Disparaging Language (*ex curia*) as a Barrier in Individual Complaints before the European Court of Human Rights (*Zhdanov v Russia*)—Lessons for the African System?

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Abstract

On 16 July 2019, the European Court of Human Rights (ECtHR) rejected an application by Russian human rights activist, Nikolay Alekseyev, on the basis that he had published personally offensive and threatening material online, directed towards the ECtHR. This was in the matter of *Zhdanov and Others v Russia* Applications Nos 12200/08, 35949/11 and 58282/12. Even though the published material fell afoul of the European Convention in that it amounted to an abuse of the court process, nothing offensive was contained in the applicant's own submissions before the court. In like fashion to the ECtHR's admissibility requirements, the African Charter contains a much more pointed exclusionary clause which renders inadmissible any communication that contains disparaging or insulting language. The difference between the two systems is that the European system relies on an open-ended concept of 'abuse of the right of individual petition', whilst the African system specifically proscribes insulting language. In this article, I analyse the approach of the ECtHR in the *Zhdanov* matter, and contrast it with the approach of the African Commission on Human and Peoples' Rights (the African Commission) under Article 56(3) of the African Charter on Human and Peoples' Rights. I further interrogate whether there were any instances where, in similar fashion to the *Zhdanov* matter, the African Commission declared a communication inadmissible on account of insulting language occurring externally, and not contained within the submission itself. Alive to the fact that the concept of 'abuse' in the European system is wide, the article is limited to cases in which the abuse of the right of individual petition under the European Convention manifests in disparaging or insulting language.

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Background

In mid-2019, the European Court of Human Rights (ECtHR) delivered a judgment in a matter involving the alleged violation of the rights of members of a sexual minority in Russia. The matter originated from three separate complaints brought against the Russian Federation by three non-governmental organisations (NGOs),[1] and four Russian nationals. The four Russian nationals were Mr Aleksandr Zhdanov, Mr Nikolay Aleksandrovich Alekseyev, Mr Kirill Sergeyevich Nepomnyaschchiy, and Mr Aleksandr Sergeyevich Naumchik. The complaints were lodged under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).[2] This is the provision that permits aggrieved individuals to lodge complaints alleging a violation of rights in the ECtHR.

The application centred around the refusal by the Russian government to register associations that were established to promote and protect the rights of lesbian, gay, bisexual, and transgender (LGBT) people. They alleged before the court that the refusal to register these institutions violated their fundamental freedoms, namely freedom of association. They further alleged that the actions of the government amounted to discrimination on the grounds of sexual orientation.

In application No 12200/08, *Zhdanov and Rainbow House v Russia*, Zhdanov was the president of Rainbow House, whose sole mandate was to lobby for the protection of the sexual rights of Russian citizens. Zhdanov had opened a club for members of the LGBT community in April 2005, which became notorious for its parties. On a fateful day, his club was shut down by police and armed para-military forces, which arrested everyone found on the premises. In the same year, his attempts to organise pride marches in Zhdanov's town were quashed by the local authorities.[3] Eventually, in the same year, an attempt to register Rainbow House to defend LGBT people faced similar resistance from the government.[4] In 2006, relying on expert legal opinion, the registration authority refused to register Rainbow House. The main reason for its refusal was that

1 The three NGOs were: (i) the regional public association 'Rainbow House'; (ii) an autonomous non-profit organisation movement for marriage equality; and (iii) the regional public sports movement 'Sochi Pride House'.

2 Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides as follows:'The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.'

3 Paragraphs 7–9.

4 Paragraph 11.

Rainbow House represented a danger to Russia's national security, in that the entity sought to spread non-traditional sexual orientation which was capable of 'destroying the moral values of society and undermining the sovereignty and territorial integrity of [Russia] by decreasing its population.'[5] Additionally, the registration authority considered that the proposed activities of Rainbow House rendered it an extremist organisation, and threatened the sanctity of constitutionally protected institutions such as the family and marriage.

In 2007, Zhdanov unsuccessfully appealed the decision through the Taganskiy District Court, which found that the registration authority's refusal to register the organisation was lawful, well-reasoned, and justified.[6] A further appeal to the Moscow City Court was also not successful, as this court confirmed the lower court's judgment.[7] A second attempt to register Rainbow House was also refused, with the authority citing the extremist nature of the organisation as a barrier.[8] It also cited minor irregularities such as failure to staple the application form and that the lease agreement the organisation had submitted was drawn up incorrectly.[9] Subsequent applications for registration were refused and a further appeal through the Russian courts was unsuccessful.[10]

The second application, application No 35949/11, *Alekseyev and Movement for Marriage Equality v Russia*, was brought by Mr Alekseyev and the Movement for Marriage Equality. Alekseyev was the founder and executive director of the Movement. In 2009, Alekseyev started an NGO to defend the human rights of people in the LGBT community. His organisation's focus was legal reform, to ensure that Russian laws were LGBT-friendly, in particular, to allow for same-sex marriages. His application for registration was refused by the Moscow Registration Department of the Ministry of Justice (Moscow Registration Authority).[11] The authority relied on the fact that the NGO's founding instrument was incompatible with Russian law. Alekseyev challenged the decision of the Moscow Registration Authority before the Gagarinsky District Court of Moscow. The court dismissed his complaint, holding that the aims of the NGO were incompatible with public order and morality. The court opined that the Movement sought to increase the number of LGBT citizens and undermine the conceptions of good and evil, of sin and virtue established in Russian society. A further consideration was that the Movement's actions could lead to a reduction in the birth rate.[12] Interestingly, the court went on to state that 'in accordance with national tradition, reflected in Article

5 Paragraph 14.
6 Paragraph 19.
7 Paragraph 20.
8 Paragraph 22.
9 Paragraph 22.
10 Paragraphs 25–30.
11 Paragraph 34.
12 Paragraph 36.

12 of the Family Code, marriage was a union of a man and a woman with the aim of giving birth to and raising children.'[13] The court's decision was upheld on appeal.[14]

In the third matter, application No 58282/12, *Alekseyev v Russia*, Alekseyev and the other applicants decided to create Sochi Pride House to promote and defend the rights of LGBT people within the sporting fraternity. They sought to 'combat homophobia in professional sport', and to create 'a forum for LGBT people during the Sochi Olympic Games.'[15] Their application for registration was refused by the Krasnodar registration authority on the basis of incompatibility with Russian law and the fact that the name of the fourth applicant (Sochi Pride House) contained words that did not exist in the Russian language.[16] This was in reference to the words 'pride' and 'house'. They appealed to the Pervomayskiy District Court. Their argument that the words 'pride' and 'house' did not have an adequate equivalent in Russian, or that there were eleven other registered associations whose names contained the word 'pride' and forty with the word 'house', did not sway the court.[17] The applicants' appeal was also unsuccessful.

The ECtHR decided to join the three matters in accordance with rule 42(1) of its Rules of Court.[18]

Admissibility as Contra-distinguished from Jurisdiction

The concepts of jurisdiction and admissibility feature in almost all international law adjudication platforms. These two concepts are often confusing for scholars because of their similarities. However, McIntyre argues that they are 'as different as night and day'.[19] Paulson asserts that although strikingly similar, only a fool would argue that the existence of a thin dividing line between the two is proof that these two concepts do not exist.[20]

13 Paragraph 36.
14 Paragraph 37.
15 Paragraph 39.
16 Paragraph 41.
17 Paragraph 43.
18 Article 42 provides that:
(1) The Chamber may, either at the request of the parties or of its own motion, order the joinder of two or more applications.
(2) The President of the Chamber may, after consulting the parties, order that the proceedings in applications assigned to the same Chamber be conducted simultaneously, without prejudice to the decision of the Chamber on the joinder of the applications.
19 Juliette McIntyre, 'Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility before the International Court' (2018) 19 Melbourne J Intl L 1–40, 31.
20 Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen and Robert Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (International Chamber of Commerce 2005) 601, 603.

Jurisdiction on the one hand refers to the power of a court to hear and decide on a matter; in other words, to subject persons or things to that court's proceedings.[21] It is non-discretionary, it is concerned not only with the power to but an obligation to do so once the jurisdictional links have been established.[22] Admissibility on the other hand, has a discretionary character.[23] Ndiaye argues that admissibility 'refers to the character that an application, a pleading or evidence must present to be examined' by the court before which it serves.[24] Haiskanen asserts that whilst jurisdiction concerns the power to adjudicate a dispute, admissibility is more concerned with the circumstances in which an international tribunal is permitted to decline to exercise its legal powers. In other words, propriety and expedience lie at the core of admissibility.[25]

Whilst a court might have jurisdiction to entertain a particular complaint, it might nonetheless decline to do so on account of the complaint failing to meet the admissibility criteria. Pauwelyn and Salles assert that jurisdiction relates to a tribunal's authority, as determined by its own constitutive instruments; whilst admissibility is focused more on the procedural relationship between the parties, as determined by a set of legal norms binding on them.[26] This distinction between the two concepts, Pauwelyn and Salles argue, flowed firstly from the Statute of the International Court of Justice (the ICJ), and has now been embraced by many international dispute settlement tribunals. These include the ECtHR, the African Commission on Human and Peoples' Rights (African Commission), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).[27] Both these concepts are preliminary questions that the court must entertain before proceeding to the merits.

The ICJ has on many occasions attempted to proffer guidance on what admissibility entails. In the Oil Platforms (*Iran v US*) case, the court preferred the following to explain how admissibility works. It opined that where a party raises an objection to the admissibility of a matter, it is in essence asserting that, 'even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.'[28]

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21 Angelo Dube, *Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa* (Glienicke, Galda Verlag 2016), 4.

22 McIntyre (n 19) 31.

23 ibid.

24 Tafsir Ndiaye, 'Admissibility before the International Courts and Tribunals' (2018) 1(2) Journal of Law and Judicial System 21–48, 21.

25 Veijo Heiskanen, 'Questions of Jurisdiction and Admissibility before International Courts – Book Review' (2017) 18 Journal of World Investment and Trade 755–765, 756.

26 Joost Pauwelyn and Luiz Salles, 'Forum Shopping before International Tribunals: (Real) Concerns, (Im)possible Solutions' (2009) 42(1) Cornell Intl LJ 77–118, 94.

27 ibid 93.

28 Oil Platforms (*Iran v US*) 2003 ICJ 161, 177 (Nov 6) para 29.

In pronouncing on the distinction between the two concepts, the ICSID Tribunal in *Abaclat v Argentina* opined that:

> [g]enerically, the admissibility conditions relate to the claim, and whether it is ripe and capable of being examined judicially, as well as to the claimant, and whether he or she is legally empowered to bring the claim to court.[29]

The prevailing confusion between the two concepts is understandable. When a court refuses to deal with a matter based on its inadmissibility, it is in any case, exercising jurisdiction, albeit in a contingent manner. In other words, the court decides to exercise jurisdiction incidentally, in order to recognise and rule on the inadmissibility of the action and stop the proceedings without making a finding on the merits.[30]

It is clear from the foregoing that the value of the rules on admissibility for international adjudication is that they offer international courts the wherewithal to mediate between their legal powers, their institutional interests and concerns, and the prevailing environmental conditions.[31] Be that as it may, this concept evokes controversy and confusion in international law.[32] Owing to this controversy, unsuccessful litigants run the risk of insulting the very same tribunal in their comments after their findings have been published. Hence a tribunal that declines to hear a matter on the basis of inadmissibility alone may find itself embroiled in insulting commentary from the disgruntled litigant or complainant.

Disparaging language in communications before the ECtHR

Article 35(3)(a) of the European Convention provides that:

> 3. [t]he Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> (a) the application is … an abuse of the right of individual application.

The clause in the European Convention works in the same way as Article 56 of the African Charter on Human and Peoples' Rights (African Charter) which regulates how human rights complaints can be brought before both the African Commission, and the African Court of Justice and Human Rights (African Court). The text of the African Charter (discussed below) regarding the use of disparaging language was designed to filter insulting communications, rather than insulting expressions occurring outside the

29 *Abackat v Argentina*, Dissenting Opinion of Gorges Abi-Saab.
30 Pauwelyn and Salles (n 26) 96.
31 Yuval Shany, 'Jurisdiction and Admissibility' in Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 2.
32 ibid.

ambit of the African Commission. As long as a complainant does not insult the Commission, a state institution or official in its submitted papers, the Commission cannot censure that complainant's communications. Its European equivalent, however, provides for a more broad and malleable mechanism aimed at ensuring that complainants are also held to the same standard of accountability as state officials and state institutions. The European Convention's text is couched in terms that allow for flexibility in interpretation. It therefore allows for censure, during the admissibility analysis, even for expressions that are not necessarily contained in the submitted papers, so long as the offending expression flows from or is related to a matter of which the ECtHR was seized.

In its papers before the court, the Russian government argued that Mr Alekseyev's petition should fail because he had insulted the judges of the court on his social media accounts. This amounted to an abuse of his right to approach the court.[33] Mr Alekseyev's insults followed a rejection of his claims for non-pecuniary damage in the earlier case of *Alekseyev v Russia* (No 14988/09 of 27 November 2018).[34] The Russian government then informed the court, whilst the matter under review was ongoing, that Mr Alekseyev had taken to his Instagram and VKontakte social media accounts to publish the insulting comments in relation to the earlier case.

In Zhdanov, the ECtHR held that 'abuse' within the meaning of Article 35(3)(a) of the Convention must be interpreted in line with its ordinary meaning. In other words, 'abuse' must be seen as the harmful exercise of a right for the purposes inimical to those for which it was designed.[35]

The court went on to discuss two instances in which the Article 35(3) 'abuse' doctrine can be applicable. First, where a petitioner knowingly bases the application on untrue facts, the ECtHR may reject that application as an abuse of the right of petition. For example, in *Gross v Switzerland* the court admitted the complaint after finding that it was not manifestly ill-founded within the meaning of Article 35(3)(a) of the Convention, and that it was admissible on all the other grounds.[36] The government had alleged abuse of right of petition after counsel for the applicant failed to inform the court that the applicant had died eighteen months before the date of the hearing, and had thereby based the applicant's case on untrue facts, and calculated to mislead the court.[37]

33 Paragraph 76.
34 Paragraph 77.
35 *Zhdanov* para 79.
36 Communication 678/2010, *Gross v Switzerland*, Judgment (Merits and Just Satisfaction) 14 March 2013 para 40.
37 *Gross v Switzerland* paras 19–21.

The second instance where the ECtHR could regard a matter as constituting 'abuse' mirrors the Article 56(3) African Charter (discussed below) prohibition on disparaging or insulting language. Where an applicant uses in his application language which is considered to be vexatious, contemptuous, threatening, or provocative, s/he may have his or her application declared inadmissible.[38] This disparaging language must be contained in the communication with the court, and be directed at either the respondent government, their agent, the authorities of the respondent state, the court itself, its judges, its Registry or its members. The court was quick to underscore that the classification as 'abuse' does not apply to language that is sharp, polemical, or sarcastic.[39]

Relying on *Podeschi v San Marino*,[40] the court also emphasised that the above instances are not the only ones in which the abuse of the right to individual petition may manifest.[41] The court accepts that abuse shall consist in any conduct on the part of an applicant that is manifestly contrary to the purpose of the right of individual application provided for in the Convention. The conduct must be of such a nature as to impede the court from functioning properly or conducting its proceedings properly.[42] It must be noted that the court's understanding of 'abuse' is cast in very wide terms and as such can and does include expressions considered vexatious, even where they occur outside the parameters of submitting an application before the court.

In *Duringer v France* the court found that the petitioner's submissions amounted to 'abuse' because his application contained allegations touching on the integrity of the judges of the court and its Registry.[43] In *Stamoulakatos v The United Kingdom*, the European Commission found that a petitioner who had persistently used insulting and abusive language against the respondent government and its agent had violated Article 35(3)(a). The allegations raised in the applicant's papers were not accompanied by any evidence.[44]

It is worth noting that the court regards the rejection of matters that violate Article 35(3)(a) as an exceptional measure.[45] Where the court has asked the petitioner to revise the application, withdraw the offensive content, or the petitioner has expressly withdrawn or offered an apology for the offending language, 'abuse' will not be found to exist. Such an application can therefore no longer be rejected as an abuse of the court

38 *Zhdanov* para 80.
39 ibid.
40 Communication 66357/14, *Podeschi v San Marino* para 86.
41 *Zhdanov* para 81.
42 ibid para 81.
43 Communication 61164/2000 *Duringer v France*, Decision 4 February 2003, 2.
44 Communication 27567/1995, *Stamoulakatos v The United Kingdom*, Decision 9 April 1997.
45 *Mirolubovs v Latvia* para 62.

process.[46] In *Manoussons v The Czech Republic and Germany*, the court nonetheless admitted a matter in which the petitioner had used insulting language. In declaring that it did not find it appropriate to declare the application inadmissible for being abusive within the meaning of Article 35(3)(a), the court was influenced by three key considerations: (i) that the applicant's insulting expressions about Czech people in general and about Czech authorities were of rare occurrence within his voluminous submission; and (ii) that such vexatious expressions had ceased since the court's Registrar had cautioned the applicant.[47]

Whilst the ECtHR will reject an application that is couched in offensive language, it seems to be alive to the fact that there may be instances where such language may, when viewed in the totality of the circumstances, be warranted. For instance, in coming to a conclusion that the expressions of a petitioner are abusive, the court often indicates that it found 'nothing to warrant the language used'.[48] This choice of words on the part of the court implies that there may be instances where a disparaging communication might be found by the court to have been warranted. For instance, where a communication raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits, the court will most likely continue to consider a matter, even if it contains offensive language. The case of *Gongadze v Ukraine*,[49] in which a petitioner alleged that her journalist husband had been murdered by the respondent state is illustrative in this regard.

It must be stated at this stage that whilst the European Convention's 'abuse of the individual right to petition', could in certain circumstances have the same effect as the African Charter's Article 56(3) prohibition on disparaging and insulting language, this will not necessarily always be the case. Indeed, in the *Zhdanov* matter, the abuse of the individual right of petition related to the use of disparaging language. However, there are plenty of matters disposed of by the ECtHR in which the 'abuse' did not relate to the use of insulting language at all.

In *Mirolubovs v Latvia*,[50] the ECtHR dealt with a matter in which the state alleged that the application must be declared inadmissible on account of the fact that the applicants had released confidential communications between themselves and the government of Latvia, at the domestic level. The documents contained letters sent by the applicants to the Latvian Prime Minister, in which they questioned the competence and integrity of a

46 Communication 5964/2002, *Chernitsyn v Russia*, Judgment 6 April 2006 paras 25–28.

47 Communication 46468/1999, *Manoussons v The Czech Republic and Germany*, Decision 9 July 2002 para 1.

48 See for instance, Communication 27567/1995, *Stamoulakatos v The United Kingdom*, Decision 9 April 1997.

49 Communication 34056/2002, *Gongadze v Ukraine* Decision 22 March 2005.

50 Communication 798/2005, *Miralubovs v Latvia*, Judgment 15 September 2009.

state official, and those letters also referred to correspondence between the applicants and the court's registry, as well as other documents that were regarded as confidential. These included a possible friendly settlement from the government. The government argued that this was in violation of Article 38(2) of the Convention and Rule 62(2) of the Rules of Court on confidentiality, and amounted to an abuse of the right to individual petition. The applicants had therefore violated Article 35(3).

In dealing with the state's argument, the ECtHR was of the view that whilst disclosure of the contents of documents relating to a friendly settlement declaration to a third party could in principle amount to an abuse of the right of individual petition, this was not necessarily the case in every case. It opined that Article 35(3) was not an unconditional prohibition on showing or mentioning such documents to a third party.[51]

The court emphasised that what Article 38(2) and Rule 62(2) prohibits is the conduct of parties who publicise confidential information in a manner that makes that information liable to be read by a large number of people or by any other means. In the case at hand, the government of Latvia was unable to make the allegation or adduce evidence that the applicants had been at fault. The court therefore dismissed the objection raised by the government, essentially finding that there was no abuse of the right of individual petition.[52]

The right of the ECtHR to exclude disparaging applications may at face value look like a denial of the right to access courts. However, Article 10 of the European Convention makes provision for the court to do exactly that. The article provides for freedom of expression, which litigants exercise when they submit papers before the court. However, Article 10(2) stipulates that this right carries with it duties and responsibilities. It proceeds to state that this right may be 'subject to such formalities, conditions, restrictions or penalties' as prescribed by law, to the extent that this is necessary in a democratic society. The provision lists 'maintaining the authority and impartiality of the judiciary' as one of the grounds that could be raised to support a limitation of the freedom of expression of litigants. Thus, it can be argued that when the ECtHR rejects an insulting application, it is merely trying to protect its authority as empowered by Article 10(2).

The Legal Frameworks of the African Human Rights System

As demonstrated by the foregoing, the submission of complaints to human rights protection tribunals at the international level is often guided by highly circumscribed regulations. Under the African human rights protection system, admissibility of cases is

51 ibid 2.
52 ibid 2.

regulated by Article 56 of the African Charter. It originally regulated matters that were submitted for consideration by the African Commission. However, as Africa's international justice system developed, this set standard of six prerequisites was adopted by other treaties as the preferred admissibility criteria for matters submitted to them. For example, in its founding instrument, the African Court makes reference to Article 56 of the African Charter. In terms of Article 6(2) of the Court Protocol, the court is enjoined to consider Article 56 of the African Charter when ruling on the admissibility of cases. It is worth noting that unlike in the *Zhdanov* case, the African admissibility criteria is concerned with the elimination of disparaging or insulting language at the level of submitting a communication. In other words, what is critical is that the language in which the communication is couched should not be insulting, not whether the complainant expressed himself or herself in an insulting manner outside the parameters of the individual complaints mechanism. For instance, in *Romy Goornah (represented by Dev Hurnam) v Mauritius* the African Commission perused the complainant's papers and noted that having found that the communication was not written in disparaging language, it was compatible with the African Charter.[53] The Commission, however, declared it inadmissible because the complainant had taken over three years from exhausting local remedies to approach the Commission, thereby violating Article 56(6) of the African Charter.[54]

Article 56 provides six grounds which every application under the African system must satisfy.[55] Of note is Article 56(3) which provides that the communication must not be couched in offensive terms, stating that: 'The application must not be written in disparaging or insulting language directed at the state or its institutions, or the AU.' Sabelo Gumedze decries the fact that the text of the provision contains terms

53 Communication 596/2016, *Romy Goornah (represented by Dev Hurnam) v Mauritius* para 50.

54 Paragraph 64.

55 Article 56, in its totality, provides as follows:

(1) The authors must be indicated or identified, even if they request anonymity;
(2) The application must be compatible with the Charter of the Organisation of African Unity or the African Charter itself. [Of course, since the Constitutive Act of the African Union replaced the Charter of the OAU, the application must be compatible with this latter instrument];
(3) The application must not be written in disparaging or insulting language directed at the state or its institutions, or the AU;
(4) The application must not be based exclusively on content drawn from mass media;
(5) The application must be sent after exhausting local remedies, unless doing so would unduly prolong the procedure;
(6) The submission of the application must have taken place within reasonable time from the time local remedies were exhausted; and
(7) The subject matter of the application must not been settled by the state involved in accordance with the UN Charter, the AU Constitutive Act or the African Charter itself.

(disparaging or insulting language) that are not defined.[56] In Communication 65/92, *Ligue Camerounaise des Droits de L'Homme v Cameroon*,[57] the Commission found the communication inadmissible for failing to satisfy a prima facie case[58] and for being couched in insulting language.[59] It is worth noting that the communication was submitted in 1992, and was only disposed of in 1997.[60] The communication contained statements allegedly maligning the former and current presidents of Cameroon, such as 'Paul Biya must respond to crimes against humanity'; '30 years of the criminal neo-colonial regime incarnated by the duo Ahidjo/Biya'; 'a regime of torturers'; and 'government barbarism'.[61] In another communication against Cameroon, *Bakweri Land Claims Committee v Cameroon*, allegations of wielding excessive powers and interfering with the judiciary were levelled against the president. In this case the Commission did not regard the allegations as insulting. It opined that the truthfulness of the allegations is not the sole determinant of whether the remarks are disparaging or not. That is but one of the many factors the Commission had to balance to come to a suitable finding.[62]

In *Ilesanmi v Nigeria*,[63] the complainant alleged widespread corruption amongst government officials, which included smuggling of narcotics, arms, and minerals. The complaint named several top government officials, such as the Attorney General and officials in the Chief Justice's office. He went on to allege that the president himself was corrupt.[64] The African Commission declared the matter inadmissible on account of both the failure to exhaust local remedies and of using disparaging language.[65] This came after the complainant had argued before the Commission that he had exhausted 'local, legislative and logical remedies' without informing the African Commission by what methods.[66]

In *Kevin Mgwanga Gunme v Cameroon*, the complaint contained words such as 'state sponsored terrorism' and 'forceful annexation' to highlight the violations complained

56 Sabelo Gumedze, 'Bringing Communications before the African Commission on Human and Peoples' Rights' (2003) 3(1) African Human Rights LJ 118–148, 130.
57 Communication 65/1992, *Ligue Camerounaise de Droits de L'homme v Cameroon*, Tenth Annual Activity Report.
58 Paragraph 11.
59 Paragraph 13.
60 Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press 2012) 315.
61 Communication 65/1992, *Ligue Camerounaise de Droits de L'homme v Cameroon* Tenth Annual Activity Report para 13.
62 Communication 260/2002, *Bakweri Land Claims Committee v Cameroon* Thirty-Sixth Session para 48.
63 Communication 268/2003 *Ilesanmi v Nigeria*, Thirty-Seventh Ordinary Session.
64 Paragraph 38.
65 Paragraph 40.
66 Paragraph 43.

of.[67] The African Commission admitted that the disparaging clause was problematic because of its subjectivity. It noted that statements that appeared to one party to be insulting, could not necessarily be perceived in the same way by another party. It also stated that whilst it is normal for violations to elicit strong language from victims, complainants need to exercise restraint and be respectful when submitting their communications.[68] Despite the foregoing, the Commission found the communication to be admissible.[69]

In determining whether the language used by the complainant was disparaging, the Commission emphasised the need to strike a balance to ensure that those state institutions established to facilitate the enjoyment of individual rights are also respected by the very same individuals they seek to protect. It opined that allowing insulting language in communications brought before it would bring those very same state institutions into disrepute, thereby weakening their effectiveness in their human rights protection mandate. It found that the language in which the communication was written, was aimed at bringing the office of the president into ridicule and was therefore insulting.[70]

Murray argues that this restrictive clause has over the years been interpreted by the African Commission in reference to two determinants. First, it is necessary to determine whether the remark was aimed at unlawfully and intentionally violating the dignity or reputation of a state official or an institution of the state.[71] The second interpretive process is an attempt to bring it into conformity with Article 9(2) of the African Charter.[72] She further asserts that the approach taken by the Commission is influenced by the African Commission's Declaration of Principles of Freedom of Expression in Africa (the Declaration). In Article 46 the Declaration provides that public figures shall be required to tolerate a greater degree of criticism and that the freedom of expression of an individual should not be unduly inhibited by severe sanctions imposed by the state.[73]

67 Communication 266/2003, *Kevin Mgwanga Gunme and Others v Cameroon*.
68 Paragraph 75.
69 Paragraph 87.
70 Paragraph 40.
71 Rachel Murray, The Charter on Human and Peoples' Rights: A Commentary (Oxford University Press 2019) 21.
72 Communication 284/03, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe* para 92.
73 Article 46 of the African Commission's Declaration of Principles of Freedom of Expression in Africa provides that:
States shall ensure that their laws relating to defamation conform with the following standards:
(a) no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;

The foregoing demonstrates that under the African human rights protection system, the international tribunals historically frowned upon language that tended to be critical of the state, its institutions, its officials, or the African Union (AU) itself. Although initially taking a very stringent slant, there seems to be a departure from the restrictive approach, where any form of government criticism was readily regarded by the Commission as 'insulting'. The reasoning in *Kevin Mgwanga Gunme v Cameroon* and in *Bakweri Land Claims Committee v Cameroon* seems to take into consideration that human rights violations by their very nature, tend to elicit a particular reaction, and a particular language from the victim of those violations. As a result, the Commission did not strictly follow the heavily circumscribed approach to disparaging language it adopted in *Ligue Camerounaise des Droits de L'Homme v Cameroon.* Perhaps the fact that more than a decade had passed between these decisions, and the fact that the AU was gravitating more towards embracing human freedoms such as freedom of expression (as demonstrated by the adoption of the Commission's own declaration on the subject), influenced the Commission's approach.

Implications of the *Zhdanov* Decision for International Law

There is no doubt that the filter mechanism in the submission of communications is necessary and serves the legitimate purpose of ensuring that the integrity and reputation of state institutions tasked with human rights protection are not whittled down by the reckless and fallacious expressions of a disgruntled individual.

The African system can draw inspiration from the EU system regarding the way disparaging communications are treated. The aim must not be for the African Commission to jettison disparaging communications without enquiring into the surrounding circumstances. The choice of language by victims in their papers is often a desperate attempt to draw the attention of all parties that have the power to intervene, to the plight of the petitioner. As Hampson and others argue, this requirement is a reflection of the stronghold of sovereignty, and the thin-skinned nature of those in power, and their aversion to open criticism.[74]

The African human rights protection system can also draw inspiration from the practice adopted by the ECtHR to cure defective submissions. For instance, in *Mirolubovs v Latvia*, the ECtHR, through its Registry, gave directions to the applicant to remove the disparaging language from its papers. The African Commission/Court could adopt the

(b) public figures shall be required to tolerate a greater degree of criticism; and
(c) sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.

74 Francoise Hampson, Claudia Martin and Frans Viljoen, 'Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa' (2018) 16(1) Int J of Constitutional L 161–186, 174.

same approach and instruct the author of a defective communication to excise the offensive parts, and to also issue an apology where this is warranted. Also, where the author of an insulting communication proffers an apology of their own accord, the African Commission/Court must be able to come to the conclusion that the communication is admissible.

Conclusion

The two systems, which is to say, the African and European systems of human rights, approach the issue of disparaging language in the same way. The enabling provisions, however, differ slightly. In, on the one hand, the European system, the provision is a blanket clause that encompasses a broad range of abuses of the right of individual petition. Over the years, the ECtHR has produced jurisprudence which clearly demarcated the various forms in which this 'abuse' may manifest. As indicated above, the use of insulting language within an applicant's papers usually amounts to abuse. The African system on the other hand has a clearly worded clause in Article 56(3), where applications that are disparaging and insulting are clearly excluded from the Commission/Court. A careful assessment of the jurisprudence from both institutions on their treatment of disparaging language related to communications reveals that both forums had not had a chance to determine the application of these rules to insulting language appearing outside an applicant's submission. Thus, in the European system this only happened for the first time in the case of *Zhdanov*, and gave the court a chance to produce new jurisprudence on how courts deal with *ex curia* expressions, connected to an ongoing matter, where such expressions are couched in insulting language and therefore amount to abuse of process.

It is also clear that the European Union system is much more advanced in its determination of what constitutes insulting language, as well as the mechanisms for remedying a disparaging application in instances where this is warranted, or is in the interests of justice.

References

Amos M, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28(3) European Journal of International Law <https://doi.org/10.1093/ejil/chx044>

Dube A, *Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa* (Galda Verlag 2016).

Gulevich O, Osin E, Isaenko N and Brainis L, 'Scrutinising Homophobia: A Model of Perception of Homosexuals in Russia' (2018) 65(13) Journal of Homosexuality <https://doi.org/10.1080/00918369.2017.1391017>

Gumedze S, 'Bringing Communications before the African Commission on Human and Peoples' Rights' (2003) 3(1) African Human Rights Law Journal.

Hampson F, Martin C and Viljoen F 'Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa' (2018) 16(1) International Journal of Constitutional Law <https://doi.org/10.1093/icon/moy007>

Heiskanen V, 'Questions of Jurisdiction and Admissibility before International Courts – Book Review' (2017) 18 Journal of World Investment and Trade <https://doi.org/10.1163/22119000-12340059>

McIntyre J, 'Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility before the International Court' (2018) 19 Melbourne Journal of International Law.

Murray R, *The Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019).

Ndiaye T, 'Admissibility before the International Courts and Tribunals' (2018) 1 (2) Journal of Law and Judicial System.

Paulsson J, 'Jurisdiction and Admissibility' in Gerald Aksen and Robert Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (International Chamber of Commerce 2005).

Pauwelyn J and Salles L, 'Forum Shopping before International Tribunals: (Real) Concerns, (Im)possible Solutions' (2009) 42(1) Cornell International Law Journal.

Shany Y, 'Jurisdiction and Admissibility' in Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) <10.1093/law/9780199660681.003.0036>

Sleptocov N, ‘Political Homophobia as a State Strategy in Russia’ (2018) 12(1) Journal of Global Initiatives: Policy, Pedagogy, Perspective.

Viljoen F, *International Human Rights Law in Africa* (Oxford University Press 2012) <https://doi.org/10.1093/acprof:osobl/9780199645589.001.0001>

Wiedlack K, ‘Gays v Russia: Media Representations, Vulnerable Bodies and the Construction of a (Post)modern West’ (2017) 21(3) European Journal of English Studies <https://doi.org/10.1080/13825577.2017.1369271>

Cases

Abackat and Others v Argentina, Dissenting Opinion of Gorges Abi-Saab.

Oil Platforms (Iran v US) 2003 ICJ 161, 177 (Nov 6).

Communication 678/2010, *Gross v Switzerland*, Judgment (Merits and Just Satisfaction) 14 March 2013.

Communication 260/2002, *Bakweri Land Claims Committee v Cameroon*, Thirty-Sixth Session.

Communication 5964/2002, *Chernitsyn v Russia*, Judgment 6 April 2006.

Communication 61164/2000 *Duringer and Others v France*, Decision 4 February 2003.

Communication 34056/2002, *Gongadze v Ukraine* Decision 22 March 2005.

Communication 268/2003 *Ilesanmi v Nigeria*, Thirty-Seventh Ordinary Session.

Communication 266/2003, *Kevin Mgwanga Gunme and Others v Cameroon*.

Communication 65/1992, *Ligue Camerounaise de Droits de L’homme v Cameroon*, Tenth Annual Activity Report.

Communication 46468/1999, *Manoussons v The Czech Republic and Germany*, Decision 9 July 2002.

Communication 798/2005, *Miralubovs and Others v Latvia*, Judgment 15 September 2009.

Communication 66357/14, *Podeschi v San Marino*.

Communication 596/2016, *Romy Goornah (represented by Dev Hurnam) v Mauritius*.

Communication 27567/1995, *Stamoulakatos v The United Kingdom*, Decision 9 April 1997.

Communication 284/03, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe*.

Zhdanov and Others v Russia, Applications Nos 12200/08, 35949/11 and 58282/12.

International Instruments

African Charter on Human and Peoples' Rights of 1986.

African Commission's Declaration of Principles of Freedom of Expression in Africa of 2002.

European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.