

**IN THE SUPREME COURT OF ZIMBABWE
HELD AT HARARE**

CASE NO. S.C. 252/2002

In the matter between:

ASSOCIATION OF INDEPENDENT JOURNALISTS

First Applicant

and

ABEL TICHARWA MUTSAKANI

Second Applicant

and

VINCENT KAHYA

Third Applicant

and

**THE MINISTER OF STATE FOR INFORMATION
AND PUBLICITY IN THE PRESIDENT'S OFFICE**

First Respondent

and

MEDIA AND INFORMATION COMMISSION

Second Respondent

and

THE ATTORNEY GENERAL OF ZIMBABWE

Third Respondent

FULL ARGUMENT FOR THE APPLICANTS

1. It is respectfully submitted that Section 79, 80, 83 and 85 clearly hinder the enjoyment of freedom of expression and interfere with the right to receive and impart information and ideas in contravention of Section 20 subsection 1 of the Constitution of Zimbabwe.
2. Clearly, Sections 79, 80 subsection 1, paragraphs (c) and (d), 83 and 85 do not fall within the ambit of any of the exceptions to Section 20 subsection 1 of the Constitution and are, consequently, manifestly invalid, null and void.

3. Whilst it is accepted that intentional falsification, fabrication and publication of false information which injures the reputations, rights and freedoms of other persons are wrong and may be punishable in a democratic society, section 80, section 1 paragraphs (a) and (b) fall outside the protection afforded by the exception to paragraph 20 subsection 1 and are, furthermore, unnecessary in a democratic society for the following reasons:

- 3.1. The Sections impose criminal liability even where the reputations, rights and freedoms of other persons have not been threatened or contravened. The sections impose criminal liability in respect of any falsehood irrespective of the impact of the falsehood on the reputations, rights and freedoms of other persons.

- 3.2. On an April fools day, one of the local newspapers published a story concerning a plane which was alleged to have landed in the city centre. On another occasion, it published a story concerning a luxury vehicle which was alleged to have crushed into a ditch in the city centre. The stories were published in jest and the April fools days jokes associated with them were well received by members of the public. Indeed, they contributed significantly to lifting what is normally a dismal morning at work for most people. Under Section 80, subsection 1 paragraphs (a) and (b) of the Access to Information and Protection of Privacy Act, such publications would have been punishable despite the fact that they did not injure the reputations, rights and freedoms of other persons.

- 3.3. Section 80 subsection 1 paragraphs (a) and (b) impose strict criminal

liability/...

liability. It is a fundamental feature of criminal liability that innocent persons should not be subjected to liability. An unintentional contravention of the law is an innocent act. It is innocent in that there is not fault for moral blameworthiness or other turpitude associated with it. To the extent that Section 80 subsection 1 paragraphs (a) and (b) impose criminal liability even for unintentional publication of incorrect information, they are repugnant to elementary notions of criminal justice and unnecessary in a democratic society. The Attorney General's position is that the Section does not impose strict liability. As a jurist, his discomfort with strict liability is understandable. However, the First Respondent's position on the same issue appears to be that strict liability is justifiable. It is respectfully submitted that Section 80 subsection 1 paragraph (a) and (b) does impose strict liability and is for that reason, among others, unnecessary in a democratic society and unconstitutional.

- 3.4. The fact that a person is deemed to have abused journalistic privilege and to have committed an offence contravenes the presumption of innocence and constitutes an unconstitutional and unfair reversal of the onus of proof in violation of fundamental requirements of criminal justice in a democratic society. In a democratic society, no person should be deemed to have committed any offence before such offence is proved against him. See **S v CHOGUGUDZA 1996 (1) Z.L.R. 28(5)** and **TSVANGIRAI v THE STATE** S.C. 91/2001 pages 8, 9, 10 and 11.

4. In general, the measures contained in Sections 79, 80, 83 and 85 contravene Section 20 subsection 1 of the Constitution. Only a limited portion of Section 80 can be said to have anything to do with one of the exceptions in Section 20 subsection 1 of the Constitution. All the sections under challenge are, in any event, excessively broad in their limitation on freedom of expression and are unnecessary in a democratic society as will more fully appear in hereinbelow.

5. It is respectfully submitted that the sections of the Access to Information and Protection of Privacy Act, which are the subject matter of this attack, are so vicious in their attack on professional independence and autonomy as to depart significantly from the legislative philosophy of the Parliament of Zimbabwe. The Parliament of Zimbabwe has traditionally recognised the importance of professions being controlled by democratically elected organs and being structured in such a matter as to be self governing.
 - 5.1. In terms of the Architects Act Chapter 27:01, architects are controlled by the Architects Council of Zimbabwe, an eleven member council with two members appointed by the Minister responsible for the administration of that statute and nine members elected by the Institute of Architects of Zimbabwe.

 - 5.2. In terms of Chartered Secretaries (Private) Act Chapter 27:03 as read with Statutory Instrument 20/1973, Chartered Secretaries are controlled

by/...

by the Council of the Institute of Chartered Secretaries and Administrators. The Council is democratically elected by members of the Institute in terms of the Act as read with the regulations made thereunder.

5.3. Although one member acts ex-officio and two are appointed by the Minister of Lands, the majority of the members of the Council of Land Surveyors, the organ which controls Land Surveyors are democratically elected by Land Surveyors in terms of Chapter 27:06.

5.4. In terms of the Legal Practitioners' Act Chapter 27:07 as read with Law Society By Laws contained in Statutory Instrument 314/1982, the legal profession is controlled by an eleven member Council of the Law Society of Zimbabwe. Nine of the eleven members are democratically elected by members of the Law Society of Zimbabwe.

5.5. In terms of the Quantity Surveyors Act, Chapter 27:13, Quantity Surveyors are controlled by the Quantity Surveyors Council of Zimbabwe. Out of the eleven members of that Council, only three are appointed by the Minister responsible for the administration of that Act. The rest of the members are democratically elected by members of the Zimbabwe Institute of Quantity Surveyors.

5.6. In terms of the Veterinary Surgeons Act, Chapter 27:15, Veterinary Surgeons are controlled by a six member Council of Veterinary Surgeons.

Only two of the Council members are appointed by the Minister. The majority are democratically elected by registered Veterinary Surgeons.

- 5.7. In terms of the Zimbabwe Institution of Engineers (Private) Act Chapter 27:16 as read with Statutory Instrument 286/1997, Engineers are controlled by the Council of the Zimbabwe Institution of Engineers. Apart from a representative of the faculty of Engineering of the University of Zimbabwe and one from the National University of Science and Technology whose seats on Council are predetermined by Parliament which delegated formal appointment to the Minister, and a provision for co-option, the Council is democratically elected by Engineers.
- 5.8. In terms of the Health Professional Act No. 6/2000, Medical and Dental Practitioners are controlled by an eighteen member Council consisting of two employees of the Ministry of Health appointed by the Minister, two persons appointed by the Minister from a list of names submitted by the faculty of Medicine of the University of Zimbabwe, two rural practitioners appointed by the Minister, three members appointed by the Minister from a list of names submitted to him by an association representing general practitioners and the remainder elected by members of that profession.
- 5.9. Accordingly, the composition of the Council is determined by Medical and Dental Practitioners.

- 5.10. Pharmacists are, in terms of Act 8/2000, controlled by fourteen member council. Although the Minister of Health appoints ten of them, apart from only one who has to be a hospital employee, he appoints them from lists provided to him by interested associations. The rest are elected by persons engaged in pharmaceutical and allied professions. The same applies to the fifteen member council for Medical Laboratory and Clinical Scientists' Council of Zimbabwe.
- 5.11. Environmental Health Practitioners are, in terms of Act 6 of 2000 controlled by a seven member council. Only two of the members are appointed by the Minister. The remaining five are elected by Environment Health Practitioners. The same position obtains in respect of the seven member Medical Rehabilitation Council which controls physio-therapists, occupation therapists and allied practitioners.
- 5.12. In terms of the Estate Agents Act Chapter 27:17, Estate Agents are controlled by a nine member council. Six of the members of council are democratically elected by Estate Agents. Only three are appointed by the Minister responsible for the administration of the statute.
- 5.13. The only occupations in respect of which there appears to have been a departure from democratic elections are private investigators, security guards and traditional healers which are clearly not professions in the traditional sense of the word.

6. Accordingly, it is respectfully submitted that the relevant sections of the Access to Information and Protection of Privacy Act represent a significant and ominous departure from the legislative philosophy of the Parliament of Zimbabwe. They put the Journalism Profession in a class of its own as a profession under governmental control and denied the basic democratic right to choose its own leaders, regulate its affairs and enjoy professional independence. Self regulation is one of the major features of a profession. It is submitted that these sections destroy a major element of the professional status of journalism.
7. In the two decades since attainment of democracy and independence, no government minister in Zimbabwe has found it necessary to subject professions governed by legislation administered by him to the type of control that the journalism profession is being placed under. Indeed, even the dark days of repugnant and autocratic rule appear to have respected the autonomy of professions. It is respectfully submitted that, on its own, this ample demonstration of the fact that the provisions of the Access to Information and Protection of Privacy Act, which are under challenge in this application, are not necessary in a democratic society. In Zimbabwe, no Minister responsible for Information has, before this Act, found it necessary to place the journalism profession under governmental or other control other than the common law of Zimbabwe. It is significant to note that two of the former Ministers of Information are highly respected professionals in the field of journalism.

It is respectfully submitted that to swing from a position where the common law is adequate to controlling the profession in a manner that goes beyond the controls imposed on all other professions in Zimbabwe, is to act without due respect to precedent, necessity and the experiences of other Ministers responsible for the administration of legislation governing other professions.

8. It is respectfully submitted that by leaving the determination of who may become a journalist in the discretion of the Minister as is done by Section 91(2) (P) of the Access to Information and Protection of Privacy Act, this statute departs significantly from the democratic traditions of the Parliament of Zimbabwe and places journalists in a class of their own as a profession under direct governmental control. The qualifications of Architects are set by Parliament. The qualifications of Accountants are set by their governing councils. The qualifications for Land Surveyors are set by Parliament. The qualifications for Quantity Surveyors are set by Parliament. The qualifications for Veterinary Surgeons are set by Parliament. The qualifications for Engineers are prescribed by their governing council. The qualifications for Medical Practitioners are prescribed by their governing councils. The qualifications for Legal Practitioners are set by a council for legal education whose membership is pre-determined by an act of Parliament.

It is respectfully submitted that the sudden leap into autocracy in the determination of the qualifications of a Journalist is further evidence of the fact that the compulsory accreditation measures introduced by this statute are not necessary in a democratic society and are indeed positively repugnant to our notions of democracy which frown upon concentration of power in the hands of one person.

9. The common law of Zimbabwe considers dignity, reputation, character, privacy and truthfulness to be legally protected interests. Injuria, defamation, invasion of privacy and malicious falsehoods are actionable delictual wrongs recognised by the common law of Zimbabwe. Indeed, there are common law criminal remedies for criminal injuria, defamation and some invasions of privacy.

The common law of Zimbabwe goes further than the common law of other jurisdiction in so far as, in actions brought under the *actio injuriarum*, it does not recognise truthfulness as a complete defence. A defendant has to show that in addition to being truthful, the publication was in the public interest in order to successfully plead the defence of justification. Under English Law, truthfulness is a complete defence. Obviously, a good law in the area of reputation, privacy and dignity is one which balances the interests the public have in a free flow of information against reputational interests. The common law of Zimbabwe is considered to lean heavily in favour of the protection of reputations, dignity and privacy because of its disregard of truthfulness as a complete defence and its imposition of both civil and criminal sanctions against those who violate interests in dignity, reputation and privacy. In a world which promotes the right to freedom of expression, the law has, indeed, been under spotlight for imposing criminal remedies where civil remedies appear to be adequate.

10. Journalists provide the public with vital information including information on the conduct of public officials and influential persons.

The information is vital to accountability and the exercise by members of the public of other democratic rights such as the right to choose their leaders. Conscious of the power of the media, it is common for public officials, powerful and influential persons to seek to minimise their exposure to independent journalists who may expose corruption, unethical practises, incompetence and other forms of abuse of power and authority.

Accordingly, a law placing the decision as to who may practise journalism under the control of central government, is a law inherently inimical to independence of the media, freedom of expression, accountability and the proper functioning of a democracy. It is a law without justification in a democratic society particularly if it is enacted in an environment where other remedies are available for the protection of the public's interest in dignity, reputation, privacy. The State and all those who carry the power and authority of the State should be open to public criticism. The public has a right, as part of the general right of freedom of expression, to freely criticise the activities of those who exercise State power or authority. The State should not be able to use public funds derived from its subjects, to finance activities or structures, which interfere with the free exercise of the right by the public to criticise it and those who exercise its power or authority. See **P.T.C. v MODUS PUBLICATIONS (PRIVATE) LIMITED 1997 (2) ZLR PAGE 492 (S)**. In Derbyshire **C.C. v TIMES NEWSPAPERS LIMITED [1993] 1 LAW ENGLAND REPORTS 1011** LORD KEITH observed that: ***"It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, be open to uninhibited public criticism."***

In DIESPOORBOND and ANOTHER v RLYS, VAN DER HEERDEN and OTHERS 1946 AD PAGE 999 Mr Justice Schrieiner pointed out that *“I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in the country if the wealth of the State, derived from the State’s subjects, be used to launch against those subjects actions for defamation because they have, falsely and fairly it may be, criticised or condemned the management of the country.”*

11. It is the judicial philosophy of this Honourable Court to guard and treat as of paramount importance, the right to freedom of expression. In MUNHUMESO AND OTHERS 1994 (1) ZIMBABWE LAW REPORTS PAGE 49 AT PAGE 56, this Honourable Court pointed out that: *“The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be underestimated.” They lie at the foundation of a democratic society and are one of the basic conditions for its progress.* In WOODS AND OTHER v THE MINISTER OF JUSTICE AND OTHER 1994 VOL, 2 ZIMBABWE LAW REPORTS PAGE 195 (S) this Court highlighted that freedom of expression was one always to be jealously guarded by the Courts. In RETROFIT (PRIVATE) LIMITED v P.T.C. AND OTHER 1995 VOL. 2 ZIMBABWE LAW REPORTS PAGE 199 AT PAGE 211, this Court observed that *“This approach, which underscores the pre-eminence of freedom of expression as an indispensable condition for a free and democratic society, conforms with what is reflected in international human rights instruments, some of which Zimbabwe has ratified or acceded to.”*

Indeed, it was observed in the Retrofit case, that most jurisdictions recognise that freedom of expression is central to democracy. It was pointed out, quoting from Justice Cardozo that ***“Freedom of thought and speech is the matrix, the indispensable condition of nearly every other form of freedom.”*** The Supreme Court furthermore, referred to the judgment of Mr Justice McIntyre of the Supreme Court of Canada who observed that ***“Freedom of expression is not, however, a creature of the charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of Western Society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of various idea depends upon its maintenance and protection.”*** In the MUNHUMESO judgment *supra* at page 57A, this Honourable Court observed that freedom of expression serves three broad special purposes namely, enabling the individual to obtain self fulfilment, assisting in the discovery of the truth, strengthening the capacity of the individual to participate in decision making and providing a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

12. The pre-eminence given to the right to freedom of expression demonstrates the unconstitutionality of the sections under attack. The test as to necessity in a democratic society is contained in NYANABIRAI v NATIONAL SOCIETY SECURITY AUTHORITY and ANOTHER 1995 VOL. 2 ZIMBABWE LAW REPORTS, PAGE 1(S).

It is:

- 12.1. whether the legislative objective is sufficiently important to justify limiting the right.
- 12.2. whether the measures designed to meet the legislative objective are rationally connected to it and
- 12.3. whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

In the instant case, clearly, the protection of the dignity, privacy and reputations of others is already adequately provided for in the common law of Zimbabwe which imposes both criminal and civil remedies for violation of same. The new measures are, consequently, an unnecessary duplication of or addition to existing remedies. The legislative objective is not, therefore, of any importance.

In his article **PRESS AND THE LAW OF DEFAMATION LEGAL FORUM (1993), VOL. 2 AT PAGE 43** Professor Feltoe observed that the law was weighed in favour of protection of reputational interests at the expense of the press' freedom of expression. In his book **A GUIDE TO PRESS LAW IN ZIMBABWE** Professor Feltoe observed that: ***"The press in Zimbabwe is not protected by a qualified privilege if it publishes reports which seek to expose corruption or other forms of misconduct on the part of the persons such as high ranking Government officials or prominent businessmen. If the story turns out to be without substance the person defamed can sue for damages. The fact that the press organ which published the statement believed that the statement was true and that it was in the public interest to publish the story/...***

story, will not provide any defence to the action for defamation. It is, therefore, incumbent on the press to make sure that such a story does have substance before it goes ahead and publishes it. If it is sued for damages, it must be able to establish in court that the defence of justification applies, because not only was it in the public interest to publish the story, but the details of the story were substantially correct. By seeking to expose dishonesty, corruption and nepotism the press is seeking to root out these evil practices and to promote integrity in public administration and honest and compliance with the laws protecting the economy in the field of private business. To allow it to fulfil this role effectively it is arguable that the law of defamation should be changed so as to give the press limited protection against defamation along the lines outlined below. It has been suggested that it should be a defence in Zimbabwe for the press to establish that before it published a story in the public interest, it took all reasonable steps to check the accuracy of the facts.”

Requiring mandatory registration of journalists and depriving them of rights they currently enjoy and furthermore depriving them of the right to self governance enjoyed by all other professions are measures which are not rationally connected to observation of the dignity, reputation and privacy of other persons. Furthermore, they go far beyond what is necessary to protect the dignity, reputations and privacy of other persons. Indeed, the measures run contrary to the fundamental principle of the common law that the State should not be placed in a position where it is able to use public resources to restrict the free exercise of a right to criticise it by the public.

13. In SHAMUYARIRA v ZIMBABWE NEWSPAPERS, (1980) LIMITED AND ANOTHER, 1994 (1) ZIMBABWE LAW REPORTS 445 the High Court agreed with Professor Feltoe's observations and lamented the absence of laws protecting journalists sources from disclosure. The Court, furthermore observed that it was unlikely that government would take action to achieve a better balance in the law of defamation because, by relaxing the restrictions on the press, it would expose itself to more bold and searching scrutiny from the press. It agreed with Professor Feltoe that investigative reporting ***"can be a very hazardous business under the present Zimbabwean law."***

14. It is submitted that to pile more restrictions against a background of an expectation of relaxation of common law restrictions is outrageous in its defiance of common sense, disregard for legitimate expectations and desire for control and power, all of which are the very antithesis of what is necessary or desirable in a democratic society.

15. It is respectfully submitted that attempts to distinguish between freedom of the press and freedom of expression are spurious and illogical. Clearly, although freedom of expression encompasses a wider range of activities than freedom of the press and in that sense the two are different, freedom of the press is an element of freedom of expression. The press is one of the means of expression. Although Harare is not Zimbabwe, it is part of Zimbabwe. You cannot attack Harare and deny having

attacked/...

attacked Zimbabwe. Equally, you cannot attack freedom of the media and deny having attacked freedom of expression. As was observed in this Honourable Court in the Retrofit case, “Section 20 subsection 1 of the constitution enjoins not only that persons be free to express themselves, but also that they are not hindered in the means of their expression. This is manifest in the freedom **“to receive and impart**

ideas and information without interference” (see Page 213).” At the same page this Honourable Court referred to a decision of the European Court of Human Rights which interpreted a similarly worded section to Section 20 subsection 1. It observed that article 10 Subsection 1 of the European Convention “applies not only to the contents of the information but also to the means of transmission and dissemination since any restriction imposed on the means necessarily interferes with the right to receive and impart information.” The European Court went on to observe that ***“like the commission, the court is of the view the reception of television programmes by means of a dish or other Aerial comes within the right laid down in the first two sentences of article “10” subsection 1 without it being necessary to ascertain the reason and purpose for which the right is to be exercised.”*** In **RED LION BROADCASTING CO. INC & OTHERS v FEDERAL COMMUNICATIONS COMMISSION** et al (No. 2) 395 US 367 (1969) cited in the **RETROFIT** case, United States Supreme Court held that radio broadcasts were protected by the First Amendment guarantee of freedom of expression. In **BELIZE BROADCASTING AUTHORITY v COURTNEY & HOARE** [1988] LCR Page 276,

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cited in the **RETROFIT** case, it was held that restrictions on the use of television broadcasting were not be countenanced under a constitutional provision protecting the enjoyment of freedom of expression. The court is quoted as having said “**Today television is the most powerful medium of communications, ideas and disseminating information. The enjoyment of freedom of expression therefore includes freedom to use such medium.**” It was pointed out that the medium was in integral part of freedom of expression. This Court, after reviewing the cases observed at Page 216 that “**These cases, and there are others, underline the principle that restriction upon or interference with the means of communication, whatever form it may take, abridges the guarantee of freedom of expression.**”

15.1 *In large modern societies it is no longer possible to realise the right to freedom of expression through direct communication only. Citizens need a medium – the press, sound and television broadcasting – to engage with each other. The media provide a forum which helps to realise the right to freedom of expression. The freedom of the media is thus an integral part of every citizen's freedom of expression.*

15.2 *In its session in 1946 the United Nation's General Assembly adopted Resolution 59(1) which stated:*

“Freedom of information is fundamental human right and... the touchstone of all the freedoms to which the United Nations is consecrated.”

Article 19 of the Universal Declaration of Human Rights (1948) says:

everyone/...

19.

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

The UN International Covenant on Civil and Political Rights (1996) – a legally binding document to which Zimbabwe is party – in its article 19 goes into more detail:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

15.3 *These international documents prove beyond doubt – contrary to the First Respondent's contention in paragraph 3.13 – that press/media freedom is an integral part of freedom and that journalists (like all human beings) are indeed protected by these conventions.*

15.4 *This fact is spelt out in detail in any Advisory Opinion concerning a compulsory registration scheme for journalists in Costa Rica, the Inter-American Court of Human Rights (OC-5/85, November 13, 1985, Ser.A, No. 5):*

“It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use

must/...

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 the freedom and independence of journalists.”

15.5 *The Court refers to article 13 of the American Convention of Human Rights which defines freedom of expression in a way similar to that in the constitution of Zimbabwe as “freedom to seek, receive, and impart information and ideas of all kinds.” The Court concludes:*

“This language establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. 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. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by

others/...

others. In its individual dimension, freedom of expression goes further than the theoretical recognition of the right to speak or to write. 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. When the Convention proclaims that freedom of thought and expression includes the right to impart information and ideas through "any... medium" [as does the UN Universal Declaration it emphasises the fact that the expression 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 importance of the legal rules applicable to the press and to the status of those who dedicate themselves professionally to it derives from this concept. In its social dimension, freedom of expression is a means of the interchange of ideas and information among human beings and for mass communication. It includes the right to each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.]

15.6 *The European Court of Human Rights has this to say:*

Freedom/...

“Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions of its progress and for the development of every man..... It is applicable not only to information or ideas that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.” (Handyside v US [1979-80 1 EHRR 737, para 49). This was confirmed in the CHAVUNDUKA case which includes “false” information.

International jurisprudence has also consistently emphasised the vital role of free media in a state governed by the rule of law. For example, the European Court of Human Rights found:

“Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it give politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of democratic society.”

15.7 *The First Respondent in his paragraph 3.8.1 and 3.8.2 contends that “the practice of journalism is necessarily a privilege worldwide” and that*

Zimbabwe/...

“Zimbabwe cannot be an exception.” As follows from the above, journalism worldwide is not seen as a “privilege”, but an activity open to anybody and protected by the inalienable human right of freedom of expression.

- 15.8 *Freedom of expression, and thus media freedom, includes the indispensable principle of pluralism of ideas and information. The widest possible dissemination of information and ideas of all kinds from diverse and antagonistic sources is essential to a democratic society.*
- 15.9 *In order to ensure such pluralism, the SADC Protocol on Culture, Information and Sport (2001) states that “Member States agree to create a political and economic environment conducive to the growth of pluralistic media” (article 18 [4], and commit themselves to the “promotion, establishment and growth of independent media, as well as free flow of information” (article 17 [a]. In Article 20 the Protocol enjoins member states to “take necessary measures to ensure the freedom and independence of the media”, and defines media as “all forms of communications” including “broadcast media.” “Media independence” is defined as “editorial independence, whereby editorial Policy and decisions are made by the media without interference.”*
- 15.10 *An integral part of editorial policy decisions is the recruitment of staff. Any pre-selection of the human resource pool available to editors by way of compulsory accreditation constitutes undue interference in their editorial independence and is thus in breach of the SADC Protocol, signed by the Heads of State of all SADC member states.*

- 15.11 *The First Respondent's reference to articles 21 and 22 of this Protocol (his paragraph 3.12) in defence of the disputed sections in the Act does not back his argument.*
- 15.12 *Article 21 obliges member states to “encourage the establishment or strengthening of codes of ethics by various sectors of the media through the creation of an enabling environment for the formulation of such frameworks.” Encouragement is the opposite of imposition, i.e. using the force of law. The “adoption and establishment of standards and codes relating to the operating of mass media” by the Minister (Section 39 [1 h] of the Act) and the right of a Media Commission appointed by the Minister “to enforce professional and ethical standards in the mass media” (Section 39 [1 j] of the Act) do not create “an enabling environment” as envisaged in the SADC Protocol.*
- 15.13 *Article 22 states that “State Parties agree to establish a regionally and internationally-recognised SADC Accreditation system or procedure for media practitioners with specific guidelines in order to facilitate the work of such personnel in the rest of the world.” The purpose of this commitment is obvious: SADC as a regional body (not any individual state for its internal purposes) is tasked to establish an accreditation system to facilitate (not impede) the work of media practitioners in the region and the rest of the world (not in Zimbabwe). This could mean in practical terms that SADC will issue press cards for journalists to have easier access regionally to all SADC organs and meetings as well as other countries in the world as SADC-accredited foreign correspondents.*

“Accreditation”/...

“Accreditation” is defined as “regionally and commonly accepted standards of registering or accrediting practitioners in the fields of culture, information and sport.” As will be shown, the standards of accreditation outlined in the Act are by no means “regionally and commonly accepted.”

15.14 *The First Respondent claims in his paragraphs 3.6. and 3.6.1 to 3.6.6 that “accreditation is a worldwide practice,” and asserts “the fact that there is no country in the world today which does not accredit journalists.” This is incorrect.*

15.15 *In Zambia, compulsory registration of journalists ordered by the Zambian government was judged unconstitutional by the Zambian High Court in 1997 (Zambia High Court civ. Case No. 95/HP/2959 **FRANCIS KASOMA v THE ATTORNEY GENERAL**). Journalists were to be obliged to become members of a Media Association of Zambia and to register with a statutory Media Council. The High Court quashed the decision. Among the reasons given are the following:*

“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 assembly and association, 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/...

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. In the light of the above it cannot be seriously argued that the creation of the Media Association of any other regulatory body by the Government would be in furtherance of the ideal embodied in the Constitution, viz-a-viz 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].

15.16 *In the Advisory Opinion OC 5/85, 13 November 1985 Set A No. 5, the Inter-American Court of Human Rights clearly stated the applicable principle:*

"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."

German Press Laws expressly state that “the press activities ... may not be rendered dependent upon any form of registration or admission” (e.g. article 2, Press Law for the Free and Hanseatic City of Hamburg). Lawmakers probably drew a lesson from the Nazi past of that country between 1933 and 1945 when journalists were forced to register with the Ministry of Propaganda.

15.17 The assertion of the First Respondent in paragraph 3.6. that “the United Nations itself requires journalists to be accredited first before they can gain access to cover its events,” as do (further examples quoted) the ITU and the World Education Forum, is not valid either. Clearly, there is a distinction to be made between states and international organisations. The accreditation of and the issuing of press cards to journalists by organisations is based on their right of admission to their premises and is done mainly for the purpose of facilitating journalists’ (as opposed to ordinary visitors’) easy access to an office building, e.g. the UN Headquarters. A government has no such right of admission to grant to or withhold from citizens of that country.

15.18 The First Respondent argues in paragraph 3.19 that “journalism is a profession attainable after training and obtaining relevant qualifications.” While this is partly correct, it follows logically from the above that there can be no regulations concerning “relevant qualifications” of journalists other than those set by employers themselves according to their specific needs. This makes perfect sense as the range of possible subject matter

for/...

for journalists to cover is unlimited: they deal with virtually all aspects of life. Therefore their training and experience should be similarly unlimited and un-prescribed. In this respect, they can perhaps best be compared to politicians who have to be able to address the totality of people's concerns (also with no obligation to first obtain training and a licence to do their job).

15.19 *In its Advisory Opinion mentioned above, the Inter-American Court of Human Rights said:*

"A law licensing journalists, which does not allow those who are not members of the 'colegio' to practice journalism and limits access to the 'colegio' to university graduates who have specialized in certain fields, is not compatible with the Inter-American Convention of Human Rights" [which guarantees freedom of expression].

15.20 *The same argument goes for the requirement that journalists must have formal journalistic training. Such basic training is certainly desirable and often acquired beforehand by those wishing to enter the field at colleges or universities, or actively encouraged by employers in the form of intensive on-the-job or in-house training or extended leave given for degree courses or other forms of further study. However, to make such formal journalistic training a condition for employment would limit access to the profession and thus be in breach of the right to freedom of expression. Given the all-encompassing nature of journalists' field of work, there can be no one set body of required qualifications – apart,*

perhaps/...

perhaps, from the ability to “write”, which is something that can not be objectively assessed. Experience shows that many of the best journalists in the world, including Africa never had any formal journalist training at all.

15.21 *The Inter-American Court in its Advisory Opinion referred to above found in 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.

15.22 *It also has to be noted that any qualifications introduced as legal requirements for being employed as a journalist would retrospectively affect an individual's source of livelihood. The High Court judgment in Zambia cited under 3.2 found:*

“Those (journalists) who would fail to meet whatever standards, which may be set (the Media Council), would lose their right to work as journalists, a threat and possibility they have never faced until the decision was made, thereby depriving them of a right of livelihood they previously enjoyed.”

15.23 *The provision under section 84 of the Act, 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/...

insecurity. This will have an extremely chilling effect on their ability to freely practise their trade and will inevitably lead to various degrees of self-censorship.

15.24 *To make the granting of accreditation conditional on the payment of a fee would be unconstitutional: fundamental rights are, by definition, unconditional.*

15.25 *The First Respondent in his paragraph 3.5.3 “strongly” submits “that the right under Section 20 of the Constitution does not, at least with equal measure and force, apply to a profession whose preoccupation is primarily to make money for both the journalist and his employer.”*

The Inter-American Court has this to say:

“It has been argued that what the compulsory licensing of journalists seeks to achieve is to protect a paid occupation and that it is not directed against the exercise of freedom of expression as long as it does not involve remuneration and that, in that sense, it deals with a subject other than that dealt with by Article 13 of the Convention. This argument is based on a distinction between profession journalism and the exercise of freedom of expression that the Court cannot accept. This argument assumes that it is possible to distinguish freedom of expression from the professional practice of journalism, which is not possible. Moreover, it implies serious dangers if carried to its logical conclusion. The practice of professional journalism cannot be differentiated from freedom of expression. On the contrary, both are obviously intertwined, for the professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of expression in a continuous, regular and paid manner.”

- 15.26 *The First Respondent claims in his paragraph 3.10 that the “Honourable court may have benefited from some insight in the virtues, if any, of voluntary media councils that Applicants talk about so much,” and he cites the Mozambican example as one “that has no significant difference with our system.”*
- 15.27 *The Supreme Media Council in Mozambique does not accredit or licence or register journalists. It has no power to delete any journalist's name from a roll of journalists (there is no such roll); to suspend him/her for a specific period; to order him/her to pay a penalty – all powers spelled out in Section 85 (2) of the Zimbabwean Act. Moves are currently under way in Mozambique to replace the Supreme Media Council, a statutory body, by a self regulatory mechanism.*
- 15.28 *The First Respondent argues repeatedly that “Zimbabwe cannot be the exception” in the world. Sadly, this Act and the sections dealt with herein particular – if upheld – do indeed make the country just that.*
- 15.29 *International law and most constitutions, including the Constitution of Zimbabwe, permit only those restrictions on fundamental rights that are provided by law. This implies not only that the restriction is based in law but also that the relevant law meets certain standards of clarity and accessibility, sometimes referred to as the “void of vagueness” doctrine. The European Court of Human Rights elaborated on the requirement of “prescribed by law” under the ECHR:*

“[A] norm cannot be regarded as a “law” unless it is formulated

with/...

with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.”

Vague provisions are susceptible of wide interpretation by both authorities and those subject to the law. As a result, they are in invitation to abuse and authorities may seek to apply them in situations that bear no relation to the original purpose of the law or to the legitimate aim sought to be achieved. Vague provisions also fail to provide sufficient notice of exactly what conduct is prohibited or prescribed as individuals stay clear of the potential zone of application in order to avoid censure.

The requirement of “provided by law” also prohibits laws that grant authorities excessively broad discretionary powers to limit expression. In Re Ontario Film and Video Appreciation Society v Ontario Board of Censors, (1983) 31 O.R. (2d) 583 ONT H.C. p592 the Ontario High Court considered a law granting the Board of Censors power to censor any film it did not approve of. In striking down the law, the Court noted that the evils of vagueness extend to situations in which unfettered discretion is granted to public authorities responsible for enforcing the law:

“It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must articulated with some precision or they cannot be considered to be law.”

In The Sunday Times v United Kingdom the UN Human Rights Committee 24th July 2002 CCPR/CO/69K.G.Z. para 21 has expressed concern about excessive discretion in the context of licensing the media:

“21. The Committee expresses its concern ... about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters.”

15.30 Section 79 of the AIPPA states:

(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;....

Pursuant to section 91(2)(p), the Minister has the power to set these standards.

This provision is central to the entire licensing system and yet it is impossibly vague. No indication is given of what should constitute either “prescribed formalities”, or “prescribed standards”, nor are any limitations imposed on the content of these two conditions for obtaining a licence. As a result, these provisions vest too much discretionary power to restriction freedom of expression in a government body and fail

to/...

to provide for any control mechanism or consultation process. They thus fail to meet the standards required under the provided by law part of the test for restrictions on freedom of expression.

It may be noted that the greater the intrusion on freedom of expression, the more confined the exercise of discretion needs to be. In this case, the discretionary power can be used to completely deny someone the right to exercise their right to freedom of expression through the media by barring access to the journalism profession, a very grave intrusion indeed.

We submit, therefore, that subsections 79(5)(a) and (b), in tandem with section 91(2)(p), grant an excessive measure of discretion to politically linked individuals and bodies and thus do not satisfy the requirement that restrictions on freedom of expression be “provided by law.”

15.31 The ICCPR provides a full list of the aims that may justify a restriction on freedom of expression. It is quite clear from both the wording of Article 19 of the ICCPR and the views of the UN Human Rights Committee that restrictions on freedom of expression that do not serve one of the legitimate aims listed in paragraph 19(3) are not valid. This is also the

position/...

position under the ECHR and the ACHR. Many national constitutions, including the Constitution of Zimbabwe, mirror this approach, providing a full list of all aims that may justify a restriction on freedom of expression.

It is not sufficient, to satisfy this second part of the test for restrictions on freedom of expression, that the restriction in question has a merely incidental effect on the legitimate aim. The restriction must be primarily directed at that aim, as the Indian Supreme Court has noted: (THAPPAR v STATE OF MADRAS (1950) SCR 594 at 603

“So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.”

In assessing the legitimate aim, courts go beyond the general aim the law serves and look at its specific objectives. As the Canadian Supreme Court has noted:

“Justification under s.1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees.” (R v ZUNDEL(1992) 2 SCR 731 at p. 733

In assessing whether a restriction on freedom of expression addresses a legitimate aim, regard must be had to both its purpose and its effect. Where the original purpose was to achieve an aim other than one of those listed, the restriction cannot be upheld. As the Canadian Supreme Court has noted:

“[B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.” (R v BIGMDRUG MART LIMITED (1985) 15CR 295 at p. 331

It may be noted that the list of legitimate aims in section 20 of the Constitution of Zimbabwe goes beyond those allowed under international instruments, additionally including public safety and the economic interests of the State. The former presumably falls largely, if not entirely, within the ambit of public order, recognised as a legitimate public aim under the ICCPR. The latter – the economic interests of the State – is not, under international law, considered a legitimate ground for restricting expression. It is therefore incumbent upon Zimbabwean courts to construe it narrowly, so as to minimize any potential breach by Zimbabwe of its international obligations.

15.32 *It is not immediately clear what the aims of the licensing system for journalists in AIPPA are. The First Respondent suggests in his Affidavit various harms that must be avoided, including protecting society because it “risks being destroyed by an irresponsible media which has no regulations to curb the dangerous excesses” (para.3.16.2). As an example of this, the First Respondent claims that negative publicity has damaged the country’s economy, particularly the tourism and investment sectors (para. 3.16.3). The First Respondent also cites the need to address the “deterioration of journalism” (para.3.8.3) as justification for the legislation.*

The first of these harms is, with respect, simply not attributable to the media, either in general or as regards the specific example cited. Indeed, it is perhaps ironic to note that nothing could be more harmful to tourism or investment than imposing harsh restrictions on freedom of the media, including through AIPPA. In those very rare instances where expression really does pose a risk to society, as in the example from Rwanda posited by the First Respondent, this should be addressed through the criminal law, not by generalised restrictions on all journalists. In this regard, I respectfully refer the Court to the Public Order and Security Act Chapter 11.17 and the common law. Sedition is an offense.

Promotion of professional standards is the main goal of self-regulatory systems for the media and so it seems reasonable to assume that one aim of the AIPPA licensing system is to address this as well. There are two problems with this as a goal. First, promotion of professional standards is not, on its own, one of the legitimate aims listed in either the ICCPR or the Constitution of Zimbabwe. The only legitimate aim to which promoting professionalism might relate is the rights of others. It may be noted that the rights of others already finds protection in a number of restrictions on freedom of expression, including some found in AIPPA, such as defamation law, rules on protection of privacy and laws prohibiting hate speech. Furthermore, as noted above, in order to be justified, the aim of a restriction must have more than a tangential link to one of the enumerated

legitimate/...

legitimate aims. Promoting professionalism comprises far more than promoting the rights of others, and so the latter can at best be seen as a tangential goal of the contested provisions.

Second, and more serious, the system as envisaged goes far beyond what would be required simply to promote professionalism. To achieve this end, there is, in particular, no need to require journalists to have their licenses renewed annually, no need to vest virtually unfettered discretion in both the Minister and Commission to set the conditions for obtaining and holding a licence, and no need to provide for highly intrusive sanctions which include effectively being banned from the profession. In all these respects, the system may be contrasted with the self-regulatory systems in place in many countries that, more-or-less effectively, promote high professional standards in the media.

Taken as a whole, it is hard to avoid the conclusion that the real purpose of the licensing system established by AIPPA is to provide the Government with a measure of control over journalists and to prevent or at least limit critical reporting.

As a result, I submit that the licensing system for journalists imposed by the contested provisions of AIPPA does not serve a legitimate aim as required by the Constitution of Zimbabwe or under international law.

15.33 A number of persuasive international bodies have made it clear that the mandatory licensing of journalists constitutes a violation of the right to freedom of expression.

United Nations

Within the UN, the Human Rights Committee has on several occasions made it clear that licensing systems for either the press or journalists which afford discretion to refuse licenses are contrary to the guarantee of freedom of expression.

In 1999, for example, the Committee noted, in respect of Lesotho's regular report:

23. The Committee is concerned that the relevant authority under the Printing and Publishing Act has unfettered discretionary power to grant or to refuse registration to a newspaper, in contravention of article 19 of the Covenant. (8th April 1999 CCPR/C/79/Add 106 para 23)

The same year, the Committee expressed concern about the newspaper licensing laws in Cambodia:

18. The Committee is concerned at ... the Press Laws which impose license requirements (27th July 1999, CCPR/C/79/Add 108 para 18).

Earlier this year, the Committee expressed concern about restrictions on the exercise of the profession of journalism in Yemen:

21. The Committee expresses its concern about some restrictions under Yemeni legislation on freedom of the press and about the difficulties encountered by journalists in the exercise of their profession particularly when criticisms of the authorities are expressed (art. 19 of the Covenant).

The State party must ensure respect for the provisions of article 19 of the Covenant. (CCPR/CO/75/YEM para 21

Africa

Within Africa, the Windhoek Declaration on Promoting an Independent and Pluralistic African Press, was adopted in 1991 at a UNESCO-sponsored conference. It states that an independent press is essential to the development and maintenance of democracy in a nation. "Independent" in this context means:

[A] press independent from governmental, political or economic control, or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals. (Adopted 3 May, 1991 under the auspices of UNESCO)

At its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002,

the/...

the African Commission on Human and Peoples' Rights adopted a Declaration of Principles on Freedom of Expression in Africa. Principle X of the Declaration, entitled "Promoting Professionalism", states:

- 1. Media practitioners shall be free to organise themselves into unions and associations.*
- 2. The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.*

Furthermore, in relation to registration of the print media, the Declaration states, in Principle VIII, "Print Media":

- 1. Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.*

It is clear from this that the term "undue" in Principle X(2) would rule out any substantive conditions being imposed on the practise of journalism.

Other

Within Europe, a Declaration on the Freedom of Expression and Information was adopted in 1982 by the Committee of Ministers of the Council of Europe. Principle II states that the Member States:

Declare that in the field of information and mass media they seek to achieve the following objectives:

- a) Protection of everyone, regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source, as well as to impart them, under the conditions set out in Article 10 of the European Convention of Human Rights;*
- b) absence of censorship or any arbitrary controls or constraints on participants in the information process....*

The Inter-American Declaration of Principles on Freedom of Expression states at Principle 6:

“Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression. Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State.” (Approved by the Inter-American Commission on Human Rights during its 108 regular session, October 2000).

Thus globally persuasive statements have been made which make it clear that mandatory licensing of journalists is not a legitimate restriction on freedom of expression, particularly where the system imposes substantive conditions on the right to practise journalism.

15.34 Both the UN Human Rights Committee and all three regional systems for the protection of human rights have addressed the issue of licensing of newspapers and journalists in the context of contentious or advisory cases. The most important of these for our purposes, because it directly and comprehensively addresses the issue of mandatory licensing of journalists, is an advisory opinion decided by the Inter-American Court of Human Rights in 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism.

The case, which was referred to the Court by Costa Rica, addressed many of the same issues as those at issue in this case. The law under consideration in that case required anyone who wished to practise journalism to belong to a professional association and imposed certain substantive conditions on membership. Breach of these rules was an offence which could attract penal sanctions.

The question considered by the Court was whether the ends sought to be achieved by the legislation “fall within those authorized by the [American Convention on Human

Rights/...

Rights], that is, whether they are 'necessary to ensure: a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals.'"¹

The stated aims of the Costa Rican law – similar to the situation pertaining under AIPPA – included protecting the general welfare of society and promoting ethics and public accountability. The Costa Rican law also sought to promote general social welfare by guaranteeing the publication of objective and truthful information as required by codes of professional responsibility and ethics. The Court held that these were not legitimate aims for restricting freedom of expression, that the means employed were excessively restrictive and that the system was not, as a result, a justifiable restriction on freedom of expression.

Due to the similarity between this case and the one currently before this Court, it is worth quoting extensively from the decision of the Inter-American Court of Human Rights:

67. *[Both general welfare and public order] can be used as much to affirm the rights of the individual against the exercise of governmental power as to justify the imposition of limitations on the exercise of those rights in the name of collective interests. In this respect, the Court wishes to emphasize that*

“public order” or “general welfare” may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content. Those concepts, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the “just demands” of a “democratic” society, which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.

71. *...[J]ournalism is the primary and principal manifestation of freedom of expression and 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 “collegio.”*

72, *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/...

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 Convention guarantees.

73. *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....*

77. *The argument that licensing is a way to guarantee society objective and truthful information by means of codes of professional responsibility and ethics, is based on considerations of general welfare. But, in truth, as has been shown, general welfare requires the greatest possible amount of information, and it is the full exercise of the right of expression that benefits this general welfare. In principle, it would be a contradiction to invoke a restriction to freedom of expression as a means of guaranteeing it. Such an approach would ignore the primary and fundamental character of that right, which belongs to each and every individual as well as the public at large. A system that controls the right of*
expression/...

expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has....

81. It follows from what has been said that a law licensing journalists, which does not allow those who are not members of the "colegio" to practice journalism and limits access to the "colegio" to university graduates who have specialized in certain fields, is not compatible with the Convention. Such a law would contain restrictions to freedom of expression that are not authorized by Article 13(2) of the Convention and would consequently be in violation not only the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference.²

The Court thus concluded that reasons which may justify legal regulation of other professions do not apply to journalists because this would effectively deprive those who are not licensed of the right to exercise their freedom of expression.

The UN Human Rights Committee has not decided a case involving the issue of licensing of journalists, but it has expressed concern about laws requiring the registration of newspapers which either imposed substantive conditions as a pre-requisite for such registration or which imposed excessively onerous registration requirements on newspapers. In a case from Belarus, the Committee had to consider a registration requirement which required a newspaper with a circulation of just 200 copies to register. The Committee was very sceptical of the State's claim that these measures were necessary to protect public order or the rights of others, stating:

In the absence of any explanation justifying the registration requirements and the measures taken, it is the view of the Committee that these cannot be deemed necessary for the protection of public order (ordre public) or for respect of the rights or reputations of others. The Committee therefore finds that article 19, paragraph 2, has been violated in the present case. (Laptsevich v Belarus, 20 March 2000, Communication No. 780/1997, para 8.5)

The Committee also held that the registration requirements in that case were excessively onerous for a publication with a circulation of just 200 copies.³

The African Commission on Human and Peoples' Rights has similarly decided only cases involving registration of newspapers, not licensing of journalists. One case from

Nigeria involved a legal requirement for newspapers to register, with discretion on the part of the authorities to refuse registration. The Commission stated:

A payment of a registration fee and a pre-registration deposit for payment of penalty or damages is not in itself contrary to the right to the freedom of expression. The government has argued that these fees are “justifiable in any democratic society”, and the Commission does not categorically disagree....

Of more concern is the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9.1. There has thus been a violation of Article 9.1. (Media Rights Agenda and Others V Nigeria, note 11, paras. 55 and 57).

One of the early cases decided by the European Court of Human Rights considered the legitimacy of an order depriving an individual of the right to practise journalism, as part of an ongoing sentence in a criminal case. The individual in question, de Becker, had been convicted in Belgium of collaborating with the German authorities and sentenced to life imprisonment. The sentence of imprisonment was later commuted and de Becker released. However, de Becker’s punishment carried with it a prohibition on participating

in/...

in any way in the publication of a newspaper. The European Commission of Human Rights held that this was a breach of his right to freedom of expression and referred the case to the Court. By the time the Court heard the case, Belgium had amended the law so that de Becker's right to freedom of expression was no longer restricted and the case was struck off the list as a result. De Becker v Belgium, 23 March 1962, Application no. 214/56. However, the case is widely understood as standing for the proposition that depriving individuals of the right to practise journalism, even as part of a criminal sanction, it is not a justifiable restriction on freedom of expression. Depriving an individual of this right outside of the context of a criminal case would, a fortiori, represent a breach.

National courts have also held that licensing of journalists is a breach of the right to freedom of expression. An attempt to establish a statutory body to regulate journalists was struck down by the High Court of Zambia in a decision released in August 1997.⁴ On 17 June 1995, the Information Minister, Keli Walubita, announced that the cabinet had given him 60 days to draft legislation to establish a statutory Media Association of Zambia (MAZ). Individuals would be required to register with MAZ before they could work as a journalist. The Press Association of Zambia (PAZA) filed an application for judicial review, claiming that the fact that they had not been consulted was a breach of the rules of natural justice and that the proposed legislation was, in any case,

unconstitutional. The Court issued a stay on any further action to establish a media body pending its decision.

In its 1997 decision, the High Court held that the “principles of procedural fairness demand that the Applicants be given adequate notice of the impending decision and be heard or allowed to make representation on its own behalf to defend its interest.” The Court therefore ordered the Government, should it decide to reintroduce the bill, to consult with the applicants.

Importantly, the Court also stressed that statutory licensing of journalists, as proposed in the legislation, would breach the rights to freedom of expression and association:

Exercise of [the power of Ministers pursuant to the Constitution to draft legislation] is not unfettered. They must be exercised within the framework of the Constitution.... [I]t cannot seriously be argued that the creation of the *Media Association* or any other regulatory body by the Government would be in furtherance of the ideals embodied in the Constitution, vis-à-vis freedom of expression and association.

The decision is particularly noteworthy for its extremely wide application. In effect, the Court ruled that any statutory attempt to license journalists would breach the right to freedom of expression, regardless of the form that attempt took. In this, it reflects the decision of the Inter-American Court of Human Rights.

15.34.1 *The mandatory licensing system under AIPPA is not reasonably justifiable in a democratic society. Mandatory licensing of journalists, particularly where there is a possibility of a license being refused on substantive grounds, cannot be justified as a restriction on freedom of expression. The law is not rationally connected to any legitimate aim, has not been carefully tailored to achieve its purported goals so as to impair freedom of expression as little possible and, in any case, the harm to freedom of expression is disproportionate to any possible benefit.*

15.34.2 *As noted above, the only possible legitimate goal for the licensing system is to protect the rights of others by promoting professional standards. The approach adopted cannot be said to be rationally connected to this goal. As noted above, promoting professional standards goes far beyond protecting the rights of others.*

A rational approach would involve specific rules, narrowly tailored to protecting specific rights. This approach is reflected in narrowly drafted laws on defamation and hate speech.

15.34.3 *The fact that most other democratic countries, do not employ such licensing procedures shows that they are not necessary to protect any legitimate interest.*

15.34.4 *Even if a licensing system could be legitimate, the system in question fails to impair the right as little as possible. First, the extremely severe sanctions associated with the licensing system, including possible exclusion from the profession, are unnecessarily harsh for the goal of promoting professional standards.*

As the experience in other countries shows, far less intrusive sanctions, such as requiring the offending media outlet to print a decision acknowledging its breach, overseen by self-regulatory bodies, are sufficient to this end.

15.34.5 *Second, under AIPPA, the Minister and Commission have almost unfettered power to set conditions for obtaining and keeping a license to practise journalism. This clearly allows for the possibility of political bias and a lack of fairness in implementation of the system. It is equally clearly unnecessary. The “prescribed qualifications” could easily have been set out in the law, as could the code of conduct, or at least the categories for the code. At the very minimum, conditions on these powers should have been included in the law.*

15.34.6 *Third, the rule that a license must be renewed annually is clearly oppressive, unnecessary and open to abuse.*

15.34.7 *Finally, the consequences for failing to adhere to the licensing requirements imposed by the AIPPA are totally disproportionate to the potential harm that the system is meant to prevent.*

Journalists can be denied access to their profession, deprived of their livelihood, fined and even imprisoned for violations of the Act. Sanctions are not restricted to serious offences but can be imposed for breach of any of the Act's provisions. Such a harsh consequence for what amounts to a very broad range of activities does not serve society's best interests. Rather, it creates a massive chilling effect: journalists, or aspiring journalists, will self-censor in order to avoid reprisal.

15.34.8 *I submit, therefore, that the mandatory licensing system for journalists under AIPPA cannot be justified as necessary or reasonably justifiable in a democratic society.*

15.35 *The licensing system for journalists under AIPPA is also contrary to the guarantee of freedom of expression because of the lack of independence of the body responsible for licensing, the Media and Information Commission.*

It is well established under international and comparative law that licensing and other regulatory powers in relation to the media and journalists must be exercised by bodies that are independent of political or commercial control.

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The reason is obvious: otherwise, those vested with such control will be tempted to use their power to interfere and thereby restrict freedom of expression.

If a body which is subject to political interference can prohibit a journalist from practising his or her profession, journalists will, out of fear of this extreme sanction, exercise caution when criticising the government or senior political figures.

This is clearly contrary not only to their right to freedom of expression but also the public's right to a free flow of information and ideas, particularly important in relation to senior political figures.

Protection against such interference is, in regulatory systems around the world, provided in a number of ways, including through the manner of appointing members to regulatory bodies and by protecting their tenure, by ensuring members are not subject to conflicts of interest, by ensuring that processes and regulatory instruments, such as any codes of conduct, are developed in close consultation with those affected and other interested parties, and by ensuring that licensing and/or registration processes are clear, open and fair.

The Commission, responsible for licensing journalists, stands in stark

contrast/...

contrast to these standards. All of the 5 to 7 members of the Commission's governing Board are appointed by the Minister, after consultation with the President. The Fourth and Fifth Schedules give the *Minister broad powers over members, including the power to set the terms of office, as well as other terms and conditions, including allowances, and to remove a member on a number of grounds, some of which are highly subjective. The Minister also appoints both the chair and the vice-chair of the Board.*

As has been noted above, the Commission's powers in relation to licensing journalists are formidable and the consequences of not being licensed are very severe, involving exclusion from the profession of journalism.

- 15.36.1 *Within the UN system, both the Human Rights Committee and the Special Rapporteur on Freedom of Opinion and Expression have made statements on this issue, primarily in the context of broadcast regulation. On a number of occasions in recent years, the Human Rights Committee has expressed concern about the lack of independence of regulatory authorities. In 1997, for example, the UN Human Rights Committee expressed concern about the licensing system for the press in Sudan:*

18. *The Committee is concerned at the system of licensing the press and other media, and the requirement to register the names and addresses of editors, journalists and printers. The Committee questions the independence of the National Press and Publication Council. Therefore:*

“Current laws and decrees should be revised so as to remove all disproportionate limitations on the media, which have the effect of jeopardizing freedom of expression itself.”
(Concluding Observations on Sudan’s Second Periodic Report, 19 November 1997, UN Doc. CCPR/C/79/Add.85, para. 18.

15.36.2 *The Committee made a clear statement on the need for independent broadcast authorities in its Concluding Observations on Lebanon’s Second Periodic Report, where it stated:*

355. The Committee therefore recommends that the State party review and amend the Media Law of November 1994, as well as its implementing decree, with a view to bringing it into conformity with article 19 of the Covenant. It recommends that the State party establish an independent broadcasting licensing authority, with the power to examine broadcasting applications and to grant licences in accordance with reasonable and objective criteria. (Annual Report of the UN Human Rights Committee, 21 September 1997, UN Doc. A/52/40)

The UN Special Rapporteur on Freedom of Opinion and Expression has also stressed the need for independent regulation of broadcasting, stating:

15. The Special Rapporteur continues to receive allegations of bias in broadcasting which severely limits or seriously compromises the right to seek, receive and impart information. In this regard, the Special Rapporteur wishes to recall points made in previous reports.

16. There are several fundamental principles which, if promoted and respected, enhance the right to seek, receive and impart information. These principles are...laws governing the registration of media and the allocation of broadcasting frequencies must be clear and balanced; any regulatory mechanism, whether for electronic or print media, should be independent of all political parties and function at an arms-length relationship to Government.... (Annual Report of the Special Rapporteur to the UN Commission on Human Rights, 29 January 1999, UN Doc.E/CN.4/1998/40, para. 20, where the Special Rapporteur noted the need for independent regulatory frameworks for private broadcasters).

15.36.3 The case before the African Commission on Human and Peoples' Rights challenging, among other things, a law establishing a licensing system and registration board for the print media is note worthy. Although the Commission noted that registration itself was not contrary to the guarantee of freedom of expression, it was concerned that the licensing body was not independent of government and had broad discretionary powers to refuse registration:

Of more concern is the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9.1 There has thus been a violation of Article 9.1 [guaranteeing the right to receive information]. (Media Rights Agenda v Nigeria).

15.36.4 Principle VII of the Declaration of Principles on Freedom of Expression in Africa, entitled, "Regulatory Bodies for Broadcast and Telecommunications" states:

- 1. Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.*
- 2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.*
- 3. Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.*

Although these statements are directed at broadcasting and telecommunications, the same underlying principles clearly apply to licensing of journalists or the print media.

Other International Statements

15.36.5 *The need for independent regulatory mechanisms for broadcasting finds strong support in a recommendation adopted recently by the Committee of Ministers of the Council of Europe, Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector. (Recommendation (2000) 23, adopted 20 December 2000.) The Recommendation includes a set of Guidelines regarding broadcast regulatory bodies; the first three sections are of particular relevance here:*

1. *Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.*

2. *The duties and powers of regulatory authorities for the broadcasting sector, as well as the ways of making them accountable, the procedures for appointment of their members and the means of their funding should be clearly defined in law.*

3. *The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.*

15.36.6 *The Inter-American Declaration of Principles on Freedom of Expression, recently adopted by the Inter-American Commission on Human Rights, reiterates the need for independent regulation of broadcasting:*

13. *...the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner.... (Adopted at the 108th regular session, October 2000).*

15.36.7 *ARTICLE 19 has adopted a set of principles, drawn from international law and practice relating to broadcasting, entitled, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation. (London: 2002) Principle 10 reads as follows:*

All public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature. The legal status of these bodies should be clearly defined in law. Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:

- *specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;*
- *by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;*
- *through the rules relating to membership;*
- *by formal accountability to the public through a multi-party body; and*
- *in funding arrangements.*

15.36.7 These international statements have been echoed by a number of national courts.

Athukorale and Others v. Attorney-General involved a challenge before the Supreme Court of Sri Lanka to a Broadcasting Bill. One of the key issues was the lack of independence of the Broadcasting Authority. The Court held that the Bill was unconstitutional, among other things because the Broadcasting Authority was insufficiently independent, stating:

While a regulatory authority is, for the reasons explained, necessary, it is imperative that such an authority should be independent.... The airways/frequencies, as we have seen, are universally regarded as public property. In this area, a government is a trustee for the public: its right and duty is to provide an independent statutory authority to safeguard the interests of the People in the exercise of their fundamental rights: No more and no less. Otherwise the freedoms of thought and speech, including the right to information, will be placed in jeopardy. (Supreme Court of Sri Lanka, 5 May 1997, S.D. No. 1/97-15/97, p.22.)

The Broadcasting Authority in that case was made up of five members appointed by the Minister and six ex officio members, five of whom were secretaries to ministries or their representatives. The Minister also had various additional powers, including to remove members. The Sri Lankan Supreme Court noted:

“Having regard to the composition of the Board of Directors of the Authority, the lack of security of tenure in office either of the Chairman or of the appointed members, and having regard to the power of the Minister to give directions which the Authority is obliged to follow, the Authority...lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.

- 15.36.8 *The Constitutional Courts of both Germany and Italy have stressed the need for broadcast regulators to be independent of Government. As far back as 1974, the Italian Constitutional Court held that radio and television should be under parliamentary, not executive, control to ensure independence. (Decision 225/1974 [1974] Guir. cost. 1775. [The material in this argument on French, German and Italian constitutional decisions is drawn from Barendt, E., *Broadcasting Law: A Comparative Survey* (1995, Clarendon Press, Oxford)] Similarly, the German Constitutional Court held unconstitutional the establishment of a government-controlled national broadcaster as contrary to the guarantee of freedom of expression. (First Television case, 12 BverfGE 205 (1961) Later on, the same Court held that licensing criteria should be set out in the law, not left up to the licensing body, even if it were independent, so as to ensure fair and equal access to broadcasting. (Third Television case, 57 BverfGE 295 (1981).*

The need to confine the discretion of the licensing body was further developed in later cases. (See Fourth Television case, 73 BverfGE 118 (1986) and Sixth Television case, 83 BverfGE 238 (1991))

*In **New Patriotic Party v. Ghana Broadcasting Corp.**, the key issue was equitable access of political parties to the State broadcaster. However, the Supreme Court of Ghana noted that one role of the independent broadcast regulator was, "to breathe the air of independence into the state media to ensure that they are insulated from Governmental control. (30 November 1993, Writ No. 1/93, p.13).*

There is no question but that the Commission lacks independence from the Government. The Commission is established in section 38 of AIPPA and its powers are listed in section 39, including in relation to registration and promoting ethical and professional standards.

Pursuant to section 40, the Commission is governed by a Board of 5 to 7 members, all of whose members are appointed by the Minister responsible for information, after consultation with the President. At present, at least three members of the Board need to be nominated by an association of journalists and an association of media houses but the amendments currently being considered would remove that condition on appointment. Pursuant to section 42, the Board must report annually to the Minister.

Pursuant to sections 40(3) and 41, respectively, the Fourth and Fifth Schedules apply to the Board. Together, these Schedules give the Minister broad powers over members.

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The Minister sets the term of office, as well as other terms and conditions of office (Fourth Schedule, para. 1), including allowances (Fourth Schedule, para. 8), and may remove a member on a number of grounds, some of which are highly subjective, for example, where the member has conducted him- or herself in a manner which “renders him unsuitable” (Fourth Schedule, para. 4). The Minister also appoints both the chair and the vice-chair of the Board (Fourth Schedule, para. 6).

Paragraph 2 of the Fourth Schedule imposes certain restrictions on who may be appointed to the Commission, prohibiting the appointment of individuals where this might constitute a conflict of interest or who have been convicted of a crime. However, it imposes very limited restrictions on individuals with strong political connections, prohibiting only sitting Members of Parliament and individuals who already sit on two statutory bodies from being appointed.

Cumulatively, these provisions give the Minister enormous control over the Board. In particular, members are appointed by the Minister, without any requirement that the process be open or transparent or involve civil society, and members have very little protection against dismissal, which can be based on vague and subjective grounds. The powers of the Minister, acting with the President of Zimbabwe, under AIPPA exceed those struck down as unacceptable in the Athukorale case from Sri Lanka, noted above. The Commission is clearly not independent, which represents a restriction on freedom of expression, as outlined above.

17. It is respectfully submitted that the commercial nature of the media is irrelevant for the purposes of asserting the rights contained in the declaration. Section 24 subsection 1 of the Constitution gives protection to any “person”. Indeed, in the **RETROFIT** case, this Court decided that the rights are accorded even to a commercial corporation. In **AUTRONIC AG v SWITZERLAND (1990) 12 EHRR 485** at paragraph 47, the European Court of Human Rights observed that ***“In the court’s view, neither Autocrat AG’s legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autocrat AG of the protection of Article 10. The Article applies to everyone, whether natural or legal persons. The court has, moreover, already held on three occasions that it is applicable to profit making corporate bodies.”*** (See Page 208 of the **RETROFIT** judgment). It is perhaps necessary to state the obvious that the issue in the **RETROFIT** case was means of communicating ideas, information and opinion. It is, furthermore, necessary to restate that the means in the **RETROFIT** case were required for financial gain. In any event, the suggestion that information, ideas and opinions with marketable value are not protected whereas worthless information, ideas and opinions in respect of which no buyer can be found are protected, as appears to be argued by the First Respondent, defies logic.

Furthermore and in any event, the suggestion that freedom of expression is limited to expression of one’s own information, idea and beliefs is not supported by the wording of the constitution and decided cases. **RETROFIT** was not going into business to communicate its own information, ideas and opinions.

The constitution protects both imparting and receiving information, ideas and opinions. Normal people do not spend time receiving their information, ideas and opinions.

18. In the premises the Applicants pray for an order in terms of the draft attached to the application.

DATED at **HARARE** on this the 21st day of NOVEMBER 2002.

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TO: **THE REGISTRAR**
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AND TO: **THE MEDIA AND INFORMATION COMMISSION**
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AND TO: **THE ATTORNEY GENERAL OF ZIMBABWE**
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**IN THE SUPREME COURT OF ZIMBABWE
HELD AT HARARE**

CASE NO. S.C. 252/2002

In the matter between:

ASSOCIATION OF INDEPENDENT JOURNALISTS

First Applicant

and

ABEL TICHARWA MUTSAKANI

Second Applicant

and

VINCENT KAHYA

Third Applicant

and

**THE MINISTER OF STATE FOR INFORMATION AND
PUBLICITY IN THE PRESIDENT'S OFFICE**

First Respondent

and

MEDIA AND INFORMATION COMMISSION

Second Respondent

and

THE ATTORNEY GENERAL OF ZIMBABWE

Third Respondent

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AVAILABLE. COMPILED WITH THE ASSISTANCE OF PROFESSOR G FELTOE,
ARTICLE 19 AND H BUSSIEK**

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| 9. | Chapter 5 of the Article 19 Handbook | (separately paginated) |
| 10. | Windhoek Declaration | (separate one page) |

DATED at **HARARE** on this the 21st day of **NOVEMBER** 2002.

.....
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