

Communication 296/05 – Centre on Housing Rights and Evictions/The Sudan

Rapporteur:

37th Ordinary Session: Commissioner Nyanduga

38th Ordinary Session: Commissioner Nyanduga

39th Ordinary Session: Commissioner Nyanduga

Summary of facts:

1. The communication is submitted by a Washington based NGO (the complainant) having observer status with the African Commission, against the Republic of the Sudan (Respondent State), party to the African Charter since 18/02/1986.
2. The complainant avers that Darfur is the largest region in The Sudan, on its western border with Libya, Chad and the Central African Republic. Darfur is divided into south, west and north. Darfur has an area of about 256,000 square kilometers in size. It has a population of an estimated five million (5,000,000) persons, consisting of a complex tribal mix. The predominant ethnic groups in west Darfur are the Masaalit and Fur, together making a population of about 1.7 million. That in February 2003 fighting intensified in the Darfur region following the emergence of two groups, the Sudan Liberation Army (SLA) and the Justice Equality Movement (JEM). The SLA and JEM share an ethnic background and come primarily from the Fur, Zaghawa and Masaalit tribes whose political demand essentially is for the Khartoum authorities to address the marginalisation and underdevelopment of the region. That in response to the emergence of these groups, the Government of Sudan formed, armed and sponsored a militia composed of a loose collection of fighters of so-called “Arab” background known as the “Janjaweed” to help suppress the rebellion.
3. The complainant alleges further that Sudanese Government documentation indicates the involvement at the highest level of the Government of Sudan in the recruitment, arming and activities of the Janjaweed militia. For instance, a directive dated 13 February 2004 from the office of Sub-locality in North Darfur directed all Security units within the locality to allow the activities of the Janjaweed under the command of Sheikh Musa Hilal to proceed in areas of North Darfur and to secure their “vital needs.” That the Janjaweed was trained, armed and clothed in military uniform by the Government of Sudan and that Government military helicopters provide arms and supplies of food to the Janjaweed camps in Mistriyah, Ustani, Jebel Kaya, Girgigirgi, Masry, Milla, Ussayala, Funu Abu Jida, Kuma and several other Janjaweed camps in Darfur.

4. That in addition to attacking rebel targets, the Sudan Government's campaign has targeted the civilian population of the Fur, Masaalit and Zaghawa tribes. In certain areas in Darfur, the Janjaweed have been supported by the regular army in attacking and targeting civilians merely suspected of supporting the rebellion, while in other areas the Janjaweed have played the primary role of attack with the support of the military. These attacks on the civilian population either by the Government forces or the Janjaweed have resulted in widespread human rights violations against the people of Darfur. Essentially, according to the complainant, the victims are being forcibly evicted from their homes and lands by some of the most egregious means, including killings, rape, assault, burning of houses, destruction of crops, looting of property and slaughter of livestock. Indeed, rape has been a feature of most attacks on women and girls in the Fur, Massalit and Zaghawa areas in Darfur. Furthermore, women and girls fleeing from the attacks are often sexually assaulted by the Janjaweed militia as they seek refuge in neighbouring Chad or in one of the camps for internally displaced persons within Sudan. The complainant allege further that, food stores, crops and livestock have been either looted or destroyed and wells have been poisoned by the Janjaweed in an intentional attempt to starve the people of Darfur. In one such example, they claim, an aid worker reported to the United Nations news agency that the Janjaweed burned villages to the ground and poisoned wells and that the areas were rendered uninhabitable.
5. The complainant alleges that the Government of Sudan has used the Janjaweed as ground forces in its attacks against civilians from the Fur, Massalit and Zaghawa ethnic groups. The villages have been raided with the use of helicopter gunships and Antonov airplanes belonging to the Government of Sudan, which often drop bombs on defenseless people in villages, towns, markets, and around wells. The air strikes are primarily pronounced in north Darfur, which is largely populated by the Zaghawa tribe. The attacks on villages take place in the night or early in the morning. The air raids are usually followed with land attacks by the military and Janjaweed who are often armed with AK 47 assault rifles, MiG3 assault rifles and rocket propelled grenades.
6. The complainant claims residents of hundreds of villages have been forcibly evicted, with their homes and other structures totally or partially burned and destroyed. Thousands of civilians in Darfur have been killed in deliberate and indiscriminate attacks and more than a million people have already been displaced.
7. The complainant alleges that the Government of Sudan has been directly involved through the armed forces of Sudan and the Government-backed militia, the Janjaweed, in the killing of hundreds of thousands of civilians in

Darfur. This brutality is one means utilised by the Government of Sudan to forcibly evict the civilian population of the Darfur region. They allege that from February 2003 to the present, there have been numerous attacks and killings of civilians by the Janjaweed, at times accompanied by Sudanese Government soldiers. That the Government soldiers either stay behind the Janjaweed and cordon off villages, thereby preventing people from fleeing, or participate directly in the attacks and killings. That attacks have been carried out during or after prayers at the local mosque or in the houses and at wells where women and children draw water. These attacks were carried out with the use of bombs dropped from the back of Antonov planes, shelling from helicopter gunship, AK 47 assault weapons, MiG3 and rocket propelled grenades.

8. To substantiate further, the complainant provided the following accounts:
 - that on 17 May 2003, the village of Adu Jidad was attacked. Sudanese soldiers cordoned the market, and the Janjaweed killed at least 76 people in that market. In Kutum, in north Darfur, at least 32 persons were killed in their houses in July 2003. Between the period of February 2003 and August 2004, similar attacks and killings took place in several villages in Darfur, including, Abu Gamara, Sasa, Nana, Gorsella, Kornoy, Adar, Tina, Kishkish, Jafal, Amir, Garadai, Silaya, Murli, Meramta, Tukultukul, Usha and Jizu, all located in the Darfur region. In August 2003, the village of Kishkish was cordoned and attacked by the Janjaweed and Sudanese soldiers and several people were killed including Mohamad Ishaq, Ishaq Abaker, Aisha Ishaq, Adam Mohamad, Ibrahim Yahaya Abdulahi, Ahmed Abubakar, Yahya Ismail, Abu Ishaq, Dilak Mohamad Bas, Adam Mohamad Abdulahi, Omar Adams and many more. In Usha village about 400 people were killed, about 72 people killed in Murli, about 300 people killed in Meramta, 18 people killed in the village of Kasia, about 280 people killed in Garadai and several others in other villages and towns in Darfur. In Dar Masalit alone about fourteen coordinated attacks by the army and Janjaweed were carried out beginning in mid-2003. Mororo village was attacked on 30 August 2003 and about forty people were killed. On 9 October 2003 an attack in Murnei area comprising about twelve villages left 82 people dead including children. In Urum about 122 people were killed in two attacks within a month. Between 6 and 29 December 2003, the villages of Bareh, Habila, Kondoli, Nouri, Kenyu and Sildi all inhabited by the Fur, Masaalit and Zaghawa tribes were attacked by the Sudanese army and Janjaweed militia killing about 290 people comprising men women and children. On 7 February 2004 the villages of Sildi, and Tunfuka were attacked and about 38 people killed.²⁰ There have been and continue to be scores of such attacks, forced evictions, and accompanying human rights violations in Darfur since February 2003.

9. In this regard, the complainant argues that the Government of Sudan has legal obligations pursuant to Article 4 of the African Charter to both respect the right to life, by not violating that right itself, as well as to protect the right to life, by protecting persons within its jurisdiction from non-state actors, such as the Janjaweed, that may violate that right. The complainant notes further that the Government of Sudan has legal obligations pursuant to Article 6 of the African Charter to both respect the right to security of the person, by not violating that right itself, as well as to protect the right to security of the person, by protecting persons within its jurisdiction from non-state actors, such as the Janjaweed, that may violate that right. That the facts above illustrate that the Government of Sudan has violated both of these legal obligations.
10. Apart from the right to life and security, the complainant alleges that the forced evictions and accompanying human rights violations constitute violations of the right to freedom of residence as guaranteed in Article 12(1) of the African Charter on Human and Peoples' Rights. They argue that the intent by the Government of Sudan and the Janjaweed to forcibly evict and forcibly displace thousands upon thousands of persons from their chosen and established places of residence clearly contravenes the right to freedom of residence.
11. The complainant also alleges that the action of the Government of Sudan and the Janjaweed involving forced eviction and housing and property destruction constitute a violation by the Government of Sudan of the right to property enshrined in Article 14 of the African Charter. That the Government of Sudan has an obligation under Article 14 of the African Charter, read in concert with Article 1, not only to *respect* the right to property, but also to *protect* that right. That the forced evictions and destruction of housing and property constitute violations of those obligations. The forced evictions that have occurred and are occurring in the Darfur region have not been carried out in accordance with the provisions of appropriate law, including international human rights law, and did not contribute to public need nor was it in the general interest of the community. Indeed, rather than contributing in any way to public need or in the general interest of the community, these forced evictions amount to gross violation of human rights, as recognized by the United Nations Commission on Human Rights in Resolution 1993/77 and 2004/28.
12. The complainant avers that, the Government of Sudan has therefore violated the right to adequate housing implied in Articles 14, 16 and 18(1) of the African Charter by (1) *not respecting* the right to adequate housing by being complicit in the forced evictions and destruction of housing in the Darfur region; and (2) by *not protecting* the residents of those communities from forced eviction and housing destruction at the hands of third parties including the Janjaweed. Furthermore, the Government of Sudan also violated the right to judicial protection under Article 7 of the African Charter, by not adequately

investigating and prosecuting its agents and the third parties responsible for the forced evictions and housing destruction that occurred and is occurring in the Darfur region. Based on the legal obligations of the Government of Sudan under the African Charter, the African Commission should find violations by the Government of Sudan of its obligation to respect and to ensure the right to adequate housing as guaranteed under Articles 14, 16, and 18(1) of the African Charter on Human and Peoples' Rights. Furthermore, the Government of Sudan must provide restitution, compensation or both, as warranted, for damages resulting from the violation of the right to adequate housing. That the egregiousness and brutality of the forced evictions in the Darfur region constitute cruel and inhuman treatment by the Government of Sudan in violation of Article 5 of the African Charter on Human and Peoples' Rights.

13. Consequently, the Government of Sudan has violated the right to adequate food and the right to water implied in, *inter alia*, Articles 4, 16, and 22 of the African Charter by (1) *not respecting* the right to adequate food and the right to water by being complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells in the Darfur region; and (2) by *not protecting* the residents of those communities from looting and destroying foodstuffs, crops and livestock as well as poisoning of wells at the hands of third parties including the Janjaweed. Furthermore, the Government of Sudan also violated the right to judicial protection under Article 7 of the African Charter, by not adequately investigating and prosecuting its agents and the third parties responsible for these actions that occurred and are occurring in the Darfur region.

14. Based on the legal obligations of the Government of Sudan under the African Charter, the African Commission should find violations by the Government of Sudan of its obligation to respect and to ensure the right to adequate food and the right to water as guaranteed under, *inter alia*, Articles 4, 16, and 22 of the African Charter on Human and Peoples' Rights. Furthermore, the Government of Sudan must provide restitution, compensation or both, as warranted, for damages resulting from the violation of the right to adequate housing.⁷²

Complaint and prayer

15. Complainant alleges violation by the Republic of The Sudan of Articles 4, 5, 6, 7, 12(1), 14, 16, 18(1) and 22 of the African Charter on Human and Peoples' Rights and requests that the African Commission on Human and Peoples' Rights hold the Government of Sudan liable for the human rights violations suffered in the Darfur region at the hands of Government forced and the Janjaweed.

16. The complainant also urges the Commission to place the violations described in the Communication, before the Assembly of Heads of States for consideration under article 58 of the African Charter; that the Commission, with the approval of the Assembly, undertake an in-depth study of the situation in Darfur and make a factual report with findings and recommendations as mandated by Article 58(2) of the African Charter; and that the Commission apply Rule 111(3), of the Provisional Measures of the Rules and Procedure of the African Commission on Human and Peoples Rights, adopted on 6 October 1995, in view of the urgency required in this communication.
17. The complainant argues that based on the legal obligations of the Government of Sudan under the African Charter, and guided by past precedent of the African Commission and the persuasive analyses of the European Court, the African Commission should find violations by the Government of Sudan of its obligations to respect and to protect the rights of the victims. That the African Commission should also find a violation of the right to appeal to a competent national organ against acts violating fundamental rights as recognised and guaranteed by conventions, laws, regulation and customs in force protected under Article 7 on account of the Government of Sudan's failure to adequately investigate and prosecute those responsible for the forced evictions and housing destruction, even if those responsible are agents of the Government acting in the course of their official duties. Furthermore, the Government of Sudan must provide restitution, compensation or both, as warranted, for damages resulting from the violation of human rights.

Procedure

18. The complaint was received at the Secretariat of the African Commission by e-mail 6 January 2005.
19. On 11 January 2005, the Secretariat wrote to the complainant acknowledging receipt of the complaint and informing it that it will be considered at the Commission's 37th Ordinary Session.
20. At its 37th Ordinary Session held in Banjul, The Gambia from 27 April to 11 May 2005, the African Commission considered the communication and decided to be seized thereof.
21. By Note Verbale of 24 May 2005 the Respondent State was notified of the decision of the Commission and a copy of the communication was sent to the State through its Embassy in Dakar, Senegal requesting the State to send its arguments on admissibility within three months of the notification. By letter of the same date, the complainant were notified of the decision of the

Commission and asked to submit their arguments on admissibility within three months of notification.

22. By letter of 15 June 2005, the complainant submitted its arguments on admissibility.
23. By letter of 7 July 2005, the Secretariat acknowledged receipt of the complainant's submission on admissibility. By Note Verbale of the same date the complainant's submission on admissibility were sent to the Respondent State and the latter was requested to submit its arguments before 24 August 2005.
24. By Note Verbale dated 2 September 2005, the Respondent State was reminded to send its arguments on admissibility.
25. On 9 November 2005, the Secretariat received a Note Verbale from the Respondent State submitting its argument on admissibility in Arabic.
26. By Note Verbale of 11 November, the Secretariat of the African Commission acknowledged received of the Respondent State's submission and requested the latter if the submissions could be sent in English.
27. At its 38th ordinary session held from 21 November to 5 December 2005, the African Commission deferred consideration on the admissibility of the communication to its 39th Ordinary Session.
28. By Note Verbale of 15 December 2005 and by letter of the same date, the Secretariat of the African Commission notified both parties of the African Commission's decision.
29. By letter of 9 March 2006, the Secretariat of the African Commission forwarded the arguments on admissibility of the State to the complainant.
30. On 20 March 2006, the Secretariat received a supplementary submission on admissibility from the complainant in response to the State's submission.
31. By letter of 27 March 2006, the Secretariat acknowledged receipt of the complainant's supplementary submissions on admissibility.
32. By Note Verbale of 27 March 2006 the Secretariat transmitted the complainant's supplementary submission on admissibility to the State and requested the latter to respond before 15 April 2006.

Arguments on admissibility

33. The communication is in respect of alleged forced evictions and human rights violations committed by the Respondent State in the Darfur Region of Sudan. According to the complainant, these forced evictions and human rights violations amount to both a series of serious human rights violations and a massive violation of human rights protected by the African Charter, and in particular Articles 4, 5, 6, 7, 12(1), 14, 16, 18(1) and 22.
34. The complainant avers that the communication be declared admissible as domestic remedies are not available, the claims have not been settled by the government of The Sudan, and they involve both a series of serious human rights violations and a massive violation of human rights. The complainant alleges that the facts occurred very recently and are ongoing and as such the communication has been submitted to the African Commission within a reasonable period of time.
35. The complainant argued further that those facing forced evictions and accompanying human rights violations in the Darfur Region cannot avail themselves of local remedies for several reasons. First, they are increasingly being displaced into remote regions of Sudan or across international frontiers. Second, the Government of Sudan has not created a climate of safety necessary for victims to avail themselves of local remedies. Finally, the Government of Sudan is well aware of the series of serious and massive human rights violations now occurring in Darfur and has taken little or no steps to halt and remedy those violations. Consequently, these impediments render local remedies unavailable to the victims.

Respondent State's arguments on admissibility

36. In its Response of 9 March 2006, the Republic of The Sudan rejected the complainant's arguments on two main grounds: first, that local remedies have not been exhausted and secondly, that the communication has been settled by other international mechanisms.
37. According to the State, the author of the communication failed to use the judicial recourse available in seeking justice. That they failed to resort to any existent legal, judicial or administrative means within the state to deal with the allegations.
38. The state argues that the author of the communication could have addressed the alleged violations through the Sudanese state courts noting that under Sudanese law the protection of human rights is regulated by three main legislative norms: a) International and regional human rights as ratified by the

Sudanese government (considered to be an integral part of the Constitution), b) The Constitution, and c) State Legislation.

39. The Constitutional Court was established in 1998 and has jurisdiction to hear issues relating to the protection of human rights guaranteed in the constitution and other international instruments the Sudan has ratified. The state noted further that other courts such as the Supreme Court, the Courts of Appeal, the General Court and the Tribunals of 1st, 2nd and 3rd Appeals all have jurisdictions, depending on the location, to deal with specific issues. The President of the Supreme Court can establish special or specialized courts to deal with specific situations and ordinary tribunals specialized to hear cases on human rights violations in the three regions of Darfur (North Darfur-South Darfur-West Darfur) have been established.
40. The State noted that legal and judicial procedures had been introduced by the government against alleged perpetrators of human rights abuses in the region, and enumerated mechanisms that had been put in place to address allegations of human rights violations. They include: the National Commission of Enquiry on the violation of Human Rights in Darfur under the Chairmanship of the former Vice-President of the Supreme Court. It is comprised of human rights lawyers and activists. The Commission submitted its report to the President of the Republic in January 2005. Three Committees were established based on the recommendations of the report: - Judiciary Committee of Enquiry to investigate violations, Committee for Compensation and Committee for the settlement of priority cases of property ownership.
41. The Committees of Enquiry on allegations of rape had been set up by the Sudanese Minister of Justice in the three provinces of Darfur to report on violations against women, specifically on sexual assault cases. These committees are comprised of female lawyers (a female magistrate, legal Counsel and police officer in each committee). These committees have received numerous complaints and transferred a great number of cases from the criminal tribunals to the courts. The Special Criminal Tribunals to prosecute those implicated in human rights violations in Darfur during armed conflicts as confirmed by reports submitted by the Judicial Committee of Enquiry, established by order of the National Commission of Enquiry.
42. Therefore, according to the State, the communication does not comply with the provisions of article 56 (5) of the African Charter on Human and Peoples' Right which stipulates that communications complaining of human and peoples' rights violations as mentioned in article 55, petitioned through the Commission would only be examined if "*they are transmitted after having exhausted all local remedies, unless it has been proven that this procedure is unduly prolonged.*"

43. The state submits further that the communication was submitted after being settled by UN Mechanisms. The State noted that the communication was previously submitted to the United Nations and the UN Security Council adopted resolutions 1590, 1591 and 1592 concerning the situation in Darfur and the resolutions are currently being implemented. The Sudanese government has given its full cooperation in the matter. That the case was also submitted to the Commission on Human Rights of the Economic, Social and Cultural Council of the United Nations system. A resolution of the Commission on Human Rights concerning human rights violations in Sudan was adopted in April 2005 to this effect. As a result, a Special Rapporteur was assigned to look into the human rights situation. He recently visited Sudan, specifically the Darfur region.
44. According to the State, since the matter had been submitted to mechanisms based on the United Nations Charter, the communication is inadmissible in accordance with article 56 (7) of the African Charter on Human and Peoples' Rights.
45. Based on the above-mentioned facts, the Sudanese government demands the withdrawal of the communication submitted by the Centre for Housing and Eviction Rights on the premise that it does not conform to conditions of admissibility as established in the African Charter on Human and Peoples' Rights.
46. In a Supplementary brief on admissibility in response to the State's submissions, the complainant reiterated its arguments that the victims cannot avail themselves to local remedies for several reasons, including the fact that they are increasingly being displaced into remote regions of The Sudan or across international borders; that the Sudan has not created a safe climate necessary for them to seek local remedies and that according to an Amnesty International Report, the State has failed to bring an end to the current climate of intimidation. The complainant notes further that in her 2006 Report, the UN Special Rapporteur on the human rights situation in The Sudan found that "the human rights situation worsened from July 2005...and a comprehensive strategy responding to transitional justice has yet to be developed in the Sudan" adding that the cases prosecuted before the Special Criminal Court on the events in Darfur "did not reflect the major crimes committed during the height of the Darfur and "only one of the cases involved charges brought against a high-ranking official, and he was acquitted."
47. The Special Rapporteur also found that "the Government has taken other justice initiatives, but they too have fallen short of producing accountability."¹ The Special Rapporteur also found that "national laws s... effectively protect Sudanese law enforcement officials from criminal prosecution [and that these laws] contribute to a climate of impunity in the Sudan." Consequently,

¹ Id. at paragraph 48.

according to the complainant, these domestic remedies, including those cited by the Republic of The Sudan in its response, can not be deemed to be effective, as they offer little prospect of success, nor sufficient as they are incapable of redressing the complaints made in the present Communication.

48. Furthermore, the complainant argues that Amnesty International has pointed out that “the Government has failed to disarm the *Janjawid* militias or bring those accused of crimes to justice” and that “the national justice system urgently needs to be rebuilt if Sudan is to complement the work of the ICC by bringing to justice those accused of committing war crimes in trials that meet international standards of fairness.”² Again, this failure to disarm human rights violators or bring them to justice create impediments that render domestic remedies unavailable.
49. The complainant refers to the Commission’s decision on *World Organisation Against Torture, et al. v. Zaire*, Communications 25/89, 47/90, 56/91 and 100/93, as well as *SERAC and CESR v. Nigeria*, Communication 155/96, in which the Commission held that one rationale for the exhaustion of local remedies is that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation. Similar to the reasoning and conclusion in the above-mentioned cases, it is not necessary to recount the international attention the violations in Darfur have received. The Republic of The Sudan is well aware of the series of serious and massive human rights violations that have occurred and are now occurring in Darfur and has taken no steps to halt or remedy those violations. Consequently, the Government of Sudan has had ample notice and more than sufficient opportunity to provide local remedies and redress and has failed to do so.
50. The complainant adds that, lacks standing to bring claims before domestic courts of the Republic of The Sudan, and as the actual victims and potential victims cannot avail themselves of domestic legal protection, one of the only effective means of recourse is to seek remedy from the African Commission on Human and Peoples’ Rights.
51. On the mechanisms the State claims it has established to deal with alleged human rights problems, the complainant argues that they do not in practice adequately address the individual and collective remedies due to the violations of Articles 4, 5, 6, 7, 12(1), 14, 16, 18(1) and 22 of the African

² Amnesty International, *Sudan: Sudanese Government Must Support ICC Investigation of War Crimes in Darfur*, News Service No: 155, AI Index: AFR 54/058/2005 (Public) (6 June 2005).

Charter. According to the complainant, while peace talks will hopefully result in what could be considered injunctive relief by halting further human rights violations, they do not provide remedies for past human rights violations, including those of Articles 4, 5, 6, 7, 12(1), 14, 16, 18(1) and 22 of the African Charter, and while the National Commission of Enquiry on the violations of Human Rights in Darfur, the Committees of Enquiry on allegations of rape and the Special Criminal Tribunals are welcome in theory, they fail in practice to provide adequate remedies for the actual victims of forced eviction and accompanying human rights violations in the Darfur region. The complainant notes that Amnesty International, in a Press Release warned that the establishment of Special Criminal Tribunals “may just be a tactic by the Sudanese government to avoid prosecution by the International Criminal Court” and that such tribunals are “doomed to failure” because they lack “serious legal reforms ensuring independence of the judiciary” and because the Republic of The Sudan has failed to bring “about an end to the current climate of intimidation.”

52. The complainant added that the UN Human Rights Commission, in its resolution 2005/82, cited by the Republic of The Sudan in its response, confirms that these alleged domestic remedies are ineffective and insufficient in preventing, halting or remedying the forced evictions and accompanying human rights violations in Darfur. In its resolution 2005/82, the Commission condemned “the continued, widespread and systematic violations of human rights and international humanitarian law as reflected in the findings of the International Commission of Inquiry on Darfur” as well as “the violence against civilians and sexual violence against women and girls, destruction of villages, widespread displacement and other violations in Darfur.” The Commission called upon, *inter alia*, the Republic of The Sudan to, *inter alia*, “cease all acts of violence immediately, and protect women and girls from sexual and other forms of violence” and to “respect the rights of refugees and internally displaced persons and their right of voluntary return in safety and dignity”, adding that the UN Security Council resolution 1591, also cited by the Republic of The Sudan in its response, also confirms that domestic remedies are ineffective and insufficient at preventing, halting or remedying the ongoing violations. In resolution 1591, the UN Security Council stated that it “*deplores strongly* that the Government of Sudan and rebel forces and all other armed groups in Darfur have failed to comply fully with their commitments and the demands of the Council.”³

53. Consequently, according to the complainant it cannot be said that these claims have “been settled” as required by Article 56(7) of the African Charter requires, nor can it be shown that domestic remedies are indeed available, effective and sufficient.

³ UN Security Council resolution S/RES/1591 (29 March 2005).

54. The complainant concludes that for the foregoing reasons, the present Communication addressing the past and ongoing forced evictions and accompanying human rights violations in the Darfur region of the Republic of The Sudan is admissible as it satisfies the requirements of Article 56 of the African Charter. Furthermore, taken together, these forced evictions and accompanying human rights violations amount to both a series of serious human rights violations and a massive violation of human rights protected by the African Charter, and in particular Articles 4, 5, 6, 7, 12(1), 14, 16, 18(1) and 22.
55. The complainant also request the African Commission to “*exercise authority to issue Provisional Measures*”, pursuant to Rule 111 of the Rules of Procedure of the African Commission since the ongoing forced evictions and accompanying human rights violations result in irreparable damage to the victims. Such Provisional Measures should include ordering the Republic of The Sudan to immediately implement UN Commission on Human Rights resolution 2005/82 and in particular to “cease all acts of violence immediately, and protect women and girls from sexual and other forms of violence” and to “respect the rights of refugees and internally displaced persons and their right of voluntary return in safety and dignity.” With respect to the latter, the African Commission should expressly order that the Republic of The Sudan implement the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles)⁴ and in particular Principle 2.1.

Commission’s decision on admissibility

56. The present communication is submitted pursuant to Article 55 of the African Charter which allows the African Commission to receive and consider communications, other than from States Parties. Article 56 of the African Charter provides that the admissibility of a communication submitted pursuant to Article 55 is subject to seven conditions.⁵
57. The complainant in the present communication argues that it has satisfied the admissibility conditions set out in Article 56 of the Charter and as such, the communication should be declared admissible. The Respondent State submits that the communication should be declared inadmissible because, according to the State, the complainant has not complied with Article 56 (5) and (7) of the African Charter.

⁴ Sub-Commission on the Promotion and Protection of Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons, UN Doc. E/CN.4/Sub.2/2005/17 (28 June 2005).

⁵ See Article 56 of the African Charter on Human and Peoples’ Rights.

58. As the State has not raised any objection to the complainant's compliance with the other conditions under Article 56, the African Commission will assume they have been fulfilled and will make no decision thereof.
59. Article 56 (5) of the African Charter provides that communications relating to human and peoples' rights referred to in Article 55 received by the African Commission shall be considered if they "*are sent after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged*".
60. In its supplementary brief on admissibility submitted on 20 March 2006, the complainant noted that the allegations were current and ongoing meaning that local remedies, if pursued couldn't be considered as unduly prolonged. The complainant do admit that local remedies have not been attempted and explained that the circumstances prevailing in Darfur make such remedies, even if available, ineffective and inefficient.
61. When can we say a local remedy is available, effective and sufficient? It must be noted that all three criteria must be present for the local remedy envisaged in Article 56 (5) to be considered worthy of pursuing. A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.⁶
62. The State argues that the remedies were not only available but effective and sufficient and that the complainant didn't bother to access them to seek justice for the victims. The Complainant quotes several reports which indicate that there was intimidation, displacement, harassment, sexual and other kinds of violence, which according to the complainant may not be conducive for the exhaustion of local remedies. The complainant did note in its supplementary brief that the cases prosecuted before the Special Criminal Court on the events in Darfur "did not reflect the major crimes committed during the height of the Darfur and "only one of the cases involved charges brought against a high-ranking official, and he was acquitted." This means persons are actually being prosecuted and the fact that no one has been found guilty or that high ranking officials have not been indicted does not make local remedies unavailable.
63. The Amnesty International Press Release quoted by the complainant simply cast aspersions on the viability of the Special Criminal Tribunals as it states that the court "may just be a tactic by the Sudanese government to avoid prosecution by the International Criminal Court " and that such tribunals are "doomed to failure" because they lack "serious legal reforms ensuring independence of the judiciary" and because the Republic of The Sudan has

⁶ Dawda Jawara v. The Gambia, African Commission on Human and Peoples' Rights, Comm. Nos. 147/95 and 149/96 (2000).

failed to bring “about an end to the current climate of intimidation.” The complainant was simply casting doubts about the effectiveness of this particular domestic remedy.

64. The African Commission is of the view that it is incumbent on the complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences. In this regard, the African Commission would like to refer to the decision of the Human Rights Committee in **A v Australia**⁷ in which the Committee held that “mere doubts about the effectiveness of local remedies ... did not absolve the author from pursuing such remedies”.⁸
65. This notwithstanding, the scale of the alleged abuses, the number of persons involved and the nature of the alleged abuses *ipso facto* makes local remedies unavailable, ineffective and insufficient. This Commission has held in *Malawi African Association and Others v. Mauritania*⁹ that it “does not believe that the condition that internal remedies must have been exhausted can be applied literally to those cases in which it is neither practicable nor desirable for the complainants or the victims to pursue such internal channels of remedy in every case of violation of human rights. Such is the case where there are many victims. Due to the seriousness of the human rights situation and the large number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable ...”¹⁰ Such is the case with the present communication with respect to the

⁷ Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

⁸ See also *L Emil Kaaber v Iceland*, Communication No. 674/1995. UN Doc. CCPR/C/58/D/674/1995 (1996). See also *Ati Antoine Randolph v. Togo*, Communication No. 910/2000, UN Doc. CCPR/C/79/D/910/2000 (2003).

⁹ African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), para 85.

¹⁰ See also *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah / Zaire*, African Comm. Hum. & Peoples' Rights. Communication No. 25/89, 47/90, 56/91, 100/93 Comm. 25/89 alleges the torture of 15 persons by a Military Unit, on or about 19 January 1989, in Kinsuka near the Zaire River. On 19 April 1989 when several people protested their treatment, they were detained and held indefinitely. Comm. 47/90, alleges arbitrary arrests, arbitrary detentions, torture, extra-judicial executions, unfair trials, severe restrictions placed on the right to association and peaceful assembly, and suppression of the freedom of the Press. Comm. 56/91 alleges the persecution of the Jehovah's Witnesses, including arbitrary arrests, appropriation of church property, and exclusion from access to education. Comm. 100/93, makes allegations of torture, executions, arrests, detention, unfair trials, restrictions on freedom of association and freedom of the press. It also alleges that public finances were mismanaged; that the failure of the Government to provide basic services was degrading; that there was a shortage of medicines; that the universities and secondary schools had been closed for two years;

situation in the Darfur region of the Sudan where tens of thousands of people have been forced from their homes, some are still within the country while others have fled across to other countries. It is impracticable and undesirable to expect these victims to exhaust the remedies claimed by the State to be available.

66. In the present communication therefore, the fact that the complainant has not sufficiently demonstrated its inability to exhaust domestic remedies does not mean such remedies are available, effective and sufficient. The African Commission can infer from the circumstances surrounding the case and determine whether such remedies are in fact available, and if they are, whether they are effective and sufficient.
67. The invocation of the exception to the rule requiring that remedies under domestic law should be exhausted provided for in Article 56(5) must invariably be linked to the determination of possible violations of certain rights enshrined in the African Charter, such as the right to a fair trial enshrined under article 7 of the African Charter.¹¹ The exception to the rule on the exhaustion of domestic remedies would therefore apply where the domestic situation of the State does not afford due process of law for the protection of the right or rights that have allegedly been violated. In the present communication, this seems to be the case, the victims cannot access the courts to claim protection of their rights, either because they have been displaced, or because they are being harassed, intimidated and persecuted, the prevalence of violence in the region makes any attempt at exhausting local remedies by the victims an affront to common sense, good conscience and justice.
68. Another rationale for the exhaustion requirement is that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal. The African Commission is of the view that the State has had ample time and notice of the alleged violation to at least create conducive environment for the enjoyment of the rights of the victims. In its Fact Finding Report, this Commission recommended that the State takes the necessary measures to create a conducive atmosphere that would enable displaced persons return to their home in peace and safety. This seems not to have been done. If it is shown that the State has had ample notice and time within which to remedy the situation, even if not within the context of the domestic

that freedom of movement was violated; and that ethnic hatred was incited by the official media.

¹¹ Inter-American Court of Human Rights, *Case of Velásquez Rodríguez. Preliminary Exceptions*, cit., para. 91. See in this connection also *Judicial Guarantees during States of Emergency* (Articles 27.2, 25 and 8 of the American Convention on Human Rights). Advisory Opinion OC–9/87 of October 6, 1987. Series A. N° 9, para 24.

remedies of the State, as is the case with the present communication, the State may still be said to have been properly inform and is expected to have taken appropriate steps to remedy the violation alleged. The fact that the State has not effectively dealt with the human rights violation in the Darfur means that domestic remedies are either not available or if they are, not effective or sufficient to redress the violations alleged.

69. On the claim that the communication has been settled by UN mechanisms, the African Commission wishes to state that a matter is settled within the context of Article 56 (7) of the African Charter if it has been dealt with by any of the human rights treaty bodies or the Charter bodies of the United Nations system. The UN treaty bodies include bodies created under international human rights treaties. There are presently seven human rights treaty bodies that monitor implementation of the core international human rights treaties: Human Rights Committee (HRC), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee Against Torture (CAT), Committee on the Rights of the Child (CRC) and Committee on Migrant Workers (CMW). The Charter bodies are those created under the UN Charter and include Commission on Human Rights (CHR) (to be replaced with the Human Rights Council), Special procedures of the Commission on Human Rights, in particular the 1503 procedure;¹² and the Sub-Commission for the Promotion and Protection of Human Rights.
70. To be settled also requires that the treaty or Charter body dealing with the matter has taken a decision which addresses the concerns, including the relief being sought by the complainant. It is not enough for the matter to simply be discussed by these bodies.
71. The present communication was never submitted to any of these bodies either by the present complainant or any other individual or institution. The general human rights situation in the region was rather discussed by the UN Security Council following reports from different organizations, including agencies of the UN itself. In response to these reports, the Security Council adopted three resolutions on the Sudan – on 24 March 2005 Resolution 1590 is passed establishing a peacekeeping force in South Sudan. Darfur is tagged onto the resolution with the force in the South to co-ordinate with the AU force in Darfur; on 27 March 2005 a resolution establishing a committee to monitor the Darfur situation and on 31 March 2005 adopted Resolution 1593 referring Darfur to the ICC. None of these bodies specifically dealt with, or was intended to deal with the allegations raised in the present communication and

¹² See Amnesty International v. Tunisia, African Commission on Human and Peoples' Rights, Comm. No. 69/92 (1994) where the communication had been dealt with under the 1503 procedure and later brought to the African Commission. The Commission declared it inadmissible in accordance with Article 56(7) of the African Charter.

it can thus not be said that the matter has been dealt with or settled as required under Article 56 (7) of the African Charter.

From the above, the African Commission declares the communication **admissible**