

11-25 November 2009
Communication No. 310/2005

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Forty-Sixth Ordinary Session
11-25 November 2009

DARFUR RELIEF AND DOCUMENTATION CENTRE

v.

REPUBLIC OF SUDAN

DECISION

BEFORE: ACTING VICE-CHAIRPERSON: Reine Alapini-Gansou
COMMISSIONERS: Catherine Dupe Atoki, Musa Ngary Bitaye, Mohamed Fayek, Mohamed Bechir Khalfallah, Soyata Maiga, Mumba Malila, Kayitesi Zainabo Sylvie, Pansy Tlakula, Yeung Kam John Yeung Sik Yue

Citation: Darfur Relief and Documentation Ctr. v. Republic of Sudan, Comm. 310/2005, 27th ACHPR AAR Annex (Jun 2009 - Nov 2009)

SUMMARY OF FACTS

1. This Communication is submitted by the Darfur Relief and Documentation Centre (DRDC) (hereinafter called the Complainant), on behalf of 33 Sudanese citizens (hereinafter referred to as victims) against the Republic of Sudan (hereinafter called the Respondent State).
2. The Complainant states that the victims were hired by the Iraqi - owned Southern Oil Company in the early 1980s as drivers, mechanics, electricians, cooks, servants and manual workers in the oil fields of the said company in Basra City (Southern Iraq).
3. On 22 and 23 February 1983 the said victims were arrested during the first Gulf War between Iran and Iraq and taken to Iranian territory on 24 February 1983 as civilian war detainees where they were detained in special military prisons, until 5 October 1990 (seven years), when they were released and repatriated to Sudan.
4. The Complainant submits that while in detention, the victims lost their sources of income and were unable to communicate with their families and lawyers; they were psychologically and physically tortured, had no access to medical treatment and could not carry out their religious rituals.

5. Following the victims' release from prison, the Iraqi government agreed to meet part of the unpaid salaries for the years that they had spent in Iranian custody. No arrangements were made to pay compensation, damages or reparations for the suffering caused to the victims during their detention.

6. A total of US\$ 500,000, paid in Sudanese currency at the exchange rate of the day of payment, was to be given to the detainees and divided evenly among all of them. It was agreed by the governments of Sudan and Iraq that the said amounts would be paid to the victims through the Ministry of Finance and Economic Planning in Khartoum. (See supporting documents No. 1, 2, and 3). The two governments further agreed that the full amount would be deducted from the debt that Sudan owed Iraq.

7. The Complainant submits further that the Ministry of Finance and Economic Planning in Khartoum informed the victims about the payment arrangements reached between Sudan and Iraq (See supporting document No. 4). The victims accepted the payment terms despite the fact that they were not part of the negotiations that led to the payment agreement reached between Sudan and Iraq. This included payment in Sudanese currency and yet their salaries had been earmarked in US dollars.

8. The Complainant alleges that on 20 March 1992, the Sudanese Ministry of Finance and Economic Planning approved the payments to the victims and instructed the bank of Sudan to effect the said payments. (See supporting document No. 5). Subsequently, on 15 April 1993 and 10 May 1993, a total of US\$ 167,367 (SP 22,700,000) was paid to the victims as the first instalment. (see supporting document No.6) Each victim received the equivalent of US\$ 5,230. The Ministry of Finance and Economic Planning promised to pay the remaining balance amounting to US\$ 332,633 at a later date.

9. Payment of the remaining balance due to the victim was delayed and the Complainant states that the Ministry of Finance and Economic Planning eventually refused to pay the said amount altogether. The Complainant alleges that the then First Under-Secretary at the Ministry of Finance and Economic Planning, Mr. Hassan Mohamed Taha was responsible for ensuring that the said amounts were not paid to the victims.

10. The Complainant submits that the victims have attempted to use all the legal and political avenues available in order to have their rights recognised and recover the monies owed them but to no avail.

ARTICLES ALLEGED TO HAVE BEEN VIOLATED

11. The Complainant alleges that Articles 1, 2, 5, 7(1) (a), 14 and 16(1) of the African Charter on Human and Peoples' Rights have been violated.

PRAYERS

12. The Complainant requests the African Commission to urge the government of Sudan to:

a. Pay the outstanding balance due to the victims which currently amounts to US\$ 2,965,789, taking into account the accumulated benefit over the years or rebeeh [FN3] specified under the Islamic Banking system applied in Sudan;

b. Pay an additional US\$3 million in compensation for the material, social and psychological damage and disruption of life that the victims have endured during the last 13 years. This brings the total amount being requested to US\$5,965,789.

[FN3] According to the Islamic Banking System the "rebeeh" is an annual benefit on the principal fund. This amount is multiplied by 120%.

13. The Complainant further requests that in case of delay in satisfactorily settling the communication and effecting payment, similar benefits should be paid during 2006 and the subsequent years, as well as, US\$ 1,000,000 compensation for each additional year from 1st January 2006. The complainant seeks payment of the above balance, benefits and compensation in US currency to be divided equally between the victims.

PROCEDURE

14. The Communication is dated 22 November 2005 and was received by the Secretariat of the African Commission on 24 November 2005.

15. At its 38th Ordinary Session held from 21 November to 5 December 2005, in Banjul, The Gambia, the African Commission considered the Communication and decided to be seized of it.

16. By Note Verbale dated 8 December 2005, the Secretariat transmitted a copy of the Communication to the Respondent State by DHL and requested it to forward its submissions on admissibility within 3 months. The Complainant was also requested to send its submissions on admissibility within 3 months.

17. On 13 February 2006, the Secretariat of the African Commission received the Complainants' submissions on admissibility and acknowledged receipt of the same in a letter dated 14 February 2006. A copy of the Complainants' submissions on admissibility was forwarded to the Respondent State by fax and email.

18. By Note Verbale dated 20 March 2006, the Respondent State was reminded to forward its written submission on admissibility of the Communication.

19. On 20 May 2006, the Secretariat of the African Commission received a Note Verbale dated 20 May 2006 and attached to it was the State's submission on admissibility.

20. During the 39 Ordinary Session of the African Commission, the Commission decided to defer its decision on admissibility of the Communication to its 40th Ordinary Session. By letter and Note Verbale dated 31 May 2006, the Secretariat informed the Complainant and the State respectively, of the Commission's decision to defer the communication to its 40th Session.

21. By email dated 16 April 2007, the Secretariat received a letter dated 10 April 2007, from the Complainant, which had attached to it, additional submissions and documents in reply to the submissions of the Respondent State.

22. At its 40th Ordinary Session, the African Commission decided to defer the communication for further consideration on admissibility, to its 41st Ordinary Session.

23. During its 41st Ordinary Session which was held in Accra, Ghana, the Secretariat of the African Commission received, on the 22 of May 2007, a letter to the African Commission to which was attached further submissions by the complainant in reply to the Respondent State's submission on admissibility.

24. At the 41st Ordinary Session of the African Commission, the decision on admissibility of the communication was further deferred to the 42nd Ordinary Session.

25. At the 42nd Session of the African Commission the decision on admissibility of this Communication was deferred, to get clarification on some issues from the Complainants.

26. At the 43rd Session the Secretariat was yet to receive the Complainants response and as a result deferred the Communication to the 44th Ordinary Session.

27. The Communication was further deferred during the 44th Session to give time to the Secretariat to draft its decision on admissibility.

THE LAW

ADMISSIBILITY

SUMMARY OF THE COMPLAINANT'S ARGUMENTS ON ADMISSIBILITY OF THE COMMUNICATION

28. The Complainant states that a letter was addressed to the President of Sudan HE Omar El Bashir requesting him to intervene in the matter and resolve the case. (Attachment No. 7).

29. After studying the relevant documents relating to this matter, the Solicitor General, on 5 September 2000 forwarded a legal opinion to the Ministry of Finance and Economic Planning confirming that the victims were entitled to the payment of the outstanding balance held by the said Ministry. (Attachment No.9).

30. On 28 August 2001, Dr. Maghzoub Al Khalifa, the then Chair of the Joint Iraqi-Sudanese Ministerial Committee and a former Minister of Agriculture and Forestry of Sudan, sent a letter to the Ministry of Finance and Economic Planning reminding them of the agreement between the Sudanese and Iraqi governments and requesting them to pay the victims the outstanding amounts without delay. (Attachment No. 8).

31. The Complainant states that since attempts at solving the matter amicably had failed, the victims decided to pursue the matter in the courts of law.

32. The Complainant states that on 18 June 2000, the victims in this matter filed a complaint against the Ministry of Finance and Economic Planning before the Court of First Instance in Khartoum. The case - No. AM/1724/2000 was dismissed by the Court on 21 March 2000 (Attachment No. 10). The victims appealed against the judgment of the Court of First

Instance before the Court of Appeal in case no. ASM/475/2001. On 7 July 2001, the Court of Appeal issued an order to the Court of First Instance to reconsider its judgement and on 19 February 2002 the Court of First Instance dismissed the case once again. (Attachment No. 10).

33. The victims appealed against the second judgment of the Court of First Instance to the Court of Appeal in Khartoum in Case No. ASM/250/2002) and on 26 December 2002, the Court of Appeal upheld the judgment of the Court of First Instance and dismissed the case. (Attachment No. 11).

34. The victims approached the High Court in Khartoum, Civil Circuit in case MA/TM/165/2003 for an injunction against the ruling of the Court of Appeal. However, on 18 June 2003, the High Court decided to uphold the ruling of the Court of Appeal and dismissed the matter. (Attachment No. 11). The Complainants allege that the decisions of the court of first instance, Court of Appeal and the High Court, to dismiss the case, were based on technicalities and not on the spirit of justice, law and good conscience.

35. Consequently, the Complainant submits that the victims have exhausted all domestic remedies by virtue of the ruling of the High Court on 18 June 2003, which dismissed the case.

36. The Complainant submits that when reaching their judgments, the courts neglected to take into account elementary facts that would have favoured the victims' case. For instance, the fact that the victims received a part payment in respect of the agreement reached between Sudan and Iraq and that the Ministry of Finance and Economic Planning made an undertaking to pay the victims the outstanding balance; failure to take into account the legal opinion of the Solicitor General stating that he was not a witness to specific incidents. They also claim that the decisions of these Courts to dismiss the matter were based on technicalities and not on the spirit of fairness, law and justice.

37. The Complainant submits further that the Sudanese domestic courts are not competent to deal with a case of such magnitude and notes that the High Court when delivering its judgement in respect of the application for an injunction stated that the amount of financial indemnification claimed in this case supersedes the amount fixed by the Judicial Circular No. 44/99 which is a necessary condition for acceptance of an injunction before the High Court.

38. Additionally, the Complainant avers that the courts in Sudan failed to take into consideration the fact that the then ruling regime in Iraq was totalitarian and that the one in Sudan is military and as such citizens are unable to interfere with government decisions or procure the necessary documents that could prove their cases in a court of law.

39. For these reasons, the Complainant submits that the domestic judicial process was flawed and could not render justice to the victims.

40. The Complainant states that Sudan has been under totalitarian military government headed by a President who is still an active army officer since 30 June 1989. Consequently, the regime pursues a systematic policy of control and domination at all levels of the State apparatus including the judiciary whose procedure and decisions are not respected. As a result, Sudanese citizens, groups and organisations are unable to submit cases relating to

human rights before the courts of law for fear of harassment, threats and intimidation by the government security agents.

41. To illustrate that the judiciary is not independent, the Complainant refers the African Commission to the annual reports the then UN Special Rapporteur on the Situation of Human Rights in Sudan in the Fifty-eighth[FN4] and the Fifty-ninth[FN5] Sessions of the UN Commission on Human Rights which make reference to the lack of independence of the judiciary in Sudan. Furthermore, the Complainant states that the International Commission of Inquiry on Darfur (ICID), established by the UN Security Council in October 2004 to investigate crimes committed within the context of the armed conflict in Darfur also examined the judicial system in Sudan as part of its mandate. In its report of 25 January 2005, the ICID gives a comprehensive overview of the Sudanese judicial system [FN6]. The Complainant submits that the report acknowledges that during the last decade the judiciary appeared to have been manipulated and politicised and as such judges who disagreed with the government often suffered harassment, including dismissals.[FN7]

[FN4] E/CN.4/2002/46 dated 23rd January 2002, Para. 19, 20 and 21 pp. 6 and 7.

[FN5]] E/CN.4/2003/42 dated 6th January 2003' Para. 28 p.8.

[FN6] See paragraphs 432-455, pp 111-115.

[FN7] See Report of the International Commission of Inquiry on Darfur, at p.111 at Para. 432.

42. The Complainant notes that, the Commission of Inquiry stated that it "considers that in view of the impunity which reigns in Darfur today, the judicial system has demonstrated that it lacks adequate structures, authority, credibility..."[FN8]

[FN8] See Report of the International Commission of Inquiry on Darfur, at p115 at Para. 455.

43. The Complainant also draws the attention of the African Commission to its decision in Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan[FN9] in which the Commission found that the judiciary in Sudan was not independent. The Complainant state that even after this pronouncement by the Commission, the situation in Sudan has not improved but has in fact deteriorated in manifolds, as more judges are purged from the judiciary and supporters of the government were appointed in their place.

[FN9] Communications No. 48/90, 50/91, 52/91 and 89/93.

SUMMARY OF THE RESPONDENT STATE'S SUBMISSION ON ADMISSIBILITY

44. The Respondent State starts by stating that the judicial system of the Sudan is one of the most competent and efficient organs of the State based on the principle of its total independence and the principle of separation of powers. It goes further to state that the

judicial system is efficient, honest and characterised with competence. The State submits that the Sudan is one of the few African States which has a Supreme Court in every Province and a judicial system which is available to all.

45. The State contends that the Complainants have not fulfilled the conditions stated in Article 56 of the African Charter. The Respondent State submits that the complaint has not complied with the condition in Article 56(5) of the African Charter which provides for the exhaustion of local remedies before a Communication is brought before the African Commission.

46. The State submits in this regard, that the Complainants are afforded the opportunity to have their cases heard by the Constitutional Court and Department of Grievances these are the two mechanisms put in place by the Constitution of Sudan, for the protection of human rights. The State substantiates this claim with documents on statistics illustrating the judicial performance in the Sudan and states that the Complainants are yet to exhaust all these avenues which are available to them.

47. The Respondent State claims that the provision of Article 56(1) was not fulfilled because the complaint "was submitted by a so-called Abdul-Baqui Jubril on behalf of Dafur Centre for Relief and Documentation Centre." The State further states that this person continues to lodge complaints which are not backed by any evidence or legal basis, sometimes to the Commission, presenting complaints under the umbrella of a number of civil society organisations.

48. The State further states that the Complainant has failed to comply with the provisions of Article 56(2) of the African Charter and that the Complainant's resort to Article 1 of the Charter is not applicable in the present case. The State submits that the ultimate nature of any case is that there is a winner and a loser and states further that the Charter requires that there is compliance with the law when rights of individuals and groups are discussed. It goes further to state that it is unacceptable to say that the judgments passed by the courts are in violation of human rights, that these judgments testify to the reality and are in keeping with the letter and spirit of the African Charter and the AU Charter and that any assumption contrary to that shall be tantamount to denying the courts of the member States of their functions.

49. The State goes further to state that the International Human Rights instruments recognise the sovereignty of States and the rule of the natural law existing in these States and that any assumption to the contrary is itself a blatant violation of the law.

50. The Respondent State further submits that the complaint is not in compliance with Article 56(3) of the African Charter, which provides that a Communication brought before the Commission should not be written in insulting or disparaging language. The State contends that the Complainants' submissions, especially in paragraph 40 of the Communication contained statements which had improper utterances against officials as well as the methods of the application of justice and the rule of law in the Sudan.

51. The Respondent State also submits that the complaint is not in conformity with Article 56(6) of the African Charter, which provides that a Communication should be brought within a reasonable time after the exhaustion of local remedies. The State contends that the present Communication was brought before the Commission after the expiration of 31

months of the court's judgement.

52. That for these reasons the Communication should be declared inadmissible by the African Commission.

SUMMARY OF THE COMPLAINANTS' REPLY TO THE RESPONDENT STATE'S SUBMISSION ON ADMISSIBILITY

53. The Complainant alleges that though the Supreme Court is the highest court in the Sudan, the Civil Procedures Act of Sudan provides that the "Supreme Court shall have jurisdiction to determine: Objection by way of cassation against the decisions and orders of the Courts of Appeal concerning objections against administrative decisions."

54. The Complainant also argues that the Communication does not have to do with, nor were it brought before the Sharia Courts; it is a civil suit which was properly brought before the civil law circuit.

55. Also the Complainant submits that the final decision of the High Court which dismissed their case was handed to them by the registrar, more than three months after its pronouncement by the court. This delay prevented the petitioners from bringing an application for review of the Supreme Court's judgment within the prescribed period of 15 (fifteen days).

56. On the contention of the Respondent State that they could bring their matter before the Constitutional Court, the complainants state that the Sudan's Constitutional Bill of 2005, outlines the jurisdiction, functions and powers of the Constitutional Court. This Bill provides that the Constitutional Court has no jurisdiction to review judgements, decisions, proceedings, and orders passed by the judiciary. This means that the Constitutional Court lacks the competence to entertain matters that were already dealt with by other Courts.

57. The Complainant also alleges that the victims' ordeal with the Sudanese authorities has been going on since 1993, when the Ministry of Finance and Economic Planning failed to pay the remaining balance of the funds. The victims then started proceedings in the courts in 2000, which was finally dismissed by the High Court in June 2003, and according to the Complainants, the victims have exhausted all means possible at their disposal to recover their outstanding funds to no avail.

58. The Complainant also allege that the judiciary of the Sudan is not independent of the government in the discharge of its duties. This it alleges is due to the fact that the country is ruled by a totalitarian military regime. That the government pursues a systematic policy of tight control and domination at all levels of the State apparatus including the judiciary.

59. The Complainant alleges that in view of the above facts, it has exhausted all possibilities for local remedy in the Sudanese courts and seek that the African Commission finds this Communication admissible.

ANALYSIS ON ADMISSIBILITY

60. The admissibility of Communications within the African Commission is governed by the requirements of Article 56 of the African Charter. This Article provides seven

requirements which must all be met before the Commission can declare a Communication admissible. If one of the conditions/requirements is not met, the Commission will declare the Communication inadmissible, unless the Complainant provides sufficient justifications why any of the requirements could not be met.

61. In the present Communication, the Complainant claims that it has fulfilled all the requirements of Article 56 of the African Charter. The Respondent State on the other hand submits that five requirements of admissibility, that is, Article 56 (1), (2), (3), (5) and (6), have not been met.

62. Article 56(1) of the African Charter states that "Communication relating to Human and Peoples' Rights... received by the Commission shall be considered if they indicate their authors even if the latter request anonymity..." According to the Respondent State, the Communication does not indicate the authors. The Communication received by the African Commission indicates that the author of the Communication is the Darfur Relief and Documentation Centre which brought the Communication on behalf of 33 Sudanese nationals whose names are stated in the Communication. This means that the author of the Communication and the victims are clearly identified. The Commission therefore holds that the requirement under Article 56(1) of the African Charter has been met.

63. The State also submits that the Communication is incompatible with the Charter of the Organisation for African Unity (OAU) and as such does not comply with Article 56 (2), of the African Charter. This sub-Article provides that "Communications...received by the Commission shall be considered if they are compatible with the Charter of the Organisation for African Unity or with the present Charter." In the present case, there is evidence of prima facie violation of the African Charter in the refusal of the Ministry of Finance and Economic Planning (an institution of the Sudanese government), to pay the outstanding balance of the money due to the 33 Sudanese nationals in breach of the agreement between the Sudanese and Iraqi governments to pay them this money as compensation for their time in Iranian prisons. Secondly in view of the compatibility requirements, Sudan is a State Party to the African Charter. Thirdly the Republic of Sudan became party to the Charter on 18 February, 1986, the alleged violations in this Communication falls within the period of the Charter's application to Sudan. Lastly, the alleged violation took place within the territorial sphere which the Charter applies. For these reasons, the Commission holds that the Communication has sufficiently fulfilled the requirement of Article 56(2) of the African Charter.

64. In its submission, the State calls on the African Commission to declare the Communication inadmissible on the ground that it does not comply with Article 56(3) of the African Charter which states that "communications ...received by the Commission shall be considered if they are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity (AU)".

65. The Respondent State objects to the statements made by the Complainant in paragraph 40 of the complaint arguing that it is improper to describe any sovereign State as such. Paragraph 40 of the complaint states that "This Communication documents a situation of absolute misuse of government authority and executive powers to inflict gross injustice and suffering among a vulnerable segment of the Sudanese citizens. This situation is a classical example of the absence of accountability of public officials and for the lack of proper administration of justice and the rule of law in Sudan."

66. In its decision on admissibility in *Zimbabwe Lawyers for Human Rights/ Zimbabwe(ZLHR)*[FN10], the African Commission stated inter alia that "in determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute. To this end, Article 56 (3) must be interpreted bearing in mind Article 9 (2) of the African Charter which provides that "every individual shall have the right to express and disseminate his opinions within the law". A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression."

[FN10] Communication 284/2003

67. The decision taken in *ZLHR* should be distinguished from another decision of the African Commission in *Ligue Camerounaise des Droits de l'Homme/ Cameroon* [FN11], where the African Commission held that the Communication was inadmissible because of the complainant's use of language like "[President] Paul Biya must respond to crimes against humanity", "30 years of the criminal neo-colonial/ regime", "regime of torturers", "government barbarisms" e.t.c., as this was considered as insulting language.

[FN11] Communication 65/92

68. The Respondent State in this Communication does not expressly state that the Communication was insulting or disparaging but however noted that the language used is "improper". In the opinion of the African Commission, the language used in the Communication, and especially in Paragraph 40, is not insulting or disparaging to the Government of Sudan and as such, is not contrary to Article 56(3). For this reason, the Commission holds that the proviso under Article 56(3) has been complied with.

69. Article 56(4) of the Charter provides that a Communication would be admissible if it is "...not based exclusively on news disseminated by the mass media". There is nothing in this Communication which has shown that it was based on news by the mass media and none of the parties have contested that point. To this end the African commission holds that this proviso has been fulfilled.

70. The Respondent State further submits that the Communication does not comply with Article 56(5) of the African Charter which requires that

"communications...received by the Commission shall be considered: if they are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly

prolonged".

The Commission has stated that the justification for this requirement is that a government should be aware of a human rights violation in order to have a chance to remedy such violation, thus protecting its reputation which may be tarnished by being called to plead its case before an international body. This requirement also precludes the African Commission from becoming a tribunal of first instance, a function which it cannot fulfil practically or legally.

71. In the present case, the Respondent State contends that the Complainant has not exhausted local remedies available to it in the Sudan. The State submits that the Complainant has not brought its case before the Supreme Court for review and have also not taken the matter to the Constitutional Courts on appeal. Article 15 (2) of the Constitutional Court Act of Sudan (as amended in 2005), stipulates that "...there shall not be subject, to review of the Constitutional Court, the business of the Judiciary, the judgements, decisions, proceedings and orders passed by the Courts thereof". This means that the Constitutional Court has no jurisdiction to entertain appeals arising from judgements, decisions, proceedings, and orders passed by the Judiciary.

72. The author alleges that the matter was first brought before the Court of first instance, but the case was dismissed, an appeal of this ruling was made to the Court of Appeal which ordered reconsideration of the matter in the court of first instance. The case was dismissed a second time by the court of first instance and this time the judgement was upheld by the Court of Appeal. The victims then brought the case before the High Court which approved the judgement of the Court of First Instance and dismissed the case. The Complainant claims that there is no other Court where they could take the case.

73. The Respondent State has however pointed out that there is still an option of taking the case before the Constitutional Court of the Sudan, available to the Complainants. The Constitutional Court Act of Sudan provides that "...The Court.... shall assume protection of the rights of a human being and the fundamental freedoms thereof" [FN12] This, according to the State, means that the Complainant can still take its case on the alleged violation of the rights of the 33 Sudanese, to the Constitutional Court of Sudan for a remedy of the complaint. The African Commission therefore holds that not all the local remedies which are available to the Complainants have been exhausted in accordance with Article 56(5) of the Charter, and as such the Communication has not fulfilled this proviso.

[FN12] Article 15(1) (d) of the Constitutional Court Act

74. Regarding the requirement under Article 56(6) of the African Charter which provides that "Communications...received by the Commission shall be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matte...". The African Commission notes that the Charter does not provide for what constitutes "a reasonable period of time," and neither has it defined reasonable time. For this reason, the African Commission would therefore treat each case on its own merits.[FN13]

[FN13] Communication 308/05- Michael Majuru/Zimbabwe and Communication 43/90 Union des Scolaires Nigeriens- Union Generale des Etudiants Nigeriens au Benin/ Niger, where the Communication was declared inadmissible on the ground that none of the conditions relating to form, time limit or procedure laid down under Article 56 and Rule 114 of the (Previous Version of the Rules of Procedure) were complied with.

75. Article 60 and 61 of the African Charter provides that the African Commission, in deciding matters brought before it, should draw inspiration from international law on human and peoples' rights. The African Commission in this Communication would look at the jurisprudence of the European Court on Human Rights and the Inter- American Commission on Human Rights. The European Convention on Human Rights and Fundamental Freedoms provides that the (European) "Court on Human Rights ... may only deal with the matter... within a period of six months from the date on which the final decision was taken"[FN14], after this period has elapsed, the European Court on Human Rights will declare such Application inadmissible. The American Convention on Human Rights also provides that to be declared admissible, "the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment"[FN15]. The Convention went further to provide circumstances where this provision will not be applicable to include when "...there has been unwarranted delay in rendering a final judgment under the aforementioned remedies".

[FN14] Article 26 The European Convention on Human rights.

[FN15] Article 46(1) (b) of the American Convention on Human Rights

76. The Inter American Commission on Human Rights has indicated that the six month period provided for in Article 46(1)(b) of the American Convention "has a twofold purpose: to ensure legal certainty and to provide the person concerned with sufficient time to consider his position"[FN16]

[FN16] IACHR, Case 11.230 - Francisco Martorell, Chile, Annual Report 1996, Report N° 11/96, par. 33.

77. In the present Communication, a period of twenty nine (29) months (2 years and 5 months) has elapsed between the time when the High Court dismissed the matter (18 June 2003), and when the Communication was submitted to the African Commission (24 November 2005). The Complainant submitted this Communication way beyond a time which could be considered reasonable, looking at the European Court and the Inter- American Court jurisprudence. The Complainants have also not given any compelling reason why there was such a long wait before bringing the matter before the African Commission.

78. The provision of the Charter regarding time limit in Article 56(6) is to make a party complaining of a wrong done by a State, to be vigilant and to discourage tardiness from prospective complainants. However, where there is a good and compelling reason why a

complainant does not submit his complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a complainant an opportunity to be heard.

79. In the present case, there is no sufficient reason given as to why the Communication could not be submitted within a reasonable period. For this reason, the African Commission holds that the Communication does not fulfil the proviso of Article 56(6) of the African Charter.

DECISION OF THE COMMISSION

80. It must be reiterated that the African Charter provides that all the requirements in Article 56 must be fulfilled before a Communication will be declared admissible by the African Commission. The Commission holds that the provisions of sub-Articles 5 and 6 of Article 56 have not been fulfilled by the Complainant.

81. In view of the above, the African Commission decides:

- 1) to declare the Communication inadmissible;
- 2) to transmit its decision to the parties;
- 3) to publish this decision in its 27th Activity Report.

Done in Banjul, The Gambia during the 46th Ordinary Session of the African Commission on Human and Peoples' Rights held from 11 - 25 November 2009.