

Communication 361/08: J.E Zitha & P.J.L.Zitha (represented by Prof. Dr. Liesbeth Zegveld) v Mozambique**Summary of Complaint**

1. The Communication is submitted by Prof. Dr. Liesbeth Zegveld (Attorney at Law) (hereinafter called the Complainant) on behalf of Mr Jose Eugency Zitha (herein after called first victim) and Prof. Pacelli L.J. Zitha (herein after called second victim). The Respondent State is the Republic of Mozambique a State party to the African Charter on Human and Peoples' Rights (the African Charter or the Charter)⁵⁷.

2. Mr. Jose Eugency Zitha was a citizen of Mozambique, born on 15 April 1939 in Magude, Mozambique and lived in Matola. Prior to his arrest and detention on 26 October 1974, he was a medical student at the University of Lourenco Marques in Mozambique, where he was enrolled in the Faculty of Medicine from 1968 and 1974.

3. The second victim, Prof. Pacelli L.J. Zitha, the son of the first victim, is a citizen of France, born on 19 October 1961 in Mozambique. He is currently living in The Netherlands and by profession, he is a Professor of Oil and Gas Production with the Delft University of Technology.

4. It is alleged that on 26 October 1974, the first victim was requested by the Minister of Home Affairs of the Transition Government of Mozambique⁵⁸, Mr. Armando Guebuza, to join a meeting of the members of the *grupos dinamisadores*. He was taken to the meeting in a military vehicle, accompanied by armed FRELIMO⁵⁹ soldiers. When he entered the meeting room, under the escort of heavily armed militia, he was humiliated and accused of being a betrayer.

5. It is alleged that Mr Guebuza ordered his arrest and detention at the head quarters of FRELIMO Armed Forces in Boane. He was not informed about the reasons for his arrest. His family, including his son, the second victim, were not informed nor notified of these events. After five days of thorough search by second victim and his family, they discovered that the first victim was detained at the prison of Boane.

6. A few weeks later, the first victim suddenly disappeared from the prison in Boane. After a few days the second victim found out that his father, the first victim, had been transferred to the former *Cadeia Judiciaria* in Maputo. Around the beginning of 1975, the second victim met the first victim for the last time at *Cadeia Judiciaria* in Maputo. After that visit, the first victim suddenly disappeared from the prison in Maputo.

7. The Complainant alleges that an article from the Tanzania Daily News of 23 April 1975 indicated that the first victim was paraded in public on 21 April 1975 at the

⁵⁷ Mozambique ratified the African Charter on 22 February 1989.

⁵⁸ The Transition Government of Mozambique was formed after the Lusaka Agreement in 1974

⁵⁹ The ruling party of Mozambique.

Nachinqwea Prison in southern Tanzania. Since then, there has been no trace of the first victim

Articles alleged to have been violated

8. The Complainant submits that with respect to the first victim, the Respondent State violated Articles **2,4,5,6** and **7(1) (d)** of the African and with respect to the second victim Article 5 of the same Charter.

Procedure

9. The Complaint was received at the Secretariat of the African Commission (herein after the Secretariat) on 9 June 2008.

10. On 15 July 2008, the Secretariat acknowledged receipt of the Complaint and informed the Complainant that it will be considered at the African Commission on Human and Peoples' Rights (herein after the African Commission) 44th Ordinary Session.

11. During its 44th Ordinary Session held from 10 to 24 November 2008, in Abuja, Nigeria, the African Commission decided to be seized of the Communication and requested the Complainant to submit its arguments on Admissibility.

12. By letter, dated 11 December 2008, the Secretariat wrote to the Complainant informing her of the decision of the African Commission.

13. By letter, dated 22 December 2008, the Secretariat of the African Commission wrote to the Complainant requesting her to furnish the African Commission with the information on the missing documents in the Complaint.

14. By letter, dated 7 January 2009, the Secretariat wrote to Complainant reminding her to forward the information previously requested on the missing documents in the Complaint.

15. On 18 February 2009, the Complainant sent her submission on Admissibility and adapted version of the original Communication to the Secretariat. The Secretariat acknowledged receipt by letter dated 4 March 2009.

16. By Note Verbale dated 24 March 2009, the Secretariat informed the Respondent State about the Communication and requested it to submit its submissions on Admissibility within three (3) months of notification.

17. On 21 April 2009, the Complainant wrote to the Secretariat to enquire whether she could attend and make oral submissions on Admissibility at the 45th Ordinary Session of the African Commission. The Secretariat acknowledged receipt by a letter dated 25 April 2009 and informed the Complainant that the Respondent State has not

yet submitted its arguments on Admissibility and as such it would not be necessary for the Complainant to make oral submission.

18. By letter, dated 29 April 2009 and 28 May 2009 respectively, the Complainant requested the Secretariat to consider the Communication at its 45th Ordinary Session or provide explanations for the African Commissions position on the matter. The Secretariat acknowledged receipt by a letter dated 9 June 2009 and informed the Complainant about the procedure for consideration of Communications by the African Commission.

19. By Note Verbale dated 26 June 2009, the Secretariat informed the Respondent State that it is yet to receive its arguments on Admissibility and requested the State to send its arguments on Admissibility by 23 July 2009.

20. By letter, dated 8 July 2009, the Complainant requested the Secretariat to table the Communication for considered at the 46th Ordinary Session of the African Commission. The Secretariat acknowledged receipt by letter dated 5 August 2009, and informed the Complainant that when the Communication is considered, the decision of the African Commission will be communicated to her. The Complainant by letter, dated 17 August 2009, requested the Secretariat to clarify whether the Secretariat's letter of 5 August 2009, explains that it is not necessary for her to attend the Session with her client.

21. By letter, of 29 September 2009, the Secretariat informed the Complainant that the Respondent State had still not yet submitted its arguments on Admissibility and that if the Respondent States does not forward its submissions before the 46th Ordinary Session, the African Commission will decide on the way forward and the decision will be communicated to her.

22. By letter, dated 21 October 2009, the Complainant requested the Secretariat to confirm whether due to the fact that she and her client would not be allowed to make a statement during the 46th Ordinary Session of the African Commission, it would not be necessary for them to attend the Session.

23. The Secretariat acknowledged receipt by letter, dated 26 October 2009 and informed her that it will not be necessary for them to attend the Session.

24. By letter, dated 4 November 2009, the Secretariat received the submission of the Respondent State on Admissibility and forwarded it to the Complainant by letter dated 30 November 2009 for her response.

25. On 19 February 2010, the Secretariat received the Complainant's response to the Respondent State's submission on Admissibility and acknowledged receipt on 5 March 2010.

26. On 22 April 2010, the Secretariat received an email from the Complainant indicating that, she will be attending the 47th Ordinary Session of the African

Commission, together with the second victim to address the African Commission on the Communication.

27. By Note Verbale, dated 23 April 2010, the Secretariat informed the Respondent State about the Complainants letter of 22 April 2010.

28. At the 47th Ordinary Session of the African Commission held from 12-26 May 2010, in Banjul, The Gambia, the Complainant and the Respondent State addressed the African Commission on the Admissibility of the Communication.

29. The African Commission decided to defer the Communication to the 48th Ordinary Session for consideration on Admissibility, to allow the Secretariat to take into consideration, the oral submissions of both parties in its draft decision.

30. By letter, and Note Verbale, dated 4 June 2010, the Secretariat informed the Complainant and the Respondent State of the decision of the African Commission.

31. The African Commission decided to defer the Communication to the 49th Ordinary Session for consideration on Admissibility due to lack of time.

32. By letter, and Note Verbale, dated 9 December 2010, the Secretariat informed the Complainant and the Respondent State of the decision of the African Commission.

The Law on Admissibility

Complainant's Submission on Admissibility

33. The Complainant states that the criteria for Admissibility stipulated in Article 56 of the African Charter have been fulfilled and goes further to address each of these criteria.

34. The Complainant states that in compliance with Article 56(1) of the African Charter, the author has been indicated as Prof. Dr. Liesbeth Zegveld on behalf of Mr. Jose Eugency Zitha and Prof. Pacelli L.J. Zitha.

35. The Complainant submits that Article 56(2) of the African Charter has been complied with, noting that the Communication deals with violations of rights guaranteed under the African Charter, which the Respondent State is a party to.

36. The Complainant states that the Communication is not written in disparaging or insulting language directed at the Respondent State and as such it has complied with Article 56(3) of the African Charter.

37. The Complainant avers that the Communication is not based exclusively on news disseminated through the mass media but is based on witness statements, a book and several reports of human rights organizations, and has thus fulfilled Article 56(4) of the African Charter.

38. The Complainant further states that in fulfilling Article 56(5) of the African Charter, local remedies were not available or sufficient. The Complainant submits with respect to the first victim that in ***Forum of Conscience v Sierra Leone***⁶⁰ filed on behalf of people who were already executed, the African Commission held that ‘there were no local remedies for Complainants to exhaust and even if such possibility had existed, the execution of the victims had completely foreclosed such remedy’. The Complainant argues that if there is a substantial chance that the first victim has been arbitrarily executed, exhaustion of local remedies is impossible and the requirement to exhaust local remedies is therefore not applicable in this case.

39. The Complainant further argues that if the Respondent State claims that the first victim is still alive, the Respondent State is responsible to prove so. The Complainant cites the African Commission’s decision in ***Institute for Human Rights and Development (on behalf of Jean Simbarakiye) v Democratic Republic of Congo***⁶¹ in which it stated that:

when a person is being held in detention and accused of committing a crime, it is the responsibility of the Member State, through its appropriate judicial bodies, to bring this person promptly before a competent court of law in order to enable him/her to be tried in accordance with the rules guaranteeing the right to fair trial in accordance with national and international standards.

40. The Complainant argues that with respect to the second victim, due to fear of persecution after the disappearance of the first victim, he was forced to flee his country in 1983 to France, after which his office in Mozambique was bombed. When gaining his political asylum status in France, he made a commitment by signing a form in France, stating that he would not undertake any action against Mozambique while living there. He lived in France from 1983 to 1994 and in 1995 he moved to the Netherlands where he currently resides.

41. The Complainant further argues that it was thus impossible for the second victim to pursue any domestic remedies following his flight from Mozambique to France for fear of his life. Because of this, he could not travel to Mozambique to undertake legal action himself. The Complainant cites the African Commission’s decision in ***Sir Dawda K. Jawara v The Gambia***⁶², where the African Commission held that:

‘the existence of remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of generalized fear for

⁶⁰ Communication 223/98 - *Forum of Conscience v Sierra Leone* (2000)

⁶¹ Communication 247/02 - *Institute for Human Rights and Development (on behalf of Jean Simbarakiye v Democratic Republic of Congo)* (2006).

⁶² Communication 147/95 and 149/96 - *Sir Dawda K. Jawara v The Gambia* (2000).

his life or even those of his relatives, local remedies would be considered to be unavailable to him’.

42. The Complainant further argues that, when the second victim moved to the Netherlands in 1995 and was able to work and obtain some resources to undertake legal research and action, he and his family contacted several competent lawyers in Mozambique but no counsel appeared available or willing to defend their interests because of fear for their lives. The Complainant cites the African Commission’s decision in ***Curtis Francis Doebbler v. Sudan***⁶³ which states that ‘in order to exhaust local remedies within the spirit of the Article 56(5) of the African Charter, one needs to have access to those remedies but if the victims have no legal representation it would be difficult to access domestic remedies’.

43. According to the Complainant, other reasons for the inability of the second victim to exhaust local remedies are that the fear remains that harm may be inflicted on his family living in Mozambique, and because he is still hopeful that his father may be alive in the hands of the Government, he opted for a careful approach to deal with the matter.

44. The Complainant also argues that it was only after the second victim made his first trip to Mozambique in 1995, that he became aware that it was most likely that his father had been executed and he decided to undertake legal action because the Respondent State did not react to any request for information and local undertakings proved unsuccessful.

45. The Complainant submits that recently the second victim, still being actively seized of the matter to gain information from the Respondent State, during President Guebuza’s visit to the Netherlands on 27 February 2008, he personally presented a letter to the President and subsequent correspondences took place between the victims lawyers and the Human Rights Ambassador of the Dutch Ministry of Foreign Affairs.

46. The Complainant submits that the second victim further went to Mozambique in August 2007, for an extensive inquiry to ensure progress in the case of the first victim. During this visit he managed to arrange two meetings with the son of Uria Simango (the former Vice-President of FRELIMO in the 1960’s) and a meeting with Dr. Simeao Cuamba (a high profile lawyer in Mozambique). Both meetings were unsuccessful. Several letters were also sent to Sir Armando Emilio Guebuza, the current President of Mozambique, requesting information of the whereabouts of the first victim. No reply was ever received.

47. The Complainant cites the African Commission’s decision in Communication ***Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Temoins de Jehovah v. Zaire***⁶⁴, where the African Commission stated that ‘one of the rationale for the exhaustion requirement

⁶³ Communication 236/200. *Curtis Francis Doebbler/Sudan*

⁶⁴ Communication 25/89, 47/90, 56/91 and 100/93- *Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Temoins de Jehovah v. Zaire.*

is that the government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal’.

48. The Complainant finally submits that all the above mentioned instances prove the difficulty and impossibility of the second victim to exhaust local remedies in accordance with Article 56(5) of the African Charter.

49. The Complainant submits that the requirements of Article 56(6) of the African Charter have been fulfilled. The Complainant argues that it is a well-established principle of international law that a new government inherits the previous government’s international obligations including responsibility for the previous government’s misdeeds and mismanagements⁶⁵.

50. The Complainant further submits that the African Commission is therefore, competent *ratione temporis* to consider events that happened after the coming into force of the African Charter, or if they happened before, constitutes a continuing violation after the coming into force of the African Charter⁶⁶. The Complainant, therefore, submits that forced disappearance of the first victim and the failure of the Respondent State to investigate the case constitute a continuous violation of a human right and the Communication was submitted as soon as it was possible to do so, as the second victim was unable to submit at an earlier time.

51. The Complainant states that the Communication has not been submitted to any other procedure of international investigation or settlement and as such has fulfilled the requirements under Article 56(7) of the African Charter.

Respondent State’s Submission on Admissibility

a) Incompetent *ratione temporis*

52. The Respondent State submits that the African Commission is incompetent *ratione temporis*, and therefore should not have even received the Communication in question. The Respondent State argues that Article 65 of the African Charter provides that: ‘For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of the instrument of ratification or adherence’.

53. The Respondent State argues that the alleged incident happened in April 1977 before Mozambique became party to the African Charter.

⁶⁵ Communication 64/92, 68/92 and 78/92 - *Khrishna Achutan (on behalf of Aleke Banda), Amnesty International 9on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chriwa) v Malawi* (1995)

⁶⁶ Communication 251/02 - *Lawyers for Human Rights v Swaziland* (2005)

54. The Respondent State submits that the Communication alleges that the first victim was transferred to Nachingwea, Tanzania, in April 1975 and has never been seen since. The Respondent State states that the Communication mentioned that most probably the first victim was executed there, noting that if that is true, it is obvious that the African Commission is being called upon to entertain a matter (the occurrence of which besides being prior to its own existence also preceded the coming into force of the Charter).

The Respondent State submits that the African Commission is only competent to entertain facts which occurred after the coming into force of the African Charter or, if they occurred before, they constitute a violation continuing after the coming into force of that same Charter.⁶⁷ The Respondent State argues that that is not the case with the facts alleged in the present Communication. The Respondent State thus submits that, the African Commission is incompetent *ratione temporis*, since the facts which it is being asked to entertain in relation to both victims, preceded the coming into force of the African Charter, insofar as the Respondent State is concerned, and such facts have not continued subsequently.

55. The Respondent State submits further that if, however, the African Commission decides it is competent *ratione temporis* to entertain the subject matter of the Communication, the African Commission should declare the Communication inadmissible for failure to meet the fundamental requirement in Article 56(5) of the African Charter.

b) Incompatibility with Article 56(5)

56. The Respondent State argues that Article 56(5) of the African Charter states that: '[...] Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall of necessity, in order to be examined, meet the following conditions: [...] Be subsequent to the exhaustion of local remedies, if any, unless it is obvious to the Commission that the procedure relating to these remedies is unduly prolonged'.

57. The Respondent State argues that with respect to the first victim, the Communication was submitted on behalf of a citizen who, according to the same Complainant had been detained on 26 October 1974 and executed in Nachingwea, Tanzania, in April 1975 or thereabout. The period in question, the Respondent State argues, coincides to a large extent with the transitional period to an independent Mozambican State, during which an assortment of legislation was enacted, culminating in the adoption of the first Constitution of the Republic on 24 June 1975, which came into force with the proclamation of independence on 25 June 1975.

58. The Respondent State further argues that there is no record at Mozambique's judicial institutions of any report, application for the right to appear before a judge, for *habeas corpus* or other appropriate judicial proceedings addressed by either the family members of the first victim or his legal representative. The Respondent State cites the

⁶⁷ Communication 59/91 - *Emgba Louis Mekongo v Cameroon* (1995) para. 28.

case of *Jawara v The Gambia*⁶⁸ where the African Commission noted that the exhaustion of domestic remedies was one of the most important conditions for Admissibility of Communications, and held that ‘before a case is brought before an international body, the State in question should have the opportunity to remedy the situation through its own system’. The Respondent State argues that this has not happened.

59. The Respondent State argues that the same observation applies with respect to the second victim. Although the Complainant lists several attempts of which the second victim claimed to have tried to find answers of the whereabouts of the first victim, he did not grant the Respondent State the opportunity to remedy the situation through its own system. The Respondent State argues that none of the attempts were addressed to institutions of the judicial apparatus, which, besides being available since the time of the alleged detention of the first victim, were a reality, and effective and sufficient.

60. The Respondent State argues that the 1975 Constitution established the political, economic and social organization of the Mozambican State, and enshrines the separation of legislative, executive and judicial powers. It further argues that the Constitution guarantees the rights and freedoms of citizens, as well as, the principle of continuity of the preceding legislation, that is, from the colonial era, which did not contravene the Constitution. It argues that the Constitution also established the judicial organization, enshrining among other aspects, the fundamental rules and principles of the judiciary. It states that, Article 33 of the Constitution of the People’s Republic of Mozambique provides that:

‘The State guarantees the individual freedoms to every citizen of the People’s Republic of Mozambique. These freedoms include the inviolability of dwelling and the secrecy of correspondence, and cannot be restricted save in cases specially foreseen in the law.’ It states further that Article 35 of the same Constitution states: “In the People’s Republic of Mozambique nobody may be arrested and subjected to trial except in terms of the law. The State guarantees the accused the right to defence’.

61. The Respondent State further argues that the periods of provisional detention are laid out in Article 308 of the Criminal Procedure Code, and Article 337 deals with the procedure for disregard of such periods. It argues that Article 312 of the Criminal Procedure Code also provides for (application for appearance before a judge), the right of a detainee to appear before a judge, and Article 315 provides for (“habeas corpus”). The Respondent State, therefore, argues that the Complainant could have had recourse to these rights before judicial instances already contemplated in Article 62, Chapter VI of the Constitution of the Republic (Judicial Organization).

62. Furthermore, the Respondent State argues that the Ministry of Justice provides legal assistance to citizens through the National Institute for Judicial Assistance (I.N.A.J) established under Law no. 3/86 of 16 April 1986. The Respondent State also argues

⁶⁸ Communication 147/95 and 149/96 - *Sir Dawda K. Jawara v The Gambia* (2000)

Law no.6/89 of 19 September 1989 created and institutionalized the Office of the Attorney-General of the Republic as the supreme body of the Public Prosecution Office and Article 42 of Law no.12/78 of 2 December 1978 provided that: “The fundamental tasks of the Public Prosecution Office are as follows:

- a) To watch over the observance of legality;
- b) Oversee the enforcement of the law and other legal norms;
- c) Control the legality of detentions and compliance with the respective periods”;

63. The Respondent State, therefore, submits that the Complainant had opportunities for redress.

64. The Respondent State further submits that the Communication unfortunately presumed at the outset that it was useless to resort to the existing institutions, contrary to what the rest of Mozambique’s citizens had been doing. The Respondent State states that preference was given to unsuitable mechanisms, for instance, the handing of letters to bearers or members of the Executive branch. It argues that disregard of the judiciary, which is the only institution competent to address concerns of the Communication in hand, and the preference for political mechanisms (letters and meetings) have compromised the prime opportunity that the second victim, who, according to the Communication, has visited Mozambique more than once, and his family who are even residents of Mozambique, had to put to the test the efficacy and sufficiency of the remedies available in the country.

65. The Respondent State, therefore, submits that this Communication should be declared Inadmissible on two grounds:

- 1) Incompetence *ratione temporis* in light of Article 65 of the African Charter.
- 2) Non-compliance with the requirement of Article 56(5) of the African Charter.

Supplementary Submission by the Complainant

66. In response to the Respondent State’s submission, the Complainant states that in general, the African Commission should consider carefully the political situation under which the violations were made.

67. The Complainant therefore comments on two points made by the Respondent State. Firstly, on the Respondent State’s argument that the African Commission is not a competent *ratione temporis*, the Complainant states that the Respondent State has neither disputed that it inherited the alleged acts and consequences of the previous Government, nor has it offered any reasons or explanation why the alleged violations are continuing.

68. The Complainant further submits that, the fact that the Respondent State ratified the African Charter in 1988 does not mean that it is exonerated from past violations of human rights and are therefore under obligation to undertake due diligence to remedy past violations that are still continuing and as such the African Commission should declare itself competent *ratione temporis*.

69. Secondly, on exhaustion of domestic remedies, the Complainant argues that the first victim was a political prisoner unable to exhaust local remedies. As to the applicability of *habeas corpus*, the Complainant states that according to Article 6 of Decree-Law No.21/75 (11 October 1975), “persons implicated in the practice of crimes, the investigations and preparations of suits thereof having been or to be attributed to National Service for Public Security (SNASP), shall not benefit from the provisions of Article 315 of the criminal Procedure Code”. The Complainant argues that since the SNASP was involved in the case of the first victim, he could not benefit from *habeas corpus*.

70. On exhaustion of local remedies by the second victim, the Complainant refers the African Commission to a personal statement made by the second victim in which he reiterates personal facts that are of importance to this Communication. The second victim in his personal statement stated that:

‘Mozambique indicates the existing legal machinery that could have been used for this case. The fact that they exist does not guaranty that they have been, or would have been applied. In the political case the judiciary system has lacked and may still lack the capacity to apply the law because of the specific political situation where a single party governance hardly warranties independence of justice. It is misleading to state that domestic remedies have been and continued to be available uninterruptedly, especially when members of the executive branch are involved. There are many examples where injustice was rendered rather than justice, sometimes with deadly consequences. I have indeed visited Mozambique- my mother country for which I still have the deepest love-but certainly not calmly. It has always been after taking adequate security measures with appropriate warning systems to be able to flee the country at the first sign of danger. Perhaps the 1975 Constitution of Mozambique intended to enshrine the separation of the legislative, executive and judicial power and the guarantee of the fundamental rights of persons, but the reality has been totally different. On the contrary the executive has maintained strict control over the judicial power. Therefore, the judicial machine will be ineffective in any case’.

Oral Submissions at the 47th Ordinary Session

71. At the 47th Ordinary Session of the African Commission, held from 12 to 26 May 2010, in Banjul, The Gambia, the Complainant, the Respondent State and the second victim made oral submissions to the African Commission.

72. The oral submissions made by all the parties were the same as the written submissions submitted to the African Commission above.

Decision on the Competence of the Commission

73. In the present Communication, the Complainant submits that the Communication fulfils all the requirements of Article 56 of the African Charter. The Respondent State on the other hand submits that: firstly, the African Commission is incompetent *ratione temporis* in terms of Article 65 of the African Charter, and secondly if the African Commission decides that it is competent *ratione temporis* to entertain the Communication, the Complainants have not fulfilled the requirements of Article 56(5) of the African Charter and as such, the African Commission should declare the Communication Inadmissible.

74. The Respondent State on the other hand argues that the African Charter came into force in 21 October 1986 and the Republic of Mozambique ratified the African Charter on 22 February 1988, and it came into force for Mozambique in February 1989.

75. The Respondent State submits that the African Commission is only competent to entertain allegations which occurred after the coming into force of the African Charter, or where, they constitute a continuing violation after the coming into force of the African Charter. The Respondent State further submits that since the facts which the African Commission is asked to consider in relation to both victims, preceded the coming into force of the African Charter, and as far as the Respondent State is concerned such facts have not continued subsequently, the African Commission is therefore incompetent *ratione temporis*.

76. The Complainant argues that the African Commission held in ***Krishna Achutan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chriwa) v Malawi***,⁶⁹ that 'it is a well established principle of international law that a new government inherits the previous government's international obligations, including responsibility of the previous government's misdeeds and mismanagements'. The Complainant submits that even if the Government in power did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses. The Complainant further argues that in order to consider whether the African Commission is competent to entertain allegations of human rights violations that took place before the coming into force of the African Charter, the African Commission has to differentiate

⁶⁹ Krishna Achutan (on behalf of Aleke Banda) and others v Malawi.

between allegations of violations that are no longer perpetrated and violations that are ongoing⁷⁰.

77. The Complainant further argues that the African Commission needs to consider whether a disappearance is a continuous violation? The Complainant states that though the African Commission has not explicitly decided whether a disappearance leads to a continuous violation, in ***Commission Nationale des Droits de l'Homme et des Libertes v Chad***⁷¹, the African Commission referred to the principle that conforms with the practice of other international human rights adjudicatory bodies. The Complainant argues that the African Commission's duty to protect human rights indicates that it may take decisions from other international bodies into consideration, where it is accepted that forced disappearances amounts to a continuous violation.

78. The Complainant submits that in the Inter-American Court on Human Rights, the Court in numerous cases, held that 'forced disappearance of human beings is a multiple and continuous violations of many rights under the Convention that the State Parties are obliged to respect and guarantee'.⁷² She also argues that the European Court of Human Rights have held that:

'there has been a continuous violation of Article 2 on account of the failure of the authorities of the Respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of the Greek-Cypriot missing persons, who disappeared in life-threatening circumstances in respect of whom there is arguable claim that they were in custody at the time they disappeared'⁷³.

79. The Complainant submits that it must be concluded that the forced disappearance of the first victim and the failure of the Respondent State to investigate the case constitutes a continuous violation of human rights, and the African Commission is competent *ratione temporis*.

80. The African Commission holds that the fact that the events alleged occurred before the coming into force of the African Charter, is not sufficient to render the African Commission incompetent *ratione temporis*, because the African Commission is of the view that not only has the first victim been missing before the coming into force of the African Charter, he continues to be missing even after the coming into force of the Charter and to date, he is still missing.

81. In the view of the African Commission, every enforced disappearance violates a range of human rights including, the right to security and dignity of person, the right not

⁷⁰ Lawyers for Human Rights v Swaziland

⁷¹ Communication 74/92 - *Commission Nationale des Droits de l'Homme et des Libertes v Chad* (1995)

⁷² Inter-American Court on Human Rights (IACHR), *Velasquez v. Honduras*, 29 July 1988, Series C No.4, para. 155.

⁷³ European Court of Human Rights (ECHR), *Cyprus v. Turkey*, Application no. 25781/94, Judgment d.d.10 mei 2001

to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, the right to humane conditions of detention, the right to a legal personality, the right to a fair trial, the right to a family life and when the disappeared person is killed, the right to life.

82. It is worth mentioning that the Respondent State does not refute that the first victim was ordered to be arrested by the then Minister of Interior. The Respondent State does not deny that the first victim was in its custody at some point in time. In the present Communication, the first victim did not just vanish.

83. According to the facts before the African Commission, the first victim was arrested on 26 October 1974 on the orders of the then Minister of Home Affairs of the Transition Government of Mozambique, Mr Armando Guebuza. It should be noted that on this date, the African Charter was not in existence. The African Charter was adopted in 1981 and came into force in 21 October 1986. The Republic of Mozambique ratified the said African Charter on February 1988, and it came into force for Mozambique on 22 February 1989 in terms of Article 65 of the Charter. Is it possible therefore that a violation that occurred before the adoption, ratification and entry into force of an international instrument can be imputed on a State that was not a party to the treaty when the act was committed?

84. It is a well-established rule of international law that a State can be held responsible for its acts or omissions only if these acts and omissions are not in conformity with the obligations imposed on that State at the time that they were committed. However, in some cases, an act or an omission committed before the ratification of a human rights treaty may keep affecting the right(s) of a person protected under the treaty. A similar situation may be observed when an application is lodged with an international organ whose competence was recognized by the relevant State after the complained act or omission had been committed.⁷⁴ The effects of an event which occurred before the recognition might be continuing. Problems arising from these situations are generally resolved with reference to the doctrine of continuing violation under international law.

85. In the present Communication, the alleged act is enforced disappearance and the alleged lack of investigation on the part of the Respondent State. The question to ask at this juncture is can enforced disappearance, be considered a continuing violation?

86. The question whether or not a disappearance can be considered to be a continuing violation of the African Charter is relevant in this case for at least two reasons: the first is to determine the moment from when the time limit under Article 56(6) of the African Charter starts to run, and the second is a determination of the Admissibility of complaints concerning events which occurred before ratification of the African Charter by the Respondent State.

⁷⁴ Altıparmak Kerem, *The Application of the Concept of Continuing violation to the Duty to Investigate, Prosecute and Punish under International Human Rights Law* (1 January 2003). Available at SSRN: <http://ssrn.com/abstract=926281>

87. To determine whether 'disappearance' is a continuing violation, the African Commission has to clarify what is a continuing violation or a continuing act?

88. A continuing violation happens when an act is committed in a certain moment, but continues due to the consequences of the original act.⁷⁵ The doctrine of continuing violation has been used by several international tribunals to hold states accountable for acts or human rights violations which occurred before the state became a party to a particular treaty or recognized the competence of the tribunal.

89. In the Inter-American Human Rights system, the Inter-American Commission on Human Rights has used the doctrine of continuing violation on several occasions to exert its authority over failure to investigate a past violation on grounds that an ongoing failure violates victims' Convention-protected right to judicial protection. In ***Moiwana Village v. Suriname***,⁷⁶ the Inter-American Court of Human Rights examined the violation which occurred before Suriname's acceptance of the Court's jurisdiction, but which continued after it. The Court argued that its jurisdiction is based on the State's failure to investigate the facts which occurred before the Convention's ratification.

90. In ***Ovelario Tames v. Brazil***,⁷⁷ the victim was allegedly beaten by military police officers and found dead in a prison in October, 1988. The Inter-American Commission accepted its own jurisdiction on facts which occurred before Brazil ratified the American Convention. It stated that: 'The fact that Brazil has ratified the Convention on 25 September, 1992, does not exempt its responsibility for violations of human rights that occurred prior to that ratification...'

91. In ***Blake v. Guatemala***⁷⁸, an American journalist was executed by Guatemalan authorities before the State accepted the Tribunal's jurisdiction. In that case, Blake's forced disappearance lasted from 1985 until 1992, and in spite of the fact that his whereabouts were known by the Government authorities, his next of kin were not informed. The Guatemalan Government ratified the Convention in 1978 and accepted the jurisdiction of the Court in 1987, therefore, concerning the forced disappearance, the Court exerted its jurisdiction. According to the Court, the enforced disappearance was a continuous violation of the Convention rights.

92. All the above mentioned cases refer to continuing violation of rights which happened after the establishment of either the Inter American Commission or the Court, even if the events occurred before the related countries had ratified the Inter-America Convention.

⁷⁵ Lilian M. Yamamoto., Inter-American Commission of Human Rights -Feasibility Study of Atomic Bombing Case. Japan Association of Lawyers Against Nuclear Arms.

⁷⁶ Inter-Am. Ct. H.R. (ser. C) No. 124, at 1 (15 June, 2005)

⁷⁷ IACHR Report N? 19/98, Case No. 11.516, 21 February, 1998, Ann. Report . IACHR 1998.

⁷⁸ Inter-Am. Ct. H.R. (ser. C) No. 36, at 1 (2 July 1996).

93. Another issue that must be taken into account is the doctrine of instantaneous act, which should be distinguished from continuous violations. In case of a continuing act, the violation occurs and continues over a period of time until the violation ceases. In case of an instantaneous act, the violation itself does not continue over time, although the completion of such an act might take some time. This definition of continuous violations can be applied to acts of disappearances, which can be qualified as a violation that occurs and continues over time, until it ceases, that is, until the missing person is no longer disappeared. Nigel Rodley, the United Nations Special Rapporteur on Torture at the time until 2001, pointed out that: "[...] the idea of 'disappearances' constituting a continuing offence is logical, since non-acknowledgement of the detention and non-disclosure of the fate or whereabouts of detained persons are key elements in the offence itself."⁷⁹

94. In the present Communication, the Respondent State has not proved the whereabouts of first victim and neither has it demonstrated efforts made to investigate his whereabouts. The African Commission is of the view that the forced disappearance of the first victim constitutes a continuing violation of his human rights and for these reasons holds that it is competent *ratione temporis* to examine the matter.

The African Commission's Analysis on Admissibility

95. Having established that the African Commission is competent *ratione temporis* to entertain the Communication before it, the African Commission will now proceed to analyze Admissibility of the Communication.

96. The Admissibility of Communications within the African Commission is governed by the requirements of Article 56 of the African Charter. This Article provides seven requirements that must be met before the African Commission can declare a Communication Admissible. If one of the conditions/requirements is not met, the African Commission will declare the Communication Inadmissible, unless the Complainant provides sufficient justifications why any of the requirements could not be met.

97. Article 56(1) of the African Charter states that 'Communications relating to Human and Peoples' Rights...received by the Commission shall be considered if they indicate their authors even if the latter request anonymity...' The Communication indicates the author as well as the victims of the alleged violations, and the African Commission therefore holds that the requirement under Article 56(1) of the African Charter is fulfilled.

98. Article 56(2) of the African Charter states that 'Communications...received by the Commission shall be considered if they are compatible with the Charter of the Organisation of African Unity or with the present Charter.' The Communication is brought against the Republic of Mozambique which became a party to the African Charter on 22 February 1989 and the Communication alleges violations of the rights

⁷⁹ "An Analysis of International Instruments on 'Disappearance', *Nunca Más*, in *Human Rights Quarterly*, vol.19, 1997, p. 389.

contained in the African Charter, in particular, rights guaranteed under Article 2,4,5,6 and 7(1) (d) of the African Charter. The African Commission therefore holds that the requirements under Article 56(2) of the African Charter have been fulfilled.

99. Article 56(3) of the African Charter states that ‘Communications ...received by the Commission shall be considered if they are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity now African Union (AU). The present Communication is not written in disparaging or insulting language directed at the State, its institutions or the AU, and for these reasons the African Commission holds that the requirement of Article 56(3) of the African Charter has been complied with.

100. Article 56(4) of the African Charter states that ‘Communications relating to human and peoples’ rights... shall be considered if they are not based exclusively on news disseminated through the mass media’. The Communication is not based exclusively on news disseminated through the mass media and there is evidence to show that the Communication is based on witness statements, a book and several reports of Human Rights Organisations. For these reasons, the African Commission holds that the requirement under Article 56(4) of the African Charter has been fulfilled.

101. Article 56(5) of the African Charter states that ‘Communications relating to human and peoples’ rights... shall be considered if they: are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged’. With regards to the first victim, the Complainant submits that the Respondent State has to prove that the first victim is still alive and bring him before a competent court of law in order to enable him to be tried in accordance with national and international fair trial standards.⁸⁰ The Respondent State has not proved that the first victim is alive, and the Complainant argues that there is substantial chance that the first victim has been executed and his execution has completely foreclosed such a remedy.

102. With respect to the second victim, the Complainant submits that he has made several attempts to exhaust local remedies during visits to Mozambique to find out the whereabouts of his father. It is submitted that in his attempt to deal with the whereabouts of his father, the second victim took the following measures:

- a) Sent a letter to the former President of Mozambique Joaquim Chissano with no response;
- b) Sent several letters to the current President of Mozambique, Sir Armando Emilio Guebuza on 15 August 2006, 12 September 2006 and 17 November 2006 respectively with no response;
- c) Sent a letter to Mr Bacre Waly Ndiaye: Special Rapporteur of Extrajudicial, Summary and Arbitrary Executions of the United Nations on 11 March 1996;

⁸⁰ Communication 250/02 - *Liesbeth Zegveld & Mussie Ephrem v Eritrea* (2003)

- d) Correspondence with Mrs. Marise Castro of Amnesty International dated 5 January 1996 and 11 March 1996 respectively.
- e) Attempted to engage Mozambican Lawyers to no avail, because, he alleges they were too afraid;
- f) Through his sister he tried to find another Mozambican Lawyer whom he allege was also not available for this case;
- g) Other family members of first victim undertook several actions such as seeking information from the police and prisons;
- h) Sister and mother contacted the former President of Mozambique, Samora Machel and even had an appointment with the President. He promised to support the case but later died in an air crash in 1986 and could not conclude the case.

103. The question to be asked at this juncture is 'what does exhaustion of local remedies entail?

104. The African Commission in *Institute of Human Rights and Development in Africa and Interights v Mauritania*⁸¹, made it clear that 'the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice'.

105. The African Commission is of the view that the measures taken by the second victim in paragraph 102 above, do not only fall short of the judicial remedies required to be exhausted, but they also do not seem to be institutionalized administrative remedies. The second victim seemed to have been exploring other possibilities other than judicial remedies. The Complainant's argument that the second victim approached lawyers who refused to take up the matter for fear of their lives has not been adequately substantiated – no dates have been indicated and there is no adequate indication of why the lawyers would be afraid to take up the matter.

106. 106. It is a general principle that the person who seizes the African Commission with a complaint is expected to demonstrate that he or she has complied with the requirements under Article 56 of the African Charter especially Article 56(5). The African Commission has developed in its jurisprudence that the person submitting the Communication (author or complainant) need not be the victim. All the author/Complainant needs to do is to comply with the requirements of Article 56.

⁸¹ Communication 242/01 - *Institute of Human Rights and Development in Africa and Interights v Mauritania*

107. The African Commission has thus allowed many Communications from authors acting on behalf of victims of human rights violations. Thus, having decided to act on behalf of the victims, it is incumbent on the author of a Communication to take concrete steps to comply with the provisions of Article 56 (5) or to show cause why it is impracticable to do so'. This was reiterated in **Article 19 v the State of Eritea**⁸², where the African Commission made it clear that 'it is incumbent on the Complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the Complainant to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences',⁸³

108. Therefore, local remedies could have been exhausted by the victim, the Complainant or any other person. The African Commission is thus not convinced that the Complainant or the victim in the present Communication attempted, to exhaust local remedies, and was unable to exhaust those remedies because they were not available, effective or sufficient. The African Commission is of the view that the measures taken by the second victim as stated above in paragraph 102, to deal with the matter, do not fall within the purview of the African Commission's meaning of domestic remedies. The African Commission, therefore, is of the opinion that local remedies were not attempted.

109. For the above reasons, the African Commission holds that the requirement of Article 56(5) of the African Charter has not been complied with.

110. Article 56(6) of the African Charter states that 'Communications relating to human and Peoples' Rights... shall be considered if they: are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter'. The Complainants argue that because of fear of persecution, the second victim fled to France in 1983, and lived there until 1994. He later moved to the Netherlands in 1995, where he currently lives and works.

111. The African Commission notes the Complainant's arguments that while applying for refugee status in France, the second victim made a commitment not to undertake any legal action against Mozambique while living in France and due to lack of resources it was impossible to undertake legal action from France. The Complainant further states that when the second victim moved to the Netherlands in 1995, and obtained work, he was able to fund the resources in order to undertake legal action. He however made his first visit to Mozambique in 1995 and a second visit in 2007. This according to the Complainant explains why the matter was submitted to the African Commission only in 2008.

112. While noting the difficulties encountered by the second victim, the African Commission is of the view that, the second victim or the Complainant could have seized the African Commission as soon as the second victim or the Complainant was convinced that local remedies could not be exhausted. The Complainant submits that

⁸² Id, para 63

⁸³ Id. para 65.

the second victim visited Mozambique in 1995 and again in 2007 to deal with the matter and that in 1995 when the second victim visited Mozambique, it became clear that his father, the first victim, had been executed, and he decided to pursue legal action.

113. In the second victim's personal statement Annex V and in his oral submission to the African Commission at the 47th Ordinary Session, he stated that he visited Mozambique on average every two years, and spends three to four weeks although, he indicates that he did so after taking adequate security measures. One wonders why it took the Complainant over 13 years, from 1995 to 2008, to either bring a legal action in Mozambique or seize the African Commission. In ***Darfur Relief and Documentation Centre v. Republic of Sudan***⁸⁴, the African Commission held that '29 months after the exhaustion of local remedies, the Complainant submitting the complaint to the African Commission was unreasonable' and in ***Southern Africa Human Rights NGO Network and Others v. Tanzania***⁸⁵ the African Commission held that '11 years after the exhaustion of local remedies, the Complainant submitting the complaint to the Commission was considered unreasonable'. It is therefore the African Commission's view that the Complainant seizing the African Commission 13 years after which the Complainant could have submitted the Communication to the African Commission, is unreasonable.

114. For the above reasons, the African Commission holds that the requirement of Article 56(6) of the African Charter has not been fulfilled.

115. Article 56(7) of the African Charter states that 'Communications relating to human and Peoples' Rights... shall be considered if they: do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.' The Complainant submits that the Communication has not been submitted to any international body and as such this requirement has been met. The State has no objections and there is no evidence before the Commission to show that the Communication has been settled by another international body. The Commission therefore holds that this requirement has been fulfilled.

DECISION OF THE AFRICAN COMMISSION

116. Based on the above analysis, the African Commission on Human and Peoples' Rights decides:

- I. To declare the Communication Inadmissible because it does not comply with the requirements under Article 56 (5) and (6) of the African Charter;
- II. To give notice of this decision to the parties;
- III. To publish this decision on its 30th Activity Report.

⁸⁴ Communication 310/2005- *Darfur Relief and Documentation Centre V. Republic of Sudan*

⁸⁵ Communication 333/2006- *Southern Africa Human Rights NGO Network and Others v. Tanzania*

Done in Banjul, The Gambia during the 9th Extra-ordinary Session of the African Commission on Human and Peoples' Rights, 23 February to 3 March 2011.