

## African Commission reaffirms protection of socio-economic rights in the African Charter

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*Communication 279/03, Sudan Human Rights Organisation v The Sudan, and Communication 296/05, Centre on Housing Rights and Evictions v The Sudan*

*In July 2010, the ruling of the African Commission on Human and Peoples' Rights (African Commission) in relation to communications 279/03 and 296/05 was made public, the decision having been adopted in May 2009. The communications were submitted by the Sudan Human Rights Organisation (SHRO) and the Centre on Housing Rights and Evictions (COHRE), respectively, against the Sudan government. However, because the applicants in the SHRO case did not appear before the African Commission on the merits, the Commission considered and decided only the COHRE case on the merits.*

The decision is viewed as another landmark decision, as it speaks to the indivisibility of human rights and advances socio-economic rights, such as the rights to housing, food, water and health, as well as the need for effective domestic remedies.

### The facts and admissibility

The complaints concerned allegations of 'gross, massive and systematic' violations of human rights in the Darfur region of Sudan, including forced evictions, the destruction of public facilities and properties, the looting and destruction of foodstuffs, crops and livestock, the poisoning of wells and the denial of access to water (paras 1–14 and 207). It was alleged that these acts had been committed in a discriminatory manner against people of black African origin in the Darfur region (para 63). The civil and political and socio-economic rights at stake included the rights to life and dignity, the right to be heard, the right to property, the right to health, the right to protection of the family and the rights to food and water.

The situation was compounded by the unavailability of local remedies. It was impossible to bring issues of human rights violations before independent and impartial courts since the state was under a military regime, resulting in intimidation, threats and harassment where a case was brought (para 64). Moreover, it was argued that the Sudan government had taken few or no steps to remedy the violations. Displacements into remote regions also made it

impossible for people to avail themselves of any remedies (para 67).

The Sudan government disputed the allegations. It also challenged the complaints on admissibility grounds under article 56(5) of the African Charter on Human and Peoples' Rights of 1981 (African Charter) (paras 69–80). One of such grounds referred to by the government was the non-exhaustion of local remedies. Article 56(5) of the Charter requires, among other grounds, that local remedies be exhausted before a complaint is brought to the African Commission, except if such remedies are unduly prolonged.

The African Commission, while finding the case to be admissible, stated in relation to local remedies that 'the scale and nature of the alleged abuses, [and] the number of persons involved *ipso facto* make local remedies unavailable, ineffective and insufficient' (para 100). Local remedies are 'available' if they can be utilised without impediment, 'effective' if they offer a prospect of success, and 'adequate' or 'sufficient' if they are capable of redressing the wrong complained against (Viljoen, 2007: 336).

### Decision of the Commission

#### Forced evictions, the rights to life and dignity, and the right to be heard

With regard to the rights to life and dignity, the African Commission pointed out that international courts have interpreted the right to life broadly to include the right to dignity and the right to a livelihood (para 146). It found a violation of the right to life provided under article 4 of the African Charter based on the lack of effective investigations into cases of arbitrary killings and extra-judicial executions (para 153).

The Commission also found a violation of the right to dignity in the fact that the government of Sudan and its agents had actively participated in the forced eviction of the civilian population and failed to protect the victims against this violation, and that the state had targeted the civilian population when fighting the armed groups. The Commission found this to be cruel and inhuman, and thus to have 'threatened the very essence of human dignity' (para 164).

A violation of the rights to life and dignity was also found in the fact that the forced eviction of the Darfur civilian population could not be justified under article 27(2) of the African Charter (para 166). This article provides that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. The reasons for the finding were that the government of Darfur had not acted

diligently to protect the civilian population against violations by its forces or third parties and had failed to provide immediate remedies to victims (para 168).

The failure of the state to investigate and prosecute its agents and third parties also resulted in the Commission finding a violation of the right to be heard under article 7 of the African Charter. The Commission considered it an affront to common sense and justice to expect victims who suffered fear due to constant bombing, violence, burning of their houses and evictions to bring their plights to the courts in Sudan (para 182). Access to competent national organs to have their case heard was thus seen to be impractical and illusory (para 185).

### **Forced evictions, liberty and security, freedom of movement and protection of the family**

The African Commission further derived the right not to be forcibly evicted or displaced from the right to freedom of movement and residence provided for in article 12(1) of the African Charter (paras 186 and 189). States have a duty to ensure that the right to freedom of movement and residence is not restricted. Any restrictions 'should be proportionate and necessary to respond to a specific public need or pursue a legitimate aim' (para 188).

The Commission did not find the restrictions set out in these communications to be justifiable (para 189). It thus found a violation of article 12(1) of the African Charter, because the government of Sudan had failed to prevent forced evictions or to take urgent steps to ensure that displaced persons returned to their homes (para 190). In arriving at this conclusion, the Commission considered the UN Guiding Principles on Internal Displacement, adopted by the UN General Assembly in 1998, requiring states and international actors 'to prevent and avoid conditions that might lead to displacement of persons' (principle 5).

The African Commission also observed that the right to liberty and security protected in article 6 of the African Charter complemented the right to freedom of movement. It held that if internally displaced persons were not able to move freely to their homes because of insecurity or because their homes had been destroyed, then their liberty and freedom were proscribed (para 177). The failure of the government of Sudan to take steps to protect the victims thus amounted to a violation of article 6 of the African Charter. The Commission drew attention to women and girls, whose rights to liberty and security had remained an illusion as a result of several factors including sexual and gender-based violence against them (para 178).

The African Commission also found a violation of article 18(1) of the African Charter, which states: 'The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.' The Commission held that the forced eviction of people from their homes and the killing of family members threatened the very foundation of the family and rendered the enjoyment of the right to family life difficult. This was compounded by the fact that the government had done nothing to prevent the violations of this right (para 216).

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### **Right to property**

Article 14 of the African Charter guarantees the right to property. The right 'may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. The Commission observed that there were two principles in respect of the right to property: the first related to its general nature, providing for the principle of ownership and peaceful enjoyment of property, and the second provided for the possibility and conditions of limitation of the right (para 193). The state had a duty to 'respect' and 'protect' this right. It was required to establish conditions and provide means to ensure the protection of life and property in times of both peace and war. The state was also required to ensure that displaced persons were resettled in safety and with dignity (para 201).

Drawing from international jurisprudence (such as the European Court of Human Rights decisions in *Dogan and Others v Turkey* of 19 June 2004 and in *Akdivar and Others v Turkey* of 30 August 1996, both concerning the destruction of homes and property), the Commission held that the victims had been deprived of their property, even though the state had not taken possession of the victims' property and the property was destroyed by military and armed forces acting on their own or alleged to be supported by the state (para 194).

The African Commission also considered the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles), which were endorsed by the UN Sub-Commission on the Promotion and Protection of Human Rights on 11 August 2005. The African Commission stated that, though these principles were not binding, they reflected emerging principles in international human rights law jurisprudence and, when read together with other decisions, had persuasive value as a guide to the interpretation of the right to property in the African Charter (para 204). Principle 5 deals with the right to be protected from displacement and sets out the following obligations of states:

- 5.2 States should incorporate protections against displacement into domestic legislation, consistent with international human rights and humanitarian law and related standards, and should extend these protections to everyone within their legal jurisdiction or effective control.
- 5.3 States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of land as a punitive measure or as a means or method of war.

5.4 States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors. States shall also ensure that individuals, corporations, and other entities within their legal jurisdiction or effective control refrain from carrying out or otherwise participating in displacement.

Following its consideration of the relevant jurisprudence and principles 5.3 and 5.4, the African Commission found a violation of article 14, on the basis that the government of Sudan had failed to refrain from evicting the victims or demolishing their houses and property, and had not taken steps to protect the victims from constant attacks and bombings. Whether or not the victims had title to the land was immaterial. The Commission held that

the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by Article 14 (para 205).

### Right to health

The African Commission also found a violation of article 16 of the African Charter, which guarantees the right to the best attainable state of physical and mental health. The provision also requires states to take necessary measures to protect the health of their people and ensure that they receive medical attention when sick.

The Commission noted the developments in international law relating to the normative content of the right to health, which includes health care and health conditions (para 208). Specifically, the Commission considered General Comment 14 of the UN Committee on Economic, Social and Cultural Rights, on the right to the highest attainable standard of health (UN doc. E/C.12/2000/4) and the duties on states contained in it. These include the obligations to ensure that third parties do not encroach on the enjoyment of the right, to refrain from unlawfully polluting water and soil during armed conflicts, to ensure that third parties do not limit people's access to health-related information and services, and to enact or enforce laws to prevent the pollution of water (paras 209 and 210).

The Commission also recalled its decision in *Free Legal Assistance Group and Others v Zaire* (Communications 25/89, 47/90, 56/91 and 100/93 (2000) AHRLR 74). In that case, the Commission had found the failure of a state to provide basic services such as safe drinking water and electricity and the shortage of medicine to constitute a violation of the right to health (para 211).

The Commission thus found that the destruction of homes, livestock and farms, and the poisoning of water sources, exposed the victims to serious health risks and therefore constitute a violation by the government of Sudan.

### Right to economic, social and cultural development

The Commission also considered whether the government of Sudan had violated article 22 of the African Charter, which guarantees the right to economic, social and cultural development. Because this right is a collective right, the Com-

mission first had to determine whether the victims constituted a 'people' within the context of the African Charter (para 218). Considering the characteristics used to define people – such as language, religion, culture, territory, history and ethno-anthropological factors – the Commission found the population of the Darfur region to constitute 'people' (paras 220–223). It then held that '[t]he attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities' and also impeded the right to education for their children as well as other individual rights. The Commission thus found a violation of article 22 of the African Charter (para 224). The Commission also considered the right to equality in arriving at its decision, specifically section 19 of the African Charter, which recognises the right of all people to enjoy the same respect and rights and prohibits the domination of one people by another (para 221).

### The remedy

In addition to the violations above, the Commission also, based on the fact that article 1 of the African Charter places a general obligation on states to recognise the rights contained in it and adopt measures to give effect to the rights, found a violation of that provision (paras 227 and 228).

Following the finding of violations, the African Commission recommended that the government of Sudan should, among other things,

- investigate the abuses and reform its legislative and judicial framework in order to handle cases of serious and massive human rights violations;
- take measures to ensure that there were effective domestic remedies, including restitution and compensation;
- rehabilitate economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces in order to facilitate the return of those that had been displaced; and
- establish a national reconciliation forum to resolve, *inter alia*, issues of land, grazing and water rights, including the destocking of livestock.

### Conclusion

The decision of the African Commission reinforces the protection of socio-economic rights in the African Charter and the need for effective domestic remedies. It reaffirms that where there are serious and widespread violations that make it impossible to access remedies, domestic remedies can be considered to have been exhausted. It elaborates on the right to property, the prohibition on forced eviction and the right of peoples to their economic, social and cultural development. It speaks to the right to water, which is not explicitly provided for in the African Charter. It accentuates the fact that forced evictions and displacements impact on a range of rights: civil, political, economic, social and cultural. This decision is therefore relevant to many countries, including states parties to the African Charter such as South Africa, where evictions are a regular occurrence.