers were asked to produce ZANU (PF) membership cards and where they failed to produce ZANU (PF) membership cards they were interrogated about their involvement with opposition political parties. It is alleged that they were further ordered to lie prone and to roll in the mud while water was poured over them and that victims reported being subjected to severe beatings with various objects such as sticks, sjamboks, open hands, axe handles and hosepipes. Petros Sande for example, is alleged to have testified that he was ordered to stick his penis in the sand and imitate sexual positions until he masturbated. When he failed to perform to his assailants' satisfaction his penis was hit with a stick.

**95.** The Complainant provided information about persons who alleged to have been subjected to ill-treatment and stated that the victims of these atrocities reported to the police but in many of the cases the police made no effort to arrest or investigate the reports. Other victims were issued with death threats if they reported while others such as Sekai Chadeza feared reprisals and so they declined to report the assaults to the police.

**96.** The Complainant submitted that all the above examples reveal a violation of Article 5 of the African Charter by the Respondent State and referred the African Commission to its jurisprudence in *International Pen et al (on behalf of Ken Saro- Wiwa Jnr)/Nigeria*<sup>33</sup> where it held that "the prohibition in Article 5 included not only actions which cause serious physical or psychological suffering, but also actions which humiliate the individual or force him or her to act against his will or conscience."

According to the Complainant, the prohibition of torture, cruel, inhuman and degrading treatment is absolute<sup>34</sup> and one of the most fundamental values of a democratic society<sup>35</sup>. <sup>33</sup> Consolidated communication 137/94, 139/94, 161/97 - International PEN, Constitutional Rights Project, Interights and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa Jnr.)/Nigeria; See also communication 224/98 - Media Rights Agenda/Nigeria; See also the definition of Torture in Article 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture, Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations in Resolution 3452(XXX) of 9 December 1975 and Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of

1984.<sup>34</sup> Communication 225/98 - HURILAWS/Nigeria. <sup>35</sup> *Lorse v Netherlands* (2003) 37 EHRR 3.  
EX.CL/322 (X) Page 70 Allegation of violation of Article 6 of the African Charter

**97.** The Complainant also alleged a violation of Article 6 of the African Charter which provides that "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."

**98.** The Complainant submitted that the victims in the communication were abducted and kidnapped and held in detention for a whole night at camps established by war veterans and ZANU (PF) supporters mainly because they held differing political opinions. The Complainant asserted that kidnapping of a person is an arbitrary deprivation of their liberty.<sup>36</sup>

**99.** The Complainant further submitted that the African Commission has held that detaining a person on account of their political beliefs, especially where no charges are brought against them renders the deprivation of liberty arbitrary and where government maintains that no one is presently detained without charge does not excuse past arbitrary detentions<sup>37</sup>. The Complainant makes reference to the decision of the European Court of Human Rights in *Ibilgin v Turkey*<sup>38</sup> where it stated that "any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention."

**100.** The Complainant stated that arbitrary deprivation of liberty often involve an element of suffering or humiliation which also amounts to cruel, inhuman or degrading treatment<sup>39</sup>. Allegation of violation of articles Article 9, 10 and 11 of the African Charter

**101.** The Complainant further alleged a violation of Articles 9, 10 and 11 of the African Charter averring that there is a close relationship between these rights<sup>40</sup>. Article 9 of the African Charter provides -: (1) Every individual shall have the right to receive information<sup>36</sup> See Valesquez Rodriguez Case, Inter-American Court of Human Rights, Judgment of 29 July 1988, paragraph 155. <sup>37</sup> Consolidated communication 140/94, 141/94, 145/95 Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria. <sup>38</sup> Ibilgin v Turkey (2003) 35 EHRR 39. <sup>39</sup> Communication 225/98 - HURILAWS/Nigeria; See also Lorse v Netherlands (2003) 37 EHRR 3. <sup>40</sup> Consolidated communication 137/94, 139/94, 161/97 - International PEN, Constitutional Rights Project, Interights and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa Jnr.)/Nigeria. EX.CL/322 (X) Page 71 (2) Every individual shall have the right to express and disseminate his opinions within the law Article 10 of the African Charter provides -: (1) Every individual shall have the right to free association provided that he abides by the law. (2) Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association. Article 11 of the African Charter provides -: Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others

**102.** The Complainant alleged that the victims in the present communication were abused because they held and sought to impart political views and opinions that were unfavourable to those of the Respondent State. It is alleged that they were forced to attend all night rallies where they were given information on why they should support ZANU (PF) and not the opposition MDC. Furthermore, the victims were forced to surrender their parties' campaign materials and were prevented from communicating to others their parties' policies.

**103.** The Complainant submitted further that freedom of expression is a basic human right vital to an individual's personal development and political consciousness. It is therefore one of the essential foundations of a democratic society and one of the basic conditions for its progress.<sup>41</sup>

**104.** According to the Complainant, the persecution of real or perceived members of opposition political parties in an attempt to undermine the ability of the opposition to function amounted to an infringement<sup>42</sup> of Article 10 of the African Charter and of persons because they belong to opposition political parties amounted to a violation of Article 9 of the African Charter.<sup>43</sup> <sup>41</sup> Consolidated communication 105/93, 128/94, 130/94, 152/96 - Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda & Constitutional Rights Project/Nigeria; consolidated communication 140/94, 141/94, 145/95 - Constitutional Rights Project, Civil Liberties Organisation & Media Rights Agenda/Nigeria; communication 212/98 - Amnesty International/Zambia; See also Thoma v Luxembourg (2003) 36 EHRR 21. <sup>42</sup> See Yazar, Karatas, Aksoy & People's Labour Party (HEP) v Turkey (2003) 36 EHRR 6. <sup>43</sup> Consolidated communication 48/90, 50/91, 52/91, 89/93 - Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan. EX.CL/322 (X) Page 72

## **Allegation of violation of Article 13(1) of the African Charter**

**105.** The Complainant equally alleged a violation of Article 13(1) of the African Charter which provides that "every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".

**106.** It is submitted by the Complainant that the alleged victims were abused because of their political opinions and affiliations, while some of the victims were members of political parties others were not affiliated to any political party but were assumed to support the opposition and therefore subjected to abuse.

**107.** The Complainant argued that the right of people to participate in the government of their countries is not limited to the casting of votes. In addition to voting for representatives of their choice, people participate in the government of their country through uninhibited, robust and wide open communication on matters of government, politics and public issues<sup>44</sup> and by freely associating and forming associations for political ends, adding that, there must always be a general capacity for citizens to join, without interference, in associations in order to attain various ends

## STATE PARTY'S SUBMISSION ON THE MERITS

**108.** The State contended that there were many allegations in the Communication intended to give an impression of serious or massive violation of human rights which Zimbabwe proved to be false. The State indicated that there were many cases alleged to have been reported yet the Police did not have records of such cases. The State also noted that Complainant did not avail any proof to the Commission that reports had been made to the Police, neither did Complainant submit any medical reports of the injuries sustained by some of its clients as a result of the severe and life threatening assaults allegedly perpetrated on the victims.

**109.** The State also submitted that the Complainant exaggerated the number of deaths some of which were in fact as a result of natural causes and other causes not related in any way to political violence during the period in question. That Complainant even included people who were still alive and still had not submitted proof of the death of any of the 74 deceased persons. The State recognized its responsibility under the Charter to assist the Commission in arriving at the truth, provided the information on which cases had been reported, their reference numbers both Police and Court and progress made in the investigation of the matters in order to bring justice to the victims. 44 See *New York Times v Sullivan* 376 US 254 (1964) at 270; *Reynolds v Times Newspapers Ltd* [2001] AC 127. 45 Communication 101/93 - Civil Liberties Organisation (In respect of the Nigerian Bar Association)/Nigeria. EX.CL/322 (X) Page 73

**110.** The State also drew the Commission's attention to the fact that in the Complainant's Submissions on Merits, they abandoned a number of allegations and had made brazen submissions in respect of some of the allegations. The State noted that with regards to freedom of expression for example, Complainant's submissions had always been centered on freedom of the media and the enactment of laws such as the Access to Information and the Protection of Privacy Act (AIPPA). However, in its Submissions on Merits it does not make any reference to these allegations other than making reference to paragraph 58 of the Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution E/CN.4/2002/74 and paragraph 634 of E/CN.4/2002/74/Add.2, paragraphs 109-121 of E/CN.4/2002/75/Add.2. According to the State it should therefore be taken that Complainant has abandoned its allegations in this regard.

**111.** The Respondent State informed the Commission that the Government of Zimbabwe had taken appropriate and effective measures to ensure that those who perpetrated the ascertainable violations specified in the communication been brought to book and as such had provided effective remedy to the aggrieved. The State indicated a number of measures taken to bring those accused of perpetrating violence to justice, including investigations conducted by the police, amendment of relevant legislation and the payment of compensation to victims. Regarding the violations of specific provisions of the Charter, the Respondent State noted as follows

**112.** As regards allegations of violation of Article 1 of the African Charter, the Respondent State pointed out that it unreservedly accepts that its obligations under the Charter are to respect, protect and promote the rights guaranteed under the Charter. By respecting the rights, Zimbabwe was required to refrain from interfering with the enjoyment of the rights. The respondent state indicated that the State had enacted the necessary policy and legislation, had made provision for effective remedies and taken the necessary administrative measures to ensure that its people enjoy their rights.

**113.** The State contended that the Communication is essentially to determine whether the alleged violations of human rights can be imputed to the Government of Zimbabwe since the Complainant averred that the Government planned, committed or otherwise aided and abetted a campaign of terror and this was based on the perceived interlink between the Government, ZANU (PF) and the war veterans.

**114.** The State noted that it is responsible for the acts of its organs and officials undertaken in their official capacity and for their omissions even when these organs act outside the sphere of their authority or violate internal law.<sup>46</sup> The underscoring factor, according to the State, is that any such violation is imputable to the State only when the <sup>46</sup> See *Velasquer Rodrigues Case*, Inter-American Court of Human Rights, Judgment of 29 July, 1998 paragraphs 169 - 170. EX.CL/322 (X) Page 74 act is by a public authority which uses its authority to perpetrate the violation.<sup>47</sup> The import of paragraph 172 of *Velasquez Rodriguez Case* is that even where the State agent acts outside his/her authority or violates the law, the agent must have held himself/herself to be exercising his authority as a State agent. In any other circumstance, the illegal act can only be imputable to a State if there is lack of diligence to prevent or respond to the violation as required by the Charter. The State concluded that where a State agent is on a frolicking of his own and commits acts considered of violation of rights, such acts will not be imputed to the State.

**115.** The State further noted that whilst Article 1 extends the obligation of a State Party to investigate acts of violation of rights guaranteed under the Charter, the duty to investigate, such as the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result, admitting however, the investigations must be undertaken in a serious manner and not as a mere formality. Referring to the Rodriguez Case, the State noted that the Inter-American Court of Human Rights was clear to what extent a State may become responsible for cases not intentionally or directly imputable to the State. The Court observed that: an illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

**116.** The State emphasised that there is a clear distinction between the Government of Zimbabwe and ZANU (PF). The State maintained that whilst ZANU (PF) is the ruling party, the actions of the party cannot be attributed to the Government of Zimbabwe and added further that the actions of the war veterans cannot equally, be attributed to the Government of Zimbabwe. The Respondent State acknowledged that President Mugabe is the Patron of the war veterans, but that did not in any way imply that war veterans were controlled by the Government of Zimbabwe. ZANU (PF) is a political party and the war veterans (either individually or as an association) are not State organs. Therefore, according to the State, their illegal acts cannot be imputable to the Government of Zimbabwe. Neither can it be said that the violence alluded to in the Communication was an orchestrated policy of the Government of Zimbabwe. Submissions by Complainant in this regard are palpably untenable and should be disregarded, submitted the State.

**117.** The State concluded by noting that it was improper to impose liability on the Government of Zimbabwe, or any Government for that matter, for actions of persons or organisations who were not part of the State machinery. The State's liability in such a situation should only attach where the State fails to exercise the duty to protect the 47 *ibid* para 172. EX.CL/322 (X) Page 75 rights, welfare and interests of the people diligently or acts in complicity with such persons.

**118.** With regards to allegations of violation of Article 4, the right to life, the State noted that extra-judicial, arbitrary or summary executions are, under international law, generally attributable to State organs and officials in the ordinary exercise of governance. They entail, among other things, disregard of due process of the law by State entities or officials. The State referred to the Principles on the Effective Prevention and Investigation of Extra - Legal, Arbitrary and Summary Executions Recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989 and the U.N. Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (U.N. Doc. G/ST/CS DHA/12 (1991) which provide for definitions of extra-Legal, Arbitrary and Summary Executions.

**119.** The State noted further that apart from the case of Chiminya and Mabika out of the alleged seventy four (74) "extra-judicial executions", the Complainant did not give an account of how the others happened. Therefore, the Complainant's naked allegations did not assist in determining whether or not the alleged deaths actually happened. To buttress this point, the State argued that although Complainant alleged that some of the victims were severely assaulted with objects such as "sticks, sjamoks, open hands, axe handles and hosepipes", not a single medical report was produced in support of such severe assaults. The State called on the Commission to distinguish the present Communication from Communications such as Amnesty International/Sudan 48/90, Comite Loosli Bachelard/Sudan 50/91, Lawyers Committee for Human Rights/Sudan 52/91 and Association of Members of the Episcopal Conference of East Africa/Sudan 89/93 where the communication was supported with not only personal accounts but also medical testimonies. The State concluded that throughout the Communication, there was evidence that the Complainant did not take steps to ascertain what had happened to the matters that were reported to the police.

**120.** As regards Joseph Mwale, who was alleged to have killed Chiminya and Mabika, and who was alleged to be a member of the Central Intelligent Organisation, the Respondent State submitted that his actions could not be imputed to the State as the alleged acts could not be said to have been committed in his official capacity, in other words, using their authority in the normal course of their duty. The death of Chiminya and Mabika, according to the State, was a case of an allegedly intentional and illicit deprivation of another's life which can and must be recognised and addressed in terms of the criminal law as murder.

**121.** Furthermore, the Respondent State submitted that the alleged or perceived inaction of the Police in relation to all the alleged violations cannot be said to be a contravention of the rights guaranteed by the Charter and in particular Article 1. The State insisted that the Police were deployed to deal with cases of violence and unrest, and to this end, suspects were arrested, investigations conducted and prosecutions effected. The State also reminded the Commission of the fact that the Complainants had submitted at the

33<sup>rd</sup> Ordinary Session that in most cases the alleged victims of the alleged violence did not know who the perpetrators of the violence were and therefore EX.CL/322 (X) Page 76 could not assist the Police in identifying the perpetrators of the violence and in a large number of cases, the alleged victims did not even report the alleged violations.

**122.** The State also drew the attention of the Commission to the fact that some of the names of those alleged to have been assaulted did not appear in the records of the Registrar General and therefore their existence was questionable; that some of the deaths had been found not to have occurred at all; that in some cases members of either ZANU (PF) or MDC were driven from other areas to perpetrate acts of violence in different areas. (Alouis Musarurwa Mudzingwa v Oswald Chitongo HH 73-2002); that some of the individuals alleged to have died in politically motivated violence, died of natural causes or other mishaps and not as a result of the alleged assaults and some well before the period in issue. The State noted that all the above came about as a result of investigations conducted by the Police following reports in the Press; that in the bulk of the cases the perpetrators had been identified, arrested, tried, convicted or acquitted and in some cases matters were still pending before the courts; that in other instances the police had carried out their investigations but had failed to identify the culprits; and that in other instances the Attorney General declined to prosecute due to lack of evidence.

**123.** The State submitted that given the concession by the Complainant and the fact that there had been prosecutions of some of the culprits, the Police had discharged their duties diligently in the circumstances, noting that the fact that the investigations did not always produce results satisfactory to the Complainant did not amount to a breach of their duty. The State concluded that the fact that the situation in the country had stabilised was indicative of the Police's role in preventing further violations and containing the situation.

**124.** In the case of Chiminya and Mabika, the State submitted that the Attorney General had appraised the investigations conducted by the Police and had since issued instructions to the Police for the arrest and prosecution of Mwale and others for the murder of Chiminya and Mabika. According to the State, general indications were that the investigations were done in a professional and independent manner and had been effective.

**125.** The State concluded on this allegation by noting that in any event, the question of an independent investigator does not arise as the alleged executions could not in the strict sense be termed extra-judicial or summary executions.

**126.** Regarding allegations of torture, Inhuman and Degrading Treatment, the State noted that as in the case of extra-judicial or summary execution, torture, inhuman or degrading treatment must be 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. (See Article 1 of the Conventions Against Torture and other Cruel, Inhuman and Degrading Treatment, 1984". EX.CL/322 (X) Page 77

**127.** To this end the State noted that ZANU (PF) and war veterans are not synonymous with the Government of Zimbabwe and are not State institutions. Torture or ill treatment of a citizen by another citizen who is not in government service and/or whose behaviour is not sanctioned by government does not fall within the definition of the Convention. The Respondent State argued that the Police investigated those cases that were reported and since in most of the cases the alleged victims could not identify the perpetrators, the Police could not pursue the matter any further.

**128.** On the allegation of arbitrary detention, the State submitted that its submissions on the right to life and freedom from torture equally applied in this context.

**129.** Regarding Freedom of Expression, Association and Assembly and discrimination, the State distinguished the communication from Amnesty International/Sudan 48/90, Comite Loosli Bachelard/Sudan 50/91, Lawyers Committee for Human Rights/Sudan 52/91 and Association of Members of the Episcopal Conference of East Africa/Sudan 89/93 noting that in the latter cases government institutions perpetrated the violations. Although Complainant made reference to "parties", the list of persons assaulted was either ZANU (PF) or MDC or they were said not to be affiliated to any political party. The State pointed out that what was clear was that the violation was not directly attributed to the Government. The State further noted that the Government had taken the necessary measures to ensure that those who have perpetrated the violations were brought to book. And that there was no policy by the Government of Zimbabwe to trample on the rights of any individual to freely associate with a political party of his or her choice. The State reiterated the same argument with regard to allegations of violation of the right to participate freely in one's government.

**130.** Regarding Equal Protection of the law, the State refuted the claim that the alleged victims had been denied this protection in the manner and to the extent averred by the Complainant and denied that there

was an outright denial of Police protection for Complainant's clients.

**131.** On the Clemency Order No. 1 of 2000, the Respondent State emphasised that the prerogative of clemency or amnesty is recognised as an integral part of constitutional democracies. To ensure that those who had committed more serious offences did not go unpunished, the Clemency Order excluded crimes such as murder, rape, robbery, indecent assault, statutory rape, theft and possession of arms. The State further noted that a decision by the Commission that the Clemency Order was an abdication of Zimbabwe's obligations under the Charter would amount to undermining the whole notion of the clemency prerogative worldwide adding that Clemency Orders are the prerogatives of the Head of State and this discretion was exercised reasonably under Clemency Order No 1 of 2000.

**132.** On the report issued by the Special Rapporteur on Extra-judicial, Summary or Arbitrary Execution's Report E/CN.4/2001/9/Add.1, the State submitted that her appeal to the Government of Zimbabwe was based on reports that she had received on the alleged violation of human rights, and it was, according to the State, apparent from the report that: EX.CL/322 (X) Page 78 (i) the alleged violations were by the supporters of the ruling party and war veterans and not by the Government of Zimbabwe; and (ii) that Zimbabwe responded to the Special Rapporteur's appeal that all incidents were being investigated.

**133.** In conclusion, the State stated that the Special Rapporteur's report was supportive of its submissions that the Government of Zimbabwe did not have a policy to violate the rights of its people and also that it took its obligations on human rights seriously. Issues for determination and decision of the African Commission on the merits

**134.** The present communication raises several issues that must be addressed by the African Commission to determine whether the Respondent State has or has not violated the rights of the victims as alleged by the Complainant. The African Commission is called upon to determine: ' what non-state actors are and whether the Zimbabwe African National Union-Patriotic Front - ZANU (PF) and the Zimbabwe Liberation War Veterans Association (War Veterans) can be termed non-state actors; ' the extent of a State's responsibility for human rights violations or acts committed by non-state actors; and ' whether the Clemency Order No. 1 of 2000 resulted to a violation of the Respondent State's obligations under Article 1 of the Charter. Issue One: What are non-state actors under international law?

**135.** Traditionally, international human rights law mostly talked to and about national governments or States. The need to look beyond the State or its agents as the primary subject of international law and the sole possible actor capable of impairing the enjoyment of the human rights of others, requires a term that captures the very many different kinds of individuals, groups or institutions whose behaviour, actions or policies have an effect on the enjoyment of human rights, and who can either be directly called to answer by the international system or for whom the government will be called to answer.

**136.** The term 'non-state actors' has therefore been adopted by the international community to refer to individuals, organisations, institutions and other bodies acting outside the State and its organs. They are not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures EX.CL/322 (X) Page 79 of business and finance, as the research on the human rights impacts of oil production or the development of power facilities demonstrates.<sup>48</sup> Issue Two: Are the Zimbabwe African National Union-Patriotic Front - ZANU (PF) and the Zimbabwe Liberation War Veterans Association (War Veterans) non-state actors

**137.** By its submission of 23 February 2004, the Complainant argued that the Government of Zimbabwe planned, committed or otherwise aided and abetted a campaign of terror and violence...and stated further that the War Veterans and the supporters of the governing ZANU (PF) with endorsement and support of the government unlawfully occupied commercial farms... which were turned into torture and re-education camps. The Complainant argued further that "under the current political arrangement in Zimbabwe, ZANU (PF) is government and the government is ZANU (PF) and with respect to the war veterans, the Complainant submitted that "at all material times the government of Zimbabwe exercised extensive de jure and de facto control over the war veterans", noting that the Chairperson of the Zimbabwe Liberation War Veteran Association, Dr. Hunzvi made a statement in court to the effect that President Mugabe had control over the war veterans. The Complainant was therefore implying that the ZANU (PF) and the War Veterans were either State apparatus or were controlled by the Government. In its submission of 23 February 2004 the Complainant argued further that even if it were found that ZANU (PF) supporters and war veterans were not agents of the government, read together with the general obligation under Article 1 of the African Charter, the government could still be held liable for a violation of the Charter, noting that under Article 1 of the Charter, the government is required to take all necessary measures to ensure that people within its jurisdiction are treated in accordance with international norms and standards.

**138.** In the opinion of this Commission, the ZANU (PF) is a political party (the ruling party) in Zimbabwe and just like any other party in the country, distinct from the government. It has an independent identity from the government with its own structures and administrative machinery, even though some of the members of the Zimbabwe Government - cabinet ministers, also hold top ranking positions in the party. For example, President Robert Mugabe is the President and First Secretary General of the Party.<sup>49</sup> This Commission also holds that the War Veterans Association is a group of ex-combatants of the Zimbabwe liberation struggle. President Mugabe was the Patron during the period under consideration.

**139.** Given what this Commission will call the "mixed membership", it would appear that there is a very thin line to be drawn between the Government and the ZANU (PF), the Government and War Veterans and between the ZANU (PF) and the War Veterans. There are members of government who are members of the party and members of the 48 See African Commission decision on Communication 155/96 - the Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria. <sup>49</sup> Seventeen members of the Zimbabwe Cabinet are also members of the ZANU (PF) Politburo, the decision making organ of the Party. EX.CL/322 (X) Page 80 party who are war veterans. However thin the line of distinction may seem, it is not the view of the African Commission that the ZANU (PF) and the Zimbabwe Liberation War Veterans Association are structures of the Government or organs of the State. The Complainant did not supply the African Commission with documentary evidence to prove this relationship. Even if President Mugabe is Patron of the War Veterans and exercises control over the group, this does not make the war veteran association part of government or State machinery.

**140.** It must also be noted that during oral submissions by both parties at the 35<sup>th</sup> Ordinary Session of the African Commission, the Complainant dropped its argument that the ZANU (PF) and the Zimbabwe Liberation War Veterans Association were structures of the government or organs of the State. The Complainant noted in its submission of 26 August 2004 that " the assertion that the Respondent State acquiesced to the gross violations of human rights is based not on agency but a failure to effectively protect its citizens from the harmful conduct of third parties". In the African Commission's view therefore, the Complainant has admitted not only that ZANU (PF) and the War Veterans are not government structures or organs of the State, but is also accepting the State's argument that it had nothing to do with their alleged actions. The Complainant is simply concerned with the fact that the State has a responsibility to effectively protect its citizens from the harmful conduct of third parties, a responsibility, which, according to the Complainant, the Respondent State failed to discharge. It is therefore the view of the African Commission that both ZANU (PF) and the Zimbabwe Liberation War Veterans Association are organisations outside the government or State structures and as such, non-state actors.

**141.** Having established that ZANU (PF) and the Zimbabwe liberation War Veterans Association are non-state actors, the Commission will proceed to deal with the Complainant's major concern - the state's responsibility to effectively protect its citizens from the harmful conduct of third parties (non-state actors), can the violence and atrocities alleged to have been committed by these non-state actors be attributed to the Respondent State or put differently, can the Respondent State be held responsible for the violations committed by these non-State actors?

### **Issue Three: Extent of a State's responsibility for acts of non-state actors**

**142.** Article 1 of the African Charter is essential in determining whether a violation of the human rights recognised by the Charter can be imputed to a State Party or not. That Article charges the States Parties with the fundamental duty to "recognize the rights ... and undertake to adopt legislative or other measures to give effect to them". Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the African Charter.

**143.** Human rights standards do not contain merely limitations on State's authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence<sup>50</sup> to prevent the violation or for not taking the necessary steps to provide the victims with reparation.



**144.** The Inter American Court of Human Rights has issued a judgment in the case of Velásquez Rodríguez v Honduras<sup>51</sup> which articulates one of the most significant assertions of State responsibility for acts by private individuals. The Court stated that a State "has failed to comply with [its] duty ... when the State allows "private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention".<sup>52</sup> In the same case, the Inter American Court reaffirmed that States are "obliged to investigate every situation involving a violation of the rights protected by [international law]". Moreover, the Court required Governments to: "take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."<sup>53</sup> This represents an authoritative interpretation of an international standard on State duty. The opinion of the Court could also be applied, by extension, to Article 1 of the African Charter of Human and Peoples' Rights, which requires States parties to "recognize the rights, duties and freedoms enshrined in the Charter and ... undertake to adopt legislative and other measures to give effect to them". Thus, what would otherwise be wholly private conduct is transformed into a constructive act of State, "because of the lack of due diligence to prevent the violation or respond to it as required by the [African Charter]".

**145.** The Inter-American Court of Human Rights in the Velásquez Rodríguez Case, thus affirmed that: "an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'. Increasingly, UN mechanisms monitoring the implementation of human rights treaties, the UN independent experts, and the Court systems at the national and regional level are using this concept of due diligence as their measure of review, particularly for assessing the compliance of states with their obligations to protect bodily integrity. 50 In human rights jurisprudence this standard was first articulated by a regional court, the Inter- American Court of Human Rights, in looking at the obligations of the State of Honduras under the American Convention on Human Rights - Velasquez-Rodriguez, ser. C.,No.4, 9 Hum. Rts.I.J. 212 (1988). The standard of due diligence has been explicitly incorporated into United Nations standards, such as the Declaration on the Elimination of Violence against Women which says that states should 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'. Increasingly, UN mechanisms monitoring the implementation of human rights treaties, the UN independent experts, and the Court systems at the national and regional level are using this concept of due diligence as their measure of review, particularly for assessing the compliance of states with their obligations to protect bodily integrity. 51 Series. C.,No.4, 9 Human . Rights .Law Journal. 212 (1988) 52 Velásquez Rodríguez case para 176. 53 Id. Para 174. diligence to prevent the violation or to respond to it as required by the Convention [or the African Charter]."<sup>54</sup>

**146.** The established standard of due diligence in the Rodríguez Case provides a way to measure whether a State has acted with sufficient effort and political will to fulfil its human rights obligations. Under this obligation, States must prevent, investigate and punish acts which impair any of the rights recognised under international human rights law. Moreover, if possible, it must attempt to restore the right violated and provide appropriate compensation for resulting damage.

**147.** In fact, international<sup>55</sup> and regional<sup>56</sup> human rights standards expressly require States to regulate the conduct of non-state actors containing explicit obligations for States to take effective measures to prevent private violations of human rights. The doctrine of due diligence is therefore a way to describe the threshold of action and effort which a State must demonstrate to fulfil its responsibility to protect individuals from abuses of their rights. A failure to exercise due diligence to prevent or remedy violation, or failure to apprehend the individuals committing human rights violations gives rise to State responsibility even if committed by private individuals. This standard developed in regard to the protection of aliens has subsequently been applied in regard to acts against nationals of the State. The doctrine of due diligence requires the State to "organize the governmental apparatus, and in general, all the structures through which 54 Id. Para 172. 55 The Covenant on Civil and Political Rights (ICCPR), in its Article 2 (3a), imposes a duty on each Party to ensure an effective remedy to any person whose rights or freedoms are violated, whether or not by persons acting in an official capacity. Further, as far as the definition of Torture is involved, the Human Rights Committee in its General Comment No 20 on art 7 of the ICCPR stated that: "It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity." The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Under Article 2 (e) States undertake "all appropriate measures to

eliminate discrimination against women by any person, organization or enterprise". The CEDAW supervising Commission further stated that: "Discrimination under the Convention is not restricted to action by or on behalf of Governments ... Under general international law and specific human rights Covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and for providing compensation. ( ...)" Article 4(c) of the UN Declaration on the Elimination of Violence Against Women obliges states to "[E]xercise due diligence to prevent, investigate and in accordance with national legislation, punish acts of violence against women whether those acts are perpetrated by the State or by private persons". 56 Article 2, 3, 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms establish a positive obligation on the State (including through legislative means). Article 1 of the American Convention provides that "the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition". EX.CL/322 (X) Page 83 public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights".57

**148.** From the foregoing, can it be argued that the Respondent State's actions to deal with the allegations or the violence alleged to have been committed by individuals and non-state actors during the period under consideration meet the due diligence test?

**149.** To fully conceptualize a State's responsibility in terms of the due diligence doctrine, it must be made clear who is responsible and to what degree, where that responsibility arises from, towards whom such responsibility exists, and how such responsibility is asserted.<sup>58</sup> Thus, in this context, the task is not only to identify the responsibilities, but also to reflect on whether and under what conditions the State can be responsible for violations by private actors. The underlying aspect is that it is up to States, and States alone, to carry out obligations established by international human rights treaties.

**150.** State responsibility in general terms denotes a situation which occurs following a breach by a State of its legal obligations. Such obligations can be negative or positive, and can give rise to direct and indirect responsibilities.<sup>59</sup> In all of its aspects therefore the question of responsibility must also be related to the element of breach - breach of a duty to respect, protect, promote or fulfil the rights of persons under its jurisdiction.

**151.** In its decision in Communication No 155/96,<sup>60</sup> the African Commission noted that internationally accepted ideas of the various obligations engendered by human rights indicate that all rights - both civil and political rights and social and economic - generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely, the duty to respect, protect, promote, and fulfil .

**152.** At a primary level, the obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right- 57 Velasquez-Rodriguez's case para 166. 58 In general, see The Dutch Branches of Amnesty International and Pax Christi International, *Multinational Enterprises and Human Rights*, Utrecht, November 1998, chapter III, (15 January 2002). Although any complete set of peremptory human rights has not been agreed upon, discussions frequently mention: genocide, crimes against humanity, piracy, torture, slavery, and war crimes. See e.g. Bassiouni, "The Sources and Content of International Criminal Law: A Theoretical Framework", in M. Cherif Bassiouni, *International Criminal Law* (2 ed.), vol. I, 3-125, at 41, and Ian Seiderman, *Hierarchy in International Law: The Human Rights Dimension*, 2001, Intersentia - Hart, at 66-121. 59 Scott, Craig / Hart / In: *Torture as Tort : Comparative Perspectives on the Development of Transnational Human Rights Litigation* / ed. by Craig Scott, ISBN 1841130605 / 2001, pp. 47-48. 60 Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria. EX.CL/322 (X) Page 84 holders, their freedoms, autonomy, resources, and liberty of their action.<sup>61</sup> At a secondary level, the State is required to ensure others also respect their rights. This is what is called the State's obligation to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework of an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures. The last layer of obligation requires the State to fulfil the rights and freedoms it freely undertook under the

various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights.

**153.** In Communication 74/92,<sup>62</sup> the African Commission held that governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This illustrates the positive action expected of governments in fulfilling their obligation under human rights instruments. This obligation of the State is further emphasised in the practice of the European Court of Human Rights, in *X and Y v. Netherlands*.<sup>63</sup> In this particular case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

**154.** In the present communication, the Respondent State has an obligation to make sure the rights of persons under its jurisdiction are not interfered with by third parties. The State argues that during the riots the police were deployed in areas where violence was reported and cases of alleged abuses were duly investigated. The State added that however, due to the circumstances prevailing at the time, the nature of the violence and the fact that some victims could not identify their alleged perpetrators, the police were not able to investigate all cases referred to them.

**155.** The extent of a State's responsibility must not be determined in the abstract. Each case must be treated on its own merits depending on the specific circumstances of the case and the rights violated. This follows therefore that, in choosing how to provide effective protection of human rights, there are different means at a State's disposal.<sup>64</sup> 61 Krzysztof Drzewicki, "Internationalization of Human Rights and Their Juridization" in Rajja Hanski and Markku Suksi (Eds.), Second Revised Edition, An Introduction to the International Protection of Human Rights: A Textbook (1999), p. 31. 62 Union des Jeunes Avocats /Chad. 63 91 ECHR (1985) (Ser. A) at 32. 64 Plattform 'Ärzte für das Leben' v. Austria, (21 June 1988), Publications of the European Court of Human Rights, Series A, vol. 139, para. 34: "...while it is the duty of the Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, EX.CL/322 (X) Page 85 This is still a disputed element but the International Court of Justice (ICJ) has held due diligence in terms of "means at the disposal" of the State.<sup>65</sup> Nevertheless, this need not be inconsistent with maintaining some minimum requirements.<sup>66</sup> It could well be assumed that for non-derogable human rights the positive obligations of States would go further than in other areas.

**156.** An analysis of the feasibility of effective State action must also be undertaken. A finding that no reasonable diligence could have prevented the event has contributed to denials of responsibility.<sup>67</sup> In the present communication, the Respondent State contended that the Police did their best to investigate the allegations brought to them.

**157.** Could the Respondent State have foreseen the violence and taken measures to prevent it? Even though it is not always possible for a State to know beforehand how a non-state actor is going to act, States have the responsibility, not only to protect human rights, but also to prevent the violation of human rights. The question to be addressed here is not necessarily who violated the rights, but whether under the present communication, the state took the necessary measures to prevent violations from happening at all, or having realized violations had taken place, took steps to ensure the protection of the rights of the victims.

**158.** A single violation of human rights or just one investigation with an ineffective result does not establish a lack of due diligence by a State.<sup>68</sup> Rather, the test is whether the State undertakes its duties seriously.<sup>69</sup> Such seriousness can be evaluated through the actions of both State agencies and private actors on a case-by-case basis.

**159.** The due diligence requirement encompasses the obligation both to provide and enforce sufficient remedies to survivors of private violence. In general terms, the Human they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used". <sup>65</sup> Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran), Judgment, ICJ Reports 1980. <sup>66</sup> Brian Smith, *State Responsibility and the Marine Environment; The Rules of Decision*, Oxford University Press, 1988, at 32. <sup>67</sup> Sornarajah, "Linking State Responsibility for Certain Harms Cause by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States", and Theodore Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, 1989, at 159. <sup>68</sup> Commission on Human Rights, Fifty-second session, February 1996, Report of the Special Rapporteur on violence against women, its causes and consequences, "FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING THE QUESTION OF THE PROGRAMME AND METHODS OF WORK OF THE COMMISSION ALTERNATIVE APPROACHES AND WAYS AND MEANS WITHIN THE UNITED NATIONS SYSTEM FOR IMPROVING THE EFFECTIVE ENJOYMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS", submitted in accordance with Commission on Human Rights

Resolution 1995/85.

**69.** Ibid. EX.CL/322 (X) Page 86 Rights Committee has held, for example, that the existence of legal rules does not suffice to fulfil a condition of reasonable measures. The rules must also be implemented and applied (entailing for instance, investigations and judicial proceedings) and victims must have effective remedy.<sup>70</sup> Thus, the existence of a legal system criminalizing and providing sanctions for assault and violence would not in itself be sufficient; the Government would have to perform its functions to "effectively ensure" that such incidents of violence are actually investigated and punished. For example, actions by State employees, the police, justice, health and welfare departments, or the existence of government programmes to prevent and protect victims of violence are all concrete indications for measuring due diligence. Individual cases of policy failure or sporadic incidents of non-punishment would not meet the standard to warrant international action.

**160.** It follows from the above that, by definition, a State can be held complicit where it fails systematically to provide protection of violations from private actors who deprive any person of his/her human rights. However, unlike for direct State action, the standard for establishing State responsibility in violations committed by private actors is more relative. Responsibility must be demonstrated by establishing that the State condones a pattern of abuse through pervasive non-action. Where States do not actively engage in acts of violence or routinely disregard evidence of murder, rape or assault, States generally fail to take the minimum steps necessary to protect their citizens' rights to physical integrity and, in extreme cases, to life. This sends a message that such attacks are justified and will not be punished. To avoid such complicity, States must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses.

**161.** In the present communication, the State indicated measures that it took to deal with the alleged human rights violations, including amendment of legislation, arrest and prosecution of alleged perpetrators, payment of compensation to some victims and ensuring that it investigated most of the allegations brought to its attention. The Complainant did not dispute these actions claimed to have been taken by the Respondent State but contends instead that the actions were not sufficient and were not taken early enough to be diligent.

**162.** The question to be asked is whether these measures taken by the State were sufficient for the Commission to come to the conclusion that the State had discharged its duty?

**163.** The Complainant did not dispute these actions claimed to have been taken by the Respondent State but contended instead that the actions were not sufficient and were not taken early enough to be diligent. The Complainant also did not demonstrate collusion by the State to either aid or abet the non-state actors in committing the violence, and equally failed to show that the State remained indifferent to the violence that took place. This view is supported by the conclusion of the Report of the this Commission's Fact-Finding Mission to the Respondent State which noted that "there 70 E, Klein, "The Duty to Protect and to Ensure Human Rights Under the International Covenant on Civil and Political Rights", in Eckart Klein (ed.), *The Duty to Protect and to Ensure Human Rights* (Colloquium, Potsdam, 1-3 July 1999), 2000. were allegations that the human rights violations that occurred were in many instances at the hands of ZANU PF party activists. The Mission [was] however not able to find definitively that this was part of an orchestrated policy of the government of the Republic of Zimbabwe. There were enough assurances from the Head of State, Cabinet Ministers and the leadership of the ruling party that there has never been any plan or policy of violence, disruption or any form of human rights violations, orchestrated by the State."

**164.** Given the above, the African Commission cannot find that with regards to the violence perpetrated by the non-state actors, the Respondent State failed to comply with its duty under Article 1 of the African Charter to "...adopt other measures to give effect to [the rights]" and to that extent cannot find the State to have violated Article 1 of the African Charter. Allegation of violation of specific provisions of the African Charter

**165.** Apart from alleging that the Respondent State has breached its fundamental duty under Article 1 of the African Charter, the Complainant also alleged the violations of several other provisions of the African Charter namely, Articles 2,3,4,5,9,10,11 and 13.

**166.** Before addressing itself to whether the State has violated any of the provisions of the African Charter, the African Commission would like to rule on the matter raised by the Respondent State that because the Complainant did not mention some of the rights during its submission on the merits, it means they have abandoned their allegations of violation of those rights.

**167.** The African Commission would like to state that the failure by the Complainant to indicate the particular articles or the rights of the African Charter alleged to have been violated is not fatal, to the extent

of regarding the communication inadmissible or unmeritorious. He or she does not need to indicate the remedy sought. It is for the African Commission, after consideration of all the facts at its disposal, to make a pronouncement on the rights violated and recommend the appropriate remedy to reinstate the Complainant to his or her right.

**168.** With respect to allegations of violation of Article 2 and 3(2) - Complainant submits that the Respondent State denied the victims their rights as guaranteed by the African Charter on the basis of their political opinions. Article 2 of the African Charter provides that Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. Article 3(2) provides that "every individual shall be entitled to equal protection of the law".

**169.** Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights. As Shestack has observed, equality and non-discrimination "are central to the human rights movement."<sup>71</sup> The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation. The African Commission has held in Communication 211/9872 that the right protected in Article 2 is an important entitlement as the availability or lack thereof affects the capacity of one to enjoy many other rights.<sup>73</sup>

**170.** Discrimination can be defined as applying any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.<sup>74</sup> From the definition of discrimination provided above, we can conclude that a universal 'composite concept of discrimination' can contain the following elements, stipulates a difference in treatment, has a certain effect and is based on a certain prohibited ground.

**171.** The general obligation is on States Parties to the different human rights treaties to ensure through relevant means that persons under their jurisdiction are not discriminated on any of the grounds in the relevant treaty. Obligations under international human rights law are generally addressed in the first instance to States. Their obligations are at least threefold: to respect, to ensure and to fulfil the rights under international human rights treaties. A State complies with the obligation to respect the recognised rights by not violating them. To ensure is to take the requisite steps, in accordance with its constitutional process and the provisions of relevant treaty (in this case the African Charter), to adopt such legislative or other measures which are necessary to give effect to these rights. To fulfil the rights means that any person whose rights are violated would have an effective remedy as rights without remedies have little value. Article 1 of the African Charter requires States to ensure that effective and enforceable remedies are available to individuals in case of discrimination.

**172.** The Complainant in the present communication concedes in their submission that the violence and alleged human rights violations were carried out by non-state actors including supporters of ZANU (PF), the War Veterans and some members of the MDC. The Complainant has not shown that there was any deliberate policy of the government to encourage this violence and by so doing discriminate against persons holding an alternative political view. The Respondent State provided the Commission with proof <sup>71</sup> Jerome Shestack, " The Jurisprudence of Human Rights", in Theodore Meron (ed), Human Rights in International Law: Legal and Policy Issues, 1984, p. 101. <sup>72</sup> Legal Resources Foundation/Zambia. <sup>73</sup> Ibid. <sup>74</sup> See The Human Rights Committee General Comment No. 18. EX.CL/322 (X) Page 89 that it did investigate some of the allegations and the Complainant did not challenge the fact the State investigated some of the allegations. Based on the evidence before it, the African Commission could not establish whether there was a discriminatory pattern in the way the police conducted investigations on the alleged violations. However, the legislative and other measures taken by the government to deal with the violence does not suggest, in the opinion of the African Commission, a discriminatory pattern.

**173.** Sometimes a law may be neutral on its face, yet have a disparate impact on a group of people due to its application. For example, in *Yick Wo v. Hopkins*,<sup>75</sup> Justice Stanley Matthews commented on the disparity in law enforcement by saying: though the law itself be fair on its face and impartial in appearance, yet, if applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, and the denial of equal justice is still within the prohibition of the [Charter]

**174.** For there to be equal protection of the law, the law must not only be fairly applied but must be seen to be fairly applied. Paragraph 9 (3) (a) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms<sup>76</sup> provides that everyone must be given the right to complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay.

**175.** The Complainant in the present communication claims that the police selectively enforced the law to the prejudice of the victims - that the police refused to record and investigate complaints filed by the victims. Due to the above behaviour of the Police, the Complainant concludes that the conduct amounted to unequal protection of the law in a violation of Article 3(2) of the Charter. The State on its part holds that the police was deployed in all areas where violence was reported and because of the widespread nature of the violence and the scanty information provided to the police by the victims, the police could not effectively investigate all the allegations. The Complainant provided 75 118 U.S.356 (1886). 76 UN General Assembly resolution 53/144.

unsigned statements to the Commission of persons who reported their cases to the police but were either turned away or the cases were not investigated.

**176.** While the African Commission cannot dispute the fact that the alleged victims did complain to the police or that they made declarations to the Complainant about the alleged conduct of the police and while the African Commission cannot confirm or deny the allegations against the police, the fact that the declarations submitted by the Complainant were not made under oath or corroborated by sworn affidavits makes it difficult to ascertain their authenticity. This Commission cannot accept the Complainant's submission that the newspaper articles attached to the communication as appendix two corroborate the statements allegedly made by the alleged victims. The African Commission can therefore not rely on these declarations to conclude that the alleged victims were victimised, discriminated or denied equal protection of the law.

**177.** With respect to allegations of violation of articles 4 and 5 of the African Charter, the Complainant alleges that extra-judicial executions and torture were perpetrated by supporters of the ZANU (PF) and the war veterans.

**178.** The Respondent State noted on the other hand that for it to be held responsible, the violations must be 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. <sup>77</sup>

**179.** Citing the UN Principles on the Effective Prevention and Investigation of Extra - Legal, Arbitrary and Summary Executions,<sup>78</sup> the State noted that generally extra-judicial executions are attributable to State organs and officials in the ordinary exercise of governance. This is supported by the U.N. Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.<sup>79</sup> The introductory paragraph of the 1991 United Nations Manual provides that such executions include: (a) political assassinations; (b) deaths resulting from torture or ill-treatment in prison or detention; (c) death resulting from enforced "disappearances"; (d) deaths resulting from the excessive use of force by law-enforcement personnel; (e) executions without due process; and (f) acts of genocide. The six circumstances of extra-judicial executions mentioned in the UN Manual point to the fact that under international law, such executions can only be carried out by the State or through its agents or acquiescence.

**180.** The UN Fact Sheet No.11 provides that the "situations of extrajudicial, summary or arbitrary execution" which the Special Rapporteur is requested to examine include all acts and omissions of State representatives that constitute a violation of the general recognition of the right to life embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.<sup>80</sup> This view is also <sup>77</sup> See Article 1 of the Conventions Against Torture and other Cruel, Inhuman and Degrading Treatment, 1984. <sup>78</sup> Recommended by Economic and Social Council Resolution 1989/65 of 24 May 1989. <sup>79</sup> U.N. Doc. G/ST/CS DHA/12 (1991). <sup>80</sup> Fact Sheet No.11 (Rev.1), Extrajudicial, Summary or Arbitrary Executions. EX.CL/322 (X) Page 91 supported by the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms which stresses that the prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the State.<sup>81</sup> This is in line with Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "

the term "torture" means 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, or 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...".

**181.** The above international human rights instruments support the State's argument that extra-judicial executions and torture are caused by the State or through its agents or acquiescence. In the present communication, the Complainant alleges that killings were committed by ZANU (PF) supporters and war veterans. The Respondent State maintains that to fulfil its obligations under international law, it investigated allegations of suspected deaths and the perpetrators were charged with the criminal law crime of murder. Some of them have been found guilty while some are still being prosecuted. The Complainant does not dispute the fact that such investigations had been undertaken but argue they were not effective. From the above reasoning, the Respondent State cannot be liable for extrajudicial executions as alleged by the Complainants, and accordingly cannot be said to have violated Article 4 of the African Charter.

**182.** In the specific case of the killing of Chiminya and Makiba, the Respondent State in its oral submission at the 35<sup>th</sup> Ordinary Session of the African stated that investigations into the murder was initiated immediately and three of the alleged perpetrators, Webster Gwamba, Bernard Makuwe and Morris Kainosi were arrested and remanded into custody and the Police was still looking for Mr. Mwale. The State noted further that the three accused have been charged and are awaiting trial. Based on the fact that the matter is still before the Courts in Zimbabwe, the African Commission decided not to make a decision on it at the admissibility stage. It will therefore not pronounce on it at this stage as well.

**183.** Regarding the allegation of torture, the Complainant did not adduce any evidence to show that State organs were responsible or that the government or State organs connived with ZANU (PF) supporters and War Veterans to inflict pain on others. The State can also not be held responsible because it has demonstrated that it investigated allegations brought to its attention. Under international law, responsibility can lie directly to the individuals and non-state actors for their acts. 81 UN General Assembly Resolution 53/144.

**184.** Regarding allegations of arbitrary detention, the Complainant argues that the victims were abducted or kidnapped and detained by war veterans and ZANU (PF) supporters. Article 6 of the African Charter provides for the right to liberty and protection from arbitrary detention.

**185.** Under international law, arbitrary detention or arrest refers to detention that is not consistent with due process of the law established by the State or international human rights norms. The UN Working Group on Arbitrary Detention in its opinion on the arbitrary detention of Dr. Wang in Case No 10/200382 declared that Wang, during his first five months in detention, did not have knowledge of the charges, the right to legal counsel, or the right to judicial review of the arrest and detention; and that, after that date, he did not benefit from the right to the presumption of innocence, the right to adequate time and facilities for defense, the right to a fair trial before an independent and impartial tribunal, the right to a speedy trial and the right to cross-examine witnesses

**186.** These fair trial procedures required by the UN are only available within a State setup and a person held by other individuals or non-state actors such as ZANU (PF) or the War veterans cannot be required to invoke a violation of these fair trial requirements because they do not exist under those circumstances. The situation would have been different if the non-state actors were holding the victims on behalf of the State, but the Complainant has not shown such agency. The Respondent State can therefore not be said to have violated article 6 of the African Charter because unlike communications 140/94, 141/94 and 145/95 where the violations were perpetrated by the policemen and security personnel of the Federal Republic of Nigeria, the current communication alleges violations caused by organisations and individuals not associated with the State. These individuals and organizations can, under international law, be held personally liable for human rights violations and under national law be charged with common law offences. The State becomes liable only when it is informed of such acts and it fails to take action, which in the present instance, the State claimed to have investigated.

**187.** With respect to allegations of violation of Articles 9, 10, 11 and 13 of the African Charter guaranteeing freedoms of expression, association and assembly, the right to participate freely in the government of one's country, respectively, the Complainant argues that the victims were forced by supporters of the ruling party to surrender their party campaign material and that the victims were prevented from communicating to others. In Communications 137/94, 139/94, 154/96 and 161/9783 the

African 82 Wang v People's Republic of China, regarding the continuing detention of Dr Wang Bingzhang, and the past detentions of Yue Wu, and Zhang Qi. The so-called "Democracy Three" were kidnapped on the Vietnamese border and taken by force into China, where they were subsequently detained by the government. 83 International PEN and Others on behalf of Ken Saro-Wiwa Jr./Nigeria, October 1998 EX.CL/322 (X) Page 93 Commission held that there is a close relationship between the right to freedom of expression and the rights to association and assembly. Because of that relationship, the actions of the government not only violated the rights to freedom of assembly and association, but also implicitly violated the right to freedom of expression. In the above communications, the actions that occasioned the violations were the direct consequence of the State action. However, in the present communication, the violations alleged to have been committed were done by individuals or organisations not directly connected to the State Party. For this reason, the State cannot be said to have violated Articles 9, 10, 11 and 13 of the African Charter. Issue Four: The Clemency Order and the Respondent's State's human rights obligations under the African Charter

**188.** The Complainant submits that by virtue of Clemency Order No 1 of 2000, the victims of human rights abuses could not seek redress for the human rights violations they suffered because they could not challenge the Clemency order. The Clemency Order granted pardon to every person liable to criminal prosecution for any politically motivated crime committed between January and July 2000. The Respondent State emphasised that the prerogative of clemency is recognised as an integral part of constitutional democracies. To ensure that those who had committed more serious offences do not go unpunished, the Clemency Order excluded crimes such as murder, rape, robbery, indecent assault, statutory rape, theft and possession of arms. The Respondent State further noted that a decision by the African Commission that the Clemency Order is an abdication of Zimbabwe's obligations under the African Charter would amount to undermining the whole notion of the clemency prerogative worldwide.

**189.** The African Commission would like to first of all address the assertion by the Respondent State that "a decision by the African Commission that the Clemency Order is an abdication of Zimbabwe's obligations under the Charter would amount to undermining the whole notion of the clemency prerogative worldwide". This assertion by the Respondent State seems to imply that the African Commission lacks the competence to make a determination on this matter.

**190.** The African Commission was established to monitor and ensure the protection of all human rights enshrined in the African Charter. It does this through among other things, making sure that policies and legislation adopted by States Parties to the African Charter do not contravene the provisions of the African Charter. The fact that the doctrine of clemency is universally recognized does not preclude the African Commission from making a determination on it, especially if it is believed that its use has been abused to the extent that human rights as contained in the African Charter have been violated. The African Commission would also like to emphasise the point that the African Charter is an International Treaty and it is customary in international law that where domestic legislation, including a national constitution is in conflict with international law, the latter prevails. The African Commission is therefore competent to make a determination on any domestic legislation, including a domestic legislation in a constitutional democracy that grants the Executive absolute discretion. EX.CL/322 (X) Page 94

**191.** Having concluded that it has the competence to rule on the question of the Clemency Order, the African Commission would now determine whether the Clemency Order as issued by the Respondent State violated the latter's obligation under the African Charter. The Clemency Order granted pardon to every person liable to criminal prosecution for any politically motivated crime committed between January and July 2000.

**192.** The Order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period. In terms of the Clemency Order, "a politically motivated crime" is defined as -: (b) Any offence motivated by the object of supporting or opposing any political purpose and committed in connection with (iii) The Constitutional referendum held on the 12<sup>th</sup> and 13<sup>th</sup> of February 2000; or (iv) The general Parliamentary elections held on 24<sup>th</sup> and 25<sup>th</sup> June 2000; whether committed before, during or after the said referendum or elections."

**193.** The only crimes exempted from the Clemency Order were murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty.

**194.** The Clemency Order under review in the present communication relates to a situation where non-state actors are alleged to have violated human rights, a situation of generalised violence which according to the state was politically motivated, a situation which resulted in loss of life and property. In a bid to reconcile the population the Respondent State passed Decree No. 1 of 2000 adopting executive



clemency to absolve perpetrators of violence if the latter related to "any offence motivated by the object of supporting or opposing any political purpose". The question for the African Commission is to determine whether the clemency order in question is a negation of the State's responsibility under Article 1 of the African Charter.

**195.** The term clemency is a general term for the power of an executive to intervene in the sentencing of a criminal defendant to prevent injustice from occurring.<sup>84</sup> The exercise of executive clemency is inherent in many, if not, all constitutional democracies of the world. National governments have chosen to implement clemency for a number of reasons. For instance, executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always just or certainly considerate of circumstances which may properly mitigate guilt. To afford remedy, it has 84 Allison Madden, "Clemency for Battered Women who kill their abusers: finding a just forum" 4 Hastings Women's L.J 1, 50 (1993). EX.CL/322 (X) Page 95 always been thought essential to vest in some authority other than the courts, power to ameliorate or avoid particular criminal judgments.<sup>85</sup>

**196.** Clemency embraces the constitutional authority of the President to remit punishment using the distinct vehicles of pardons, amnesties, commutations, reprieves, and remissions of fines. An amnesty is granted to a group of people who commit political offences, e.g. during a civil war, during armed conflicts or during a domestic insurrection. A pardon may lessen a defendant's sentence or set it altogether. One may be pardoned even before being formally accused or convicted. While a pardon attempts to restore a person's reputation, a commutation of sentence is a more limited form of clemency. It does not remove the criminal stigma associated with the crime, it merely substitutes a milder sentence. A reprieve on its part postpones a scheduled execution.

**197.** Clemency orders are not peculiar to Zimbabwe. These are resorted to the world over generally in the interest of peace and security. In the history of Zimbabwe, it is a well known fact that Clemency orders have been resorted to as a process of easing tension and creating a new beginning. For instance, at Independence in 1979/80, amnesty was resorted to by former colonial regime in order to create an environment for the new independent dispensation and to reduce the tension between the nationalists and the former white rules. In the process, members of the former white regime who had been guilty of massive killings were beneficiaries of clemency. In another incident, following the civil war in the southern part of Zimbabwe involving two former nationalist movements, ZANU (PF) and the opposition (PF) ZAPU, an amnesty was resorted to in order to create an environment for a Peace Accord in 1987, which brought about permanent peace to Zimbabwe. The result was the release of several thousands of people including those who were guilty of massive human rights violations including murder, treason, and terrorism. Also generally, clemency is granted annually to serving prisoners for the purpose of giving them a new beginning, including those released on the humanitarian grounds.

**198.** Generally however, a Clemency power is used in a situation where the President believes that the public welfare will be better served by the pardon, or to people who have served part of their sentences and lived within the law, or a belief that a sentence was excessive or unjust or again for personal circumstances that warrant compassion. In all these situations, the President exercises a near absolute discretion.

**199.** The reason the framers of national constitutions vest this broad power in the executive branch is to ensure that the President would have the freedom to do what he/she deems to be the right thing. In *Ex Parte Garland*,<sup>86</sup> the US Supreme Court characterized the scope of Executive Clemency thus: the clemency power thus conferred is unlimited, with the exception (in the case of impeachment). It extends to every 85 Linda Ammons, "Discretionary Justice: A legal and policy analysis of a Governor's use of the Clemency power in the cases of incarcerated battered women", 3 J.L & Policy 1, 30 (1994). 86 71 U.S. (4 Wall.) 333,380 (1866). EX.CL/322 (X) Page 96 offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgement. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restriction

**200.** Over the years however, this strict interpretation of Clemency powers have been the subject of considerable scrutiny by international human rights bodies and legal scholars. It is generally believed that the single most important factor in the proliferation and continuation of human rights violations is the persistence of impunity, be it of a *de jure* or *de facto* nature. Clemency, it is believed, encourages *de jure* as well as *de facto* impunity and leaves the victims without just compensation and effective remedy. *De jure* impunity generally arises where legislation provides indemnity from legal process in respect of acts to be

committed in a particular context or exemption from legal responsibility in respect of acts that have in the past been committed, for example, as in the present case, by way of clemency (amnesty or pardon). De facto impunity occurs where those committing the acts in question are in practice insulated from the normal operation of the legal system. That seems to be the situation with the present case.

**201.** There has been consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights has become a rule of customary international law. In a report entitled "Question of the impunity of perpetrators of human rights violations (civil and political)", prepared by Mr. Louis Joinet for the Sub-commission on Prevention of Discrimination and Protection of Minorities, pursuant to Sub-commission decision 1996/119, it was noted that "amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy" and that "the right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them".<sup>87</sup>

**202.** In his report, Mr Joinet drafted a set of principles for the protection and promotion of human rights through action to combat impunity, in which he stated that "there can be no just and lasting reconciliation unless the need for justice is effectively justified" and that "national and international measures must be taken ... with a view to securing jointly, in the interests of the victims of human rights violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity". The Report went on to state that "even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within certain bounds, namely: (a) the perpetrators of serious crimes under international law may not benefit from such 87 See E/CN.4/Sub.2/1997/20/Rev.1, paras. 32 and 27.

measures until such time as the State has met their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take acts to prevent the recurrence of such atrocities.<sup>88</sup>

**203.** In its General Comment No. 20 on Article 7 of the ICCPR, the UN Human Rights Committee noted that "amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible".<sup>89</sup> In the case of *Hugo Rodríguez v. Uruguay*,<sup>90</sup> the Committee reaffirmed its position that amnesties for gross violations of human rights are incompatible with the obligations of the State party under the Covenant and expressed concern that in adopting the amnesty law in question, the State party contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further human rights violations. The 1993 Vienna Declaration and Programme of Action supports this stand and stipulates that "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law".<sup>91</sup>

**204.** Importantly, the international obligation to bring to justice and punish serious violations of human rights has been recognised and established in all regional human rights mechanisms. The Inter-American Commission and Court of Human Rights have also decided on the question of amnesty legislation. The Inter-American Commission on Human Rights has condemned amnesty laws issued by democratic successor Governments in the name of reconciliation, even if approved by a plebiscite, and has held them to be in breach of the 1969 American Convention on Human Rights, in particular the duty of the State to respect and ensure rights recognized in the Convention (article 1(1)), the right to due process of law (article 8) and the right to an effective judicial remedy (article 25). The Commission held further that amnesty laws extinguishing both criminal and civil liability disregarded the legitimate rights of the victims' next of kin to reparation and that such measures would do nothing to further reconciliation. Of particular interest are the findings by the Inter-American Commission on Human Rights that "amnesty" legislation enacted in Argentina and Uruguay violated basic provisions of the American Convention on Human Rights.<sup>92</sup> In these cases, the 88 *Ibid.* Principles 18 and 25. 89 See Human Rights Committee General Comment No. 20 (44) on Article 7, para. 15 at [www.unhchr.ch/tbs/doc.nsf/view40?SearchView](http://www.unhchr.ch/tbs/doc.nsf/view40?SearchView). 90 *Rodríguez v. Uruguay*, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994). 91 See The Vienna Declaration and Programme of Action, Section II, para. 60, at [www.unhchr.ch/huridocda/huridoca.nsf/Sym.../A..CONF.157.23](http://www.unhchr.ch/huridocda/huridoca.nsf/Sym.../A..CONF.157.23). 92 Annual Report of the Inter-American Commission on Human Rights, 1992-1993.

Inter-American Commission held that the legal consequences of the amnesty laws denied the victims the right to obtain a judicial remedy. The effect of the amnesty laws was that cases against those charged were thrown out, trials already in progress were closed, and no judicial avenue was left to present or continue cases. In consequence, the effects of the amnesty laws violated the right to judicial protection and to a fair trial, as recognized by the American Convention and in the present case, the African Charter.<sup>93</sup>

**205.** In Argentina, the national courts have found Argentina's Full Stop Law<sup>94</sup> and the Due Obedience Law<sup>95</sup> as incompatible with international law and in particular with Argentina's obligations to bring to justice and punish the perpetrators of gross human rights violations. This is because these two pieces of legislation had been enacted to prevent from prosecution low and high ranking military officials (government agents) who were involved in human rights violations and disappearances during the 1970s and 1980s.

**206.** The Inter-American Court stated in its first judgment that states must prevent, investigate and punish any violation of the rights recognised by the Convention.<sup>96</sup> This has been re-emphasised in subsequent cases. In the 'Street Children case', the Court reiterated 'that Guatemala is obliged to investigate the facts that generated the violations of the American Convention in the instant case, identify those responsible and punish them.'<sup>97</sup> The Inter-American Court of Human Rights, in the *Barrios Altos Case, Chumbipuma Aguirre y otros v. Perú*<sup>98</sup> held that amnesty provisions, prescription and the exclusion of responsibility which have the effect of impeding the investigation and punishment of those responsible for grave violations of human rights, such as torture, summary, extrajudicial or arbitrary executions, and enforced disappearances, are prohibited as contravening human rights of a non-derogable nature recognised by international human rights law. The Court held further that the self-amnesty laws lead to <sup>93</sup> Ibid. See also Jayni Edelstein, *Rights, Reparations and Reconciliation: Some comparative notes*, Seminar No. 6, July 1994. <sup>94</sup> Law No 23,429 of 12 December 1986. <sup>95</sup> Law No. 23,521 of 4 June 1987. The Committee Against Torture took the view, in respect of these laws, that the passing of the "Full Stop" and "Due Obedience" Laws in Argentina by a "democratically elected" government for acts committed under a de facto government is "incompatible with the spirit and purpose of the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]" (Committee against Torture, Communications N<sup>o</sup> 1/1988, 2/1988 and 3/1988, Argentina, decision dated 23 November 1989, paragraph 9.) <sup>96</sup> *Velasquez Rodriguez v Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988). para 166. <sup>97</sup> *Hilaire, Constantine and Benjamin et al. Case*, Judgment of June 21, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 94 (2002) or the "Street Children" Case, Judgment of May 26, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 77 (2001), para. 101 and operative clause 8. <sup>98</sup> *Caso Barrios Altos, Chumbipuma Aguirre y otros vs. Perú*, Inter-American Court of Human Rights, (Ser. C), No. 75 - Judgment of March 14, 2001. EX.CL/322 (X) Page 99 victims being defenceless and to the perpetuation of impunity, and, for this reason, were manifestly incompatible with the letter and spirit of the American Convention. The Court concluded by stating that as a consequence of the manifest incompatibility of the amnesty laws with the Inter-American Convention on Human Rights, the laws concerned have no legal effect and may not continue representing an obstacle to the investigation of the facts of the case, nor for the identification and punishment of those responsible.<sup>99</sup>

**207.** The European Court of Human Rights on its part has recognised that where the alleged violations include acts of torture or arbitrary killings, the state is under a duty to undertake an investigation capable of leading to the identification and punishment of those responsible.<sup>100</sup>

**208.** The African Commission has also held amnesty laws to be incompatible with a State's human rights obligations.<sup>101</sup> Guideline No. 16 of the Robben Island Guidelines adopted by the African Commission during its 32<sup>nd</sup> session in October 2002 further states that 'in order to combat impunity States should: a) ensure that those responsible for acts of torture or ill-treatment are subject to legal process; and b) ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law'<sup>102</sup>

**209.** The UN Special Rapporteur on Torture has also expressed his opposition to the passing, application and non-revocation of amnesty laws (including laws in the name of national reconciliation, the consolidation of democracy and peace, and respect for human rights), which prevent torturers from being brought to justice and hence contribute to a culture of impunity. He called on States to refrain from granting or acquiescing in impunity at the national level, inter alia, by the granting of amnesties, such impunity itself constituting a violation of international law. As the International 99 Cited in the Interim Report on the question of torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel

Rodley, Special Rapporteur of the Commission on Human Rights, in accordance with paragraph 30 of General Assembly resolution 55/89. Interim Report A/56/156 3 July 2001. 100 European Court of Human Rights Case Zeki Aksoy v. Turkey, 18 December 1996, para 98. See also, Aydin v. Turkey App. No. 23178/94 Judgment of 25 September 1997, para 103; Selçuk and Asker v. Turkey App. Nos. 23184/94 and 23185/94 Judgment of 24 April 1998, para 96; Kurt v. Turkey App. No. 24276/94 Judgment of 25 May 1998, para 139; and Keenan v. United Kingdom App. No. 27229/95 Judgment of 3 April 2001, para 122. 101 See also: Various communications v. Mauritania Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98 and Jean Yokovi Degli on behalf of Corporal N. Bikagni, Union Inter africaine des Droits de l'Homme, Commission Internationale de Juristes v Togo Communications 83/92, 88/93, 91/93. 102 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission on Human and Peoples' Rights, 32<sup>nd</sup> Session, 17 - 23 October, 2002: Banjul, The Gambia. See also: Various communications v. Mauritania Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98. EX.CL/322 (X) Page 100 Criminal Tribunal for the former Yugoslavia Trial Chambers noted in the Celibici and Furundzija cases, 103 torture is prohibited by an absolute and non-derogable general rule of international law.

**210.** In the present communication, the African Commission has established that most of the atrocities, including human rights violations, were perpetrated by non-state actors, that the State exercised due diligence in its response to the violence - investigated the allegations, amended some of its laws, and in some cases, paid compensation to victims. The fact that all the allegations could not be investigated does not make the State liable for the human rights violations alleged to have been committed by non-state actors. It suffices for the State to demonstrate that the measures taken were proportionate to deal with the situation, which in the present communication, the State seemed to have shown.

**211.** However, this Commission is of the opinion that by passing the Clemency Order No. 1 of 2000, prohibiting prosecution and setting free perpetrators of "politically motivated crimes", including alleged offences such as abductions, forced imprisonment, arson, destruction of property, kidnappings and other human rights violations, the State did not only encourage impunity but effectively foreclosed any available avenue for the alleged abuses to be investigated, and prevented victims of crimes and alleged human rights violations from seeking effective remedy and compensation.

**212.** This act of the state constituted a violation of the victims' right to judicial protection and to have their cause heard under Article 7 (1) of the African Charter.

**213.** The protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief. If there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard. Adopting laws such as the Clemency Order No. 1 of 2000, that have the effect of eroding this opportunity, renders the victims helpless and deprives them of justice. To borrow from the Inter-American human rights system, the American Declaration of the Rights and Duties of Man<sup>104</sup> provides in Article XVIII that every person has the right to "resort to the courts to ensure respect for [their] legal rights," and to have access to a "simple, brief procedure whereby the courts" will protect him or her "from acts of authority that ... violate any fundamental constitutional rights." The right of access is a necessary aspect of the right to "resort to the courts" set forth in Article 103 IT-96-21-A, 20 February 2001, Appeals Chamber; *The Prosecutor v. Anto Furundzija* (IT-95-17/1- T), Trial Chamber II, Judgment, 10 December 1998 (121 ILR 218) 45, 47, 48, 49, 61, 316, 333, 334, 337, 340, 342, 402, 469. <sup>104</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). EX.CL/322 (X) Page 101 XVIII.<sup>105</sup> The right of access to judicial protection to ensure respect for a legal right requires available and effective recourse for the violation of a right protected under the Charter or the Constitution of the country concerned.

**214.** In yet another jurisdiction, the Canadian Human Rights Charter<sup>106</sup> provides a similar guarantee in section 24(1), which establishes that: "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances". The effect of this right is to require the provision of a domestic remedy which enables the relevant judicial authority to deal with the substance of the complaint and grant appropriate relief where required. In addition to the explicit rights to judicial protection,

implementation of the overarching objective of the Charter (ensuring the effectiveness of the fundamental rights and freedoms set forth), necessarily requires that judicial and other mechanisms are in place to provide recourse and remedies at the national level.

**215.** In light of the above, the African Commission holds that by enacting Decree No. 1 of 2000 which foreclosed access to any remedy that might be available to the victims to vindicate their rights, and without putting in place alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy, the Respondent State did not only prevent the victims from seeking redress, but also encouraged impunity, and thus reneged on its obligation in violation of Articles 1 and 7 (1) of the African Charter. The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.<sup>107</sup> <sup>105</sup> See generally, IACHR, Resolutions N° 3/84, 4/84 and 5/85, Cases N° 4563, 7848 and 8027, Paraguay, published in Annual Report of the IACHR 1983-84, OEA/Ser.L/V/II.63, doc. 10, 24 Sept. 1984, at pp. 57, 62, 67 (addressing lack of access to judicial protection in proceedings involving expulsion of nationals; linking right to freely enter and remain in one's own country under Article VIII of the Declaration to the rights to a fair trial and due process under Articles XVIII and XXVI). See also, Report N° 47/96, Case 11.436, Cuba, in Annual Report of the IACHR 1996, OEA/Ser.L/V/ II.95, Doc. 7 rev., 14 March 1997, at para. 91, (citing Annual Report of the IACHR 1994, "Cuba," at p. 162, and addressing failure of State to observe freedom of movement of nationals under Article II via denial of exit permits from which no appeal is allowed). In the context of the American Convention, see generally, IACHR, Resolution N° 30/81, Case 7378, Guatemala, in Annual Report of the IACHR 1980-81, OEA/Ser.L/V/II.54, doc. 9 rev. 1, 16 Oct. 1981, p. 60, at 62 (addressing denial of right to judicial protection in expulsion of foreigner absent any form of due process), Report N° 49/99, Case 11.610, Mexico, Annual Report of the IACHR 1998, OEA/Ser.L/V/II.102, Doc. 6 rev., 16 April 1999, Vol. II; see also, Eur. Ct. H.R., Ashingdane Case, Ser. A No. 93 (1985) para. 55. <sup>106</sup> The Canadian Charter of Rights and Freedoms, Ottawa, Canada, April 17, 1982. <sup>107</sup> See the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para C(d).

## Holding

[b]For these reasons, the African Commission:[b]

Holds that the Republic of Zimbabwe is in violation of Articles 1 and 7 (1) of the African Charter;  
Calls on the Republic of Zimbabwe to establish a Commission of Inquiry to investigate the causes of the violence which took place from February - June 2000 and bring those responsible for the violence to justice, and identify victims of the violence in order to provide them with just and adequate compensation.  
Request the Republic of Zimbabwe to report to the African Commission on the implementation of this recommendation during the presentation of its next periodic report.

Adopted at its 39<sup>th</sup> Ordinary Session held from 11<sup>th</sup> - 15<sup>th</sup> May 2006 in Banjul, The Gambia.