

**30th March – 3rd April, 2009
Communication No. 297/2005**

**AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Sixth Extraordinary Session
30th March – 3rd April, 2009**

SCANLEN AND HOLDERNESS

v.

ZIMBABWE

DECISION

Citation: Scanlen v. Zimb., Comm. 297/2005, 26th ACHPR AAR Annex (Dec 2008 – May 2009)

SUMMARY OF THE FACTS

1. The Complainants are the Independent Journalists Association of Zimbabwe, the Zimbabwe Lawyers for Human Rights and the Media Institute of Southern Africa. The Respondent State is the Republic of Zimbabwe, a State Party to the African Charter on Human and Peoples' Rights (the African Charter).

2. The Complainants submit that on 18 March 2002, the Respondent State enacted a legislation known as the Access to Information and Protection of Privacy Act (AIPPA), Chapter 10:27. Section 79 subsection 1 of the Act provides that: "No journalist shall exercise the rights provided in Section 78[FN1] in Zimbabwe without being accredited by the Commission." The Commission being referred to here is the Media and Information Commission (MIC) established under AIPPA, the Zimbabwe legislation, subject of this Communication.

[FN1]Section 78 provides that "Subject to this Act and any other Law, a Journalist shall have the following rights (hereinafter in this Act collectively referred to as "journalistic privilege"),

- i. to enquire gather, receive and disseminate information;
- ii. to visit public bodies with the express purpose of carrying out duties as a journalist;
- iii. to get access to documents and materials as prescribed in this Act;

- iv. to make recordings with the use of audio-video equipment, photography and cine-photography;
 - v. to refuse to prepare under his signature reports and materials inconsistent with his convictions;
 - vi. to prohibit the publication of, remove his or her signature from or attach conditions to the manner of using a report or material whose content was distorted, in his or her opinion, in the process of editorial preparation."
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3. According to the Complainants, the Media and Information Commission (MIC) is managed by a Board appointed by the Minister of Information and Publicity, or other Ministers the President assign the administration of the AIPPA. Complainants allege that the Minister acts in consultation and in accordance with directions from the President of the Republic of Zimbabwe.

4. It is also alleged that no journalist may practice journalism unless he/she is accredited by the MIC and that Section 80 of the AIPPA provides that a journalist found guilty of abusing his or her journalistic privilege is liable to a fine or imprisonment for a period not exceeding two years.

5. It is further submitted by the Complainants that Sections 79 (1) and 80 (1) (b) of the AIPPA contravene Article 9 of the African Charter on Human and Peoples' Rights which provides that:

"[e]very individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law."

6. According to the Complainants, compulsory accreditation of journalist, irrespective of the quality of the accrediting agency, interferes with freedom of expression. They state that accreditation fees provided for under the Law are an additional restriction on freedom of expression. They allege that compulsory accreditation of journalists by a Commission which lacks independence interferes with professional independence and the autonomy of the journalism profession. The Complainants submit further that, the MIC is not democratically constituted. Its constitution and control is not consistent with democratic values.

7. The Complainants submit further that self-regulation is a central feature of an independent profession and that the AIPPA is inherently inimical to freedom of expression and has no justification in a democratic society.

8. The Complainants claim further that they have a real and substantive interest in the matter as they were established to protect human rights and the freedom of expression.

9. They submit finally that they have exhausted local remedies and that they have litigated the issues in the highest court in Zimbabwe, whereby the Supreme Court of Zimbabwe declined to declare unconstitutional, the intentional publication of falsehoods and compulsory accreditation of journalists.

COMPLAINT

10. The Complainants allege that Section 79 (1) and Section 80 of the Access to Information and Protection of Privacy Act of Zimbabwe contravene Article 9 of the African Charter on Human and Peoples' Rights.

PROCEDURE

11. The Secretariat of the African Commission on Human and Peoples' Rights acknowledged receipt of the Communication on 10 February 2005 and informed the Complainants that the Communication was registered as Communication 297/2005 – Scanlen & Holderness (on behalf of Independent Journalists Association of Zimbabwe Lawyers for Human Rights and Media Institute of Southern Africa)/Zimbabwe.

12. The Secretariat also informed the Complainants that the Communication would be considered for seizure at the 37th Ordinary Session of the Commission scheduled to take place from 27 April to 11 May 2005, in Banjul, The Gambia.

13. On 2 June 2005, the Secretariat informed both parties that during its 37th Ordinary Session the African Commission considered the Communication and decided to be seized thereof. The Secretariat also informed them that the Commission intended to consider the Communication on admissibility at its 38th Ordinary Session to be held from 21 November to 5 December 2005. It requested the parties to forward their arguments on admissibility within three (3) months from the date of the notification.

14. On 18 August 2005, the Secretariat sent reminders to both parties requesting them to submit their arguments on admissibility.

15. On 12 September 2005, the Secretariat received the Complainants' arguments on admissibility.

16. On 14 December 2005, the Secretariat wrote to both parties informing them that during its 38th Ordinary Session held from 21 November to 05 December 2005, in Banjul, The Gambia, the African Commission considered the Communication and declared it admissible.

17. The Secretariat also informed both parties that the African Commission intended to consider the Communication on the merits at its forthcoming session, and invited the parties to forward their arguments on the same.

18. On 6 March 2006, the Secretariat received and acknowledged receipt of the Complainants' submissions on the merits.

19. On 4 April 2006, the Secretariat wrote a reminder to the Respondent State to submit their arguments on the merits.

20. During the 39th Ordinary Session held from 11 – 25 May 2006, in Banjul, The Gambia, the Respondent State submitted its arguments on the merits.

21. On 26 July 2006, the Secretariat wrote to both parties informing them that, at its 39th Ordinary Session held from 11 – 25 May 2006, in Banjul, The Gambia, the African Commission considered the above Communication and decided to defer its decision on the merits to its 40th Ordinary Session to be held from 15 – 29 November 2006 in Banjul – The Gambia.

22. On 8 December 2006, the Secretariat informed both parties that at its 40th Ordinary Session, the African Commission considered the Communication and decided to defer its decision on the merits to its 41st Ordinary Session scheduled from 16-30 May 2007 in Ghana.

23. On 25 June 2007, the Secretariat wrote to both parties informing them that at its 41st Ordinary session the Commission considered the Communication and deferred its decision on the merits to its 42nd Ordinary Session, in order to finalise the draft decision.

24. On 19 December 2007, the Secretariat wrote to both parties informing them that at its 42nd Ordinary Session held from 15 to 28 November 2007 in Brazzaville, Congo, the African Commission considered the Communication and deferred its decisions on the merits to its 43rd Ordinary Session.

25. At its 43rd Ordinary Session held in Ezulwini, Kingdom of Swaziland from 7 – 22 May 2008, the African Commission deferred consideration of the Communication to its 44th Ordinary Session.

26. By Note Verbale of 2 July 2008 and letter of the same date, the Secretariat informed both parties of the Commission's decision.

27. At its 44th Ordinary Session held in Abuja, Federal Republic of Nigeria from 10 – 24 November 2008, the African Commission deferred consideration of the Communication.

28. By Note Verbale of 5 December 2008 and letter of the same date, the Secretariat informed both parties of the Commission's decision.

LAW ADMISSIBILITY

THE STATE'S SUBMISSION

29. The Respondent State submits that the Communication does not meet the requirements of admissibility under the African Charter on Human and Peoples' Rights because:

- (i) the Complainants fail to disclose a violation of Article 9 of the
2. Charter and; (ii) the Complainants have not exhausted local remedies as required
3. under Article 56 (5).
4. Non exhaustion of local remedies

30. The Respondent State claims that the Complainants have not approached the Supreme Court of Zimbabwe to seek redress in terms of Section 24(1) of the Constitution of Zimbabwe and, as such, the Communication should be considered inadmissible.

31. Section 24(1) affords every person the opportunity to obtain expeditious redress if any of the rights under the Declaration of Rights in the Constitution of Zimbabwe are infringed. The Supreme Court has a wide discretion to grant any form of redress in order to enforce the Declaration of Rights.

32. The Respondent State made reference to a decision of the Supreme Court in the Association of Independent Journalists case, whereby the Supreme Court struck down Sections 80 (1) (a), (b) and (c) as unconstitutional and the sections were subsequently repealed and substituted through Section 18 of Act 5 of 2003.

33. The Respondent State submits further that the Complainants have not challenged the constitutionality of the substituted provision before the courts in Zimbabwe, arguing that Complainants are therefore requesting the African Commission to become a tribunal of first instance, a function which it cannot fulfill, either as a legal or practical matter.

COMPLAINANTS SUBMISSIONS ON ADMISSIBILITY

34. In response to the State Party arguments, the Complainants submits that, the Communication meets the requirements of Article 56(5) of the Charter as all national remedies have been exhausted. The Complainants concede that in terms of the hierarchy of the courts of Zimbabwe, the Supreme Court is the final arbiter on constitutional and human rights matters. They argue that Section 24 of the Constitution of Zimbabwe stipulates that an individual who feels that her or his rights as enshrined in the Chapter on the Declaration of Rights in the Constitution, have been or are likely to be infringed shall approach the Supreme Court as a court of first instance. The Complainants state that the Supreme Court was approached, and it ruled that accreditation and registration of Journalists was constitutional and mandatory, for any individual who intends to pursue the profession of journalism in Zimbabwe. Pursuant to that decision^[FN2], the Complainants claim they had no other means of remedying the situation but to approach the African Commission. They argue therefore that the requirement of Article 56(5) of the Charter have been met.

[FN2] Judgment No S.C. 136\02; Const. Application N0. 252\02; Supreme Court of Zimbabwe,, Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malab JA; Harare November 21, 2002 & February 5, 2004.

35. The Complainants state further that, the Supreme Court decision which upheld the requirement for compulsorily registration by the MIC is tantamount to an intrusion in the actual right to freedom of expression. The Complainants submit that the African Commission has held in Media Rights Agenda and Other vs. Nigeria ^[FN3], that onerous conditions of accreditation and total discretion by the registration board, effectively giving government the power to prohibit publication of newspapers or magazines are akin to censorship and seriously endanger the right of the public to impart and receive information in contravention of Article 9 (1) of the Charter.

[FN3] Communications 105/1993, 128/1994 and 130/1994.

36. The Complainants argue further that the Supreme Court found that the proscription of false news can never be said to be unconstitutional, noting that the reasoning of the Supreme Court was that falsehood is the antithesis of the truth of information.^[FN4] They claim that the Supreme Court found that there was no constitutional protection for false news.

[FN4] In that decision, the Supreme Court stated that "The Constitution confers no right on an individual to falsify or fabricate information or publish falsehoods. Section 20 of the Constitution protects the right to impart and receive information, not falsehoods. Falsehoods are not information."

37. They claim it is on that basis that they have brought their Communication to the African Commission, arguing that there is no domestic remedy available in Zimbabwe to afford protection to a distributor of false news or fiction or false cartoons.

DECISION OF THE AFRICAN COMMISSION ON ADMISSIBILITY

38. The African Commission, having considered the criteria on admissibility under Article 56 of the Charter, is satisfied that the Communication indicates the authors, that it falls within the *ratione materiae* and *ratione temporis* of the Charter and the Constitutive Act, and is therefore compatible with the Charter. It does not use disparaging language, it has provided information and facts on the decision of the Supreme Court of Zimbabwe, including Affidavits on which the Complaint is based. It was submitted within reasonable time, and is not a subject of adjudication in any other tribunal and nor previously settled by another international tribunal.

39. The only criterion which the African Commission has to look at is whether the Communication satisfies Article 56(5). Having analysed the submissions by both parties on the question of exhaustion of domestic remedies, the African Commission is satisfied that in the light of the Supreme Court decision, Constitutional Application No 252/02,[FN5] spelling out the position of the law in Zimbabwe concerning the provisions applicable to the accreditation and registration of journalists, which is a binding authority in Zimbabwe, it would have been futile for the Complainants to go to the Supreme Court in order to exhaust domestic remedies.

[FN5] Please see Footnote 3 above.

40. Taking into account all the foregoing submissions, the Commission decides to declare the Communication admissible.

CONSIDERATION OF THE MERITS

COMPLAINANTS' SUBMISSIONS

41. The Complainants argue that the emphasis on the right to freedom of expression in ensuring democracy is such that regulation, other than self-regulation, is undesirable in a democratic society. They argue further that practical considerations for media regulation arise from the need for resource management, need to ensure equal access, competition laws and minority rights, public service considerations, consumer protection and revenue considerations. All the aforesaid factors are applicable to electronic media house regulation and not applicable to regulation of journalists.

42. The Complainants submit further that there is no necessity for additional measures to control journalists in Africa because in virtually all jurisdictions in Africa, there are civil and criminal sanctions for *injuria* and defamation which already regulate the conduct of journalist in the discharge of their work.

43. The Complainants submit further that the registration requirements and procedures are unduly intrusive and burdensome, particularly inquiries into individuals' private details such as one's

marital status, passports numbers, expiring dates of passports, place of issue of passports, driver's license numbers, demands for residential addresses, and details related to any criminal record. Others include demand for details concerning specific assignments to be covered by the journalists, all of which impose prior self-censorship as a precondition to acquire accreditation. They argue that the accreditation form have to be examined and approved by both the Permanent Secretary and the Minister, thereby establishing control of journalists by central government.

44. According to the Complainants, the fact that one has to be accredited to a media house and obtain the support of a media house to successfully apply for accreditation amounts to restriction on the practice of journalism and the free flow of information.

45. They submit that a foreign journalist is required to pay as much as US\$1, 050 for accreditation and registration to carry out a temporary assignment.

46. The Complainants submit further that even more restrictive and unreasonable is the fact that there is no provision for a permanent accreditation of foreign correspondents. That the US\$12, 000,00 requirement per annum accreditation and registration fees for a foreign news agency representative is unduly burdensome, unaffordable for most people in Zimbabwe and an unreasonable restriction on freedom of expression.

47. They claim that the temporary nature of the accreditation is itself particularly ominous and different from the accreditation required to cover specific events. The Complainants argue that accreditation is not aimed at giving the journalist access, but that it is apparent from the legislation that the accreditation is aimed at controlling and even obstructing the work of a journalist.

48. The Complainants argue further that, compliance with formal but onerous and intrusive pre-registration requirements stipulated in the statutory instrument does not guarantee registration of a journalist because the MIC has discretion to decide whether or not to register the journalist.

49. The Complainants urge the African Commission to draw inspiration from legal precedent developed in other regional human rights systems. They specifically draw the attention of the African Commission to Article 13 of the American Convention on Human Rights, which provides, inter alia, that:

"Everyone has the right to freedom of thought and expression. This includes freedom to seek, receive and impart information and ideas of all kinds regardless of frontier, either orally or in writing, in print, in the form of art or through any other medium of one's choice."

Article 13 paragraph 3, provides that:

"the right of expression may not be restricted by indirect methods or means such as the abuse of government or private controls over newsprint, radio broadcasting frequencies or equipment used in dissemination of information or by any other means tending to impede the communication and circulation of ideas and opinions."

50. The Complainants also cite an Advisory Opinion of the Inter American Court of Human Rights on compulsory registration which dealt with the question of registration of journalists in Costa Rica. The Court stated in this Advisory Opinion that;

"it is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of freedom and independence of journalists. The compulsory licensing of journalists does not comply with the right to freedom of expression because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting the practice only to a limited group of the community..."[FN6]

[FN6] OC-5/85, November 13, 1985, Ser.A, N0.5.

51. According to the Complainants, Article 13 of the American Convention on Human Rights defines freedom of expression in a way similar to that of Article 9 in the Charter; as "freedom to seek, receive, and impart information and ideas of all kinds."

52. The Complainants note that the right protected by Article 13 of the American Convention (similar to the right protected under Article 9 of the Charter) has a special scope and character, evidenced by the dual aspect of freedom of expression. That, on the one hand, the prohibition of any restrictions or impediments by governments or privately against the free expression, dissemination of information, communication or circulation of thoughts and ideas, and in that sense, it is a right that belongs to each individual. Its second aspect implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.

53. The Complainants also submit that 'if you control journalists you control expression, controls are an obstacle to the means of expression and therefore against freedom of expression itself'. According to them, the Respondent State's attempts to distinguish between freedom of the press and freedom of expression are not sustainable. They add that, although freedom of expression encompasses a wider range of activities than freedoms of the press, in that sense the two are different. Freedom of the press is an element of freedom of expression.

54. The Complainants argue further that, freedom of expression goes further than the theoretical recognition of the right to speak or to write. They submit that it also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.

55. The Complainants argue that the both the Inter-American Convention on Human Rights and the Universal Declaration of Human Rights proclaim that freedom of thought and expression includes the right to impart information and ideas through "any... medium", and this means that the expression and dissemination of ideas and information are indivisible concepts. They submit that, the restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely. They argue further that the legal rules applicable to the press and to the status of those who dedicate themselves professionally to it derive from this concept. They state that in its social dimension, freedom of expression is a means of the interchange of ideas and information among human beings and for mass communication and includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others.

56. The Complainants refer the African Commission to the Zambian case of Francis Kasoma v

The Attorney General [FN7], where compulsory registration of journalists ordered by the Zambian government was declared unconstitutional by the Zambian High Court in 1997. According to the Complainants, in that case, journalists were obliged to become members of a Media Association of Zambia and to register with a statutory Media Council. They submit that the High Court of Zambia quashed the decision and among the reasons given by the High Court Judge is that:

"I do not in my view consider the decision to constitute the Media Council of Zambia to be in furtherance of the general objectives and purpose of the Constitutional powers, among them, to promote democracy and related democratic ideals such as freedom of expression, and press freedom in particular. ... The decision to create the Media Council of Zambia is no doubt going to have an impact ... on freedom of expression in that failure of one to affiliate himself to the Media Council of Zambia, or in the event of breach of any moral code determined by the council would entail losing his status as a journalist, and with the denial of the opportunity to express and communicate his ideas through the media".

[FN7] (Zambia High Court civ. Case N0. 95/HP/2959)

57. The High Court in Zambia went on to state that

‘in light of the above it cannot be seriously argued that the creation of the Media Association or any other regulatory body by the Government would be in furtherance of the ideal embodied in the Constitution, vis-à-vis freedom of expression and association. Consequently, I find that the decision to create the Media Association is not in furtherance of the objectives or purposes embodied in the Constitution in particular those protected in Articles 20 and 21 [which guarantee freedom of expression and association]’.

58. The Complainants further submitted that the provision under section 84 of the AIPPA, which makes it compulsory to renew accreditation after a maximum period of twelve months, i.e. at the end of each calendar year, places journalists in a position of permanent insecurity. This, according to them, will have an extremely chilling effect on their ability to freely practice their trade and will inevitably lead to various degrees of self-censorship.

59. The Complainants argue that in those very rare instances where expression really does pose a risk to society, as in the example from Rwanda cited by the Respondent, this should be addressed through the criminal law, not by generalized restrictions on all journalists.

60. The Complainants submit that the real purpose of the licensing system established by AIPPA is to provide the Government with a measure of control over journalism and to prevent, or at least limit critical reporting. As a result, they claim, the licensing system for journalists imposed by the contested provisions of AIPPA does not serve a legitimate aim as required under international law.

61. In conclusion, the Complainants submit that modern jurisprudence accepts that it is contrary to freedom of expression to criminalize falsehoods, and to support this argument, they cite *Chavunduka and Another v Minister of Home Affairs and Another*[FN8], where the Supreme Court of Zimbabwe observed that:

"Plainly, embraced and underscoring the essential nature of freedom of expression, are statements, opinions and beliefs regarded by the majority as being wrong or false. As the revered HOLMES J so wisely observed in *United States v Schwimmer* 279 US 644 (1929) at 654, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought-not free thought of that we hate." Mere content, no matter how offensive, cannot be determinative of whether a statement qualifies for the constitutional protection afforded to freedom of expression."

[FN8] 2000 Vol. 1 Z.L.R page 552 at 558

RESPONDENT STATE'S ARGUMENTS ON THE MERITS

62. The Respondent State on its part submits that the Complainants have failed to establish a violation of Article 9 of the Charter, adding that it is misleading to suggest that the MIC is susceptible to political manipulation and control. According to the Respondent State, the operations of the MIC are controlled and managed by a Board which consists of no fewer than five members and more than seven members of whom at least three shall be nominated by an association of journalists and an association of media houses. The Respondent State submits that the Complainants' suggestion that the registration process is prejudicial to them is baseless as there are other independent journalists who have been registered even though their work is critical of the government.

63. It is incorrect, the Respondent State argues, to suggest that Section 80 of the AIPPA unreasonably restricts the right to freedom of expression and dissemination of information. According to the Respondent State, Section 80 restricts not all falsehoods, but only those that are willfully published and that are likely to injure the public interest. In the opinion of the Respondent State, such restrictions are reasonably necessary and cannot be held to be excessively invasive of the enjoyment of the guaranteed right.

64. On the allegation that the AIPPA seeks to regulate the media, the Respondent State submits that the Constitutional Court has already held that accreditation of journalists and the licensing of electronic media is constitutional as long as the requirements for such accreditation and licensing are not onerous.[FN9] The Respondent State also made reference to the Provisions of Article 19 of the ICCPR and Article 9 of the African Charter to the effect that the right is subject to regulation by law.

[FN9] The State in this regard makes references to the *Associated Newspapers of Zimbabwe (Pvt) Ltd v The Minister of State for Information and Publicity and 2 others* SC-111-04, *Association of Independent Journalists and Others v The Minister of State for Information and Publicity and 2 Others* SC-136-02, and *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe and Others* SC-128-02.

65. In response to the Complainants' submission that journalists should not be regulated by statute but should be self-regulating, the Respondent State submits that this amounts to no regulation, and goes beyond what is permissible, adding that regulation of the media including licensing of

journalist is permissible.

66. The Respondent State argues further that in terms of Article 9 of the African Charter together with Article 19(3) of the ICCPR, freedom of expression is not absolute. Those restrictions are permissible if provided by law and are necessary. The Respondent State cites the case of *Athukorale and others*, supra where it was held that:

"Absolute and unrestricted individual rights do not and cannot exist in a modern State. The welfare of the individual, as a member of collective society, lies in a happy compromise between his rights as an individual and the interests of the society to which he belongs."

67. The Respondent State submits that the Constitution of Zimbabwe contains a justiciable Bill of Rights and Section 20(1) provides that everyone has a right to freedom of expression. It states further that, in terms of Section 20 (2) of the Constitution, the right can be restricted.

68. The Respondent State argues further that in terms of the Zimbabwe Constitution the freedom of expression is guaranteed with permissible limitations. This is in accordance with Article 9 of the African Charter which guarantees the enjoyment of the right "within the law", and according to the Respondent State, the "law" referred to in Article 9 of the Charter, relates to "domestic law".

69. The Respondent State submits that what is explicit in the African Charter is the recognition that the exercise of the right is subject to national law, adding that the Complainants conveniently avoided to mention or place emphasis on the wording of the Article in question.

70. AIPPA, according to the Respondent State, is a law made in terms of the Constitution of Zimbabwe and Section 79 thereof has been held by the Zimbabwean Constitutional Court as constitutional. The State cites

Associate Newspapers of Zimbabwe (Pvt) v The Minister of State for Information and Publicity and 2 Others SC 111/04 and *Association of Independent Journalists and 2 Others v The Minister of State and 2 Others SC. 136/02* to support this submission.

71. The State submits further that the practice of journalism does not place it beyond statutory regulation and any such law has however to conform to the stringent requirements of limitations provided for by the Constitution, and according to the State, Section 79 of AIPPA passes the test.

72. The Respondent State states further that the registration exercise is of a technical nature, it is not onerous, and urges the Commission to find Section 79 of AIPPA does not contravene the right to freedom of expression under Article 9 of the African Charter.

73. With respect to Section 80 of AIPPA, the Respondent State submits that the provision makes it an offence to intentionally publish falsehoods which threatens the interests of defence, public safety, public order, the economic interests of the State, public morality or public health or are injurious to reputation, rights and freedoms of other persons.

74. The Respondent State concludes its submission by arguing that, the provisions of AIPPA being challenged by the Complainants have been declared Constitutional and hence comply with the qualification under the African Charter's exercise of the freedom of expression "within the law."

75. The Respondent State calls on the Commission to dismiss the Communication.

DECISION OF THE AFRICAN COMMISSION ON THE MERITS

76. In the present Communication, the Complainants allege that Section 79 (1) and Section 80 of the AIPPA contravene Article 9 of the African Charter. Section 79 (1) of AIPPA provides that "No journalist shall exercise the rights provided in Section 78 in Zimbabwe without being accredited by the Commission." Section 78 meanwhile provides that:

- (1) "Subject to this Act and any other Law, a Journalist shall have the following rights (hereinafter in this Act collectively referred to as "journalistic privilege"),
- (2) to enquire, gather, receive and disseminate information;
- (3) to visit public bodies with the express purpose of carrying out duties as a journalist;
- (4) to get access to documents and materials as prescribed in this Act;
- (5) to make recordings with the use of audio-video equipment, photography and cine-photography;
- (6) to refuse to prepare under his signature reports and materials inconsistent with his convictions;
- (7) to prohibit the publication of, remove his or her signature from or attach conditions to the manner of using a report or material whose content was distorted, in his or her opinion, in the process of editorial preparation."

77. Section 80 provides for instances which constitute abuse of journalistic privileges, as well as the punishment that goes with such abuse. Section 80 (1) provides that;

"[a] journalist shall be deemed to have abused his journalistic privilege and committed an offence if he does the following:

falsifies or fabricates information;

publishes falsehoods except where he is a freelance journalist, collects and disseminates information on behalf of a person other than the mass media service that employs him without the permission of his employer; contravenes any of the provisions of this Act;"

78. Section 80(2) states that;

"[a] person who contravenes subparagraphs (a) to (d) of Subsection (1) shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or to imprisonment for a period not exceeding two years."

79. In the present Communication, the Commission is called upon to make a determination whether Section 79 (1) which requires compulsory accreditation of journalists, and Section 80 which prohibits and punishes the publication of falsehood violate the right to freedom of expression guaranteed under Article 9 of the African Charter.

80. Article 9 of the African Charter provides that:

"(1). every individual shall have the right to receive information. (2). every individual shall have the right to express and disseminate his opinions within the law."

81. Article 9 of the Charter guarantees the right to freedom of expression, which includes the right to receive information and the right to express and disseminate opinions within the law.

82. The Complainants submit that the law imposed by the Respondent State is unreasonable and restrictive to freedom of expression, thus violates Article 9 of the Charter.

83. The Respondent State on the other hand contends that the restrictions imposed by the AIPPA are reasonable, within the law and necessary for maintenance of public order. The Respondent State argues further that the right to freedom of expression is guaranteed within permissible limitations, and that it is not an absolute and unrestricted individual right.

84. To determine whether the requirements of Section 79(1) and Section 80 of AIPPA are in contravention of the African Charter, the African Commission will examine what these two provisions mean, and also examine the meaning of Article 9 of the Charter, with a view to determine whether or not there is a violation of Article 9 of the African Charter.

85. Section 79 of AIPPA reads as follows:

No journalist shall exercise the rights provided in section seventy-eight in Zimbabwe without being accredited by the Commission...

Any person who wishes to be accredited as a journalist shall make an application to the Commission in the form and manner and accompanied by the fee, if any, prescribed: Provided that a mass media service or news agency may file an application for accreditation on behalf of journalists employed by such mass media service or news agency.... (5) The Commission may accredit an applicant as a journalist and issue a press card to the applicant if it is satisfied that the applicant- (a) has complied with the prescribed formalities; and

(b) possesses the prescribed qualifications; and

(c) is not disqualified by virtue of subsection (2), or applies for accreditation in terms of subsection (4). Every news agency that operates in Zimbabwe, whether domiciled inside or outside Zimbabwe, shall in respect of its local operations not employ or use the services of any journalist other than an accredited journalist who is a citizen of Zimbabwe, or is regarded as permanently resident in Zimbabwe by virtue of the Immigration Act [Chapter 4:02]:

Provided that the news agency may employ or use the services of a journalist referred to in subsection (4) for the duration of that journalist's accreditation.

86. The Complainants are asking the African Commission to determine whether the conditions stipulated under Section 79 amount to restrictions, which constitute a violation of Article 9 of the African Charter. It is evident from the above provision that the compulsory accreditation of journalists can result in the imposition of liability, including penal sanction for those who cannot, or may not be able to fulfil the requirements of accreditation, and to that end are deemed to

intrude on the professional practice of journalism.

87. Does compulsory accreditation in itself affect the enjoyment of freedom of expression?

88. Section 79(1) requires that before a journalist practices his/her profession within the Respondent State's territory, he/she must apply for and obtain a certificate of accreditation from the MIC. Section 83 of the AIPPA makes it clear that;

'(1) No person other than an accredited journalist shall practice as a journalist nor be employed as such or in any manner hold himself out as a journalist'.

89. Official accreditation of a journalist is a mandatory precondition for operating within the Respondent State. Criminal sanctions are imposed for operating without accreditation. There are mandatory requirements for accreditation and the possession of the requisite qualifications does not guarantee provision of a certificate of accreditation.

90. The African Commission considers that registration procedures are not in themselves a violation of the right to freedom of expression, provided they are purely technical and administrative in nature and do not involve prohibitive fees, or do not impose onerous conditions. The requirements set out in AIPPA, in the opinion of the Commission, undoubtedly have a negative effect on the exercise of freedom of expression. There are no good grounds for official involvement in the registration of journalists. It creates considerable scope for politically motivated action by the authorities. The regulation of the media should be a matter for self-regulation by journalists themselves through their professional organizations, or associations.

91. A regulatory body such as the MIC whose regulations are drawn up by government cannot claim to be self-regulatory. Any act of establishing a regulatory body by law brings the body under the control of the State. This is exactly the case with the AIPPA.

92. The compulsory accreditation of journalists has been held at both national and international levels to be a hindrance to the effective enjoyment of the right to freedom of expression.

93. In its Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,[FN10] the Inter-American Court of Human Rights emphasized the important role of the press in the development of a free and democratic society. , The Costa Rican government approached the Court for advisory opinion whether '...the compulsory membership of journalists and reporters in an association prescribed by law for the practice of journalism is permitted or included among the restrictions or limitations authorized by Articles 13 and 29 of the American Convention on Human Rights'. In responding to the Costa Rican government's question the Court stated that a law providing for compulsory association and, thus, barring non-members from the practice of journalism was incompatible with the American Convention, as it would deny access to the full use of the news media as a means of expressing opinions or imparting information.

[FN10] Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985).

94. The Inter-American Court noted further that compulsory licensing of journalists or the

requirement of a professional identification card does not mean that the right to freedom of thought and expression is being denied, nor restricted, nor limited, but only that its practice is regulated. Compulsory licensing, the Court held, 'seeks the control, inspection and oversight of the profession of journalists in order to guarantee ethics, competence and the social betterment of journalists...'. The accreditation of journalists may thus be beneficial to the profession, provided though it is done in a manner that does not infringe on the effective enjoyment of the rights of journalists to freely express themselves or receive and disseminate information.

95. Distinguishing the compulsory registration of persons of other profession from the registration of journalists, the Court held that;

'.....within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional...The argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that Article 13 expressly protects freedom " to seek, receive, and impart information and ideas of all kinds... either orally, in writing, in print....". The profession of journalism - the thing journalists do - involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the [Charter] guarantees'.[FN11]

[FN11] Id. Paras 71-73.

96. The Court went on to state that;

'.....this is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law and medicine -that is to say, the things that lawyers or physicians do - is not an activity specifically guaranteed by the Convention [Charter].

It is true that the imposition of certain restrictions on the practice of law would be incompatible with the enjoyment of various rights that the Convention guarantees....But no one right guaranteed in the Convention exhaustively embraces or defines the practice of law as does Article 13 when it refers to the exercise of a freedom that encompasses the activity of journalism. The same is true of medicine'.[FN12]

[FN12] Id. Para 74.

97. The African Commission has considered the opinion expressed by the Inter American Court on Human Rights in the Costa Rican case, and finds a great deal of persuasion in the reasoning and the approach adopted by the Inter American Court on the question of compulsory licensing of journalists. The Commission is convinced that the question of compulsory accreditation is the same as compulsory licensing which was addressed by the Inter American Court. The

Commission is inclined to accept the argument that compulsory licensing or accreditation amounts to a restriction of the freedom to practice the journalist profession where it aims to control rather than regulate the profession of journalism. Regulation is acceptable where it aims at the identification of journalists, the maintenance of ethical standards, competence, and the betterment of the welfare of journalists. In other words the aim of registration should be for purposes of betterment of the profession rather than its control, since control by its nature infringes the right to express oneself. Article 60 and 61 of the African Charter enjoin the Commission to seek inspiration from other international human rights instruments, precedent and doctrine.

98. The Inter American Court found that compulsory licensing aimed at controlling journalists was a violation of Article 13 of the American Convention. By applying the same logic, and analogy to the conditions stipulated for compulsory accreditation under AIPPA, without which, one could not practice journalism, the African Commission finds that section 79 of AIPPA constitutes a violation of Article 9 under the African Charter..

99. Section 80 of AIPPA makes it clear that;

‘(1) No person other than an accredited journalist shall practice as a journalist nor be employed as such or in any manner hold himself out as a journalist.

No person who has ceased to be an accredited journalist as a result of the deletion of his name from the roll, or who has been suspended from practising as a journalist, shall, while his name is so deleted, or is so suspended, continue to practice directly or indirectly as a journalist, whether by himself or in partnership or association with any other person, nor shall he, except with the written consent of the Commission, be employed in any capacity whatsoever connected with the journalistic profession.

100. The Respondent State argued that the restrictions could be imposed in the interest of public order. It also stated that the limitations are permissible and that the exercise of the right is not absolute. The African Commission having looked at Section 79 of AIPPA, holds that the provision does not mention if the said conditions were made in the interest of public order. In fact the reading of Article 9(2) suggests that the phrase "within the law" applies to the actual dissemination and expression of opinion and ideas, rather than pre accreditation conditions. In our view, any conditions prescribed for the accreditation of journalists should be aimed at facilitating, rather than impeding the exercise of the right. In the John D. Ouko/Kenya,[FN13] the African Commission commenting on Article 9 stated the following;

"[t]he above provision guarantees to every individual the right to free expression, within the confines of the law. Implicit in this is that if such opinion is contrary to laid down laws, the affected individual or government has the right to seek redress in a court of law. Herein lies the essence of the law of defamation....."

[FN13] Communication 232/99, 14th Activity Report, also reported in the IHRDA Compilation of Decisions of Communications of the ACHPR, extracted from the Commission's Activity Reports 1994-2001, at page 149.

101. The Complainants argue that, the accreditation conditions are onerous, and aimed at

controlling journalists through the exercise of prior self censorship, and obstruction of the work of journalists. They submitted that there are civil and criminal sanctions within Zimbabwe, which provide remedies in the event journalists violate legal provisions during the exercise of their profession. They argue against the conditions for compulsory accreditation.

102. The African Commission agrees with these submissions and states that the presence of laws which provide for civil and other legal sanctions in the event of any injury caused, or infraction of the law by journalists during the practice of their profession, coupled with self regulation, would provide an adequate mechanism for the regulation and control of the journalism profession in a democratic society, without the necessity of the rigorous regime under AIPPA.

103. The right to freedom of expression is protected by national, regional as well as international human rights instruments. One common thread that runs through the freedom of expression guarantees at all levels is the fact that the right to freedom of expression is not absolute.

104. The European Convention on Human Rights regulates freedom of expression in Article 10(2) and spells out the legitimate aims that can justify the restriction of freedom of expression, states that:

"[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

105. Article 13 of the American Convention on Human Rights guarantees the enjoyment of the right of freedom of expression. Article 13(2) provides that the exercise of freedom of expression;

"shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be established by law to the extent necessary to ensure respect for the rights and reputation of others as well as to protect national security, public order, public health, or morals.

106. Article 10 of the European Convention, 13 of the American Convention and 9 of the African Charter all emphasize that the exercise and enjoyment of freedom of expression can be restricted under lawful conditions.

107. The African Commission has adopted a Declaration of Principles on Freedom of Expression in Africa which upholds certain basic principles aimed at enhancing the enjoyment of freedom of expression. Principle II of the Declaration states that;

"(1) No one shall be subject to arbitrary interference with his or her freedom of expression; and

(2). Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society"(emphasis is added). The African Commission reads from the foregoing that the right to freedom of expression may be restricted by legislation which aims to protect the public or individuals, against practice of journalism which deviates from certain basic norms and legitimate interests in a democratic society. The restrictions imposed by AIPPA do not fall within those norms or interests.

108. The individual's right to freedom of expression thus carries with it the right to impart information to others. The right to freedom of expression within the context of the African Charter must also be read together with the duties of the individual under Article 27. Hence when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. When the Charter proclaims that every individual has the right to receive information and disseminate opinions, it also implicitly emphasizes the fact that the expression, reception and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely. The Commission is thus of the opinion that the two dimensions of the right to freedom of expression must be guaranteed simultaneously.

109. In the present Communication, the Respondent State cites the protection of public order, security and public safety as reasons to ensure the regulation of the profession of journalism. It argues further that the practice of journalism does not place it beyond statutory regulation and any such law has however to conform to the stringent requirements of limitations provided for by the Constitution. The Commission finds that the notion of public order in a State implies conditions that ensure the normal and harmonious functioning of institutions on the basis of an agreed system of values and principles. The Commission notes however that maintenance of public order in the exercise of the freedom of expression is perfectly conceivable without the necessity of restricting the practice of journalists.

110. Further, the same concept of public order in a democratic society demands the greatest possible amount of information. It is the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole that ensures this public order.

111. In the instant Communication, the restrictions imposed on the practice of individual journalists can thus not be justified on the grounds of public order.

112. With regards to the Respondent's assertion that the restrictions imposed by the AIPPA are within the domestic law of Zimbabwe, in conformity with Section 20 (2) of the Constitution of the Respondent State, the Commission notes that, the meaning of the phrase "within the law" in Article 9 (2) must be interpreted in the context of Principle II as elaborated under the Declaration of Principles on Freedom of Expression stated hereinabove. In other words, the meaning of the phrase "within the law," must be considered in terms of whether the restrictions meet the legitimate interests, and are necessary in a democratic society. In addition, the concept of "within the law" employed in the Charter cannot be divorced from the general concept of the protection of human rights and freedoms.

113. In *Dawda Jawara v. The Gambia*[FN14], the African Commission elaborated the meaning of such phrases such as; 'in accordance with the law', or 'previously laid down by law' or 'within the law'. In that Communications, the Republic of The Gambia defended arbitrary arrests and detention and stated that it was acting within the confines of legislation 'previously laid down by law', as required by the wordings of Article 6 of the Charter.

[FN14] Communications 147/95 and 149/96.

114. The Commission rejected the arguments by The Gambia and restated its decision in

Alhassane Aboubacar v Ghana[FN15], that

"competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution or international human rights standards. This principle applies not only to freedom of association but also to all other rights and freedoms. For a State to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter...'

[FN15] Communication 103/1993.

115. The Commission adopts a broader interpretation of phrases such as "within the law" of "in accordance with the law" in order to give effect to the protection of human and peoples' rights. To be "within the law" the domestic legislation must be in conformity with the African Charter or other international human rights instruments and practices. The Respondent State can not argue that the limitation placed by AIPPA was permissible "within the law" i.e. within its domestic law. This would be tantamount to admitting that the exercise of freedom of expression is left solely at the discretion of each State Party. This, in the opinion of the Commission, will cause jurisprudential/interpretation chaos, as each State Party will have its own level of protection based on their respective domestic laws.

116. The African Commission succinctly made this point in Constitutional Rights Project; et al /Nigeria[FN16] where it stated the following;

"[a]ccording to Article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one's opinion guaranteed at the international level: this would make the protection of the right to express one's opinion ineffective. To permit national law to take precedence over international law would defeat the purposes of codifying certain rights in international law and indeed, the whole essence of treaty making"

[FN16] Consolidated Communication 140/94, 141/94, 145/95 13th Annual Activity Report. 1999-2000)

117. The Commission therefore finds that the Respondent State's arguments that the accreditation of journalists and prohibition of falsehood are on grounds of public order, safety and for the protection of the rights and reputation of others, to be unsustainable and an unnecessary restriction of the individual's practice of journalists.

118. Similarly, by preventing journalists from freely exercising their right to freedom of expression, the Respondent State inevitably violates the freedom of expression of the Zimbabwean society by depriving the society the right to receive information due to the restrictions imposed on the journalists' right to disseminate information.

119. The African Commission therefore finds that Section 80 of the Access to Information and Protection of Privacy Act (Chapter 10:27) of 2002, was not necessary, it did not address any

legitimate interest such as to require compulsory accreditation of journalists. It reiterated the restrictions imposed by section 79, without giving any justification for such restrictions. The African Commission therefore finds that Section 80 is incompatible with Article 9 of the African Charter on Human and Peoples' Rights.

120. The African Commission finds further that while accurate reporting is the goal to which all journalists should aspire, there will be circumstances under which journalist will publish or disseminate information, opinion or ideas, which will contravene other persons' reputations or interests, national security, public order, health or morals. Such circumstances cannot be foreseen during accreditation. In such circumstances, it is sufficient if journalists have made a reasonable effort to be accurate and have not acted in bad faith.

121. The African Commission acknowledges the argument by the Respondent State that the rights of individuals, including the right under Article 9 are not absolute, hence the inclusion of Article 27 of the Charter on the duties of individual towards others. In the case of journalists, when they fail in their duty to respect the rights of others, when exercising their rights to free expression, then their right ceases to be absolute. It is then that the civil and other legal remedies will take their natural course. The African Commission holds that the Zimbabwe domestic legal system can grant remedies to such false publication, and which therefore obviate the necessity for the restrictions complained against.

122. To adopt legislation such as AIPPA aimed at or under the pretext of protecting public order, health or morals, is tantamount to imposing conditions for prior censorship.

123. The African Commission is satisfied that Sections 79 and 80 of AIPPA impose restrictive accreditation conditions and excessive burden on journalists and restrict their effective enjoyment of the right to freedom of expression.

124. The Commission thus concludes that the arguments advanced by the Respondent State in justification of the restriction of the journalists' right to freedom of expression are incompatible with obligations assumed by the Respondent State to respect Article 9 of the Charter. Accordingly, the Commission considers that the Communication discloses a violation of Article 9 of the Charter.

125. In view of the above reasoning, the African Commission recommends that the Respondent State:

(i) Repeal Sections 79 and 80 of the AIPPA;

(ii) Decriminalize offenses relating to accreditation and the practice of journalism;

(iii) Adopt legislation providing a framework for self regulation by journalists;

(iv) Bring AIPPA in line with Article 9 of the African Charter and other principles and international human rights instruments;

and (v) Report on the implementation of these recommendations within six months of notification thereof.

Adopted during the 6th Extra-Ordinary Session of the ACHPR, Banjul, The Gambia. April, 2009.

