

**Communication 430/12 - Gabriel Shumba and Others (represented by Zimbabwe
Lawyers for Human Rights) v The 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 27 December 2012 against the Republic of Zimbabwe¹ (the Respondent State) from Zimbabwe Lawyers for Human Rights (the Complainant) on behalf of Gabriel Shumba, Kumbirai Tasuwa Muchemwa, Gilbert Chamunorwa, Diana Zimbudzana and Solomon Sairos Chikohwero (the Victims).
2. The Victims are all Zimbabwean citizens who have lived and worked in the Republic of South Africa (South Africa) for varying periods of time, although none holds South African citizenship or is a permanent resident of South Africa. The Complainant avers that the Victims are all loyal and patriotic citizens of Zimbabwe and that they had previously registered for and voted in past elections. The Complainant submits that the Victims continue to retain active family ties in their home country, and, intend to return and permanently live in Zimbabwe. The Complainant adds that the Victims keenly monitor events in Zimbabwe and retain a vested interest in its electoral processes.
3. The Complainant alleges that despite the patriotism of the Victims and desire to continue their involvement in the political affairs of their home country, the Victims were denied the right to vote in the Constitutional Referendum of 16 March 2013 because they were unable to travel to Zimbabwe on polling day. The Complainant further alleges that the Victims were prevented from voting despite having participated in the Constitution drafting process, through public consultations and meetings of the diaspora with Zimbabwean authorities, specifically with the Select Committee of Parliament in 2010, in Johannesburg, South Africa.
4. The Complainant alleges that the laws of Zimbabwe limit the right to vote on the basis of residency, and contends that this is discriminatory, as all citizens of Zimbabwe should be able to exercise their right to participate in government, as provided for in the African Charter on Human and Peoples' Rights. The Complainant specifically refers to Section 58 of the Constitution of Zimbabwe (as amended in 2007), which places a residency requirement for prospective voters, and Section 72 of the Electoral Act of Zimbabwe (2005), which only allows absentee voting through post for Zimbabweans on duty in government service

¹ The Republic of Zimbabwe ratified the African Charter on 30 May 1986

and their spouses. The Complainant avers that since the Victims do not fall within this category, they were denied their right to vote in the referendum.

Articles alleged to have been violated

5. The Complainant alleges violations of Articles 2, 3, 9 and 13 (1) of the African Charter on Human and Peoples' Rights (the African Charter).

Prayers

6. The Complainant requests the African Commission on Human and Peoples' Rights (the Commission) to:
 - i. Find the Respondent State in violation of Articles 2, 3, 9 and 13 (1) of the African Charter; and
 - ii. Urge the Respondent State to amend the Constitution of the Republic of Zimbabwe and the Electoral Act to guarantee the rights of the Victims to vote from abroad.

Procedure

7. The Complaint was received at the Secretariat on 27 December 2012, and the Secretariat acknowledged receipt of the same on 15 January 2013.
8. At its 12th Extraordinary Session, held from 18 - 25 February 2013 in Banjul, The Gambia, the Commission decided to be seized of the matter. The Commission also decided to issue Provisional Measures of its own initiative in accordance with Rule 98(1) of its Rules of Procedure, requiring the Respondent State to:
 - i. Allow all eligible Zimbabweans living abroad to vote in the Referendum of 16 March 2013, whether or not they are in government service or not, and at the general elections immediately following the referendum, pending a determination of the Communication;
 - ii. Provide all eligible voters, including the Victims in this Communication, the same voting facilities it affords to Zimbabweans working abroad in service of the Government; and
 - iii. Take measures to give effect to its obligations under Article 1 of the African Charter including in areas of free participation in Government.

9. By letter dated 26 February 2013, the Secretariat informed the Complainant of the Commission's decision to be seized of the matter and invited the Complainant to submit its arguments on Admissibility. By Note Verbale also dated 26 February 2013, the Secretariat also informed the Respondent State of the Seizure decision and transmitted a copy of the Complaint, together with the notice of issuance of Provisional Measures.
10. On 11 March 2013, in response to a correspondence from the Respondent State alleging non-receipt of documents related to the Communication, the Secretariat re-forwarded the Note Verbale along with the Complaint and the notice of issuance of Provisional Measures to the Respondent State.
11. On 26 April 2013, the Secretariat received the Complainant's arguments on Admissibility, and by Note Verbale dated 2 May 2013, the Secretariat transmitted the submissions to the Respondent State, and invited it to submit its observations on the Admissibility of the Communication within two (2) months from the date of the Note Verbale.
12. In response to a correspondence from the Respondent State dated 8 May 2013, indicating non-receipt of the original Complaint, the Secretariat resent the Complaint and the Complainant's arguments on Admissibility to the Respondent State and invited the latter to submit its observations within two (2) months in accordance with the Rules of Procedure of the Commission.
13. On 13 May 2013, the Secretariat wrote to the Complainant updating the latter on the status of the Communication. On 28 May 2013, the Secretariat sent a Note Verbale to the Respondent State to retransmit the earlier Note Verbale of 8 May 2013.
14. On 12 August 2013, the Secretariat made a final request by Note Verbale for the Respondent State to submit its observations and arguments on Admissibility.
15. The decision on Admissibility was deferred during the 54th and 55th Ordinary Sessions of the Commission, pending submissions from the Respondent State.
16. At its 16th Extra-Ordinary Session, held in Kigali, Rwanda from 20 - 29 July 2014, the Commission considered the Communication on Admissibility and decided to declare it admissible.
17. On 6 August 2014, the Secretariat transmitted the text of the decision to the Parties and requested the Complainant to submit on the Merits within sixty (60) days of the notification.

18. On 3 March 2015, the Complainant submitted on the Merits of the Communication, which was transmitted to the Respondent State on 6 March 2015.
19. On 23 June 2015, the Respondent State submitted on the Merits, which was forwarded to the Complainant on the same day.
20. The Commission deferred consideration on the Merits of the Communication from its 57th Ordinary Session to the 27th Extra Ordinary Session.

The Law on Admissibility

Submissions of the Complainant

21. The Complainant submits that the Communication satisfies all the Admissibility requirements contained in Article 56 of the African Charter and presents arguments in support of that submission.
22. On Article 56(1) of the African Charter, it is the Complainant's submission that the Communication complies with the requirement of identity, and that no request for anonymity was made. The Complainant argues therefore, that the Communication satisfies the requirements in Article 56(1) of the African Charter.
23. In relation to Article 56 (2) of African Charter, the Complainant contends 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. Accordingly, the Complainant argues that the Communication satisfies the requirement in Article 56(2) of the African Charter.
24. Regarding Article 56 (3) of the African Charter, the Complainant submits that the requirement is met because the Communication is not written in disparaging language which is disrespectful of the State's institutions or the organs of the AU.
25. With regards to 56 (4) of the African Charter, the Complainant submits that the Communication is based on existing operational laws such as the Electoral Act of Zimbabwe and the Constitution of Zimbabwe. The Complainant therefore contends that the facts are not based exclusively on news disseminated through the mass media and that the Communication satisfies the requirements of Article 56(4) of the African Charter.
26. In relation to Article 56 (5) of the African Charter, the Complainant submits that local remedies are non-existent and unavailable because "the provisions complained of are provided for in the Constitution of Zimbabwe and as such there are no prospects of success in litigation before the domestic courts". The

Complainant contends that “it is not possible to challenge constitutional provisions within the Zimbabwean legal system.”

27. Relying on the Commission’s decision in *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria*,² the Complainant argues that a complainant is only required to have recourse to remedies which are capable of providing an effective means of redress. The Complainant further argues that there are no local remedies available to the Victims because the Constitution of the Respondent State does not provide for the rights sought to be vindicated by the Victims.
28. The Complainant submits that in a similar situation in the case of *Madzango and Others v The Minister of Justice, Legal and Parliamentary Affairs*,³ (the *Madzango Case*), the Supreme Court of Zimbabwe had stated that in the absence of provisions in the Zimbabwean Constitution and the Electoral Act, the right claimed cannot be granted. Hence, the Complainant argues further that “an attempt to approach the courts on the legality of the issue in question would simply be an exercise in futility as the Constitutional provisions on this issue are very clear”. Accordingly, the Complainant argues that Article 56(5) of the African Charter is satisfied as there are no effective domestic remedies to be exhausted.
29. On the requirement in Article 56(6) of the African Charter, the Complainant submits that the Communication ought only to be submitted within a reasonable period from the time when domestic remedies were exhausted or deemed to have been exhausted. The Complainant argues that the present Communication already complies with Article 56(6) of the African Charter since there are no domestic remedies to exhaust and the Communication was filed as soon as it became apparent that there would be no arrangements made for Zimbabweans in the diaspora to participate in the referendum.
30. In relation to Article 56(7) of the African Charter, the Complainant submits that the Communication satisfies the requirement because the issues in the Communication have not previously been settled in conformity with the principles of the African Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the African Charter.

The Commission’s Analysis on Admissibility

31. Article 56 of the African Charter sets out seven conditions that a Communication initiated under Article 55 of the African Charter must satisfy in order to be

² Communication 338/07 - *Rights and Accountability Project (SERAP) v Nigeria* (2010) ACHPR

³ *Madzango and Others v The Minister of Justice, Legal and Parliamentary Affairs* (2005) Supreme Court of Zimbabwe

declared Admissible, which apply conjunctively and cumulatively.⁴ The Complainant submits that the present Communication satisfies all the conditions for Admissibility required under Article 56 of the African Charter.

32. The Commission observes that notice was sent to the Respondent State on several occasions requesting its observations on the Complainant's arguments on Admissibility. The Respondent State however failed to submit its observations within the prescribed time periods. The Commission recalls its decision in *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh and 13 others) v Angola*,⁵ wherein the Commission concluded that in situations where a State Party fails to submit its observations in accordance with the Rules of Procedure in spite of notice to that effect, the Commission "has no option than to proceed with its consideration of the Communication".⁶ Accordingly, the Commission undertakes the following analysis on the basis of information made available to it by the Complainant.
33. With regard to the requirement in Article 56(1) of the African Charter which provides that Communications should "indicate their authors even if the latter requests anonymity", the Commission notes that the identity and the address of the Complainant have been indicated. Accordingly, the Commission finds that the Communication satisfies the requirements under Article 56(1).
34. In relation to Article 56(2) of the African Charter, the Commission notes the submission of Complainant that the issues at hand are within the scope of the Constitutive Act of the African Union and the African Charter. Article 56(2) of the African Charter provides that Communications shall be considered if they 'are compatible with the African Charter of the Organisation of African Unity of with the present African Charter'.⁷
35. The Commission recalls its jurisprudence that in order to satisfy the requirements under Article 56(2), the Communication must demonstrate a *prima facie* violation of the African Charter, and in this instance, the Communication alleges violations of Articles 2, 3, 9, and 13(1) of the African Charter. The Commission notes that the

⁴ Communication 304/2005 - *FIDH & Others v Senegal* (2006) ACHPR para 38

⁵ Communication 292/04 - *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh and 13 others) v Angola* (2008) para 34

⁶ Communication 159/1996 - *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v Republic of Angola* (1997) ACHPR; Communication 276/03 - *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2009) ACHPR

⁷ The African Charter of the Organisation of African Unity has now been replaced by the Constitutive Act of the African Union (AU Constitutive Act).

Respondent State is a State Party to the African Charter, therefore the Communication falls within the *rationae personae* jurisdiction of the Commission. Since the Communication is compatible with the Constitutive Act and the African Charter and also indicates a *prima facie* violation of the African Charter, the Commission finds that the Communication satisfies the requirements of Article 56(2).⁸

36. Concerning Article 56(3) of the African Charter, the Commission notes the Complainant's submission that the Communication was not written in disparaging language. Pursuant to Article 56(3) of the African Charter, Communications shall be considered if they 'are not written in disparaging or insulting language directed at the State concerned and its institutions or to the Organisation of African Unity'. In this regard, the Commission does not observe any such use of insulting or disparaging language. The Commission therefore finds that the requirements of Article 53(3) are satisfied.
37. With regard to Article 56(4) of the African Charter, the Commission notes that the Communication is based on information extracted from existing and operational laws of the Respondent State. Article 56(4) of the African Charter requires that Communications 'are not based exclusively on news disseminated through the mass media'. The Commission notes that the present Communication is not based exclusively on news disseminated through mass media and finds that Article 56(4) is satisfied by the Communication.
38. The Commission notes that the Communication satisfies Article 56(5) of the African Charter because one of the exceptions to the requirement to exhaust domestic remedies applies to the present Communication. The Complainant invokes the exception on the grounds that effective domestic remedies are not available because the violation is premised on a constitutional *lacuna* and there is no prospect of success in challenging constitutional provisions within the Respondent State's legal system. It is on these grounds that the Complainant argues that the Communication satisfies Article 56(5) of the African Charter.
39. The Commission recalls that Article 56(5) requires Communications to be 'sent after exhausting domestic remedies, if any, unless it is obvious that this procedure is unduly prolonged'. As the Commission has previously observed, this requirement is based on the principle that "the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual."⁹

⁸ Communication 333/06 - *Southern Africa Human Rights NGO Network & Others v Tanzania* (2010) (ACHPR), para 51

⁹ Communication 71/92 - *Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia* (1997) ACHPR

40. In interpreting Article 56(5) of the African Charter, the Commission has consistently noted that the use of the phrase “if any” in that provision means that only domestic remedies that are available, effective and sufficient need be exhausted by a Complainant.¹⁰ The Commission has also previously held that a domestic remedy is considered to be available when a petition can be pursued without impediment; is deemed effective if it offers prospects of success and is sufficient if it is capable of redressing the complaint.¹¹
41. The Commission recalls that the law on exhaustion of local remedies presupposes **i)** the existence of domestic procedures for dealing with the claim; **ii)** the justiciability or otherwise, domestically of the subject-matter of the complaint; **iii)** the existence under the municipal legal order of provisions for redress of the type of wrong being complained of; and **iv)** availability of effective local remedies, that is, remedies sufficient or capable of redressing the matter.¹² The Complainant here contends that the subject-matter of the Communication does not lend itself to domestic justiciability because it involves a constitutional challenge which has no prospect of success in the Zimbabwean legal system.
42. In support of its argument, the Complainant has submitted that the issue in dispute amounts to a constitutional challenge because the Constitution of Zimbabwe does not provide for absentee voting in the case of Zimbabweans living abroad other than those in government service. The Commission also recalls the Complainant’s submission that a similar question was raised and addressed by the Supreme Court of Zimbabwe in the *Madzango Case*. In that case, the Supreme Court came to the conclusion that the rights sought to be enforced by the Victims had no constitutional or statutory foundation in Zimbabwe. In effect, the Supreme Court ruled that the right does not exist in the legal framework of the Respondent State and that there is no prospect of success for any litigant bringing a similar or related claim. The implication is that registered voters, including the Victims who are abroad, will continue to find themselves in situations where they cannot cast their votes from a foreign country, unless they are able to travel back to their home country.
43. Recalling its jurisprudence that a Complainant will only be required to exhaust domestic remedies that are available, effective and sufficient, the Commission agrees with the Complainant that the requirement does not apply to the present Communication. The Commission finds that this is a case where exceptions to the requirement to exhaust domestic remedies should apply. The Commission

¹⁰ Communication 147/95-149/96 – *Sir Dawda K. Jawara v The Gambia* (2000) ACHPR; Communication 275/03 – *Article 19 v Eritrea* (2007) ACHPR

¹¹ *Jawara v The Gambia* (n 11 above)

¹² *Article 19 v Eritrea*, para 47

therefore holds that Article 56(5) of the African Charter is satisfied by the Communication.

44. With regard to Article 56(6) of the African Charter, the Complainant submits that a determination of reasonable time begins from the date of exhaustion of local remedies. The Complainant argues further that the requirement has been satisfied in the present Communication since there are no domestic remedies to exhaust and the Communication was filed immediately after it became obvious that there would be no facilities for the Victims to vote in referendum. The Commission recalls that Article 56(6) provides that the Commission shall consider Communications which 'are submitted within a reasonable period from the time domestic remedies are exhausted or from the date the Commission is seized of the matter'.
45. As the Commission has previously noted, generally, the requirement of timeliness in Article 56(6) of the African Charter is dependent on the exhaustion of domestic remedies envisaged in Article 56(5) of the African Charter.¹³ Where domestic remedies are unavailable such that the Complainant is unable to exhaust those remedies, Article 56(6) of the African Charter is satisfied so long as the Complainant acts without delay. The Commission is satisfied that the Communication has been submitted within a reasonable time. The Commission therefore finds that Article 56(6) of the African Charter is satisfied.
46. In relation to Article 56(7) of the African Charter, the Complainant has stated that the present claim has not been brought before or settled by any other international investigation or dispute settlement mechanism. Article 56(7) of the African Charter provides that the Commission will consider Communications that 'do not deal with cases which have been settled by those States involved in accordance with the principles of the African Charter of the United Nations or the African Charter of the Organisation of African Unity or the provisions of the present African Charter'. The Commission also notes that the issues and claims in this Communication have not been brought before any other international forum. Accordingly, the Commission finds that Article 56(7) of the African Charter has been satisfied.

Decision of the Commission on Admissibility

47. In view of the above, the African Commission on Human and Peoples' Rights declares this Communication Admissible in accordance with Article 56 of the African Charter.

¹³ Communication 322/2006 - *Tsikata v Ghana* (2006) ACHPR, para 37

Consideration of the Merits

Complainant's submissions on the Merits

Alleged violation of Articles 2, 3

48. Regarding Article 2 of the African Charter, the Complainant argues that the most important aspect of this article is that it prohibits distinction of any kind, and that the grounds listed under the article are not exhaustive, thereby also prohibiting discrimination on other grounds. The Complainant avers that the provision prohibits every kind of discrimination based on "any status".
49. The Complainant contends that the placement of a residence qualification on who can vote in referendums and elections is a form of discrimination against Zimbabwean citizens living abroad, which includes the Victims. The Complainant states that the discrimination is made more acute when persons in Government service and their spouses outside the country are not placed under the same restrictions. According to the Complainant, equal treatment requires that all Zimbabwean citizens be allowed to participate in the Government of their country regardless of their place of residence, and that all citizens be afforded the same rights and privileges regardless of the nature of their work abroad. The Complainant further contends that the denial of the Victims' right to participate in government is also upheld in the Electoral Act, which subjects the Victims to conditions and restrictions not applicable to other citizens residing in Zimbabwe.
50. Regarding Article 3 of the African Charter, the Complainant contends that the Respondent State's non-implementation of the Provisional Measures issued by the Commission constitute a violation of the Victims' right to equal protection of the law.

Alleged violation of Article 9 (2)

51. The Complainant submits that the right of the Victims to participate in the government of their home country is an extension of their right to freely express and disseminate their political opinions within the confines of the law. The Complainant therefore concludes that by denying the Victims the opportunity to vote in the referendum, the Respondent State has also violated their right to freedom of expression.

Alleged violation of Article 13 (1)

52. The Complainant submits that the right of every citizen to participate freely in the government of his or her country is given effect by the State through the

enactment of laws that guarantee the right to vote, and that universal suffrage is one of the foundational values of a constitutional order. The Complainant adds that a necessary element of the right guaranteed under Article 13(1) is the right to participate in elections, which are the only means by which a people can democratically elect the government of their choice. The Complainant submits that the right to vote is an inherent right of all citizens and its exercise is a crucial part of democracy, such that its denial would itself imperil a democracy.

53. The Complainant contends that, in designing and establishing an electoral system, States should consider it crucial to foster enfranchisement, recognise the right to vote as an essential democratic value, and wherever possible, encourage the participation of citizens in the electoral process. It adds that States are therefore obliged to provide the machinery, mechanisms or processes to ensure that all persons who want to vote and take reasonable steps in pursuit of that right, are able to vote.
54. The Complainant agrees that States can indeed regulate the application of the right to vote through their national legislation, but it submits that this legislation should be compatible with the State's obligations under the African Charter. The Complainant submits that allowing national legislation to take precedence over the African Charter would result in eroding the importance and impact of the rights and freedoms guaranteed in the African Charter.
55. The Complainant further submits that the right guaranteed under Article 13(1) is extended to 'every citizen' of a particular State and any curtailing of the right can only be justified by reasons of legal incapacity. The Complainant notes that Article 13(1) of the African Charter is similar in substance to Article 25 of the International Covenant on Civil and Political Rights (ICCPR), which the United Nations Human Rights Committee (the Human Rights Committee) has suggested that any conditions applicable to the exercise of the right should be based on objective and reasonable criteria established by law.
56. The Complainant suggests that in interpreting the African Charter, the only legitimate reasons for restricting the rights and freedoms contained therein are expressly stated in Article 27(2), which provides that rights 'shall be exercised with due regards to the rights of others, collective security, morality and common interest, and that in cases of restrictions, they must 'be based on legitimate public interest and the inconveniences caused by the restrictions should be strictly proportional and absolutely necessary for the benefits to be realised'.
57. Finally, the Complainant contends that Section 58 of Zimbabwe's Constitution (as amended in 2007) , which places a residency requirement for prospective voters to be registered in the voter's roll and Section 72 of the Electoral Act of Zimbabwe

(2005) which makes provision for absentee voting through post available only to Zimbabweans working in government service, violates the Victims' rights protected under Article 13(1) of the African Charter and other international human rights instruments.

Respondent State's submissions on the Merits

58. The Respondent State argues that Article 25 of the International Convention on Civil and Political Rights (ICCPR), which provides for the right of every citizen to participate in the political affairs of their country without any distinctions, only state race, colour, language, religion, political or other opinion, national or social origin, property or birth as prohibited grounds of discrimination. The Respondent State also notes that residency does not form part of these discriminatory distinctions nor is it included in the list of unlawful distinctions contained in Article 2 of the African Charter, which the Respondent State is alleged to have violated.
59. The Respondent State further submits that Article 7 of the Universal Declaration of Human Rights (UDHR) establishes a general principle of equality, and avers that Article 2 of the African Charter expands the meaning established in the UDHR by providing some of the grounds for non-discrimination, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.
60. The Respondent State avers that reasonable restrictions do not amount to discrimination, noting that the ICCPR enshrines the right to vote as a fundamental human right, however Article 25 of the ICCPR allows for reasonable restrictions on the right to vote, and accordingly, the African Charter should be interpreted in the same spirit.
61. The Respondent State also submits that the cost of organising external voting; the fact that Zimbabweans abroad are not affected by the political decisions taken in Zimbabwe; and that Zimbabweans abroad cannot cast a meaningful vote due to their lack of knowledge of the political reality on ground, are justifications for restricting external voting. The Respondent State adds that external voting can also be restricted based on the strength of non-resident citizens' stake in the outcome of the elections.
62. The Respondent State contends that except for military personnel or other specially designated groups of people such as diplomats, external voting has not been historically extended to non-resident citizens worldwide. In the case of Zimbabwe, the Respondent State argues that non-resident Zimbabweans who

are voluntary migrants are not denied the right to vote *per se*, as they can always travel back to Zimbabwe to vote.

63. The Respondent State agrees with the Complainant that elections are at the heart of democracy and the right to vote undeniably forms the basis and foundation of any democratic government. The Respondent State however submits that voting has been traditionally subject to citizenship and residency requirements, and that therefore, only voters residing in the country and in the electoral district are eligible to vote. It further submits that citizens living abroad retain the right to vote but would need to travel to their relevant constituencies to cast their vote. The State submits that during conflict situations, exceptions are made for people living outside their country as displaced persons or refugees, and that this is a different scenario from voluntary migrants, as the latter category are non-residents by choice.
64. The Respondent State avers that the mere lack of legal provisions for absentee voting is not disenfranchisement, as it only limits the right to vote but does not entirely eliminate its exercise.
65. The Respondent State submits that citizens who reside abroad are not denied the right to vote, and that what is required is registration in their constituencies, after which they can vote. It avers that external voting is by its nature expensive and with economic sanctions having been imposed on Zimbabwe, it would be an unbearable burden to require that Zimbabwe internationalize its elections. The Respondent State concludes that Zimbabwe is a peaceful country and whoever wants to participate in elections can always travel to the homeland and vote.
66. Thus, according to the Respondent State, the residence restrictions imposed by the Zimbabwe Electoral Act are reasonable and do not violate Articles 2, 3 (1) and (2), 9 and 13(1) of the African Charter.

The Commission's analysis on the Merits

67. In the present Communication, the Commission is called to examine two interrelated but distinct points of contention: *firstly*, on the placement of a residency requirement as a precondition for citizens to exercise their right to vote, and, *secondly*, on the provision of external voting only to a select category of citizens, specifically, persons on duty in the service of government and their spouses. In essence, the Commission will determine whether the restrictions placed by the Respondent State on the right to vote on the basis of residency is an acceptable limitation of the right, and whether allowing only a select category of citizens to vote from abroad while others have to travel back home is either discriminatory or amounts to unequal treatment. It must be kept in mind that the subjects of this Communication are citizens of the Respondent State but were not

residents of the Respondent State at the material time in which the facts of the Communication took place.

Alleged violation of Article 13 (1)

68. Article 13 (1) of the African Charter provides that:

every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

69. The Commission recognizes that the right to participate in government forms an integral and inextricable part of democracy, such that a State cannot be considered a democracy if it does not guarantee the right of its citizens to participate in government through free and fair elections. The importance of this right is demonstrated by its inclusion in several of the continent's human rights instruments and standards, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), the African Charter on Democracy, Elections and Governance, the African Union Declaration on the Principles Governing Democratic Elections in Africa and the Constitutive Act of the African Union, which declares the promotion of democratic principles and popular participation as an objective of the African Union.

70. The right to directly participate in government refers to the right of citizens to stand as candidates for elections, whereas the right to participate through freely chosen representatives refers to the right of citizens to vote in elections, the latter of which is the subject of this Communication. The Commission notes that although the African Charter does not explicitly contain a right to vote in a manner similar to other instruments such as the ICCPR¹⁴ and the American Convention on Human Rights (American Convention)¹⁵, the right to vote is

¹⁴ International Covenant on Civil and Political Rights (1966) , Article 25:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country;

¹⁵ American Convention on Human Rights (1969) Article 23 Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:

a. to take part in the conduct of public affairs, directly or through freely chosen representatives;

b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

c. to have access, under general conditions of equality, to the public service of his country.

naturally subsumed within Article 13 (1) of the African Charter as the most valid method by which citizens are able to elect their representatives. The Commission has in several decisions, affirmed this logical conclusion.¹⁶ As the African Charter does not distinguish between the types of elections covered by Article 13 (1), the right to participate in government must therefore be interpreted in the widest possible sense so as to include all forms of elections, whether local or national, parliamentary or presidential, referenda or any other modes by which individuals participate in elections.¹⁷

71. In spite of its fundamental importance to democracy, the African Charter nevertheless recognizes the prerogative of States to legitimately restrict the right to participate in government. This prerogative does not however give States *carte blanche*, and as such, the Commission retains a duty to ensure the compliance of such restrictions with the African Charter.

72. In *Amnesty International v Zambia*, the Commission stated that “claw-back clauses must not be interpreted against the principles of the African Charter [and that] recourse to these should not be used as a means of giving credence to violations of the express provisions of the African Charter”.¹⁸ The Commission also stated in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria (Constitutional Rights Project case)* that “to permit national law to take precedence over international law would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making”.¹⁹ This position is underpinned by the customary international law principle expressed in Article 27 of the Vienna Convention on the Law of Treaties, which precludes States from invoking the provisions of their domestic law to violate their treaty obligations.²⁰

73. These treaty obligations and standards are expressed in the jurisprudence of the Commission and that of its international and regional counterparts. In *Purohit and Moore v Gambia*, the Commission expressly adopted the interpretation of

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

¹⁶ See Communication 97/93 – *John K. Modise v Botswana* (2000) ACHPR; Communication 211/98 – *Legal Resources Foundation v Zambia* (2001) ACHPR; Communication 241/01 – *Purohit and Moore v the Gambia* (2003) ACHPR

¹⁷ Human Rights Committee on Civil and Political Rights, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) (CCPR General Comment) paras 6, 10

¹⁸ Communication 212/98 – *Amnesty International v Zambia* (1999) ACHPR, para 50

¹⁹ Communication 140/94-141/94-145/95 – *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* (1999) ACHPR, para 40

²⁰ Vienna Convention on the Law of Treaties (1969) (VCLT) Article 27

the Human Rights Committee affirming its position that the right to vote may be limited when there are “objective and reasonable” grounds.²¹ In determining these elements, the Human Rights Committee has in the past taken into consideration, firstly, whether there were any duly enacted laws that restricted the right, and secondly, whether the justifications forwarded by the State pursued a legitimate purpose and that the means adopted served that intended purpose.²²

74. The European Court on Human Rights (European Court) detailed in *Sitaropoulos and Giakoumopoulos v Greece* that the right to vote may be lawfully restricted only when the restrictions

*“do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they meet the requirements of lawfulness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate”.*²³

75. In discussing the modalities for the legitimate restriction of the rights contained in Article 13 (1) of the African Charter, the African Court on Human and Peoples’ Rights (the African Court) stated in *Mtikila v Tanzania* that “restrictions must be necessary in a democratic society [and] they must be reasonably proportionate to the legitimate aim pursued”.²⁴

The restriction must be provided by law

76. The Commission reproduces below the relevant aspects of the Zimbabwe’s domestic law, in order to determine whether the restrictions can be said to have been “in accordance with the provisions of the law” within the meaning of Article 13 (1) of the African Charter.
77. The Constitution of Zimbabwe (2007) in force at the material time of the dispute states as follows

58 Elections

(1) A general election shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament

²¹ Communication 241/01 - *Purohit and Moore v the Gambia* (2003) ACHPR para 76

²² See Communication 932/2000 - *Marie-Hélène Gillot et al. v France* (2002) Human Rights Committee; Communication 2629/2015 - *Eduardo Humberto Maldonado Iporre v Bolivia* (2018) Human Rights Committee

²³ Application no. 42202/07 - *Case of Sitaropoulos and Giakoumopoulos v Greece* (2012) ECHR, para 64

²⁴ Application 011/2011 – *Reverend Christopher R. Mtikila v the United Republic of Tanzania* (2013) AFCHPR para 106

under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the Gazette, fix.

(2) [Subsection repealed by section 20 of Act 31 of 1989 - Amendment No. 9]

(3) *The qualifications and disqualifications for registration as a voter and for voting at elections shall be as prescribed in Schedule 3 and, subject thereto, by the Electoral Law*

(4) *An Act of Parliament shall make provision for the election of members of Parliament, including elections for the purpose of filling casual vacancies. [Subsection as amended by section 20 of Act 31 of 1989 - Amendment No. 9]*

Schedule 3 Qualifications and disqualifications for voters

(1) *Subject to the provisions of this paragraph **and to such residence qualifications as may be prescribed in the Electoral Law** (emphasis added) for inclusion on the electoral roll of a particular constituency, any person who has attained the age of eighteen years and who –*

(a) *is a citizen of Zimbabwe; or*

(b) ...

[Subparagraph (b) repealed by s. 20 of Act 5 of 2005 with effect from the 14th September, 2005.]

shall be qualified for registration as a voter on the common roll.

78. The Electoral Act (2005) of Zimbabwe states

23 Residence qualifications of voters

(1) *Subject to the Constitution and this Act, in order to have the requisite residence qualifications to be registered as a voter in a particular constituency, **a claimant must be resident in that constituency at the date of his or her claim:***

Provided that if a claimant satisfies the voter registration officer that he or she is or intends to be a candidate for election as a member of Parliament for a particular constituency in which he or she is not resident, the claimant may be registered as a voter in that constituency.

(2) *For the purposes of subsection (1), a claimant shall be deemed to be residing in a constituency while he or she is absent therefrom for a temporary purpose.*

(3) A voter who is registered on the voters roll for a constituency, other than a voter who has been registered in that constituency in terms of the proviso to subsection (1), shall not be entitled to have his or her name retained on such roll if, for a continuous period of twelve months, he or she has ceased to reside in that constituency:

Provided that nothing in this subsection shall prevent his or her name from being struck off such voters roll –

- (a) on his or her being registered in another constituency; or*
- (b) if he or she becomes disqualified for registration as a voter.*

(4) The Commission, any voter registration officer or any officer of the Commission may demand from any voter who is registered on the voters roll for a constituency proof of identity or proof of residence in that constituency or both of the foregoing.

(5) For the purposes of subsection (4), the Commission may prescribe documents that shall constitute proof of identity and additionally, or alternatively, proof of residence:

Provided that the prescribing of such documents shall not preclude a person from proving his or her identity or residence by other means.

24 Claims for registration

(1) Any person who wishes to be registered as a voter on the voters roll for any constituency shall present himself or herself at the appropriate registration office in order for the appropriate prescribed claim form to be completed on his or her behalf by the voter registration officer:

Provided that a claimant who, in accordance with the proviso to subsection (1) of section twenty-three, seeks registration in a constituency in which he or she is not resident shall lodge a claim form with the Registrar-General of Voters.

(2) Where a claimant seeks registration in a constituency in which he or she is not resident, he or she shall provide the Commission with an address in that constituency where he or she shall be deemed to be resident for the purposes of any delimitation of constituencies in terms of the Constitution.

(3) If the voter registration officer is satisfied that a claimant who seeks registration in a constituency in which he or she is resident is entitled to be

registered as a voter on the voters roll for that constituency, the voter registration officer shall, pursuant to the claim form and subject to this Part, enter the claimant's name and the particulars relating to him or her on that voters roll.

(4) If, on receipt of a claim form in which the claimant seeks registration in a constituency in which he or she is not resident, the Commission is satisfied that it is appropriate for the claimant to be registered in that constituency, the Commission shall direct the appropriate voter registration officer to enter the claimant's name and particulars relating to him or her on the voters roll for his or her constituency.

(5) If a voter registration officer considers that a claimant should be registered on the voters roll for some other constituency, the vro shall forward the claim to the constituency registrar for that other constituency and shall advise the claimant accordingly.

(6) The Commission, any voter registration officer or any officer of the Commission may demand from any claimant proof of identity or proof of residence in that constituency or both of the foregoing.

(7) Any applicant aggrieved by any decision of the Commission or voter registration officer made under this section may lodge a complaint with the Commission in terms of section one hundred and ninety.

72 Persons who may vote by post

Where an election is to be held in a constituency, a person who is registered as a voter on the roll for that constituency shall be entitled to vote by post in terms of this Part if, on all polling days in the election, he or she will be –

(a) on duty as a member of a disciplined force or as an electoral officer; or

(b) on duty in the service of the Government outside Zimbabwe; or

(c) outside Zimbabwe as the spouse of a person referred to in paragraph; and so unable to vote at a polling station in the constituency.

79. In *Konate v Burkina Faso*, the African Court adopted the interpretation of the Human Rights Committee that the law providing for the restriction must be sufficiently clear.²⁵ This is similar to the position of the European Court, which

²⁵ Application No. 004/2013 - *Lohé Issa Konaté v. Burkina Faso* (2014) AFCHPR judgement, para 128

summarized its view on the meaning of “prescribed by law” in *The Sunday Times v the United Kingdom*, stating that “the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case... [and] ... a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct”.²⁶

80. A combined reading of the above laws of Zimbabwe clearly limits eligible voters to resident citizens, and permits external voting via post to only a certain category of persons, as argued by the Complainant. In this regard, the Commission also observes that the Respondent State does not argue to the contrary, and as such, the parties are in agreement as to the meaning and effect of the relevant laws. The Commission also observes that the Complainant has not argued that the Victims were resident in Zimbabwe at the time of the referendum or that they belonged to the category of persons eligible to vote via post. The Complainant has also not challenged the procedural legality of the laws, specifically, whether any of the laws in question were enacted in compliance with the duly prescribed processes applicable in Zimbabwe.
81. The restrictions can therefore be said to have been provided by law as both the Constitution and the Electoral Act prescribe an objective criteria for regulating the exercise of voting rights, based firstly on residency and secondly on the nature of work abroad. The Commission notes that although the Respondent State has revised its Electoral Act²⁷ and adopted a new Constitution²⁸ since the initial submission of this complaint, the relevant provisions remain the same in so far as they retain a residency requirement and limit external voting to persons in government service.

The restriction must be based on a legitimate interest or aim

82. The Commission now examines whether the restrictions pursued a legitimate aim or interest, and can be considered as reasonable.
83. The Complainant acknowledges that the purpose of the expression “in accordance with the provisions of the law” is intended to provide States with the necessary scope to regulate the specific application of the right, but submits that the restrictions are incompatible with the human rights obligation of the Respondent State, as they are not based on any of the legitimate grounds

²⁶Application no. 6538/74 - Case of *the Sunday Times v. The United Kingdom* (1979) ECHR judgement, para 49

²⁷ Electoral Amendment Act (2018)

²⁸ Constitution of Zimbabwe (2013)

provided for under Article 27 (2) of the African Charter. The Complainant concludes that the restrictions are therefore unreasonable.

84. The Respondent State on the other hand argues that residency is an acceptable ground for restriction, and supports this assertion by contending that Zimbabweans living abroad are less familiar with the domestic political situation and may therefore be unable to cast “meaningful votes”. The Respondent State furthermore submits that Zimbabweans living abroad are not affected by the outcome of elections and should therefore not have the same voting rights as residents. The Respondent State also claims that it does not have the financial resources to internationalize its elections, hence the need to have all electors present in Zimbabwe to cast their votes.
85. As correctly indicated by the Complainant, the Commission has held in several of its decisions that the only legitimate interests for the restriction of rights that are compatible with the African Charter are the conditions enumerated under Article 27 (2), which states that “the rights of the African Charter shall be exercised with due regard to the rights of others, collective security, morality and common interest”.²⁹ The African Charter does not however define the scope of these conditions, which allows for interpretation on a case by case basis, taking into consideration the peculiarities of each circumstance at hand.
86. In relation to the claims of the Respondent State as to the cost of organizing elections that include Zimbabwean citizens living abroad, the Commission notes that this appears to be a blanket justification, and that the argument is not accompanied by any supporting evidence. Without evidence detailing the additional costs that such an election would entail, the Commission would have to rely on conjecture to make the necessary analysis. Certainly, while the Commission recognizes that a larger electorate would naturally entail more expenses, without specific data and evidence, it is not possible for the Commission to truly appreciate the difference in cost between elections that include or exclude citizens that are resident abroad. For these reasons, the Commission is of the view that this particular aim has not been sufficiently justified.
87. The Respondent State provides two other justifications, which will be considered jointly, as they both relate to what the Respondent State views as the primary reason for excluding citizens living abroad, specifically, that they are less informed about the issues at stake and that they are not affected by the outcome of elections.

²⁹ Communication 255/02 – *Garreth Anver Prince v South Africa* (2004) ACHPR, para 43; Communication 15/96: *Social and Economic Rights Action Centre & Another v Nigeria*, (2001) ACHPR, para 165

88. Historically, eligibility to vote has been closely linked to the relationship between the electorate and the territory in which elections are to take place. Persons with sufficiently strong links to the territory have been considered as eligible voters, although the yardstick for measuring the strength of any supposed links has been appreciated differently by various States. Citizenship and residency have nevertheless often formed the basis for determining such a relationship.
89. In this instance, the Respondent State tests this relationship through citizenship and residency, requiring that a person satisfy this two tier test in order to vote. The Respondent State justifies this by submitting that non-resident citizens are less informed and would thus not be able to cast a “meaningful vote”. In this regard, the Commission acknowledges that traditionally, this indeed may have been the case, and non-residents would generally have been assumed to be less knowledgeable on the issues at stake in comparison to their resident counterparts. The strength of this argument does not however retain its validity in our current globalized environment. With increased migration, accessibility of transportation that allows non-residents to travel to and fro more frequently, and the development of modern technology that allows non-residents to keep abreast of events in their home countries, non-residents today are no longer in the same position as their counterparts from the not too distance past. Notably, in national elections such as a referendum, as opposed to local elections with more particularized issues at stake, it is even more difficult to espouse a general principle that non-residents are uninformed to the extent that they will be unable to cast meaningful votes, as claimed by the Respondent State. The Commission further notes that in many countries across the continent, non-residents may in fact serve as reliable and independent sources of information for residents, through social media and television networks established abroad.
90. The Commission is therefore of the view that in this particular instance, limiting the voting rights of the Victims on the assumption that non-residents are less knowledgeable about the issues at stake is not justified.
91. The Respondent State also submits that non-residents are not affected by the outcome of elections, and that consequently, they should not be granted the same voting rights as residents. The Commission observes that this assertion is not entirely accurate, as by the mere fact that they retain citizenship, non-residents will still be affected by the outcome of elections, at least whenever they come into contact with their country of citizenship or through laws which may have extra territorial application. The Commission is however of the view that non-resident and resident citizens are generally not affected to the same degree by the outcome of elections. Residents would certainly have more at stake, as by being physically within the territory of that country, their daily lives are affected in a more comprehensive manner. The Commission notes that in principle, the outcome of

elections directly and primarily impacts the electors living in the territory of that State.

92. The Complainant submits that the Victims are patriotic citizens that retain strong ties to their home country, are keenly invested in its affairs and wish to return to Zimbabwe in the future. This assertion has not been challenged by the Respondent State, and the Commission sees no reason to doubt the position of the Victims. This notwithstanding, it should be noted that laws are enacted to establish general rules and cannot possibly take into consideration the situation of every individual.³⁰ If this was to be expected, States would then have to enact laws that allow them to test on a case-by-case basis the extent to which each individual non-resident citizen has maintained sufficiently strong links to their home country, which may lead to subjectivity and arbitrariness, also bearing in mind the practical difficulties of implementing such an approach. A similar sentiment was also expressed by the European Court in *Shindler v UK*, when the court stated that an objective criteria such as residency, instead of a criteria that measures an individual's ties to their home country serves to "promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing interests on a case-by-case basis".³¹
93. For these reasons, the Commission is of the view that the goal of limiting the scope of elections to citizens who are primarily affected by the outcome of elections, as determined by residency, is a legitimate aim and may be considered to be in the common interest within the meaning of Article 27 (2) of the African Charter.

The restriction must be necessary and proportional

94. The Commission now turns to examining the necessity of the restrictions placed on the voting rights of non-residents, and whether the means adopted by the Respondent State are proportional to the legitimate aim that it seeks to achieve. The African Court summarized this aspect in *Mtikila v Tanzania* by holding that "the legitimate interest must be proportionate with and absolutely necessary to the advantages which are to be obtained".³² The principle of necessity also entails that States take the least intrusive or disruptive action to achieve their aims.³³ When there are multiple options available to achieve similar aims, States are obligated to take the course of action least restrictive of the enjoyment of the right in question. In *Zimbabwe Lawyers for Human Rights & Associated*

³⁰ See *Sitaropoulos and Giakoumopoulos v Greece* (n 27 above)

³¹ Application no. 19840/09 – *Case of Shindler v. the United Kingdom* (2013) ACHPR judgment, para 116

³² *Mtikila v Tanzania* (n 28 above)

³³ See Communication 242/2001: *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne Des Droits De L'homme v. Mauritania* (2004) ACHPR

Newspapers of Zimbabwe v Zimbabwe, the Commission posed a series of questions which serve as guides in determining the necessity of a restriction, specifically, “Are there sufficient reasons to justify the action? Is there a less restrictive solution? Does the action destroy the essence of the rights guaranteed by the African Charter?”³⁴

95. In this particular instance, the Complainant argues that the restrictions applied by the Respondent State have gone beyond limiting the right to entirely taking away the right itself, and thereby disenfranchising non-residents. The Respondent State on the other hand contends that non-residents are still able to vote if they travel back to Zimbabwe and register in their relevant constituencies. The Respondent State submits that Zimbabwe’s electoral system is based on constituencies and that there are no recognized constituencies outside of Zimbabwe.
96. In a case before it on the very matter of a residency requirement on the right to vote, the Constitutional Court of Zimbabwe observed the following regarding its domestic processes:

*...the starting point is an election due to be held in a given constituency. Next is the person who is registered on the voters’ roll of that constituency. Then follows the question of whether or not, on the day of voting, such voter is physically present not only in Zimbabwe, but within the constituency in order to cast his vote. Only if he is absent from the country will he be able to cast his vote by post. However, such a person’s absence must be attributable to a call of duty in the service of the State or being the spouse of such a person”.*³⁵

97. The Commission observes that the Complainant has not challenged the assertion of the Respondent State that the Victims would have been able to vote if they had travelled back to their respective constituencies, instead, the Complainant responds that the requirement to travel back is itself discriminatory, as the same is not expected of persons in government service or their spouses. The Commission notes that as per Section 23 (3) of the Electoral Act, where a person has ceased to reside in a constituency for a continuous period of twelve (12) months, he or she may no longer be retained in the voters roll. In such instances, the person would have to re-register in order to vote, which was presumably the situation of the Victims at the time of the referendum. The Commission therefore

³⁴ Communication 284/03 – *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe* (2009) ACHPR, para 176

³⁵ *Gabriel Shumba, Sibonile Mfumisi, Darlington Nyambiya v Minister of Justice, Legal and Parliamentary Affairs, The Chairperson of the Zimbabwe Electoral Commission, Zimbabwe Electoral Commission, The Minister of Foreign Affairs, The Minister of Finance and Economic Development, The Attorney General of Zimbabwe* (2018) Constitutional Court of Zimbabwe Judgement (No. CCZ 4/18, Case No. CCZ 3/18) page 18

takes it as non-contentious that either through the reading or application of the relevant laws of Zimbabwe, the Victims could have indeed travelled back to Zimbabwe, registered and voted in the referendum.

98. As the Commission has already decided on the legitimacy of the aims that underlie the limitation of the right to vote to resident citizens, the outstanding matter therefore is whether the means adopted by the Respondent State, that is requiring non-residents to travel back to Zimbabwe, is a proportional to the aims.
99. The European Court captured this balancing act when it determined the proportionality of a restriction on the right to participate in government, stating in *Schindler v UK* that it needed to examine

*the genuine interest of the applicant, as a British citizen, to participate in parliamentary elections in his country of origin and the chosen legislative policy of Respondent State to confine the parliamentary franchise to those citizens with a close connection with the United Kingdom and who would therefore be most directly affected by its laws.*³⁶

100. The Commission acknowledges that the requirement of having to travel back to Zimbabwe would certainly have had implications for the Victims. Specifically, the Commission has in mind the potential financial costs of travelling back to Zimbabwe and the time that would have been taken away from the professional or personal commitments of the Victims. The Commission is however of the view that the difficulties presented in this situation do not go so far as to completely bar the Victims from voting “such that the right itself becomes illusory”.³⁷ The Commission is mindful that in certain circumstances, the requirement of having to travel back may indeed be so onerous as to prove prohibitive due to financial or other personal factors. In this regard, the Commission however wishes to reiterate its previous point that laws are intended to lay down general rules and cannot possibly accommodate the circumstances of every individual, and that attempting to do so may lead to arbitrariness.
101. In essence, the question is whether the general assumption should lean towards the ability or the inability of non-residents to travel back to their home countries to vote. The Commission is of the view that the general principle should assume the former, and as such, the Commission observes that requiring that the Victims should have travelled from South Africa to Zimbabwe in order to vote strikes an acceptable balance, and is therefore a proportional limitation.

³⁶ *Schindler v UK* (n 36 above) para 118

³⁷ *Constitutional Rights Project case* (n 23 above)

102. The necessity of a limitation must finally be measured against what is considered acceptable in an open and democratic society. In its examination of limitations on freedom of expression, the European Court³⁸ indicated broadmindedness, pluralism and tolerance as characterizing a democratic society, which the Commission endorsed in *Kenneth Good v Republic of Botswana*.³⁹
103. In this regard, the Commission observes a broad range of diversity in the way States organize their electoral systems in relation to the ability of non-residents to vote from abroad. While some States require that all citizens be present in their territory in order to vote⁴⁰, others allow their citizens to vote from abroad. The Commission further notes differences even in the practice of States that allow for external voting, for example: all citizens living outside the State's territory may be allowed to vote externally;⁴¹ all citizens may vote externally but only in certain types of elections, for example, Presidential or national;⁴² external voting may be permissible only for a certain category of citizens, for example, persons in government service;⁴³ citizens living abroad may have the right to vote externally if a specified minimum number of them register with diplomatic missions in the foreign country;⁴⁴ and external voting may be limited in time, for example, non-residents may lose this right if they have resided outside their country of citizenship for more than a specified period of time.⁴⁵
104. In this particular instance, the Respondent State allows non-resident citizens to vote from abroad but only if they are on duty in government service, or are able to travel to Zimbabwe and vote from their relevant constituencies.
105. The Commission further observes that the general trend of State practice around the globe is towards a more inclusive approach to the voting rights of non-residents, allowing them the right to vote and facilitating external voting, notwithstanding the above discussed differences in the way States actually put this into practice.⁴⁶ The Commission nevertheless notes that deviations or alternatives to the general trend are still retained by States, and that these deviations are not considered so out of sync as to be considered unacceptable. In other words, global and regional practice has yet to cross a critical threshold, such that any deviations would be considered unacceptable. The practice of

³⁸ Application No. 5493/72 – *Handyside v. the United Kingdom* (1976) ECHR judgment, para 49

³⁹ Communication 313/05 – *Kenneth Good v Republic of Botswana* (2010) ACHPR, para 197

⁴⁰ See for example Burkina Faso, Democratic Republic of Congo (DRC), Ethiopia, Nigeria

⁴¹ See for example Botswana, Cape Verde, South Africa

⁴² See for example Angola, Benin

⁴³ See for example Israel, Ireland, Singapore, Turkey, Zimbabwe

⁴⁴ See for example Kenya, Senegal

⁴⁵ See for example Germany, United Kingdom

⁴⁶ The International IDEA Handbook (n 46 above), See also IDEA “Voting from abroad database” available at <https://www.idea.int/data-tools/data/voting-abroad>

States around the globe demonstrates the varying degrees to which non-resident citizens are included in elections, with countries fitting in at various points on the spectrum of inclusiveness.

106. For these reasons, the Commission concludes that in this instance, the right to participate in government within the meaning of Article 13 (1) of the African Charter does not extend so far as to guarantee non-residents the right to vote from abroad. Certainly, this conclusion does not preclude States from according greater legal protection than is legally expected of them. States may choose to pursue a certain course of action because they view that action as a good policy objective, even though the same is not considered a legal obligation. As such, there is a distinction between matters considered mandatory by reason of a State's legal obligation and matters that remain within the power of States to decide.

Alleged violation of Article 9 (2)

107. The act of voting can also be viewed as a formal expression of the political opinion of citizens, consistent with Article 9 (2) of the African Charter on the right to freedom of expression. In essence, this is an example of the interrelated and interdependent nature of rights, where the same act can be encompassed within the scope of different rights. This relationship has been expressly affirmed by the African Union Declaration on the Principles Governing Democratic Elections in Africa, which recognized the importance of "the will of the people expressed through free and fair elections as the basis of the authority of government".⁴⁷

108. In international practice, the inter-linkage between the right to participate in government through electoral processes and the right to freedom of expression has also been recognized by various human rights bodies. In its General Comment on Article 25 of the ICCPR, the Human Rights Committee states that "freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected".⁴⁸ The European Convention on Human Rights (European Convention) and the American Convention also expressly draw this link by prescribing that elections should be held in conditions that guarantee "the free expression of the opinion of the people"⁴⁹ in the case of the former and "free expression of the will of the voters"⁵⁰ in the latter.

⁴⁷ African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), (2002)

⁴⁸ CCPR General Comment (n 17 above) para 12

⁴⁹ European Convention on Human Rights (195) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) Article 3

⁵⁰ American Convention on Human Rights (1969) (American Convention) Article 23

109. The right to freedom of expression is not however an absolute right and similar to the right to participate in government, this right may also be legitimately subjected to limitations, when certain conditions are met. Article 9 (2) of the African Charter provides that one may express his or her opinion “within the law”. As earlier indicated, such expressions, which are commonly referred to as “claw back” clauses, do not give States an unlimited prerogative to do as they wish. Any actions taken to limit rights must be compatible with the African Charter and other applicable human rights standards.
110. In Principle II of its Declaration of Principles on Freedom of Expression and Access to Information in Africa (Declaration on Freedom of Expression) the Commission affirmed that ‘any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society’.⁵¹ In this regard, the Commission observes that the aforementioned elements are also the same set of criteria it used in determining whether the restrictions placed by the Respondent State on the right to participate in government were in conformity with the African Charter.
111. In the *Constitutional Rights Project’s case*, the Commission also made the following observations in regard to limitations on the right to freedom of expression, stating that ‘justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory’.⁵²
112. In view of its earlier conclusions that the Respondent State’s limitations on the right to participate in government through a residency requirement and on the basis of work abroad is provided by law, in pursuit of a legitimate aim, necessary and proportional, the Commission also *mutatis mutandis* determines that the same limitations are a legitimate restriction on the right to freedom of expression.

Alleged violation of Article 2

113. The importance of the principle of non-discrimination was clearly expressed by the Commission in *Purohit and Moore v The Gambia*, when it affirmed non-discrimination as ‘essential to the spirit of the African Charter...and must

⁵¹ The African Commission On Human And Peoples’ Rights “Declaration Of Principles On Freedom Of Expression And Access To Information In Africa” (2019) The Declaration is an authoritative interpretation of Article 9 of the African Charter, and was adopted by the Commission at its 65th Ordinary Session, held from 21 October to 10 November 2019, replacing the Declaration of Principles on Freedom of Expression in Africa (2002), adopted at its 32nd Ordinary Session. The relevant provisions have however remained the same in so far as the issues raised in this Communication are concerned

⁵² *Constitutional Rights Project case* (n 23 above) para 42

therefore be respected in all circumstances in order for anyone to enjoy all the rights provided for under the African Charter'.⁵³ The Inter American Court has similarly observed that the principles of non-discrimination and equality are 'the backbone of the universal and regional systems for the protection of human rights'.⁵⁴

114. Article 2 of the African Charter provides that

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present African 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

115. The Complainant argues that the restrictive provisions of the Electoral Act of Zimbabwe which permits only citizens in government service and their spouses to vote from abroad is discriminatory, as the law does not allow the same for other non-resident Zimbabweans. The Complainant submits that this discrimination disenfranchises an entire category of persons who would have otherwise been eligible to vote.

116. The Respondent State's contention, on the other hand, pivots on the following: restrictions imposed by the Electoral Act are reasonable and do not amount to disenfranchisement or discrimination; Article 2 of the African Charter does not include residency in the list of prohibited grounds; and that the Victims are non-residents by choice and not refugees, which would have provided a justification for extending voting rights.

117. In describing what constitutes discrimination, the Commission ascribed the following guidance in *Kenneth Good v Botswana*

*...a violation of the principle of non-discrimination arises if: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; and c) if there is no proportionality between the aim sought and the means employed.*⁵⁵

118. In the same vein, the European Court in *D.H v Czech Republic* established that "discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar positions".⁵⁶

⁵³ *Purohit and Moore v the Gambia* (n 25 above) para 49

⁵⁴ IACHR. Report No. 50/16, Case 12.834, Merits, Undocumented Workers, United States of America, 30 November 2016, para. 72

⁵⁵ *Kenneth Good v Botswana* (n 45 above) para 219

⁵⁶ *Application no. 57325/00 – Case of D.H. and Others v. the Czech Republic* (2007) ECHR judgment, para 175

119. The Human Rights Committee has made the following observations:

“discrimination” as used in the Covenant should be understood to imply 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 an equal footing, of all rights and freedoms.⁵⁷

120. When identifying whether a certain situation amounts to discrimination, the crux of the matter is not so much the mere existence of differential treatment, although this is certainly a starting point, but rather a difference in treatment between objects, subjects or circumstances that are for all intents and purposes considered to be in an analogous situation. This then begs the question as to the level of similarity that needs to exist between an alleged victim of discrimination and their comparator in order for a difference in treatment to amount to discrimination. This must be decided on a case-by-case basis, and will fundamentally depend on the purpose or aim of the measure which has led to the alleged discrimination.

121. In this particular instance, the difference in treatment is twofold, firstly based on residency, which accords different rights to resident and non-resident citizens, and secondly, on the nature of work abroad, which accords favourable treatment to persons in government service.

122. In addressing these two issues, the Commission first tackles the submission of the Respondent State that residency does not form part of the prohibited grounds for restriction under the African Charter. In this regard, it should be noted that the list of prohibited grounds under Article 2 of the African Charter is not exclusive, which is evidenced by the inclusion of the term “other status” in addition to the expressly enumerated grounds. The purpose of Article 2 is to regulate differential treatment based on any identifiable criteria, which in this instance would include both residency and nature of work abroad. The Commission further notes the arguments of the Respondent State that the Victims are not refugees and so can voluntarily return to Zimbabwe to vote. In this regard, the Commission is of the view that it need not prompt any discussions as to the status of the Victims, except in relation to residency or nature of work abroad, as the Complainants have not made any submissions claiming to be refugees.

123. In relation to the first tier of distinction, between resident and non-resident citizens, the Commission has already examined this matter in its discussions on

⁵⁷ Human Rights Committee, General Comment No.25, para

whether the placement of a residency requirement is a legitimate limitation of the rights guaranteed under Article 9 (2) and Article 13 (1) of the African Charter. In that regard, the Commission found that limiting voting rights to resident citizens serves a legitimate purpose and is necessary to achieve that purpose, which is limiting voting rights to residents, which are primarily affected by the outcome of elections. The Commission found this as sufficient to justify a difference in treatment as resident and non-residents are not in an analogous situation, as they are impacted differently by the outcome of elections.

124. The Commission therefore now turns to discussing the second tier of distinction, between ordinary non-resident citizens and persons on duty in government service, who would typically, though not always, be referred to as diplomats. In this instance, the same logic underlying the first tier of distinction would also regulate this distinction. The Commission notes the general presumption earlier reached that by no longer residing in their country of citizenship, ordinary non-resident citizens are not affected by the outcome of elections in a similar manner to resident citizens, which justifies a difference in treatment. The Commission is however of the view that the same cannot be held in relation to persons on duty in government service. For this group of persons, there is a presumption that their stay away from their country of citizenship is temporary, and that were it not for their duties abroad, these persons would have been eligible to vote in person. These persons are expected to return to their home country upon completion of their duties, whereas the same may not be true in relation to ordinary non-resident citizens.

125. The Commission concurs with the underlying principle espoused by Section 33 (3) of the Electoral Act of Zimbabwe that holds that the names of persons on duty in government service will remain on the electoral roll even if they had lived outside of Zimbabwe for more than the prescribed twelve (12) months period, primarily because their stay outside of Zimbabwe is considered temporary.⁵⁸

⁵⁸ **33 Removal from voters roll on disqualification, death or absence**

(2) Subject to subsection (5), if a voter registration officer is satisfied that a voter registered on a voters roll—

(a) has been absent from his or her constituency for a period of twelve months or longer and is not a voter who was registered with the approval of the voter registration officer in a constituency in which he or she was not resident; or

(b) has left Zimbabwe with the intention of residing permanently outside Zimbabwe;

the voter registration officer shall remove such voter's name therefrom.

(3) In determining the period of absence of any person for the purposes of subsection (2), no account shall be taken of any period during which the person—

(a) resides outside his or her constituency while he or she is a Vice-President, Minister, Provincial Governor or Deputy Minister; or

(b) is occupied in the discharge of his or her duties outside Zimbabwe while in the service of the State

126. For these reasons, the Commission is of the view that the actions of the Respondent State do not subject the Victims to discriminatory treatment, as the Victims are not in a similar position to either resident citizens or persons in government service.

Alleged violation of Article 3

127. Article 3 of the African Charter states that

- (1) *Every individual shall be equal before the law.*
- (2) *Every individual shall be entitled to equal protection of the law.*

128. As earlier expressed, the right to non-discrimination and the right to equality are fundamental and form the basis for the protection of all other rights in the African Charter. These principles are so closely interlinked that it is hard to envisage a situation in which a violation of one principle does not result in a violation of the other.

129. The Human Rights Committee has however observed a distinction in the scope of these principles, noting that the principle of equality enshrined in Article 26 of the ICCPR does not merely replicate the prohibition of discrimination contained in Article 2. In this regard, it held that the right to equality is not limited to rights contained in the ICCPR, but has a wider scope that covers all matters regulated by the laws of the respective State.⁵⁹ In essence, even when a domestic law regulates circumstances not covered or envisaged by the ICCPR, the right to equality as understood in Article 3 of the ICCPR nevertheless applies to that situation.

130. This identified difference in scope does not however materially manifest itself in this particular instance as the relevant laws of the Respondent State, its Constitution and Electoral Law, regulate rights also enshrined in the African Charter. In this regard, the Complainant argues that the laws of Zimbabwe do not equally protect all of its citizens, and that the failure of the Respondent State to adhere to the Provisional Measures issued is a violation of the right to equality.

131. In regard to Provisional Measures, the Commission wishes to reiterate that Provisional Measures are issued to prevent the possible occurrence of irreparable harm, which may render any final decision on the merits of the Communication ineffective. Provisional Measures are not to be interpreted as a decision or a prejudgment on the Merits of a Communication, such that the non-adherence or

⁵⁹ Human Rights Committee, CCPR General Comment No. 18: Non-discrimination (Art. 2) (1989) para 12

failure to implement the Provisional Measures would amount to a violation of the right in question.

132. In *Spilg and Mack v Botswana*, the Commission held that ‘for there to be a violation of Article 3 of the African Charter, it must be demonstrated that the victim of the alleged violation was not accorded the same protection or treatment that is usually accorded to other persons in like circumstances’.⁶⁰ In light of this, the Commission notes its conclusions in relation to the right to non-discrimination, specifically, that the Victims were not similarly situated or in an analogous position to other resident citizens and persons in government service, which justifies the Respondent State’s differential treatment of the Victims.

133. In view of its conclusions regarding Article 2 of the African Charter, the Commission similarly holds that the Victims have not been subjected to unequal treatment, as they have not been denied protection that is accorded to persons in ‘like circumstances’.

Decision of the Commission on Merit

134. For the foregoing reasons, the Commission declares that there are no violations of Articles 2, 3, 9, and 13 (1) of the African Charter.

Done in Banjul, The Gambia, at the 27th Extraordinary Session of the African Commission held from 19 February to 4 March 2020

⁶⁰ Communication 277/2003 - *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana* (2011) ACHPR, para 160