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## Communication 446/13- Jennifer Williams and Others (represented by Zimbabwe Lawyers for Human Rights) v Republic of Zimbabwe

### Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat), received a Complaint on 13 April 2013 from the Robert F. Kennedy Center for Justice and Human Rights and Zimbabwe Lawyers for Human Rights (the Complainants), on behalf of Jennifer Williams, Magodonga Mahlangu, and Women of Zimbabwe Arise (WOZA)<sup>1</sup> (the Victims).
2. The Complaint is submitted against the Republic of Zimbabwe (the Respondent State), State Party to the African Charter on Human and Peoples' Rights (the African Charter).<sup>2</sup>
3. The Complainants submit that, the Victims are all Zimbabwean citizens currently residing in Bulawayo, Zimbabwe. Jennifer Williams and Magodonga Mahlangu are respectively the National Coordinator and the Programme Coordinator of WOZA.
4. It is alleged that the Victims' right to peaceful protest and demonstration has been curtailed by the Respondent State through the acts of the Zimbabwe Republic Police (ZRP) and other State Agencies which have prevented them from carrying out peaceful protests. This has resulted in the arrest and detention of the Victims between 2003 and March 2013.
5. The Complainants give factual details of the alleged arrest and detention of the Victims by the anti-riot police while carrying out peaceful demonstration in different parts of Bulawayo and Harare between 2003 and March 2013. The Complainants state that the tactics of their peaceful protest include processions, marches, mass demonstration, sit-ins, verbal expressions and the holding of placards.
6. The Complainants aver that, on a number of occasions, the Victims have been charged with participating in gatherings with intent to promote breaches of the peace, or bigotry under Section 37 of the Zimbabwe Criminal Law (Codification and Reform) Act (Zimbabwe Criminal Code).
7. The Complainants submit that on 16 October 2008, the Victims were arbitrarily arrested and illegally detained for three (3) weeks for engaging in a lawful public demonstration and peaceful protest. They litigated through the domestic system and received a final decision by the Supreme Court of Zimbabwe on 26 November 2010 determining that their conduct could never amount to a violation of law on which the charges brought against them by the Respondent State were based. The Supreme Court specifically ruled that the participation of the Victims was protected under the Constitution of Zimbabwe and that the arrest was a violation of their fundamental right to personal liberty.

<sup>1</sup> WOZA is a civic movement lobbying and advocating on issues affecting women and families in Zimbabwe. It was formed in 2002 and has a countrywide membership of approximately 85,000 women and men.

<sup>2</sup> Republic of Zimbabwe ratified the African Charter on 30 May 1986.



8. The Complainants state that despite the 2010 Supreme Court ruling, the Victims are still being denied their right to engage in peaceful protest and public demonstration. They have been arrested a number of times and charged under various sections of the Zimbabwe Criminal Code including Section 41 on disorderly conduct in a public place and Section 46 on criminal nuisance.
9. The Complainants aver that on 10 February 2012, ten (10) WOZA members were arrested and charged with criminal nuisance, and released on bail. The ten (10) members appeared in Court sixteen (16) times, and the hearing of the matter was postponed five (5) times. In June 2012 they were granted a referral to the Supreme Court, for a determination on the question of violation of their fundamental rights.
10. The Complainants seek the intervention of the African Commission on Human and People' Rights (the Commission), in order to prevent any irreparable harm that will occur, should the Government continue to suppress the Victims' rights to engage in peaceful protests and public demonstrations in the time leading up to the elections in 2013. The Complainants therefore request the Commission to adopt Provisional Measures.
11. The Complainants aver that since the submission of this Communication, the Respondent State has engaged in a systematic pattern of suppression in a bid to prevent the Victims from engaging in peaceful protests.

*Articles alleged to have been violated*

12. The Complainants allege violation of Articles 1, 2, 3, 6, 9(2), 10 (1) and 11 of the African Charter.

*Prayers:*

13. The Complainants pray the Commission to :
  - Interdict the Respondent State from interfering with the Victims' right to engage in peaceful protest and public demonstrations ;
  - Recommend reforms of the Respondent State's laws, policies and practices incompatible with the Charter and international law, particularly those that impermissibly restrict the right to engage in peaceful protest and public demonstrations; and
  - Recommend proactive measures including but not limited to trainings and the issuance of internal policy directives to ensure effective implementation of all domestic laws, policies and practices for the protection and facilitation of the right to engage in peaceful protest and public demonstration.
14. Pending the finalization of this matter, the Complainants also request the Commission to grant the following Provisional Measures:
  - Interdict the Respondent State from interfering in any way with the Victims' right to peaceful protest and public demonstration, particularly in the period between the date of filing this Communication and the 2013 Zimbabwean election. In particular, interdict the Respondent State to refrain from arresting or detaining the Victims and other members of WOZA when they are engaging in peaceful protest and public demonstration as protected by the Charter; and
  - Request the Respondent State to take measures to facilitate the right to engage in peaceful protest and public demonstrations and remove any restriction of the right to freedom of expression and assembly in law and practice that is incompatible with the Charter.





### *Procedure*

15. The Complaint was received by the Secretariat on 13 April 2013 and registered as *Communication 446/13- Jennifer Williams and Others (represented by Zimbabwe Lawyers for Human Rights) v the Republic of Zimbabwe*. The Secretariat acknowledged receipt of the Complaint on 2 May 2013 and informed the Complainants that it will be considered for Seizure during the next Session of the Commission.
16. The Commission was seized of the Communication at its 14<sup>th</sup> Extraordinary Session in July 2013 and did not grant Provisional Measures, on the grounds that the Complaint did not disclose sufficient grounds within Rule 98(1) of the Rules of Procedure.
17. The letter and Note Verbale notifying the Complainants and Respondent State respectively of the Seizure decision and request for Provisional Measures were transmitted on 7 August 2013.
18. The Secretariat received the brief on Admissibility of the Complainants on 10 January 2014 and the same was transmitted to the Respondent State on 16 January 2014. The Secretariat acknowledged receipt of the brief by letter of the same date.
19. By letter and Note Verbale of 27 March 2014 and 26 March 2014 respectively, the Secretariat informed both Parties that the Commission will proceed to consider the Admissibility of the Communication on the basis of the available information.
20. The Respondent State by letter of 5 May 2014 sought the indulgence of the Commission to condone its late Submissions. The Commission decided to admit the Respondent State's submissions during its 16<sup>th</sup> Extraordinary Session. Both Parties were informed of this decision by letter and Note Verbale of 11 August 2014.
21. By letter and Note Verbale of 5 March 2015, both Parties were updated about the status of the Communication.
22. The Commission declared the Communication Admissible during its 18<sup>th</sup> Extra-Ordinary Session in July 2015, and the Parties were informed of the Commission's decision by letter and Note Verbale of 8 October 2015. In the same letter, the Complainants were requested to submit on the Merits within sixty (60) days.
23. The Complainants submitted on the Merits in December 2015 and by letter and Note Verbale of 17 December 2015, the Secretariat acknowledged receipt of the submissions and forwarded the same to the Respondent State with a timeline of sixty (60) days to respond.
24. By Note Verbale of 4 March 2016, the Secretariat informed the Respondent State that the Commission decided to grant thirty (30) additional days for the State to make its submissions on the Merits. The Complainants were accordingly informed.
25. On 5 May 2016, the Respondent State made its submissions on the Merits which were transmitted to the Complainants by letter of 7 May 2016.
26. The Complainants made observations on the State's submissions on the Merits which were transmitted to the Respondent State by Note Verbale of 8 September 2016.
27. A decision on the Merits was deferred from the 59<sup>th</sup> to 67<sup>th</sup> Ordinary Sessions.



## *The Law on Admissibility*

### *Submissions of the Complainants on Admissibility*

28. The Complainants submit that the Communication complies with subsections 1, 2, 3, 4, 6 and 7 of Article 56 of the African Charter.
29. In relation to Article 56 (1), the Complainants submit that the requirement has been complied with and the Victims are not requesting anonymity.
30. With regards to Article 56 (2), the Complainants aver that the Communication raises issues that are within the scope of the implementation and operation of the Constitutive Act of the African Union (AU) as well as the African Charter. The Complainants therefore argue that the Communication satisfies the requirements in Article 56(2) of the Charter.
31. It is also the submission of the Complainants that the present Communication meets the requirements of Article 56 (3) of the Charter in that it was not written in disparaging language.
32. In relation to Article 56 (4) of the African Charter, the Complainants submit that the Communication is not based exclusively on news disseminated through mass media reports but on the Victims' lived realities. Hence, they submit that it satisfies the requirements of Article 56(4) of the Charter.
33. With respect to the exhaustion of local remedies, the Complainants submit that the Communication complies with Article 56(5) of the African Charter. Stating that the exhaustion of domestic remedies requirement is premised on the principle that the Respondent State should have the first opportunity to redress an alleged wrong,<sup>3</sup> the Complainants cite the Commission's decision in *Sir. Dawda K. Jawara v. The Gambia*,<sup>4</sup> to argue that the Victims are not required to exhaust any local remedy which is found to be, as a practical matter, unavailable or ineffective. Making reference to the same case, the Complainants further argue that, as recognized by the Commission, though the requirement of exhaustion of local remedies should not constitute an unjustifiable impediment to access international remedies, where an applicant avers the unavailability of a local remedy in the Respondent State, the burden of proof shifts to the State to claim non-exhaustion, with an obligation to prove that adequate and effective local remedies are still available to the applicant.
34. The Complainants submit that the existence of a remedy must be sufficiently certain, not only in theory, but also in practice, failing which, it will lack the requisite adequacy and effectiveness.
35. The Complainants contend that local remedies are unavailable, ineffective, and insufficient to redress the Respondent State's clear and systematic pattern of violations of the Charter. They note the Supreme Court's decision of November 2010 in favour of the Victims,<sup>5</sup> and point out that despite the Supreme Court's decision, from December 2010 to February 2013, the Victims continue to be subdued to systematic harassment, intimidation, threats, arbitrary arrests, physical force, and torture from the Respondent State, preventing them from engaging in public demonstrations and peaceful protest.

<sup>3</sup> Communication 71/92-Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v Zambia.

<sup>4</sup> Communication 147/95 and 149/96 - Sir Dawda K Jawara v The Gambia (2000).

<sup>5</sup> See paragraph 7 in the summary of facts.





36. The Complainants argue that the situation in the current Communication involves "numerous alleged violations" that "fall into a pattern" and establish a "pattern of ineffectiveness" of local remedies.
37. The Complainants argue that each time the Victims are arrested and detained, they are charged with a number of crimes and often released without any formal charge. According to the Complainants, if the Victims were forced to avail themselves of the courts every single time they are charged with a new crime for engaging in the same or similar conduct, and see a complaint through to a final decision every time they are arbitrarily arrested and detained without charge, the Victims and the State would wind up in a vicious cycle of never ending litigation that would continue to drain the resources of the Victims and inhibit their enjoyment of the rights and freedoms protected under by the Charter.
38. Citing *Anuak Justice Council v. Ethiopia*,<sup>6</sup> the Complainants argue that a remedy is available if "the petitioner can pursue it without impediment or if he can make use of it in the circumstances of his case." It is effective if it "offers a prospect of success," and is sufficient if it is "capable of redressing the complaint." The Complainants argue further that when the Commission examines the conditions for exhausting local remedies, it considers the general context of the case. Thus any limited domestic procedure that may exist in theory to provide possible redress to any single incident of a violation, would not offer any prospect of success in, nor be capable of redressing the Respondent State's overall and ongoing pattern of violations against the Victims.
39. It is the Complainants' contention that the Victims have already litigated a case and received a favorable decision from the highest domestic court-the Supreme Court of Zimbabwe. Yet the Respondent State has devised - and could continue devising *ad infinitum*- new reasons or trumped up charges to prevent the Victims from engaging in the same or similar conduct already deemed to be lawful. Accordingly, the Complainants submit that considering the general context, local remedies are neither effective nor sufficient to redress the State's systematic pattern of violations.
40. The Complainants argue that the *European Court of Human Rights (European Court) in Akdivar and Others v. Turkey*,<sup>7</sup> held that the local remedies rule is "inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective." The Complainants note that in the current Communication, the State has repeatedly violated multiple Articles of the African Charter by allowing the police to disperse and abuse protesters, and detain them as portrayed in the facts of the Communication. Moreover, the Complainants aver that the complaints of the Victims have been ignored or disregarded by senior ranking police officers, indicating that there is official tolerance of these violations.
41. The Complainants also aver that the State has failed to investigate or act against violations of the rights of the Victims. Citing *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v. Cameroon*,<sup>8</sup> where the Victim was imprisoned by a tribunal without a trial and was sentenced to five years imprisonment for hiding his brother and was not reinstated as a Magistrate after his release, the Complainants note the Commission's decision that since the Victim approached various Government bodies to seek a remedy, but received no response, local remedies were duly exhausted particularly because the Victim had taken all the above-mentioned actions which yielded no results.
42. The Complainants submit that the inaction of a State can also be a sign that there is no sufficient or available remedy. In support of this argument, they make reference to *Article 19 v. Eritrea*,

<sup>6</sup> Communication 299/05- *Anuak Justice Council v. Ethiopia*.

<sup>7</sup> Application No. 21893/93-*Akdivar and Others v. Turkey* (16 September 1996).

<sup>8</sup> Communication No. 39/90, (1997)-*Annette Pagnoulle (on behalf of Abdoulaye Mazou) v. Cameroon*.





<sup>9</sup>wherein the Complainants claimed that all requests submitted to the Government to release or give the detained journalists a fair trial were ignored. The Complainants underscore the Commission's decision in the said Communication that local remedies were not effective or sufficient because the State failed to take steps to give the victims access to attorneys or try them more than a year after being "seized of the matter."

43. The Complainants note that the State in the present Communication has consistently ignored the Victims' requests for Government action. For example, they aver that WOZA members filed a complaint regarding the abuses they faced at the hands of police officers after they were arrested at a September 21, 2011 demonstration. Even though the WOZA members requested a status update on the complaint on multiple occasions, they did not receive any information on the status of their complaint. In response to the lack of action on the complaint, WOZA members marched to the Joint Monitoring and Implementation Committee, and were promptly dispersed by the police. In November 2012, they delivered another complaint letter to the police which was equally ignored. The Complainants state that on February 14, 2013, WOZA members again organized a demonstration to protest the lack of response to all of these complaints and still no action was taken.
44. The Complainants further aver that on 19 and 20 September 2013, functionaries of the ZRP disrupted peaceful protests meant to celebrate the International Day of Peace in the cities of Bulawayo and Harare. Nine (9) WOZA members were allegedly arrested and detained, while thirty (30) suffered physical injuries as a result of assaults by baton sticks. It is alleged that no charges were preferred against the arrested persons, who were subsequently released.
45. The Complainants allege that on 29 November 2013, approximately one thousand (1000) WOZA members marched in eleven (11) separate processions from different starting points, to hand over a petition to local Government Minister at the Mhlahlandlela Complex in Bulawayo, and some of them were arrested before they could reach the complex. It is submitted that those who reached the Complex successfully handed over the petition, but as they attempted to exit the complex, members of the ZRP beat them with baton sticks, forcing two (2) members to seek medical treatment – one for a dislocated knee and the other an elbow injury. After unsuccessfully attempting to beat off other WOZA members, who remained resolute and stood in silent protest, the police allegedly deployed dogs to chase them away.
46. It is alleged further that on 2 December 2013, in commemoration of the sixteen (16) days of Activism against Gender Based Violence, eight hundred (800) members of WOZA marched to the Parliament of Zimbabwe to hand over a petition and a report titled "Zimbabweans Beat The Drum Of Peace To Break The Silence On Violence." Despite the willingness by officials from Parliament to receive the report, police officers allegedly harassed WOZA members sitting peacefully in silence outside of Parliament while the report was being presented. It is alleged that on one occasion, police officials ran a truck into the WOZA members to intimidate them into running away.
47. The Complainants aver that the Victims have lodged several formal complaints to the police about the treatment received by WOZA members during their peaceful demonstrations, including verbal abuse, physical violence, beatings and torture. It is alleged that these complaints have not been responded to. The Complainants claim that the acts of the police against the Victims have prevented them from carrying out their activities.
48. They aver that on 13 February 2014 the ZRP beat and harassed WOZA members peacefully protesting in Harare, preventing the submission of a petition to Parliament.

<sup>9</sup> Communication No. 275/2003, *Article 19 v The State of Eritrea*.





49. The Complainants aver that on 12 June 2014, three plain-clothed officers arrived at the house of a WOZA member named in their submission, to investigate an alleged crime. They allege that the officers harassed children outside the member's house in an attempt to forcefully enter the premises, once inside, the officers discovered and seized WOZA booklets titled - 'Building Democracy with WOZA'.
50. The Complainants aver that on 6 September 2014, the 1<sup>st</sup> Victim attempted to participate in the National Railways of Zimbabwe workers protest and was identified and harassed by the ZRP based on her affiliation with WOZA. They aver that although the 1<sup>st</sup> Victim indicated that she was not protesting as a WOZA member but as the daughter of a pensioner, the ZRP insisted that she leaves the protest. They aver that the leader of the National Railways of Zimbabwe Artisans Union asked the 1<sup>st</sup> Victim to leave the protest, afraid that ZRP would prevent the protest from moving forward.
51. The Complainants aver that on 13 February 2015 riot police beat, threatened and illegally dispersed a peaceful protest attended by the 1<sup>st</sup> and 2<sup>nd</sup> Victims and five hundred and fifty (550) WOZA members in Bulawayo. They further aver that on 14 and 15 September 2015, two (2) WOZA members were arrested by police stemming from trumped up charges filed against them for participating in a peaceful protest in 2009. This they allege is despite the fact that the members were removed from remand since 25 February 2010 pending the outcome of a constitutional challenge to the charges they faced.
52. It is the Complainants' contentions that not only do the above events demonstrate that officials had notice of these alleged violations, but also that they failed to conduct investigations or take any other action regarding the allegations. Thus, the Complainants conclude that local remedies are "either not available or if they are, not effective or sufficient to redress the violations alleged."
53. With regards to Article 56(6) of the Charter, the Complainants submit that the Communication has been submitted within a reasonable period of time, explaining that it details an on-going pattern of violations by the State from 2010 to the date of filing the original communication, and that, as demonstrated above, has continued. In support of their arguments, the Complainants cite *Tsatsu Tsikata v. Ghana*,<sup>10</sup> where the Commission decided that "[i]n the case of unavailability or prolongation of local remedies" the Commission estimates the timeliness of a communication from the date of the Complainant's notice thereof."
54. In relation to Article 56(7) of the Charter, the Complainants submit that the allegations as presented against the Respondent State have not been dealt with by any international tribunal or court, complying with the requirement under the sub Article.

#### *Respondent State's submissions on Admissibility*

55. In its submissions, the Respondent State contends that the Communication is not admissible as it does not satisfy the requirement of Article 56(5) of the African Charter on exhaustion of local remedies.
56. It states that there are domestic local remedies for all the alleged violations mentioned in the Communication, some of which the Victims have locally instituted proceedings, and which are still pending before the Constitutional Court of Zimbabwe. In view of this, the Respondent State argues that local remedies have not yet been exhausted and calls on the Complainants to file the present case before the relevant courts for redress.

<sup>10</sup> Communication 322/06 - *Tsatsu Tsikata v. Ghana*.





## *Analysis of the Commission on Admissibility*

57. Article 56 of the Charter provides seven Admissibility requirements which need to be cumulatively fulfilled before a Communication is declared Admissible. In the present Communication, the Respondent State contests the fulfillment of only one of these requirements pertaining to the exhaustion of local remedies. Accordingly, the Commission takes the Respondent State's non objection as assent that the six other requirements have been fulfilled.
58. The Commission therefore notes that the sole contentious Article between the Parties is with respect to the requirement in Article 56(5) of the African Charter. After carefully examining the Communication and the submissions of both Parties, the Commission is convinced that the Communication meets six of the Admissibility requirements under Article 56 of the African Charter which has been adequately substantiated by the Complainants, raise no contentious issues and require no further examination: The authors have been indicated; the Communication is compatible with the provisions of the Charter and the Constitutive act of the AU as it outlines a *prima facie* case of the violation of Articles 1, 2, 3, 6, 9, 10 (1) and 11 of the Charter; it is not written in disparaging or insulting language; it is not exclusively based on news disseminated through the mass media; it was submitted within a reasonable time; and has not been settled through other international procedures. Further, since the Respondent State did not make any submissions to the contrary, then assessment is based on what the Complainant submits. To this end, the analysis on Admissibility of this Communication will focus on the requirements contained in Article 56(5) of the Charter.
59. Article 56(5) of the African Charter provides that Communications received by the Commission shall be considered "if they are sent after exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged."
60. The Complainants contend that the Victims were not able to exhaust local remedies because they were not available, effective and sufficient to redress the Respondent State's violations of the Charter. It is in light of this submission that the Commission will proceed to determine the availability, effectiveness and sufficiency of local remedies in the Respondent State to the Victims.
61. According to the well-established jurisprudence of the Commission, Complainants are required to exhaust local remedies only if the local remedies are available, effective and sufficient. A local remedy is considered available "*if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint*".<sup>11</sup>
62. The Commission has asserted that the rationale for the exhaustion of local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matter through its own local system, thus preventing the Commission from acting as a court of first instance rather than a body of last resort.
63. In the present Communication, the Commission notes the Complainants' submissions regarding the ineffectiveness and unavailability of local remedies. The Complainants contend that all local remedies have been exhausted to the extent that they exist and that the Victims' rights continue to be violated by the Respondent State. In particular, they state that:
- i. Despite the Supreme Court's decision of November 2010 in favour of the Victims, they are still, amongst other abuses, harassed, intimidated, and arbitrary arrested when they engage in public demonstrations and peaceful protest;

<sup>11</sup> n 4 above - *Jawara v Gambia* para 32.





- ii. The Respondent State's on-going violations highlight unavailability of local remedies that can adequately relieve the Victims; and
- iii. The Respondent State has failed to investigate or act against violations of the rights of the Victims despite being aware.

64. The Respondent State on the other hand argues that local remedies have not been exhausted because there are domestic local remedies for all the alleged violations mentioned in the Communication which have not been exhausted by the Victims. It notes that some of the violations have been litigated in local courts and are still pending before the Constitutional Court of Zimbabwe.
65. Regarding the first issue above, while it is the contention of the Respondent State that even though some of the violations in the Communication have successfully been litigated in domestic courts, others are still pending before the Constitutional Court, the Respondent State has failed to persuade the Commission that at the material time, the Constitutional Court as a local remedy, was effective both in theory and in practice.
66. It is worth noting that even though the Constitutional Court has always been available as a remedy, at the time this matter was submitted to the Commission, the Supreme Court was the highest Court in Zimbabwe. Before 2013, the Supreme Court also had jurisdiction over Constitutional matters sitting as a Court of first instance.
67. On 16 March 2013, a draft new Constitution of Zimbabwe was passed by the Parliament and His Excellency the President of Zimbabwe signed it into law on 22 May 2013 to become the new Constitution of Zimbabwe. Thereafter, the highest court in the country became the Constitutional Court introduced by the Constitution.
68. This Communication was brought to the Commission in April 2013 when the Supreme Court was still the highest Court and final Court of appeal in the Respondent State, and before the new Constitution was assented by the President in May 2013. The implication of this is that, the cases handled by the Supreme Court were supposed to be transferred to the new created Constitutional Court, but there is no indication from the Respondent State's submission that this was done, rather the Respondent State submits that there are domestic local remedies for all the alleged violations mentioned in the Communication.
69. According to the Respondent State, local proceedings were instituted and some are still pending before the Constitutional Court of Zimbabwe. It is the Commission's view that the Respondent State's submission is not relevant at this point because the pending cases were before the Constitutional Court before it came into effect as the highest Court in the country, but the Supreme Court could sit as a Court of first instance in deciding Constitutional matters, and the Supreme Court decided in favour of the Victims, yet there were continuing violations.
70. Furthermore, although the Respondent State has demonstrated that the Constitutional Court can deal with "some" of the violations alleged by the Victims, it is the Commission's view that even though practically the Court is available and accessible, its decisions are ignored, and therefore the Court is not effective. The Respondent State has failed to prove that the Constitutional Court is effective to satisfy the current situation of the Victims, especially given the Complainants' contention that the Respondent State continues to violate the rights of the Victims for conduct that has already been declared lawful by the Supreme Court in its decision of November 2010. It would therefore be unfair to ask the Victims to await the outcome of the decision of the Constitutional Court while still being subdued by harassments, intimidation and arbitrary arrests as indicated by the Complainants.





71. Additionally, in the case at hand, the Respondent State has not refuted any allegations of on-going violations as outlined by the Complainants which in effect, render the available remedies ineffective in the circumstances of the Victims. The Commission notes its decision in the *Jawara case*,<sup>12</sup> wherein it held that “a remedy is considered available only if the applicant can make use of it in the circumstances of his case”. The Commission further notes that a previous decision relating to the same material aspect as handed down by the Supreme Court in 2010 with the same capacity as that of the Constitutional Court has not been respected or implemented. In other words, attempts to get remedies for continuing violations have failed in the Respondent State, showing that available remedies are ineffective. In this regard, the Commission considers that all available local remedies have been duly exhausted.
72. The Complainants also submit that the available local remedies are not effective as the Respondent State has failed to investigate or act against violations of the rights of the Victims.
73. The Commission has consistently reiterated in its jurisprudence that the requirement to exhaust local remedies is necessitated by the imperative of giving the state notice of alleged violations that have occurred in its territory and affording the authorities of the State Party an opportunity to address the alleged violation. In *Article 19 v Eritrea*, wherein 18 journalists were detained incommunicado for allegedly posing a threat to national security, and were imprisoned for years, the Commission found that “whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion.
74. In such cases one cannot demand that the Complainants, or the Victims or their family members assume the task of exhausting domestic remedies when it is up to the State to investigate the facts and bring the accused persons to court in accordance with both domestic and international fair trial standards.”<sup>13</sup> The Commission held further that “the fact that the State of Eritrea has not taken any action means that domestic remedies are either not available or if they are, not effective or sufficient to redress the violations alleged”.<sup>14</sup>
75. In the present Communication, it has been demonstrated in the submissions of the Complainants that the Respondent State was sufficiently notified of the violations perpetrated against the Victim through numerous complaints brought by the Victims and WOZA members. The Commission is of the view that the Respondent State therefore had ample notice about the alleged violations, and should have accordingly taken the necessary steps to investigate the matter. Without any contention from the Respondent State to the contrary, the Commission considers that the Respondent State was notified of the violations but failed to act on them and as a consequence, lost its prerogative to settle the matter domestically.<sup>15</sup> In other words, domestic remedies are both ineffective and insufficient to redress the violations alleged.
76. From the foregoing, it is the view of the Commission that local remedies though theoretically available, were ineffective to address the situation of the Victims and therefore the requirement of Article 56 (5) is accordingly dispensed with, and the Complainants have constructively exhausted local remedies.

*For these reasons, the Commission declares this Communication Admissible.*

<sup>12</sup> n 4 above, para 3.

<sup>13</sup> n 9 above, para 72.

<sup>14</sup> Ibid.

<sup>15</sup> Communication 296/2005-Centre for Housing Rights and Evictions (COHRE) v. Sudan.





## Merits

### *The Complainants' submissions on the Merits*

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

77. The Complainants submit that Article 1 imposes both negative and positive obligations on State Parties. The positive obligation to protect human rights and prevent others from violating the rights protected; and the negative obligation for States to refrain from acts which interfere with the rights of individuals under the African Charter.
78. The Complainants submit that in the present case, the existing legislation and legal framework in Zimbabwe falls short of the State's obligation to protect, as it fails to protect and facilitate the free exercise of the Victims' rights to engage in peaceful protests. The Complainants aver that there are no adequate safeguards against overzealous police officers and other State agents who utilize various methods such as: threats, physical force, torture and arbitrary arrest, to prevent the Victims from engaging in peaceful protests and public demonstrations. The Complainants refer the Commission to the *Report of the Study on Freedom of Association and Assembly in Africa (FoAA)* wherein it noted that '[i]n Zimbabwe the law grants police discretionary power to prohibit or condition assemblies.'<sup>16</sup>
79. The Complainants argue that States have an obligation to establish accessible and effective complaints mechanisms capable of conducting independent, prompt and thorough investigations into allegations of human rights violations, in order to hold perpetrators accountable. They argue that the failure of the State to establish these mechanisms constitutes a violation of Article 1 of the African Charter.

#### *Alleged violation of the rights to non-discrimination (Article 2) and equal protection (Article 3) on the basis of their opinion*

80. The Complainants submit that they continue to experience discriminatory treatment on the basis of their opinion critical of the Government.
81. The Complainants submit that in the present Communication, the Respondent State's treatment of WOZA members constitutes discriminatory treatment on the basis of their opinion, as the Complainants' rights to freedom of expression, assembly, and association have been impeded due to the discriminatory application of the criminal law by the Zimbabwe police authorities.
82. The Complainants submit that the right to equality before the law means that citizens are accorded fair and just treatment within the legal system and within Government institutions as are accorded to all other citizens. They refer to the decision in *Egyptian Initiative for Personal Rights and Interights v Egypt*, where the Commission held that State parties have an affirmative duty to prohibit discrimination and ensure that all persons are protected by the law and equal before the law.<sup>17</sup>
83. The Complainants submit that in the present Communication, the 1<sup>st</sup> and 2<sup>nd</sup> Victims are members of a civic movement that lobby and advocate on issues affecting women. They submit that the police have utilized various provisions of the criminal law in Zimbabwe – including various sections of the Criminal Code for offences ranging from Section 37 "disturbing the peace," to Section 41 "disorderly conduct in a public place", and section 46 "criminal nuisance" – to violate their rights enshrined in Articles 2 and 3 of the African Charter.

<sup>16</sup> African Commission on Human and Peoples' Rights, Report of the Study Group on FoAA at para 63.

<sup>17</sup> Communication 323/2006 - *Egyptian Initiative for Personal Rights & Interights v. Egypt* para 175.





84. Lastly, the Complainants submit that this discriminatory treatment by the Respondent State has left them without any protection, as the courts which are supposed to be bearers of fundamental rights are openly disregarded by the Respondent State and its functionaries.

*Alleged violation of the right to personal liberty (Article 6)*

85. The Complainants submit that the arbitrary arrest and detention of WOZA members constitutes a violation of Article 6 of the African Charter. They argue that while an arrest or detention may be a legitimate form of law enforcement, it may nevertheless be arbitrary, particularly in cases where the deprivation of liberty falls outside the confines of the law. They refer to the decision of the Commission in *Gabriel Shumba v Zimbabwe* where it held that arrests may be executed if there is reasonable suspicion that a crime is being planned or being committed, as long as due protection processes are followed, and reasonable force used to effectuate the arrest.<sup>18</sup> The Complainants also refer to the decision in *Amnesty International and Others v Sudan*, where the Commission held that the arrests of individuals for vague reasons and upon suspicion of acts that were not proven were not in conformity with the spirit of the African Charter.<sup>19</sup>
86. The Complainants submit that the 1<sup>st</sup> and 2<sup>nd</sup> Victims have been arrested and detained for protesting against abusive Government conducts. They aver that while the law stipulates that arrests require that a warrant be issued or that an arrested person should be informed of the charges against them before being taken into custody, the police have failed to respect these safeguards. They submit that the fact that the police had no genuine or reasonable suspicion that WOZA members were carrying out any activity that would constitute a criminal offense indicates a clear violation of the State's obligations under Article 6 of the African Charter. They refer to the *African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* which provides that arrests should not be carried out on the basis of discrimination of any kind such as political or other opinion.
87. Further, the Complainants submit that under international law, the detention of a person as a result of their opinion does not constitute reasonable grounds to effectuate an arrest. They aver that contrary to this, the Complainants have been subjected to repeated arbitrary arrests and detention while exercising, or in situations connected to the exercise of their rights to freedom of assembly, expression, and association. Their detention, they submit was therefore aimed at silencing a critical voice, rather than serving any legitimate purpose, and was as such in violation of the Complainants' rights under Article 6 of the Charter.

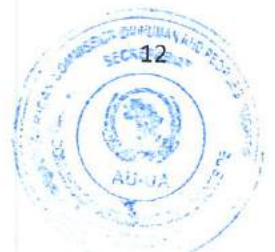
*Alleged violation of the rights to freedom of expression (Article 9(2)) and freedom of assembly (Article 11)*

88. The Complainants submit that the right to engage in peaceful protest is an essential and constituent element of democracies anchored by the twin pillars of freedom of expression and assembly. They refer the Commission to its jurisprudence in *The Law Office of Ghazi Suleiman v Sudan* where it found that the freedom of expression is "vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country."<sup>20</sup>
89. The Complainants submit that the right to freedom of expression is widely recognized under several international human rights instruments. The Complainants refer to *ACHPR XLVII (2010) Resolution on the Deteriorating Situation of Freedom of Expression and Access to Information in Africa*, wherein the Commission identified freedom of expression and access to information as an

<sup>18</sup> Communication 288/2004 – *Gabriel Shumba v Zimbabwe* para 186.

<sup>19</sup> Communication 48/90-50/91-52/91-89/93 – *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* paras 59 – 60.

<sup>20</sup> Communication 228/1999 – *Law Office of Ghazi Suleiman v Sudan* para 41.





important component for the promotion of participation, accountability and democracy in the continent. They refer to the *UN General Comment No 34* and noted that the UN Human Rights Committee had found that laws relating to upholding national security should not be invoked to suppress or withhold public information of legitimate interest that does not harm national security; nor should they be used to prosecute human rights defenders for disseminating such information.<sup>21</sup>

90. The Complainants submit that the Commission has repeatedly reaffirmed the importance of peaceful protests, notably its *Resolution on the Right to Peaceful Demonstrations*, wherein it condemned restrictions imposed by States on the rights to freedom of expression, information and peaceful demonstrations, as well as the arbitrary arrest and detention of demonstrators.<sup>22</sup> The Complainant refer to the *United Nations (UN) Resolution 24/5 on the Rights to Freedom of Peaceful Assembly and of Association*;<sup>23</sup> a 2011 report by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions;<sup>24</sup> and a statement by the former UN Special Representative of the Secretary-General on human rights defenders;<sup>25</sup> affirming the role of protests in effecting positive social change.
91. The Complainants submit that the rights to freedom of assembly and expression may be subject to certain restrictions, however, such measures must be prescribed by law and necessary in a democratic society in the interests of national security or public safety, order, health, morals or the protection of the rights and freedoms of others.
92. In support of this argument, they refer the Commission to its decision in *Law Office of Ghazi Suleiman v Sudan* wherein it found that any restriction on the freedom of assembly must be proportionate and necessary to the achievement of a legitimate goal.<sup>26</sup> They further refer to the decision of the African Court on Human and Peoples' Rights in *Lohé Issa Konaté v Burkina Faso* where the Court found that freedom of expression may be subjected to a lesser degree of interference in matters of a public debate relating to public figures and that "people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether."<sup>27</sup>
93. The Complainants submit that since November 2010, the Respondent State has forcefully prevented them from freely engaging in peaceful protests on at least two dozen documented occasions by utilizing threats and unlawful force to prematurely and unlawfully disperse peaceful protesters. They list these days in their submissions.<sup>28</sup> They allege that during these dispersals, police have routinely beaten the Victims and other peaceful WOZA protestors, forcing them to seek medical attention.
94. The Complainants submit that since November 2010, WOZA protestors have been detained during peaceful protests and kept in custody for hours sometimes days, and then released without charge. They submit that on several occasions frivolous charges have been filed against peaceful WOZA protestors, which have later been dropped after multiple court dates and delays. The Complainants in their submission indicate the instances when protestors were arrested and later

<sup>21</sup> U.N. Human rights Committee, General Comments adopted by the Human Rights Committee under Article 19 of the ICCPR, U.N. Doc. CCPR/C/GC/34 at para 2 (2011).

<sup>22</sup> ACHPR/Res. 281 (LV) Resolution on the Right to Peaceful Demonstrations.

<sup>23</sup> A/HRC/Res/24/5 Resolution on the Right to Peaceful Assembly and of Association.

<sup>24</sup> UN Human Rights Council, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, First Rep. on Extrajudicial, Summary, or Arbitrary Executions, U.N. Doc. A/HRC/17/28, Para 14, (23 May 2011).

<sup>25</sup> Special Representative of the Secretary-General on Human Rights Defenders, Report to the U.N. General Assembly of the Special Rep. of the Secretary-General on Human Rights Defenders para 4, U.N. Doc.A/62/225 (Aug. 13, 2007).

<sup>26</sup> n 20 above – *Law Office of Ghazi Suleiman v Sudan* Para 65.

<sup>27</sup> App. No. 004/2013 – *Lohé Issa Konaté v. Burkina Faso* para 150.

<sup>28</sup> Complainant submissions on the Merits p 14 & 15.





released without charge, the time frame ranging from 7 March 2011 to 29 November 2013. They argue that these incidents of arbitrary arrest and detention, individually amounts to a violation of Article 6 of the African Charter, and that each incident also represents a violation of the rights to freedom of assembly and freedom of expression by preventing the Complainants and other WOZA members from engaging in peaceful protest.

95. The Complainants argue that similarly, the persistent use of the criminal justice system – in particular the systematic arbitrary arrests and detentions –also results in a violation of Articles 9 and 11 of the African Charter.<sup>29</sup>

#### *Alleged violation of the right to freedom of association (Article 10)*

96. The Complainants submit that Article 10 of the African Charter obliges States to establish an environment that is conducive to the exercise of the right to freedom of association without fear and encumbrances. They refer to the *Commission's Report on the Study Group on FoAA* stating that associations must be able to pursue a wide range of activities, free from interference by the government.
97. The Complainants submit that the unlawful and arbitrary arrest and detention of association members is a frequently applied tactics by the Respondent State. Further, the Complainants argue that any interference with the freedom of association must be:(a) provided by law; (b) may only be imposed for one of the purposes set out in paragraph 2 of the International Covenant on Civil and Political Rights ; (c) must be "necessary in a democratic society" to achieve a legitimate purpose. They also refer to the case of *Hulica tecse v Peru by the Inter-American Court on Human Rights (Inter-American Court)*, which found a violation of the right to freedom of association, where a leader of a trade union was killed because of his union activities and criticism of the Government.
98. The Complainants submit that WOZA conducts civic education programs and teaches its members nonviolent ways to speak out about their issues. As a result, they submit that the systematic suppression of the Victims' ability to engage in lawful and peaceful protests, prevents the Victims from fully carrying out the purposes and activities of their organization in violation of their right to freedom of association. Additionally, the Complainants submit that WOZA members are also targeted for reprisals by the Respondent State solely on the account of their membership. They aver that meetings in private homes have been broken up; WOZA offices raided and organizational materials confiscated. They submit that the Respondent State has failed to provide a compelling reason justifying the interference, accordingly, the allege that the Respondent State stands in continued violation of the Complainants' rights under Article 10 of the African Charter.

#### *Respondent State's Submission on the Merits*

99. The Respondent State contend that contrary to the Complainant's averments, Zimbabwe has given effect to the fundamental human rights guaranteed under the African Charter. It submits that the Constitution of Zimbabwe Amendment (No.20) Act 2013 has a comprehensive Bill of rights stipulated under Chapter 4 of the Constitution. Hence, the State, all persons, institutions and agency of the Government at every level are obliged to respect, protect, promote and fulfill the rights and freedoms contained therein.
100. The Respondent State submits that Zimbabwe has enacted appropriate legislation in compliance with its positive obligation under Article 1 thereby facilitating the free exercise of the Complainants' rights to engage in peaceful protests. It submits that Sections 58 and 59 of the

<sup>29</sup> Communication 137/94-154/96-161/97 - *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jr.) v. Nigeria*, para 110.





Constitution provides for the rights to freely assemble, associate, demonstrate and present petitions but these rights must be exercised peacefully. It submits that there is no human rights instrument or national Constitution that grants an absolute right to protest, such right is subject to limitations and Zimbabwe is not an exception in this regard.

101. The Respondent State denies the Complainants' averments that it has failed in its negative obligation by interfering with the rights of the Complainants contained in Articles 2, 3, 6, 9, 10 and 11 of the African Charter. It contends that in the spirit of the African Charter, Zimbabwe enacted the Public Order and Security Act Chapter 11:17 (POSA), which deals with the policing of public gatherings and demonstrations. It submits that the rationale for POSA is for the Government to strike a balance between the rights of those who want to demonstrate and those who want to proceed with their daily business without hindrances. Hence, the Respondent State submits that all POSA requires of conveners of public meetings, gatherings or processions is that they give notice to the police.
102. The Respondent State avers that this notification is not intended to be a form of application for permission from the police to proceed with the gathering, but rather to initiate a consultation and negotiation between the police and the convener on how best the gathering or procession may be managed to avoid chaos. Thus, it avers that one of the purposes for the notification is that the Police and the Convener(s) must agree amongst other things on the following: (i) The place where the gathering is to take place; (ii) the time, duration and date of gathering; (iii) the anticipated number of participants; (iv) the appointment of marshals (v) the exact and complete route of the procession or demonstration; (vi) the time when and the place of which participants in the procession or public demonstration is to commence; (vii) the manner in which the participants will be transported to the place of assembly, and the time from the point of dispersal; (viii) the number and types of vehicles, if any which are to form part of the procession and; (ix) if any petition or document is to be handed to someone, the place thereof.
103. The Respondent State submits that where there is a disagreement between the police and the convener(s), the law permits the convener to make an application to the Magistrates Court. It avers that the Complainants have failed to indicate an instance where they followed the provisions of the law and were still prohibited from carrying out the intended demonstrations. The Respondent State avers that the Victims are in the habit of engaging in demonstrations without following the law which results in disturbing the public peace, safety and order.
104. The Respondent State contends that the freedom to assemble is subject to necessary restrictions provided for by law, in particular those enacted in the interest of national security, safety, health, ethics and rights of others; and that POSA falls under this category. It avers that failure to comply with the provisions of POSA is a criminal offence, and where the police have reasonable suspicion that an offence has been committed, they carry out investigations and arrests. The Respondent State avers that it is under these circumstances that the Victims have on several occasions been arrested for failure to comply with the provisions of the law.
105. The Respondent State avers that the arrests and detention of the Victims have been for failure to comply with the provisions of the law and not as a result of discriminatory application of the law on the basis of their critical opinions of the Government as alleged.
106. The Respondent State submits that the law in question is of general application to all in Zimbabwe who intend to carry out public demonstrations or gatherings. The Respondent State further avers that the Victims do not allege that they are the only conveners who have been arrested for failure to comply with POSA, and that the Victims would have had a case if they had stated justifications why the legislation is not reasonably justifiable in a democratic society. Rather, in the Communication, the Victims merely contend that they have been arrested on several occasions without furnishing the details of such arrests to enable the Respondent State verify the circumstances of such arrests and respond to the allegations. Further, the Respondent State alleges





that the Complainants seek to be protected from a law that is purely justifiable in a democratic society. Based on the foregoing, the Respondent State submits that the Communication has no merit and should be dismissed with the contempt that it deserves.

107. The Respondent State notes that although the Complainants have listed dates starting from 15 February 2011 to 13 February 2015, they failed to provide details of where and why they were arrested, as such the Respondent State requests that the Commission limits the Complaint to the alleged arrests which were substantiated. These instances it lists as follows: i) 19 and 20 November 2013; (ii) 29 November 2013; (iii) 13 February 2014; (iv) 14 February 2014; (v) 12 June 2014; (vii) 6 September 2014; (viii) 13 February 2015; (ix) 14 and 16 September 2015.
108. Finally, the Respondent State submits that since the Complainant's averments have not been substantiated it has been put in a difficult position where it cannot defend itself. It further contends that since the Complainants have failed to prove that on the occasions the Victims were arrested, they had followed the provisions of the law, the Communication lacks merit and must be dismissed for lack of merit.

#### *Complainants' Reply to the Respondent State's submissions on the Merits*

109. The Complainants submit that the Respondent State has failed to respond to the violations of Articles 2, 6, 9, 10 and 11 of the African Charter as included in the Complainant's Complaint and subsequent submissions. They submit that while the Respondent State denies that the Victims' rights to freely engage in peaceful protests were violated, the thrust of its submission contends that the Victims failed to comply with the prior notification requirements to hold peaceful assemblies as required by POSA. The Complainants contend that the Respondent State's averments that allegation of arrests and harassment by the Police have not been substantiated, is resoundingly false. They submit that incidents and dates of each violation has been detailed and thoroughly documented by the Complainants either in the original Communication or in subsequent submissions.
110. The Complainants submit that while the Respondent State attempts to argue that POSA is a law of general application, the State fails to acknowledge that the Victims are engaged in non-political activity - not involved in or aligned with any political party or entity, or entertaining a partisan message in their activities - and therefore are not subject to the regulation of POSA. They also argue that even if POSA applied to the activities of the Victims, the Respondent State applies the law unequally. They aver that the Police have repeatedly arrested and detained the Victims for engaging in peaceful protest and routinely denied other assemblies the ability to demonstrate, while frequently facilitating and encouraging pro-government assemblies. Thus, the Complainant argues that even if POSA is a law of general application, its overly broad construction allows for selective enforcement by Government actors to prevent the free exercise of the right to freedom of assembly on the basis of opinion.
111. The Complainants submit that although POSA only required that a notification be given to the Police, such notification requirement has turned into a *de facto* permission requirement, which entitles the Police to disperse any assembly not expressly authorized, as unlawful. They aver that POSA criminalizes non-notification subject to which conveners are abused, in contravention with international human rights standards. Further, they argue that the Complainants are subjected to arrest and detention even when they are not engaging in peaceful demonstrations, as State actors routinely engage in preemptive raids and arrests as a means of repression and intimidation, to silence WOZA members in violation of their human rights.
112. The Complainants submit that they have detailed in their submissions the harassments, arrests and physical assaults by State actors between 15 February 2011 to date. Further, that despite a Supreme Court order on 26 November 2010 which held that the 1<sup>st</sup> and 2<sup>nd</sup> Victims' rights to demonstrate in the October 2008 demonstration were wholly protected under the Constitution of





Zimbabwe. They aver that each incident has been supported in detail with extensive documentation throughout the proceedings of this Communication.

113. The Complainants submit that Section 23 (2) of POSA requires conveners to provide notice to the regulating authority, and not to seek their permission. However, by virtue of Section 26 of POSA, certain organizations are exempt from providing notice to the police, these include gatherings of any association or organization which is not of a political nature. The Complainants submit that WOZA is a social justice movement dedicated to the principle of non-violence and unaligned with any political party, as it is unpartisan in its approach to its work and official positions.
114. The Complainants submit that despite the Respondent State's assertion that POSA is '*a law of general application*', law enforcement authorities have declined certain demonstrations, while similarly permitting pro-Mugabe processions. They aver that Government Ministers have publically threatened to crush any demonstrations in the country that are organized by civil society organizations. They submit that such statements, and demonstrated favoritism are illustrative of the fact that State authorities have used POSA as a means to prevent civil societies and individuals from being vocal in their criticism of Government policy and from exercising their right to freedom of assembly.
115. The Complainants submit that while there are legitimate grounds for imposing limitations on the right to freedom of assembly, such restrictions are proscribed by international and regional human rights instruments which cannot be subject to loose interpretation. They contend that international standards require that the exercise of the right to freedom of assembly should not be subject to the permission of government authorities, but at most a prior notification procedure – the purpose of which is to allow authorities to take reasonable and appropriate measures to guarantee and facilitate the right to freedom of assembly. They submit that a notification process that effectively constitutes a request for authorization, or imposes inappropriate requirements on conveners has been found to be unduly restrictive.<sup>30</sup>
116. The Complainants contend that the broad wording of POSA and the deliberate misapplication of some of its provisions have allowed the police ban lawful meetings, impose arbitrary curfews, disrupt demonstrations, beat and arbitrarily arrest peaceful demonstrators. Also, they contend that while Section 29(c) of POSA authorizes the police to restrict a "*gathering to a place or guide participants along a route*", where participants have not given notice to a regulating authority, state authorities in Zimbabwe have routinely stopped processions altogether, often using excessive force.
117. The Complainants submit that the Respondent State's argument that the arrests and detentions were due to the Complainant's failure to comply with the provisions of the law, fails to address whether a substantive violation has occurred and falls short of international guidance with regards to the notification requirement and the appropriate and proportionate response by State authorities with respect to the exercise of the right to freedom of assembly.

### *The Commission's Analysis on the Merits*

#### *Alleged violation of the rights to Freedom of expression (Article 9 (2)) in conjunction with Freedom of Association (Article 10 (1)) and Freedom of Assembly (Article 11)*

118. The Commission notes that Articles 9(2) and 11 of the Charter were grouped together by the Complainants in their submissions. However, the Commission will examine Articles 9(2), 10 (1) and 11 of the Charter conjunctively, given that the facts alleged by the Complainants are

<sup>30</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN. Doc.A/HRC/23/39 (21May 2012) at para 8.





intrinsically linked to the facts alleged under Articles 10(1) and 11. In addition to this, the rights to freedom of expression, assembly and association are intertwined to the extent that they are fundamental human rights that form the foundations of democratic societies. This connection was also expressed by the Commission in *International PEN, Constitutional Rights Project, Civil Liberties Organization and Interights (on behalf of Ken Saro-Wiwa Jr.) v. Nigeria* wherein the Commission stated that “there is a close relationship between the rights expressed in Articles 9(2), 10(1), and 11.” Furthermore, in that Communication, the Commission found a violation of freedom of expression when the State violated the rights to freedom of association and freedom of assembly.<sup>31</sup>

119. The Commission underscores that a violation to the right of freedom of expression can only be determined if it is established that the Victims’ ability to engage in peaceful protests is a restriction on their right to express their opinions. In line with this, the Commission will proceed to first ascertain whether there is a violation of Article 10(1) and 11 of the Charter, before determining whether there is a violation of Article 9(2) of the Charter.

#### Article 10(1)

120. Article 10(1) of the African Charter provides that “Every individual shall have the right to free association provided that he abides by the law”.
121. The Complainants state that the primary aim of WOZA is to mobilize Zimbabweans to demand social justice by conducting civic education programs and by educating its members on nonviolent ways to voice their issues, consequently one of their primary activities is conducting peaceful protests. They allege that the systematic suppression of the Victims’ ability to protest has therefore prevented them from carrying out the purpose of their organization. Furthermore, they allege that the Victims are also targeted for reprisals solely on account of their membership in WOZA and that WOZA’s offices have been raided, organizational materials confiscated, and WOZA members are unable to discuss and promote their human rights activities free from government interference.
122. The Respondent State did not comment or refute the allegations relating to freedom of association.
123. The Commission has stated that freedom of association is an individual right and the State has the duty to refrain from interfering with the free formation of associations.<sup>32</sup> The right to freedom of association applies to “any group of individual or legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interest.”<sup>33</sup> According to the facts in this Communication, WOZA is a civic movement formed in 2002 to lobby and advocate on issues affecting women and their families in Zimbabwe. It therefore follows that WOZA should be considered an association whom this freedom is pertinent to.
124. The Commission emphasizes that Associations must be given the freedom to pursue a wide range of activities including exercising their rights to freedom of expression and assembly. Additionally, the right to freedom of association also carries with it a duty that obliges States to establish an environment that is conducive to the exercise of this right without fear and encumbrances.<sup>34</sup> This is also echoed by the Commission’s *Report on the Study of FoAA* which underscores that States should not interfere with these rights, but rather protect associations from others who might seek to interfere with them.<sup>35</sup>

<sup>31</sup> n 29 above.

<sup>32</sup> Communication. No. 101/93 - *Civil Liberties Organisation v Nigeria*, paras 54 to 59.

<sup>33</sup> Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association on, Maina Kiai, A/ HRC/20/27, para 51.

<sup>34</sup> Report of the Special Rapporteur on rights to freedom of peaceful assembly and association, para 63, U.N. Doc. A/HRC/20/27 (May 21, 2012). See also Guidelines on FoAA, para 28.

<sup>35</sup> Report of the Study Group on FoAA.





125. In *Gabriel Shumba v. Zimbabwe*, the Commission held that the right to freedom of association carries with it a prohibition against physical attack on the basis of affiliation with any association.<sup>36</sup> Similarly, in *Law offices of Ghazi Suleiman v. Sudan* also cited by the Complainants, the Commission found that preventing human rights defenders from gathering with others to discuss human rights is a violation of the right to freedom of association.<sup>37</sup>
126. The Commission's *Guidelines on FoAA* require States to respect, in law and practice, the right of associations to carry out their activities, without threats, harassment, interference, intimidation or reprisals of any kind.<sup>38</sup> According to the Guidelines, any limitations imposed by States shall be in accordance with the principle of legality, have a legitimate public purpose, and be necessary and a proportionate means of achieving that purpose within a democratic society, as these principles are understood in the light of regional and international human rights law.<sup>39</sup>
127. As the facts before the Commission in this Communication depict, WOZA is an association within the jurisdiction of the Respondent State, and as the facts further depict, the State has interfered in their activities through the arrests; harassments; seizure of property amongst other methods. The Respondent State did not contest the allegations or provide any justifiable reasons for its actions or interference.
128. It is already established that States have an obligation to not only ensure that people are free to form associations which is not the contestation in this Communication, but also to engage independently in activity without interference from the State. The State therefore has a duty to establish an environment that is free from interference. The Complainants in this Communication claim that the activities of the Victims are being disrupted by State authorities on account of their association with WOZA. While sufficient grounds has not been proffered to show that the disruptions or interference have anything to do with their affiliation to WOZA, the Commission finds that the interference, and without any due justification from the State, amounts to a violation of Article 10(1) of the Charter.

#### Article 11

129. Article 11 of the Charter provides that "*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.*"
130. The Complainants' core claims are as follows:
- i. The Respondent State has forcefully prevented the Victims from freely engaging in peaceful protests on at least two dozen documented occasions by unlawfully dispersing peaceful protesters and routinely beating the Victims and other peaceful WOZA protestors (As earlier indicated, WOZA is a civic movement aimed at lobbying and advocating on issues affecting women and their families in Zimbabwe);
  - ii. Although POSA only required that a notification be given to the Police, such notification requirement has turned into a *de facto* permission requirement, which entitles the Police to disperse any assembly not expressly authorized, as unlawful. POSA makes the failure to give notice a criminal offence subject to which conveners are abused, in contravention with international human rights standards;

<sup>36</sup> n 18 above para 89.

<sup>37</sup> n 20 above, at para 56.

<sup>38</sup> FoAA, Para 9.

<sup>39</sup> FoAA, Para 24.





- iii. The notice requirement envisioned under POSA speaks not of notice, but in effect a request for permission, which has rendered any protest critical of government policy as unlawful in violation of the rights under the African Charter.

131. The Respondent State contends that notification is not intended to be a form of application for permission from the police to proceed with the gathering, but rather to initiate a consultation and negotiation between the police and the convener on how best the gathering or procession may be managed to avoid chaos. The Respondent State argues that the requirement to provide notice to the police of a gathering or assembly is a necessary restriction provided for by the law, and enacted in the interest of national security.

*Restrictions to freely assemble*

132. On the first claim relating to restrictions on the right to freely assemble through dispersing demonstrations, the Commission is called upon to analyze the restrictions imposed by the Respondent State and whether they are justifiable and prescribed by law as required under Article 11 of the Charter.

133. The Commission recognizes that the right to freedom of peaceful assembly is not absolute, and it is on this premise that Article 11 of the African Charter has imposed criteria for necessary restrictions, namely: "...provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."

134. The Commission will therefore proceed to determine whether the restrictions alleged by the Complainants fall within the criteria under Article 11 of the Charter.

135. With respect to conformity with the law, Sections 58 and 59 of the 2013 Constitution of Zimbabwe as amended, guarantee the right to peaceful assembly and demonstrations.<sup>40</sup>

136. Section 86 (2) of the 2013 Constitution of Zimbabwe requires that rights are effected in terms of law of general application, and any limitations should be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors. These factors include amongst others, the purpose of the limitation, in particular whether it is necessary in the interests of defense, public safety, public order, public morality, public health, regional or town planning or the general public interest, and whether the limitation imposes greater restrictions on the right or freedom concerned.

137. While POSA is aimed at regulating peaceful assemblies and demonstrations, Section 27 of POSA imposes a one month ban if the regulating authority believed on reasonable grounds that public disorder would result from the holding of processions or public demonstrations.

138. The 2013 Constitution of Zimbabwe, as well as the POSA both guarantee the right to freedom of assembly and also include restrictions defined as necessary in a democratic society. The lawful nature of the restrictions however remain questionable, as the facts alleged by the Complainants portray that there seem to be a pattern of abuse of the restrictions particularly in the scope of application of the laws governing freedom of assembly.

139. The question that arises here is whether the demonstrations of WOZA had any potential of causing public disorder. Another question is whether the ban imposed under Section 27 of POSA could be classified as a restriction within the meaning of Section 86 (2) of the 2013 Constitution of Zimbabwe.

<sup>40</sup> The Constitution of Zimbabwe, 20<sup>th</sup> Amendment of 22 May 2013, Sections 58 and 59.





140. To answer the above questions, the Commission will peruse some domestic cases in the Respondent State that have addressed some of issues.

141. On the question regarding the ban imposed under Section 27 of POSA, in the case of *Democratic Assembly for Restoration and Empowerment & 3 Others v. Saunyama N.O. & 3 Others*,<sup>41</sup> (the *Democratic Assembly case*), Section 27 of POSA was declared to be unconstitutional. In that case, the Constitutional Court specifically held that:-

*It is beyond dispute that Section 27 of POSA has the effect of infringing the rights granted by Section 59 of the Constitution [the right to peacefully demonstrate and to peacefully present petitions] ... Section 27 provides a classic example of a law whose effect infringes the fundamental rights in issue in this matter....He or she can impose a blanket ban for up to one month if he or she believes on reasonable grounds that he will not be able to prevent violence from breaking out....The ban has a dragnet effect and like most dragnets, it catches the big and the small, the innocent and the guilty.*

142. In the *Democratic Assembly case*, the Constitutional Court of Zimbabwe also ruled that infringement on the right to demonstrate and petition was an unlawful limitation of citizens' right in terms of Section 86(2) of the 2013 Constitution. The Constitutional Court applied the following principles:

*"It would not be an interference within the meaning of the Constitution if the measure adopted by Government amounts to authorization of the destruction or abrogation of the right to freedom of expression itself. To control the manner of exercising a right should not signify its denial or invalidation."*

143. The Constitutional Court also noted that "...it is the duty of the court as guardian of the constitution and fundamental rights and freedoms to ensure that only truly deserving cases are added to the category of permissible legislative restrictions of the exercise of the right..."

144. From the above, it is the Commission's view that the Constitutional Court tested the infringing law [in terms of whether it] is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

145. Furthermore, as referenced earlier, Section 27 of POSA was declared to be unconstitutional in the *Democratic Assembly case*. The Constitutional Court also highlighted that the limitation in Section 27 of POSA has the effect of denying the rights to freedom of expression and freedom of assembly in advance and condemning all demonstrations and petitions before their purpose or nature is known. According to the Constitutional Court in that Case, the limitation in Section 27 of POSA stereotypes all demonstrations during the period of the ban and condemns them as being unworthy of protection. It also increases the sphere of Government control over the exercise of the right whilst decreasing the scope of the enjoyment of the right. The Constitutional Court emphasized that the limitation exceeded its purpose and, to that extent, becomes an unreasonable reaction to a situation that can be managed by other and less restrictive means.

146. Similarly, in *Jennifer Williams and others v Phathekile Msipha; Minister of Justice and Attorney General (the Jennifer Williams Case)*<sup>42</sup>, where the Applicants were charged in the lower courts in Zimbabwe for violation of the rights to freedom of expression and freedom of assembly, in contravention of Section 37(1) (a) (i) of the Criminal Code Reform Act, the Supreme Court of Zimbabwe ruled in favour of the Applicants.

<sup>41</sup> *Democratic Assembly for Restoration and Empowerment & 3 Others v. Saunyama N.O. & 3 Others* (CCZ 9/18, Civil Appeal No. CCZ 5/18) [2018] ZWCC 9 (17 Oct. 2018).

<sup>42</sup> Judgement No. SC 22/10 Const Application 53/09.



147. The Commission recalls that the Applicants in the *Jennifer Williams Case* are also the Victims in the present Communication and the same charges that were considered by the Supreme Court also form the basis of this Communication. In light of this, the Commission will provide excerpts of the Supreme Court Judgement which are relevant to the Commission's analysis in this Communication.
148. In the *Jennifer Williams case*, the Supreme Court held *inter alia* that:
- During assemblies, the crime of contravening Section 37(1)(a)(i) of the Act must be direct with obvious consequence of seriously disturbing peace and security or order of public (acts of violence committed by people assembled together or speech in which the speaker incites his or her audience to violence);
  - Conduct becomes an offence if it is intended to produce the consequence of forcible disturbance of the peace, security or order of public;
  - Primary objective of Section 37 is the preservation of peace, security or order of public. The Statute is not intended to be used to punish acts for the commission of which the fundamental human rights of freedom of assembly and expression are protected under the Constitution;
  - Examination of the conduct for which the Applicants were charged shows that they were simply exercising their fundamental rights to freedom of assembly and freedom of expression, and that their conduct does not constitute the offence they were charged with;
  - In singing, dancing, chanting slogans; and waving placards with messages that did not incite violence, the Applicants used legitimate means of expressing views or opinions on the political and governmental issues of the day.
149. From the foregoing, the Supreme Court clearly underscored that the 'conduct' of the Victims does not constitute the offence they were charged with as they were only protesting peacefully to express their views. The Supreme Court specifically stated that the Applicants were entitled to do what they did, to draw the attention of the Government to their grievances.
150. Furthermore, the European Court stated in *Gafgaz Mammadov v. Azerbaijan* that "[A]n interference with the exercise of freedom of peaceful assembly does not need to amount to an outright ban, whether legal or de facto, but can consist in various other measures taken by the authorities." The European Court also noted that actions such as, the dispersal of the assembly and the arrest of participants or the imposition of penalties for having taken part in an assembly all qualify as undue restrictions.<sup>43</sup>
151. The Commission opines that it is without doubt that the right to peaceful assembly is an inalienable right which may however be limited in certain circumstances clearly spelled out under Article 11 of the African Charter, including when it is prescribed by the law and deemed necessary in a democratic society. Having said this however, it is imperative that States strike a balance between their responsibility to ensure that the right to organize peaceful assembly is not restricted by any undue bureaucratic obligations and must further ensure that the freedom is enjoyed in a practical manner.<sup>44</sup> This was also echoed in the *Jennifer Williams case* when the Supreme Court stated that:

*"A balance must be struck between the interest of individuals to come together in the exercise of fundamental rights to freedom of assembly and freedom of expression, fundamental to any democratic society and obligation on the State to maintain the peace, security and order of the public"*

<sup>43</sup> *Gafgaz Mammadov v. Azerbaijan*, European Court, Judgment of 15 October 2015, para. 50; *Gülçü v. Turkey*, European Court, Judgment of 19 January 2016, para. 91.

<sup>44</sup> Handbook on Monitoring Freedom of Peaceful Assembly, OSCE Office for Democratic Institutions and Human Rights (ODIHR), p. 20





152. Furthermore, according to the Commission's *Guidelines on FoAA*, where States enact laws on freedom of assembly, those laws shall aim primarily at facilitating the enjoyment of the right.<sup>45</sup> An assembly should be deemed peaceful if its organizers have expressed peaceful intentions, and if the conduct of the assembly participants is generally peaceful.<sup>46</sup> This was also the view of the European Court in *Oya Ataman v. Turkey*, where the Court stated that, when assemblies are peaceful, and demonstrators do not engage in any violent act, States should show "a certain degree of tolerance"<sup>47</sup>. In this sense, the Commission underlines that tolerance from public authorities should not only be promoted with respect to the use of force to disperse an assembly.
153. In the jurisprudence of the Commission, precisely, in *Kevin Mgwanga Gunme et al. v. Cameroon*,<sup>48</sup> the Victims were arrested and detained for long periods in the course of exercising their right to freedom of assembly. The Commission underscored that States have a duty to guarantee the right to freedom of assembly while maintaining law and order, and therefore suppression of demonstrations, including the use of force against, the arrest and detention of people taking part in such demonstrations is a violation of Article 11 of the Charter.
154. The facts in the present Communication portray that the Victims were dispersed, arrested, harassed, and detained on several occasions during their peaceful demonstrations, with trumped up charges against them. On the basis that the Respondent State does not expressly contest this allegation, the Commission relies on its *Guidelines on FoAA* which require States to ensure the protection of all assemblies, public and private, from interference, harassment, intimidation and attacks by third parties and non-state actors. Specifically, where third parties aim to interfere, harass, intimidate or attack a peaceful assembly, the response of the authorities shall not be to ban or disperse the peaceful assembly, but rather to take measures to protect the assembly and to allow it to proceed.
155. Based on the above, the Commission stresses that while laws exist in the Respondent State to protect freedom of assembly with a clear indication of restrictions that should apply, certain measures taken by the Government curtail freedom of expression and assembly and such measures constitute unlawful restriction of the right of freedom to assemble peacefully and to express opinion.
156. From the forgoing, the Commission accordingly rules that the restrictions imposed by the Respondent State were not justifiable even though prescribed by law in contravention with Article 11 of the African Charter.

#### *Notification requirement*

157. On the claim relating to notification, generally, the notice procedure under Section 25 of POSA allows State authorities to facilitate and safeguard the exercise of the right to freedom of peaceful assembly and by so doing, protect public safety and order. It allows authorities to take necessary measures to facilitate assemblies with minimum disruption and to deploy security when necessary. This notwithstanding, the notice procedure or prior authorization requirement has been subject to conflicting views by various treaty bodies.<sup>49</sup>

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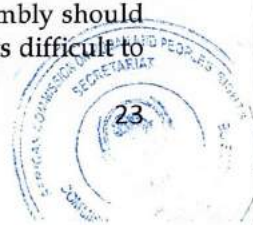
<sup>45</sup> FoAA, Para 66.

<sup>46</sup> FoAA, Para 70.

<sup>47</sup> Application no. 74552/01 : *Oya Ataman v. Turkey*, European Court of Human Rights, para 42.

<sup>48</sup> *Kevin Gunme et al. v. Cameroon*, Case No. 266/03, Afr. Comm'n H.P.R. paras 137-38.

<sup>49</sup> The Inter-American Court in its Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II, Doc. 66, of 31 December 2011 (para. 139) stated that the exercise of the right of assembly should not be subject to authorization on the part of the authorities or impose requirements that make protests difficult to carry out.





- According to the Inter-American Court, the exercise of the right of assembly should not be subject to authorization on the part of the authorities or impose requirements that make protests difficult to carry out;
- The Commission in its Guidelines of FoAA noted that, participating in and organizing assemblies is a right and not a privilege, and thus its exercise does not require the authorization of the State;<sup>50</sup>
- The European Court on its part, encourages authorization requirements for assemblies as long as authorities facilitate the assembly in question and there is no obstacle to the enjoyment of the right to freedom of assembly;<sup>51</sup>
- The Human Rights Committee emphasizes that any procedures put in place that require authorization should not be intended to stifle freedom of peaceful assembly in practice.<sup>52</sup>

158. To what extent however is failure to give notification for an assembly unlawful, and does the absence of prior notification justify an interference with a person's right to freedom of assembly?
159. The Commission acknowledges that the procedure of prior notification could be necessary for the smooth conduct of public demonstrations. However, the Commission is also cognizant of the fact that the procedure could be abused by authorities to curtail the right to freedom of assembly. The Commission opines that any intervention to an assembly that did not seek prior notice can only be justified if it is clearly shown that there is potential risk or disruption to the public.
160. A constitutional challenge of the POSA requirement to give notice of public meetings was brought in the case of *Tendai Laxton Biti & Movement For Democratic Change v Minister Of Home Affairs & The Attorney General (the Biti Case)*.<sup>53</sup> In that case, The Supreme Court of Zimbabwe held that the restriction on freedom of expression and assembly for the purposes of public order was reasonably justifiable in a democratic society. According to the Supreme Court, there was a need to reconcile the rights of freedom of expression and assembly with the Government's responsibility to ensure the sound maintenance of public order, so as to enable ordinary people to go about their business without obstruction.
161. In the *Biti Case*, the Supreme Court ruled that Section 25 of the POSA does not arbitrarily or excessively invade the enjoyment of the freedom of expression and the freedom of assembly and association. It merely requires the organizer of the public gathering to give written notice to the regulating authority. Most importantly, it does not give the regulating authority the power to prohibit the gathering or to order the persons taking part in the gathering to disperse.
162. While the Commission agrees with the Supreme Court's decision in the *Biti Case* that notification is important to give an opportunity to the Government to take necessary measures to avoid any potential disruptions and by extension, maintain public order, the Commission is also of the view that implicitly, the notification requirement could be abused by authorities in the guise of implementing the POSA. The question that remains unanswered however is whether the requirement is abused by the Respondent State as purported by the Complainants.
163. The Commission's *Guidelines on FoAA* affirm that, participating in and organizing assemblies is a right and not a privilege, and thus its exercise does not require the authorization of the State. A system of prior notification may be put in place to allow States to facilitate the exercise of this right and to take the necessary measures to protect public safety and rights of other citizens.<sup>54</sup> According to the Guidelines, "A notification regime requires that the presumption is always in favor of holding assemblies, and that assemblies not be automatically penalized, through dispersal or sanction, due to failure

<sup>50</sup> FoAA, Para 71.

<sup>51</sup> *Kudrevičius and Others v. Lithuania*, ECtHR, Grand Chamber Judgment of 15 October 2015, para. 147.

<sup>52</sup> 180 UN Human Rights Council, First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, para. 28.

<sup>53</sup> *Biti and Another v Minister of Home Affairs and Another* (34/2002) ((34/2002)) [2002] ZWSC 9 (27 February 2002).

<sup>54</sup> FoAA, Para 71.





to notify..."<sup>55</sup> The Guidelines also accentuate that "*Lack of notification shall not be understood to make an assembly illegal*"<sup>56</sup>

164. In perusing the provisions of the POSA, and allegations of the Complainants' relating to the effect of the notification requirement on their right to freedom of assembly, the Commission notes that the Act restricts all processions, public demonstrations and public meetings, by placing a requirement on conveners to give notice to the regulatory authority in terms of Section 25 of the Act.
165. From the above, the Commission holds that even though there might be justifiable reasons to impose restrictions to freedom of assembly through prior notifications, as long as there is no potential harm to the public, States should facilitate the exercise of the right to assemble peacefully. This is more so in situations such as the current Communication wherein the Victims demonstrated without prior notification, but protested to express their grievances against the Government over matters that directly concern them. This is echoed in the *Jennifer Williams case*, where the Supreme Court of Zimbabwe held that "*despite the discretion accorded to the police under Section 29 (2) of POSA to intervene in assemblies that have been authorized if they notice that the assembly constitutes disorder, it does not follow that police should always break up peaceful assembly, even when it has not been authorized.*"
166. As noted earlier, Article 11 of the African Charter allows States to subject the exercise of the right to freely assemble to restrictions only if they are measures necessary, in a democratic society, for certain aims considered to be legitimate exceptions to the right guaranteed by the African Charter. The Commission has already established that the Respondent State has not proven that the restrictions were aimed at protecting morals, order and were legitimate to a democratic society. Therefore, the dispersal of the assembly, albeit unauthorized was unjustified because the interference served no legitimate aim.
167. Based on the forgoing, the Commission holds that there is violation of the Victims' rights under 11 of the African Charter.

#### Article 9(2)

168. Article 9(2) of the Charter provides that: '*Every individual shall have the right to express and disseminate his opinions within the law.*'
169. The Complainants aver that the rights to freedom of assembly and expression may be subject to certain restrictions, however, such measures must be prescribed by law and necessary in a democratic society in the interests of national security or public safety, order, health, morals or the protection of the rights and freedoms of others.
170. The Respondent State on the other hand did not address or dispute the Complainants' assertions under Article 9(2) of the African Charter. Accordingly, the Commission will proceed, based on the evidence before it.
171. The Commission recognizes that freedom of expression under Article 9 (2), read together with Article 27(2),<sup>57</sup> of the African Charter is the cornerstone of a democratic country, and any violation of the right to freedom of expression impacts on the full realization of other rights and freedoms enshrined in the African Charter and other international instruments.

<sup>55</sup> FoAA, Para 71(1).

<sup>56</sup> FoAA, Para 71(2).

<sup>57</sup> Article 27(2) provides that "*The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.*"





172. The *Declaration of Principles on Freedom of Expression in Africa (the Declaration)*<sup>58</sup> which supplements the provisions of Article 9 of the African Charter underscores respect for freedom of expression by providing that "*freedom of expression is a fundamental and inalienable human right and an indispensable component of democracy*. The Declaration also affirms that "*freedom of expression shall not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.*"<sup>59</sup>
173. In *Kenneth Good v the Republic of Botswana ( the Kenneth Good Case)* the Commission held that freedom of expression is not an absolute right, and can only be restricted if the restrictions serve a legitimate interest and necessary in a democratic society.<sup>60</sup> Restrictions to freedom of expression were also articulated by the Commission in *Social and Economic Rights Action Centre & Another v Nigeria (the SERAC Case)*, where the Commission held that the only legitimate interests that are compatible with the African Charter are limited to the conditions enumerated under Article 27 (2) of the Charter, which states that "*the rights of the Charter shall be exercised with due regard to the rights of others, collective security, morality and common interest.*"<sup>61</sup>
174. The Constitutional Court in the *Democratic Assembly Case* also underscored that any restrictions to freedom of expression should be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, which aligns with the Commission's view in the *Kenneth Good Case*.<sup>62</sup> From the Commission's standpoint, "restrictions" should be conducive to the "protection of morals" which makes them "necessary" in a "democratic society".<sup>63</sup>
175. Furthermore, according to the Commission's *Guidelines on FoAA*,<sup>64</sup> "*the right to freedom of expression in the context of assemblies protects the manner in which assemblies are conducted as well as the paraphernalia used, including flags, masks, symbols, banners, posters and other objects as well as their content.*" The Guidelines are clear to the effect that the referenced symbols may be restricted where they are intrinsically and exclusively associated with acts of hate speech.
176. The Commission notes that the Constitutional Court of Zimbabwe's ruling in the *Democratic Assembly case* highlights the unconstitutional nature of Section 27 of POSA which also affects the right to freedom of expression.
177. The Commission also notes that the Victims' allegations relating to violation of the right to freedom of expression are intrinsically linked to the right to freedom of association and assembly.
178. Consequently, the Commission underscores that the Respondent State did not provide any justifiable reasons to show that restrictions to freedom of expression were based on legitimate grounds, including the need to safeguard national security public order, public health or morals. In this connection, since the Commission already established that there is a violation of Articles 10(1) and 11 of the African Charter, the Commission additionally rules that there is a violation of Article 9(2) of the African Charter by the Respondent State.

<sup>58</sup> Amended *Declaration of Principles on Freedom of Expression in Africa* adopted at the Commission's 65<sup>th</sup> Ordinary Session in November 2019, Banjul, The Gambia, Principle 10.

<sup>59</sup> Ibid Principle 22(5).

<sup>60</sup> Communication 313/05-*Kenneth Good v the Republic of Botswana* para. 187.

<sup>61</sup> Communication 15/96-*Social and Economic Rights Action Centre & Another v Nigeria*, (2001) ACHPR, para 165.

<sup>62</sup> n 35 above para 187.

<sup>63</sup> Ibid.

<sup>64</sup> *Guidelines on Freedom of Association and Assembly in Africa* adopted by the Commission at its 60<sup>th</sup> Ordinary Session held in Niamey, Niger, from 8 to 22 May 2017, para 81.





## Alleged violation of the right to personal liberty (Article 6)

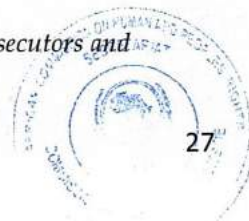
179. Article 6 provides that *"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions laid down by law. In particular, no one may be arbitrarily arrested or detained"*.
180. The Complainants allege that on at least a dozen occasions the Victims were arbitrarily arrested or detained for engaging in peaceful protests that were critical of government. They also aver that while the law stipulates that arrests require that a warrant be issued or that an arrested person should be informed of the charges against them before being taken into custody, the police failed to respect these safeguards.
181. For its part, the Respondent State counters that the Victims were arrested and detained as a result of their failure to comply with the law. The State also argues that the Complainants have not given details of all the arrests and therefore requests the Commission to only deal with those that were substantiated.
182. In its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*,<sup>65</sup> the Commission established that *"States must ensure that no one shall be subject to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause."*<sup>66</sup>
183. The Commission notes that 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. Thus, any deprivation of liberty must fall strictly within the confines of the law, failing which, such acts are considered arbitrary and illegal. The legality of arrest is therefore critical to proving whether detention is lawful or not.
184. The principle of legality provides that *"deprivation of liberty must in all cases be carried out in accordance with the law"*.<sup>67</sup> According to the Complainants, the arrest and detention of the Victims were unlawful as the police had no genuine or reasonable suspicion that the Victims were carrying out any activity that would constitute a criminal offense.
185. Section 49 of the 2013 Constitution of Zimbabwe prohibits deprivation of a person of personal liberty without any just cause. However a person can lawfully be deprived of liberty upon reasonable suspicion that he or she has committed or is about to commit a criminal offence.<sup>68</sup>
186. In the *Jennifer Williams Case*, the Supreme Court held that *"where the accused person challenges the legality of the charge on the ground that the offence itself was not committed, the onus is on the State, to first show that, if proved at the trial, the facts on which the charge is based would constitute the offence with*

<sup>65</sup> *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* Adopted by the Commission in 2003.

<sup>66</sup> *Ibid*, Section 1 (b).

<sup>67</sup> OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 5 Human Rights and Arrest, Pre-Trial and Administrative Detention,

<sup>68</sup> This was provided in Section 13(1) and (2) in the previous Constitution.





which the accused person is charged.”<sup>69</sup> The Supreme Court also held that “since the right to personal liberty is amongst the fundamental human rights guaranteed by the Constitution, any interference by the State, any restriction on it has to be closely scrutinized and construed in the narrowest sense to ensure that deprivation of personal liberty is on the ground and for the purposes prescribed by law.”

187. Within the same context, Article 9(2) of the *International Covenant on Civil and Political Rights* requires that when an individual is arrested; he or she must be informed, at the time of arrest, of the reasons for the arrest and of any charges against him or her.<sup>70</sup>
188. The Commission therefore asserts that restrictions to liberty should only be allowed in accordance with the law and compatible with the African Charter. In the process of arrests, authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution, as well as the African Charter.
189. Looking at the arguments of the Complainants and juxtaposing them with national and international standards, the Commission is of the view that the arrest and detention did not meet the requirements of the Constitution and not compatible with the African Charter and other international standards. In other words, the arrest and detention were unlawful.
190. Additionally, the detention of persons on account of their political beliefs also renders the detention an arbitrary deprivation of liberty in violation of Article 6 of the Charter. This principle was expounded by the Commission in *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria*<sup>71</sup>. Similarly, the Commission’s jurisprudence states that where the arrest or detention is motivated by discrimination;<sup>72</sup> and people are detained without charges,<sup>73</sup> then those circumstances are arbitrary and consequently constitute a violation of Article 6.<sup>74</sup>
191. The State’s arguments relating to lack of details on the number of arrests is not relevant as the number does not have any bearing on the arbitrariness of the arrests and detentions. This notwithstanding, the Complainants referred the Respondent State to the relevant paragraphs of the Initial Complaint, as well as its additional submissions<sup>75</sup> which outlined all the details of the arrests and detentions.
192. The Commission therefore finds a violation of Article 6 of the African Charter.

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<sup>69</sup> n 52 above.

<sup>70</sup> See Article 9(2) of the International Covenant on Civil and Political Rights.

<sup>71</sup> Communication Nos.140/94 -141/94-145/95 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, Para 51.

<sup>72</sup> Communication Nos. 27/89, 46/91, 49/91, and 99/93- *Organisation Contre la Torture and Others v. Rwanda*, Communications Nos (1996), ACHPR, para. 28.

<sup>73</sup> Communication No. 102/93-*Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, (1998), ACHPR para. 55.

<sup>74</sup> See Communication No. 385/10- *The Kenyan Section of the International Commission of Jurists ( ICJ) v. the Republic of Kenya*, para 124.

<sup>75</sup> Reply of the Complainants to the Respondent State’s submissions on the Merits, para 21.





*Alleged violation of the right to non-discrimination (Article 2) and equal protection (Article 3)*

193. 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>76</sup> Non-discrimination together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.<sup>77</sup>
194. Both Articles 2 and 3 have an element of discrimination which makes them intrinsically linked and inter-dependent. The connection between Articles 2 and 3 of the Charter have also been expressed by the Commission in its jurisprudence wherein the Commission noted that the right to non-discrimination and equal protection of the law are interlinked to the extent that a violation of one results to a violation of the other.<sup>78</sup>
195. The Commission will therefore proceed to examine both rights together in its analysis of this section. However, since the submissions of the Complainants are similar under Articles 2 and 3, and further, in view of the fact that the principle of discrimination cuts across both rights as already stated, for coherence purposes, the Commission will proceed by analyzing Article 3 of the African Charter, before concluding on Article 2 of the African Charter.

*Article 3*

196. Article 3(1) and (2) provide that *'Every individual shall be equal before the law' and that 'every individual shall be entitled to equal protection of the law.'*
197. The Complainants allege generally that:
- i. POSA is applied selectively and used as a means to prevent civil society and individuals vocal in their criticisms of the Government from exercising their right to freedom of assembly;
  - ii. There is differential treatment as law enforcement authorities do not allow certain demonstrations to proceed, while permitting pro-Mugabe processions to take place, and there is no investigation initiated by the State to verify the allegations;
  - iii. Decisions of the local courts are openly disregarded by the Respondent State and its functionaries.
198. The Respondent State on its part asserts that POSA is a law of general application and applies to everyone who intends to carry out demonstrations in Zimbabwe. The Respondent State avers that the arrests and detention of the Victims have been for failure to comply with the provisions of the law and not as a result of discriminatory application of the law on the basis of their critical opinions of the Government as alleged. According to the Respondent State, the Complainants do not allege that the Victims are the only conveners who have been arrested for failure to comply with POSA. Additionally, it states that the Victims merely contend that they have been arrested on several

<sup>76</sup> See General Comment No. 18, in United Nations Compilation of General Comments, p. 134, para 1.

<sup>77</sup> Ibid.

<sup>78</sup> Communication 430/12 – *Gabriel Shumba and Others (represented by Zimbabwe Lawyers for Human Rights) v The Republic of Zimbabwe*, para 116. See also *Purohit and Moore v the Gambia* (n 25 above) para 49





occasions without furnishing the details of such arrests to enable the Respondent State verify the circumstances of such arrests and respond to the allegations.

199. *Prima facie*, the terms 'equality before the law' and 'equal protection of the law' under Articles 3(1) and 3(2) respectively, may appear identical, but technically differ in theories. The Commission is therefore mindful of the special character of Article 3 of the African Charter with its two-tier principles. Accordingly, the Commission in determining the extent to which Article 3 has been violated by the Respondent State, will combine the two principles as they both have a component of discrimination. Its ruling on Article 3 however, will reflect the specific content of the right as violated.
200. In *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe*,<sup>79</sup> the Commission explained the principle of "equal before the law" under Article 3(1) wherein it stated that the fundamental meaning of "equality before the law" is "the right to equal treatment under similar conditions." The Commission also underlined that, individuals in the same jurisdiction should be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens.<sup>80</sup> In other words, laws in the jurisdiction should be applied in the same manner across the board without discrimination.
201. The implication of the above principle is that States should not focus on the existence or content of legislation, but rather how the legislation is enforced and applicable to all citizens.
202. In the same Communication, the scope of "equal protection of the law" was also expounded by the Commission wherein it noted that "equal protection of the law" relates to circumstances where no person or class of persons are denied the same protection of the laws enjoyed by other persons or class of persons in the same situations.<sup>81</sup>
203. Given the scope of Article 3, the Commission underscores that freedom from discrimination is also an aspect of the principles of equality before the law and equal protection of the law because both present a legal and material status of equality and non-discrimination. This is in line with Article 7 of the *Universal Declaration of Human Rights* which stipulates that the principles of equality and non-discrimination are fundamental elements of international human rights. Noting specifically that, everyone is equal before the law and are entitled without any discrimination to equal protection of the law, and that everyone is entitled to equal protection against any such discrimination and against any incitement to such discrimination.
204. Accordingly, in determining the extent of the violation of this right, the Commission must take account of the general issue covered by Article 3, namely, whether the Victims were treated unfairly (discriminatorily) within the legal system in the Respondent State and whether they were denied the enjoyment accorded by the laws in the country. In doing so, it is relevant for the Commission to scrutinize the ambit and application of POSA in order to ascertain the discriminatory aspect of the law. In the process, the Commission will also peruse the 2013 Constitution of Zimbabwe.

<sup>79</sup> Communication 294/2004- *Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe*, Para 96.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid, para 99.





205. An examination of POSA indicates that the definition of '*public meeting*'<sup>82</sup> in the initial version of POSA had no numerical limitation. The initial version also created no distinction between private gatherings of political parties and other gatherings. In an amendment<sup>83</sup> that was fast tracked through Parliament in December 2007 and came into law in 2008, the sweeping definition of '*public gathering*' was narrowed to a gathering of more than fifteen people.
206. The 2008 amendment excluded, from the purview of the Act, meetings, "*of an organ or structure of a political party or other organization held, (a) in any private place, whether or not it is wholly or partly in the open; or, (b) any public place that is not wholly in the open.*"<sup>84</sup> However, Section 23(8) of POSA gave the authorities powers to monitor '*political*' meetings by providing that "*For the purpose of helping a regulating authority to ascertain that a meeting is not a "public meeting" ... the regulating authority may request the political party or other organization concerned to submit to it from time to time or at such regular intervals as it may require a list of the members of the organs or structures of the political party or organization who are entitled to attend the meeting concerned.*
207. On its part, Section 86 (2) of the 2013 Constitution of Zimbabwe,<sup>85</sup> requires that rights are effected in terms of law of general application, and any limitations should be fair, reasonable, necessary and justifiable in a democratic society, based on openness, justice, human dignity, equality and freedom, and taking into account all relevant factors. These factors include amongst others, the purpose of the limitation, in particular, whether it is necessary in the interests of defense, public safety, public order, public morality, public health, regional or town planning or the general public interest, and whether the limitation imposes greater restrictions on the right or freedom concerned.
208. According to the Commission, the understanding of the '*law of general application*' requirement specifically in freedom of assembly cases is vastly different from the broader, more general understanding thereof in the broader constitutional context, and in this connection, it is relevant for the analysis to focus on the application guaranteed by POSA.
209. The Commission's *Guidelines on FoAA* require States to enact laws on freedom of assembly which primarily aim to facilitate the enjoyment of the right.<sup>86</sup> The Guidelines call on States not to discriminate against assemblies on the basis of other illegitimate grounds, including sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, migration status, property, socio-economic status, birth, disability, age, sexual orientation or gender identity.<sup>87</sup>
210. Furthermore, States are also required to ensure the protection of all assemblies, public and private, from interference, harassment, intimidation and attacks by third parties and non-state actors. According to the Guidelines, where third parties aim to interfere, harass, intimidate or attack a peaceful assembly, the response of the authorities shall not be to ban or disperse the peaceful assembly, but rather to take measures to protect the assembly and to allow it to proceed.<sup>88</sup>
211. While it is commendable that the Respondent State has enacted a law that regulates demonstrations in the country, it is also imperative to ensure that this law is not discriminatory by its application. In order for the Commission to determine if the law has been applied

<sup>82</sup> See the definition of public meeting in the Public Order and Security Act [CHAPTER 11:7], Act 1/2002.

<sup>83</sup> The Public Order and Security Amendment Act, 2007.

<sup>84</sup> Ibid Note 9.

<sup>85</sup> 20<sup>th</sup> Amendment 2013 of 15 May 2013.

<sup>86</sup> FoAA, Para 66.

<sup>87</sup> FoAA, Para 80.

<sup>88</sup> FoAA, Para 94.





discriminatorily as alleged by the Complainants, and whether the discrimination is specific to the Victims in this Communication based on their membership with WOZA and activities carried out, the Commission will examine some situations in the Respondent State that are linked to the subject matter and compare them with the circumstances in the present Communication:

- Previous bans on rallies and demonstrations in the Respondent State have been arbitrarily imposed and the police have acted beyond the scope of their authority as was the case in 2007 when the police banned rallies for 3 months. This ban was challenged in the case of *MDC v Chief Superintendent Janga and others*.<sup>89</sup> The police later conceded that the ban went beyond the scope of their authority under POSA and was illegal during the hearing of an appeal *MDC v Commissioner of Police and others*. It can thus be inferred that the actions of the police were illegal as they had not followed the provisions of POSA;
- In *MDC v The Minister of Home Affairs and Others*,<sup>90</sup> where the police unilaterally banned "Freedom Marches" organized by the then-opposition MDC, the courts held that such "bans" were unlawful;
- Similarly in *MDC v Commissioner General and others*<sup>91</sup> a Court order was issued by the High Court compelling the police not to disrupt a rally at an open space in Harare. On 21 June 2008, despite this Court order, armed ZANU-PF youths and militias allegedly sealed off the ground in violation of the provisions of POSA and the Court order. In that case, the police failed to enforce provisions of POSA in this matter;
- In another *MDC v Minister of Home affairs and others case*,<sup>92</sup> the then opposition party wrote a letter to the police to notify them of their run-off campaign rallies to be conducted on 8 June 2008 in Glen Norah, Mufakose, Kambuzuma and Chitungwiza. The police arbitrarily prohibited the rallies. The main reason for the prohibition was the pending investigations to threats of assassinating the MDC leadership and as experts in security the police further advised the MDC that rallies would increase the risk of the assassination. The court allowed the rallies as scheduled and dismissed the arguments of the police. Cognizant of the conduct of the police of disrupting rallies, High Court judge, Justice Chitakunye further held that the police were prohibited from disrupting the rally.

212. From the foregoing cases, and including the circumstances in the present Communication, there seem to be a pattern of disruption of demonstrations with the police over-reaching their powers under POSA to unnecessarily restrict and prevent public gatherings. Additionally, the police seem to have loosely interpreted POSA to place restrictions on a broader category of activities and actors.

213. The Commission does not however see a cogent link between the discriminatory impact of the law and activities of the Victims' Organization, as other demonstrations in the Respondent State have also been interrupted, and the Complainants have not provided sufficient grounds to portray such discrimination. Thus, the discriminatory aspect is not clear cut enough to warrant the responsibility of the Respondent State with respect to the Victims specifically. On this basis, the Commission rules that there was no discrimination in the application of POSA towards the Victims, and therefore, does not amount to an infringement of the right to equal protection before the law under Article 3(1) of the African Charter.

<sup>89</sup> *MDC v Chief Superintendent Janga and others* (Ref: 777/07).

<sup>90</sup> *MDC v Chief Superintendent Janga and others* (Ref: 777/07).

<sup>91</sup> *MDC v Commissioner General and others* (Ref: HH 3262/08).

<sup>92</sup> *MDC v Minister of Home affairs and others case* (Ref: HH 2950/08).





214. Having established that there was no discrimination in the application of POSA, the question that remains to be answered is whether there was differential treatment on the Victims on the grounds of their affiliation to WOZA.
215. The Commission established the test to determine whether the principle of non-discrimination has occurred in *Kenneth Good Case* wherein the victim was expelled from the country on account of his opinions. The Commission noted that if the Victim was not critical of the Government, he would not have been deported from Botswana. The Commission stated that the Victim was treated differently from those who were supportive of the presidential succession in Botswana, and the State was unable to provide any justification of how the victim became a national security threat that may have justified the reason for his discriminatory treatment.<sup>93</sup> The Commission specifically stated that there is a violation if: equal cases are treated in a different manner; a difference in treatment does not have a reasonable justification, and if there is no proportionality between the aim sought and the means employed.<sup>94</sup>
216. The standard for determining whether discrimination has taken place was also canvassed by the Inter -American Court when it made its Advisory Opinion on the proposed Amendments to the *Naturalization Provisions of the Constitution of Costa Rica*. The Court stated that "...no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things...."<sup>95</sup> This was also reflected by the UN Human Rights Committee when it held that "Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."<sup>96</sup>
217. The above principles aligns with the United Nations Human Rights Committee's decision in *Broeks v. the Netherlands*, where the Committee affirmed that "the right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of Article 26."<sup>97</sup>
218. Therefore, it is the Commission's view that while Article 3 guarantees similar treatment, it does not necessarily mean identical treatment, and where there is differential treatment, there should be a nexus between the basis of the treatment and the objective of the relevant legislation that imposes the treatment. The State will consequently not violate the equality clause if there is reasonable justification or compelling reasons why the same class of people were not treated alike.
219. It therefore follows that, the principle of equality or non-discrimination does not mean that all differential treatments and distinctions are forbidden because some distinctions are necessary when they are legitimate and justifiable.
220. The Jurisprudence of the Commission illustrates that Parties must prove that treatment received was discriminatory or selective in order to establish that they have not been treated equally by the

<sup>93</sup> (n 35 above) para 219.

<sup>94</sup> Ibid.

<sup>95</sup> *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion Oc-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984) para 57.

<sup>96</sup> Human Rights Committee, *General Comment 18, Non-discrimination* (37th Session, 1989), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994). para 13.

<sup>97</sup> Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands* (Views adopted on 9 April 1987), in UN doc. GAOR, A/42/40, p. 150, para. 13



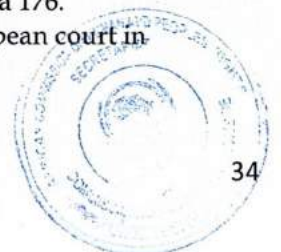
law.<sup>98</sup> The Complainants have asserted that the ZRP allow pro-government assemblies whilst preventing those which voice opinions against the government. They cite occurrences where demonstrations organized by other groups which are critical of the government have not been prohibited despite non-compliance with the notification requirement in POSA.

221. The question that arises is therefore whether the Victims were treated differently, and to answer this question, the Commission will rely on its test established by the *Kenneth Good Case* which is whether: (1) equal cases are treated in a different manner; (2) whether there was justification to the treatment; and (3), if there is no proportionality between the aim sought and the means employed.
222. The Commission's understanding of the Complainants' assertion is that while the Victims were arrested and harassed for demonstrations relating to matters critical of the Government, the Government allowed pro-Government demonstrations to take place, amounting to differential treatment or favoritism.
223. In *Rasmussen v. Denmark*, the European Court stated that Article 14 of the European Convention is violated when a State treats persons in analogous situations differently without providing objective and reasonable justification; or when, without objective and reasonable justification, it fails to treat differently persons whose situations are significantly different. The European Court stated that the applicant has the burden of establishing a difference of treatment (or the failure to ensure different treatment) and the State must then establish objective and reasonable justification. Objective and reasonable justification involves showing that the difference in treatment pursues a legitimate aim and that there is a reasonable relationship of proportionality between means and end.<sup>99</sup>
224. Furthermore, the African Charter prohibits indirect as well as direct discrimination and the Commission recognizes that discrimination regardless of the method, always has an adverse impact on the Victim. However, there would be no discrimination in differences in treatment if the facts portray that the acts alleged to have resulted to discrimination were legitimate and justified. In this connection, the Commission will rely on the principle that equality of treatment is violated if the distinction has no objective and reasonable justification.
225. Additionally, the United Nations Human Rights Committee has emphasized that, the right to equality before the law requires States to act against discrimination by public and private agencies in all fields, and that the right to equality before the law means that citizens are accorded fair and just treatment within the legal system and within Government institutions as are accorded to all other citizens.<sup>100</sup>
226. In the present Communication, further to the Complainants' assertions that the Respondent State dispersed demonstrations of the Victims critical of the Government and allowed other processions to take place without interruption, the burden shifted on the Respondent State to prove otherwise. Apart from stating that, essentially, there is general application of the law, the Commission cannot disregard the fact that the Respondent State did not provide any arguments to refute that dispersing the demonstrations of the Victims served a legitimate aim and therefore amounted to

<sup>98</sup> Communication 323/06 - *Egyptian Initiative for Personal Rights and INTERRIGHTS v Egypt*, para 176.

<sup>99</sup> *Rasmussen v. Denmark* (1985) 7 E.H.R.R. 371, para 40. This was also the position of the European court in *Thlimmenos v. Greece*, loc. cit., para 44.

<sup>100</sup> United Nations Human Rights Committee, *General Comments adopted by the Human Rights Committee under Article 3 of the ICCPR*, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).





a legitimate differentiation. In other words, there is no reasonable justification from the Respondent State for its actions.

227. In sum, the facts before the Commission depict that there is discrimination between persons who are substantially in similar circumstances and conditions, yet treated differently which to the Commission, is clearly an element of unequal protection before the law. Accordingly, the Commission finds that there was differential treatment against the Victims in the present Communication.
228. In addition to this, in the *SERAC case*<sup>101</sup> the Commission affirmed 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.*" Thus, the Commission holds that since the Respondent State did not initiate any investigations to verify the allegations, it portrayed the State's lack of commitment to take any action.
229. Likewise, the State is in principle in a better position to protect its citizens from the acts of third parties, to implement the rulings of the courts and to ensure that criminal investigations are undertaken and effective prosecutions pursued. Failure to do so puts Victims of such actions in jeopardy without recourse to remedies.
230. In the present Communication, the Commission shares the view of the Complainants that the Supreme Court's decision in the *Jennifer Williams Case* which ruled in favor of the Victims is disregarded by the Respondent State, as the actions which were condemned in that case continue to be perpetrated by the police against the Victims.
231. The Commission agrees with the Supreme Court's decision in the *Jennifer Williams Case* that the conduct of the Victims was not unlawful, and therefore continuous allegations of arrests and detentions of the Victims portray that State authorities have no regard for the Judgement of the Supreme Court, which at the time, was the highest Court in the Respondent State. In this regard, reaffirming its decision in *Egyptian Initiative for Personal Rights and Interights v Egypt*, that States have an affirmative duty to prohibit discrimination and ensure that all persons are protected by the law and equal before the law,<sup>102</sup> the Commission finds a violation of Article 3 (2) of the African Charter.

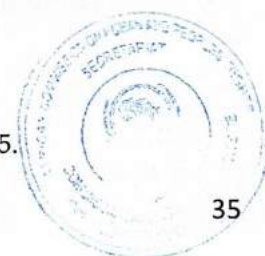
## Article 2

232. Article 2 of the African Charter provides that: "*Every individual shall be entitled to the enjoyment of the rights and freedoms recognized 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.*"
233. In its analysis of Article 2 of the African Charter, the Commission will rely on its jurisprudence in *Gabriel Shumba v Zimbabwe*,<sup>103</sup> wherein it affirmed that the right to non-discrimination and equal protection of the law are interlinked to the extent that a violation of one results to a violation of the other. Consequently, since the Commission has already established a violation of Article 3 (2)

<sup>101</sup> n 36 above, para 57.

<sup>102</sup> Communication 323/2006 - *Egyptian Initiative for Personal Rights & Interights v. Egypt* para 175.

<sup>103</sup> n 85 above, para 116.





of the African Charter, it follows therefore that there is a violation of Article 2 of the African Charter.

234. On all the above grounds, the Commission therefore finds a violation of Articles 2, and 3(2) of the African Charter by the Respondent State.

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

235. Article 1 provides that *'The member states of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.'*
236. The Complainants aver that the existing legislation and legal framework in Zimbabwe falls short of the State's obligation to protect, as it fails to protect and facilitate the free exercise of the Victims' rights to engage in peaceful protests. They aver further that States have an obligation to establish accessible and effective complaints mechanisms capable of conducting independent, prompt and thorough investigations into allegations of human rights violations, in order to hold perpetrators accountable, and that failure to this constitutes a violation of Article 1 of the African Charter.
237. The Commission has established that a violation of any of the provisions of the Charter automatically amounts to a violation of Article 1.<sup>104</sup> Additionally, requisite steps such as investigating the veracity of the allegations should be taken by the State, in accordance with its constitutional process and the provisions of relevant treaty (in this case the African Charter), and adopt such legislative or other measures which are necessary to give effect to the rights in the Charter.
238. Therefore, having found violations of Articles 2, 3(2), 6, 9(2), 10 (1) and 11 of the African Charter, the Commission holds that there is a violation of Article 1 of the African Charter.

### **Decision of the Commission**

239. In view of the above, the African Commission on Human and Peoples' Rights:
- (i) Finds the Respondent State is in violation of Articles 1, 2, 3(2), 6, 9(2), 10(1), and 11 of the African Charter;
  - (ii) Does not find violation of Article 3(1) of the African Charter;
  - (iii) Urges the Respondent State to promptly and independently investigate, prosecute, and punish all State actors responsible for violations of Articles 1, 2, 3(2), 6, 9(2), 10(1), and 11 of the African Charter and provide redress for prejudices suffered by the Victims;
  - (iv) Urges the Respondent State to implement all domestic laws, policies and practices as well as international and regional standards, for the protection and facilitation of the right to engage in peaceful protest and public demonstration; and
  - (v) Urges the Respondent State to carry out human rights trainings to Police and Public Officials.

**Done at the 31<sup>st</sup> Extra-Ordinary Session, held virtually from 19 - 25 February 2021**

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<sup>104</sup> n 4 above.

