

# African Commission on Human and Peoples' Rights

**Communications 279/03 – Sudan Human Rights Organisation & The Sudan 296/05 – Centre on Housing Rights and Evictions/The Sudan.**

## **Summary of facts:**

1. The first Communication, the **Sudan Human Rights Organisation et al/The Sudan (the SHRO Case)** is submitted by the Sudan Human Rights Organisation (London), the Sudan Human Rights Organisation (*Canada*), the Darfur Diaspora Association, the Sudanese Women Union in Canada and the Massaleit Diaspora Association (hereinafter called the Complainants).
2. The Complainants allege gross, massive and systematic violations of human rights by the Republic of Sudan (herein after called Respondent State) against the indigenous Black African tribes in the Darfur region (Western Sudan); in particular, members of the Fur, Marsalit and Zaghawa tribes.
3. The Complainants allege that violations being committed in the Darfur region include large-scale killings, the forced displacement of populations, the destruction of public facilities, properties and disruption of life through bombing by military fighter jets in densely populated areas.
4. The Complainants allege that the Darfur region has been under a state of emergency since the government of General Omar Al-Bashir seized power in 1989. They allege further that this situation has given security and paramilitary forces a free hand to arrest, detain, torture and carry out extra-judicial executions of suspected insurgents.
5. The Complainants also allege that nomadic tribal gangs of Arab origin, alleged to be members of the militias known as the *Murhaleen* and the *Janjaweed* are supported by the Respondent State.
6. The Complainants allege further that an armed group known as the Sudan Liberation Movement/Army issued a political declaration on 13 March 2003 and clashed with Respondent State's Armed Forces. The Respondent State launched a succession of human rights violations against suspected insurgents, using methods such as extra-judicial executions, torture, rape of women and girls, arbitrary arrests and detentions.

7. The Complainants also contend that hundreds of people from the aforementioned indigenous African tribes have been summarily executed by the Respondent State's security forces and by allied militia, adding that detainees are usually tried by special military courts with little regard to international standards or legal protection.
8. The Complainants allege that the abovesaid actions of the Respondent State violate Articles **2, 3, 4, 5, 6, 7 (1), 9, 12 (1, 2 and 3), and 13 (1 and 2)** of the African Charter on Human and Peoples' Rights.
9. The second Communication, **Centre for Housing Rights and Evictions/The Sudan (the COHRE Case)**, is submitted by an NGO based in Washington D.C. (the Complainant) against the Republic of Sudan (the Respondent State). The Communication is based on almost similar allegations as in the **SHRO Case**.
10. The Complainant states that Darfur is the largest region in the Respondent State, divided into south, west and north administrative zones and covers an area of about 256,000 square kilometers in size and has an estimated population of five million (5,000,000) persons. That in February 2003 fighting intensified in the Darfur region following the emergence of two armed groups, the Sudan Liberation Army (SLA) and the Justice Equality Movement (JEM), which come primarily from the Fur, Zaghawa and Masaalit tribes. The two armed groups' political demand essentially is for the Respondent State to address the marginalisation and underdevelopment of the region.
11. The Complainant alleges that in response to the emergence of these groups and the armed rebellion, the Respondent State formed, armed and sponsored an Arab militia force known as the Janjaweed to help suppress the rebellion.
12. The Complainant alleges further that the Respondent State is involved at the highest level in the recruitment, arming and sponsoring of the Janjaweed militia. The Complainant cites a Directive dated 13 February 2004, from the office of the Sub-locality in North Darfur directing all Security units within the locality to allow the activities of the Janjaweed under the command of Sheikh Musa Hilal to secure its "vital needs." The Complainant also claims that military helicopters from the Respondent State provide arms and supplies of food to the Janjaweed.
13. The Complainant alleges that in addition to attacking rebel targets, the Respondent State's campaign has targeted the civilian population, adding that villages, markets, and water wells have been raided and bombed by helicopter gunships and Antonov airplanes.

14. The Complainant claims that residents of hundreds of villages have been forcibly evicted, their homes and other structures totally or partially burned and destroyed. That thousands of civilians in Darfur have been killed in deliberate and indiscriminate attacks and more than a million people have been displaced.

### **Complaint and prayers**

15. The Complainant in the **COHRE Case** alleges that the Respondent State has violated Articles **4, 5, 6, 7, 12 (1), 14, 16, 18 (1)** and **22** of the African Charter. It requests the African Commission to hold the Respondent State liable for the human rights violations in the Darfur region.
16. The Complainant also urges the African Commission to place the violations described in the Communication, before the Assembly of Heads of State and Government of the African Union for consideration under Article 58 of the African Charter; that the African Commission, should undertake an in-depth study of the situation in Darfur and make a factual report with findings and recommendations as mandated in Article 58 (2) of the African Charter; and that the African Commission should adopt Provisional Measures in view of the urgency required in this Communication.

### **Procedure**

17. **The SHRO Case** was received by post at the Secretariat of the African Commission (the Secretariat) on 18 September 2003.
18. On 10 October 2003, the Secretariat acknowledged receipt of the Complaint and indicated that it would be considered on seizure by the African Commission during its 34<sup>th</sup> Ordinary Session held from 6 – 20 November 2003, in Banjul, The Gambia.
19. During its 34<sup>th</sup> Ordinary Session, the African Commission examined the Communication and decided to be seized of it.
20. On 2 December 2003, the Secretariat notified the Respondent State of this decision, sent a copy of the complaint, and requested it to send its arguments on admissibility within three months.
21. This decision was also conveyed to the Complainants by letter dated 02 December 2003.

22. On 29 March 2004, the Respondent State informed the Secretariat that due to various reasons, it would not be able to present its submissions on admissibility and promised to send the said observations at the earliest time possible.
23. During its 35<sup>th</sup> Ordinary Session which was held in Banjul, The Gambia in May/June 2004, the African Commission deferred consideration on the admissibility of the Communication to its 36<sup>th</sup> Ordinary Session at the Respondent State's request.
24. In the meantime, during the 35<sup>th</sup> Ordinary Session the Complainants delivered to the Secretariat documents containing supplementary information relevant to the complaint.
25. On 6 July 2004, the Secretariat informed both parties about its decision to defer the Communication and reminded the Respondent State to submit its arguments on admissibility. At the same time, the Secretariat conveyed the Complainants' supplementary submissions to the Respondent State, and also notified the Complainants about the Respondent State's request for a deferral of consideration on the admissibility.
26. Seizing the opportunity of a Commission's fact finding mission to the Respondent State, the Secretariat sent another set of the Communication documents to the Respondent State..
27. During its 36<sup>th</sup> Ordinary Session, held from 23 November to 7 December 2004 in Dakar, Senegal, the African Commission considered the Complaint and decided to defer its decision on admissibility to its 37<sup>th</sup> Ordinary Session. The Respondent State had submitted its arguments on admissibility during the said Session.
28. On 2 December 2004, the Secretariat of the African Commission acknowledged receipt of the Respondent State's submissions.
29. On 23 December 2004, the Secretariat informed the parties about the African Commission's decision.
30. During its 37<sup>th</sup> Ordinary Session, which took place from 27 April to 11 May 2005 in Banjul, The Gambia, the African Commission considered the complaint and, upon request from the Complainants, deferred its decision on admissibility to its 38<sup>th</sup> Ordinary Session.
31. During the 38<sup>th</sup> Ordinary Session held from 21 November to 5 December 2006, the African Commission considered the case and decided to postpone its consideration to the 39<sup>th</sup> Ordinary Session.

32. On 16 December 2005, the Secretariat of the African Commission notified this decision to the parties. The Complainants were requested to submit their rejoinder to the Respondent State's arguments.
33. During its 39<sup>th</sup> Ordinary Session held from 11 – 25 May 2006, in Banjul, The Gambia, the Commission considered the Communication and declared it admissible. It further decided to consolidate the Communication with the **COHRE Case**.
34. By Note Verbale of 14 July 2006 and by letter of the same date, both parties were notified of the Commission's decision and requested to submit their arguments on the merits within two months.
35. The **COHRE Case** was received at the Secretariat of the African Commission by e-mail on 6 January 2005.
36. On 11 January 2005, the Secretariat wrote to the Complainant acknowledging receipt of the complaint and informing it that it will be considered on seizure at the Commission's 37<sup>th</sup> Ordinary Session.
37. At its 37<sup>th</sup> 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.
38. On 24 May 2005, the Secretariat sent a copy of the Communication to the Respondent State, notified it of the decision of the Commission, and requested it to send its arguments on admissibility within three months of the notification. By letter of the same date, the Complainant was notified of the decision and asked to submit its arguments on admissibility within three months of notification.
39. By letter of 15 June 2005, the Complainant submitted its arguments on admissibility.
40. On 7 July 2005, the Secretariat acknowledged receipt of the Complainant's submission on admissibility and transmitted them to the Respondent State and requested the latter to submit its arguments before 24 August 2005.
41. By Note Verbale dated 2 September 2005, the Respondent State was reminded to send its arguments on admissibility.
42. On 9 November 2005, the Secretariat received a Note Verbale from the Respondent State submitting its argument on admissibility.

43. By Note Verbale of 11 November, 2005, the Secretariat acknowledged receipt of the Respondent State's submission.
44. At its 38<sup>th</sup> Ordinary Session held from 21 November to 5 December 2005, the African Commission deferred consideration on the admissibility of the Communication to its 39<sup>th</sup> Ordinary Session.
45. By Note Verbale of 15 December 2005 and by letter of the same date, the Secretariat notified both parties of the African Commission's decision.
46. By letter of 9 March 2006, the Secretariat forwarded the arguments on admissibility of the State to the Complainant.
47. On 20 March 2006, the Secretariat received a supplementary submission on admissibility from the Complainant in response to the State's submission.
48. By letter of 27 March 2006, the Secretariat acknowledged receipt of the Complainant's supplementary submissions on admissibility.
49. By Note Verbale of 27 March 2006, the Secretariat transmitted the Complainant's supplementary submission on admissibility to the Respondent State and requested the latter to respond before 15 April 2006.
50. At its 39<sup>th</sup> Ordinary Session held from 11 – 25 May 2006, the African Commission considered the Communication and declared it admissible. The Commission decided to consolidate the Communication with the **SHRO Case**.
51. By Note Verbale dated 29 May 2006 and by letter of the same date, both parties were notified of the Commission's decision and requested to make submissions on the merits before 29 August 2006.
52. On 23 August 2006, the Secretariat received the Complainant's submissions on the merits of the Communication. On 1 October 2006, the Secretariat acknowledged receipt of the Complainant's submissions.
53. On 8 October 2006, the Secretariat forwarded the Complainant's submissions to the Respondent State and reminded the latter to make its submissions on the merits before 31 October 2006.
54. At its 40<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 15 – 29 November 2006, the African Commission considered the

Communication and deferred it to its 41<sup>st</sup> Ordinary Session pending the Respondent State's response.

55. By Note Verbale of 4 January 2007 and by letter of the same date, both parties were notified of the Commission's decision.
56. By Note Verbale of 11 April 2007, the Secretariat reminded the Respondent State to submit its arguments on the merits.
57. On 25 May 2007, during the 41<sup>st</sup> Ordinary Session, the Secretariat received the State's submissions on the merits.
58. At its 41<sup>st</sup> Ordinary Session held in Accra, Ghana, the Commission considered the Communication and deferred it to its 42<sup>nd</sup> Ordinary Session to allow the Secretariat to translate the submissions and prepare a draft decision.
59. By Note Verbale of 10 July 2007 and letter of the same date both parties were notified of the Commission's decision.
60. At its 42<sup>nd</sup> Ordinary Session held from 15 – 28 November 2007, in Brazzaville, Congo, the Commission considered the Communication and deferred it to its 43<sup>rd</sup> Ordinary Session because the Respondent State made additional submissions on the matter during the Session.
61. At its 43<sup>rd</sup> Ordinary Session held in Ezulwini, the Kingdom of Swaziland, the Commission deferred the Communication to its 44<sup>th</sup> Ordinary Session to allow the Secretariat to prepare a draft decision
62. At its 44<sup>th</sup> Ordinary Session Abuja, Nigeria, the Commission considered the Communication and deferred further consideration to the 45<sup>th</sup> Ordinary Session due to time constraints.

### **Submissions on admissibility**

#### **The SHRO Case**

#### **Complainants' submissions on admissibility**

63. The Complainants submit that acts of violence were committed in a discriminatory manner against populations of Black African origin, in the Darfur region, namely the *Fur, Massaleit and Zaggawa tribes*.
64. They add that the Respondent State is "governed by a military regime, which does not attach the required importance to normal procedures under the Rule of law or respect for the country's institutions," hence

citizens, groups and organizations cannot bring issues of human rights violations before independent and impartial Courts, because of the “inevitable harassment, threats, intimidations and disruption of normal life by State security agents”.

65. The Complainants submit that the Respondent State continues to hold Mr. Hassan El Turabi, leader of the political party *National Popular Congress*, in detention, in spite of the rulings by the Constitutional Court which gave instructions for his release. That the Darfur region has been placed under a state of emergency since the 1989 coup d'état, and that the situation is deteriorating very rapidly and in a highly dangerous manner in a country which is multi-denominational, multi-cultural and multi-ethnic.

### **The COHRE Case**

66. The Complainant avers that the Respondent State has committed serious and massive violation of human rights. The Complainant argues that the violations are ongoing since 2003. It argues that the Communication has been submitted to the African Commission within a reasonable period of time.
67. The Complainant argues further that the victims of forced evictions and other accompanying human rights violations in the Darfur Region cannot avail themselves of local remedies due to several reasons, including the fact that (i) the victims are increasingly being displaced into remote regions or across international frontiers (ii) the Respondent State has not created a climate of safety necessary for victims to avail themselves of local remedies, and (iii) the Respondent State is well aware of the series of serious and massive human rights violations occurring in Darfur and has taken little or no steps to remedy those violations. Consequently, these impediments render local remedies unavailable to the victims.
68. The Complainant therefore urges that the Communication be declared admissible because domestic remedies are not available.

### **Respondent State's submissions on admissibility**

69. The Respondent State denies all the allegations advanced by the Complainants in the **SHRO Case**. The Respondent State submits that the conflict in the Darfur region is a result of its geographical location. It argues that the instability in neighbouring countries has negative repercussions on the Respondent State.

70. The Respondent State admits that the conflict in Southern Sudan, which lasted for years had affected all the regions of the country at varying degrees. It states that South Darfur, which borders Southern Sudan, has been affected by armed operations and the massive exodus of the population running away from the fighting. That the three Darfur regions have also been affected by the situation in Chad, Central African Republic and the Democratic Republic of Congo through the introduction of arms from these countries and the influx of hundreds of tribes with kinship links in the Respondent State.
71. The Respondent State submits that armed conflicts in neighbouring States have contributed to the emergence of armed rebel groups which carry out plunder and theft. The Respondent State submits further that it has taken measures to restore stability, bring criminals to courts in accordance with the law and returned stolen property.
72. The Respondent State argues further that the Complainants have not exhausted local remedies. It states that there hasn't been any report/complaint to the police, the Courts, or the National Council or to the Human Rights Consultative Council. It submits further that the complaint does not conform to Articles 56(2) and (4) of the African Charter, because it is based on erroneous or imaginary facts which have nothing to do with the Respondent State.
73. The Respondent State claims that the Communication has been overtaken by events since several of the claims were addressed by the President of the Respondent State on 9 March 2004, when he granted general amnesty to those who surrendered their arms. That the Respondent State signed peace agreements at Abeche and N'djamena; launched the reconstruction of infrastructure destroyed by the rebels; allowed international aid organizations to intervene on the ground; and allowed the return of internally displaced persons. It created an independent Commission of Inquiry on the human rights violations, and convened a meeting for all Darfurians to discuss the restoration of peace in the region. In the light of the foregoing, the Respondent State denies all the allegations and declares them 'false and against the spirit of Article 56 of the African Charter'.
74. With respect to the **COHRE Case**, the Respondent State advances two main arguments: first, that local remedies have not been exhausted and secondly, that the Communication has been settled by other international mechanisms.
75. The Respondent State argues that the Complainant failed to resort to existing legal, judicial or administrative means within the Respondent State to address the allegations. It argues further that under its law, the

protection of human rights is regulated by three main legislative norms: (a) International and regional human rights as ratified by the Respondent State (considered to be an integral part of the Constitution), (b) the Constitution, and (c) State Legislation.

76. It submits that the Constitutional Court was established in 1998 and has jurisdiction to hear cases relating to the protection of human rights, guaranteed in the Constitution and other international instruments ratified. The Supreme Court, the Courts of Appeal, the General Courts and the Tribunals of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appeals all have jurisdictions, depending on the location, to deal with specific issues. That the President of the Supreme Court can establish specialized courts to deal with specific situations and to hear cases on human rights violations in the three regions of Darfur.
77. The Respondent State argues that it had introduced legal and judicial procedures to punish perpetrators of alleged human rights abuses in Darfur. These mechanisms 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, comprised of human rights lawyers and activists. It adds further that the National Commission submitted its report to the President of the Republic in January 2005. Three Committees were established based on the recommendations of the report: namely, the Judiciary Committee of Enquiry to investigate violations, Committee for Compensation and Committee for the Settlement of priority cases of property ownership.
78. Therefore, the Respondent State submits that the Communication does not comply with Article 56 (5) of the African Charter.
79. The Respondent State submits further that the Communication was submitted after being settled by UN Mechanisms. It argues that the United Nations and the UN Security Council adopted resolutions 1590, 1591 and 1592 concerning the situation in Darfur, which are currently being implemented. In April 2005 the Commission on Human Rights of the UN Economic, Social and Cultural Council, also adopted a resolution concerning the human rights violations in Sudan. As a result, the Respondent State submits that a Special Rapporteur was assigned to look into the human rights situation. She recently visited Sudan, specifically the Darfur region.

80. The Respondent State agrees therefore that, the Communication is inadmissible under Article 56 (7) of the African Charter.

**Complainant's supplementary submission in response to Respondent State's submission on admissibility**

81. In a supplementary brief on admissibility the Complainant submits that, taken together, the forced evictions and accompanying human rights violations amount to serious and massive violations of human rights protected by the African Charter.
82. Complainant cites a 2006 Report by the UN Special Rapporteur on the human rights situation in Sudan which 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." The report adds 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 crisis" and "only one of the cases involved charges brought against a high-ranking official, and he was acquitted."
83. Consequently, the Complainant argues that, the domestic remedies, cited by the Respondent State, are not effective, nor sufficient, since they offer little prospect of success. They are incapable of redressing the complaints.
84. The Complainant submit that the Special Criminal Tribunals "may just be a tactic by the Sudanese government to avoid prosecution by the International Criminal Court." That such tribunals are "doomed to failure" because they lack "serious legal reforms ensuring independence of the judiciary." Hence, the Complainant submit, the Respondent State has failed to bring "...an end to the current climate of intimidation," thereby casting doubts about the effectiveness of domestic remedies.
85. It submits that even though the peace talks are likely to result in what could be considered injunctive relief by halting further human rights violations, they do not provide adequate remedies for the human rights violations.
86. The Complainant adds that the UN Human Rights Commission, in its resolution 2005/82, found that these domestic remedies are ineffective and insufficient in preventing, halting or remedying the forced evictions and accompanying human rights violations in Darfur.

87. Consequently, it cannot be said that these claims have “been settled” as required by Article 56(7) of the African Charter.
88. The Complainant concludes that the present Communication satisfies the requirements of Article 56 of the African Charter.

#### **African Commission’s decision on admissibility**

89. Admissibility of Communications under the African Charter is governed by the conditions set out in Article 56. The Complainants argue that the Communication complies with all the requirements under Article 56 of the Charter. The Respondent State argues that the Communications be declared inadmissible for not meeting the requirements of Article 56 (2), (4), (5) and (7) of the African Charter.
90. Article 56(2) requires Communications to be compatible with the Constitutive Act or the African Charter. The Respondent State did not explain how the Communication is incompatible with either instrument. The mere submission of a Communication by a Complainant cannot be deemed an incompatibility under Article 56(2) of the African Charter.
91. Bringing Communications against State Parties to the African Charter is a means of protecting human and peoples’ rights. States Parties to the African Charter are duty bound to respect their obligations under both the Constitutive Act and the African Charter. Article 3(h) of the Constitutive Act enjoins African States to promote and protect human and peoples’ rights in accordance with the African Charter. The African Commission does not consider the filing of complaints before it, an incompatibility with the Constitutive Act or the African Charter. It therefore finds that Article 56(2) has been complied with.
92. Article 56(4) stipulates that Communications should not be based exclusively on news disseminated through the mass media. The present Communications are supported by UN Reports as well as reports and Press releases of international human rights organizations. These Communications are not based exclusively on mass media reports. The Darfur crisis has attracted wide international media attention. It would be impractical to separate allegations contained in the Communications from the media reports on the conflict and the alleged violations.
93. In its decision declaring **Sir Dawda Jawara v The Gambia (the Jawara Case)**<sup>1</sup> admissible, the Commission stated that “[w]hile it would be dangerous to rely exclusively on news disseminated from the

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<sup>1</sup> See Communication 147/96, 13<sup>th</sup> Annual Activity Report, 1999-2000.

*mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. ....There is no doubt that the media remains the most important, if not the only source of information. It is common knowledge that information on human rights violation is always gotten from the media.....The issue therefore should not be whether the information was gotten from the media, but whether the information is correct....”* The African Commission therefore finds further that the Communications comply with Article 56(4).

94. With respect to Article 56 (5), the Respondent State argues that no attempt was made to approach various internal remedies. The Complainants, on the other hand, argue that Article 56(5) does not apply to the Communications due to the «serious, massive and systematic» nature of the alleged violations by the Respondent State. They submit that such violations are incapable of being remedied by domestic remedies.
95. 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*”.
96. The issue to be resolved is whether the local remedies were capable of addressing the violations alleged by the Complainants.
97. The African Commission has previously decided on the question of remedies with respect to cases of serious or massive violations of human rights. In the **Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Inter africaine des Droits de l’Homme, Les Témoins de Jehovahl Zaire**, the Commission stated that: *‘[i]n the light of its duty to ensure the protection of human and peoples’ rights...the Commission cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complaint [s] to seize the domestic courts in the case of each individual complaint. This is the case where there are a large number of individual victims. Due to the seriousness of the human rights situation as well as the great number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable’.*<sup>2</sup>

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<sup>2</sup> Communications 25/89, 47/90, 56/91 100/93, (4 International Human Rights Law Report 89, 92), (1997).

98. The Respondent 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 Complainants cite several reports which indicate various cases of intimidation, displacement, harassment, sexual and other kinds of violence, which according to the Complainant may not be dealt with appropriately through local remedies.
99. The African Commission has often stated that a local remedy must be available, effective and sufficient. All three criteria must be present for the local remedy envisaged in Article 56 (5) to be considered worthy of pursuing. In the **Jawara Case**<sup>3</sup> the African Commission held that a remedy is considered available if the petitioner can pursue it without impediment. It is deemed effective if it offers a prospect of success. It is found sufficient if it is capable of redressing the complaint.
100. In the present Communication, the scale and nature of the alleged abuses, the number of persons involved *ipso facto* make local remedies unavailable, ineffective and insufficient. This Commission has held in **Malawi African Association and Others v. Mauritania**<sup>4</sup> 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 ...*"<sup>5</sup>.
101. Such is the case with the situation in the Darfur region, where tens of thousands of people have allegedly been forcibly evicted and their properties destroyed. It is impracticable and undesirable to expect these victims to exhaust the remedies claimed by the State to be available.
102. The African Commission, considering that the alleged violations *prima facie* constitute "serious and massive violations," finds that under the prevailing situation in the Darfur, it would be impractical to expect the complainants to avail themselves of domestic remedies, which, are in

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<sup>3</sup> See Footnote 2 above for reference..

<sup>4</sup> Communications 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, (2000).

<sup>5</sup> 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 cited above.

any event, ineffective. Had the domestic remedies been available and effective, the Respondent State would have prosecuted and punished the perpetrators of the alleged violations, which it has not done. The Commission finds that there were no remedies and therefore the criteria under Article 56(5) does not apply to the complainants.

103. The Respondent State argued that the violations have been settled by other international mechanisms and cites Article 56(7) of the Charter.
104. The African Commission wishes to state that a matter shall be considered settled within the context of Article 56 (7) of the African Charter, if it was settled by any of the UN human rights treaty bodies or any other international adjudication mechanism, with a human rights mandate. The Respondent State must demonstrate to the Commission the nature of remedies or relief granted by the international mechanism, such as to render the complaints *res judicata*, and the African Commission's intervention unnecessary.
105. The African Commission, while recognizing the important role played by the United Nations Security Council, the Human Rights Council, (and its predecessor, the Commission on Human Rights,) and other UN organs and agencies on the Darfur crisis, is of the firm view that these organs are not the mechanisms envisaged under Article 56(7). The mechanisms envisaged under Article 56(7) of the Charter must be capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations.
106. In the opinion of this Commission, the content of the current complaints were not submitted to any such bodies, by the Complainants, or any other individual or institution.
107. For these reasons, the African Commission declares both Communications **admissible**.

#### **Submissions on the merits**

108. It should be noted that in spite of several reminders, neither the Complainants nor the Respondent State submitted in respect of the **SHRO Case**.
109. The other Complainant, COHRE, and the Respondent State made submissions on the merits with respect to the **COHRE Case**. The Commission will consider their submissions. Rule 120 of the Rules of Procedure of the African Commission states that "*if the communication is admissible, the Commission shall consider it in the light of all the information that the individual and the State Party*

*concerned has submitted in writing; it shall make known its observation on this issue.....”*

### **Complainant’s submissions on the merits**

110. The Complainant submits that since February 2003, following the emergence of an armed conflict in the Darfur region, the Respondent State has engaged in and continues to forcibly evict thousands of Black indigenous tribes, inhabitants of the Darfur from their homes, communities and villages. The alleged forced evictions and accompanying human rights abuses recorded in this Communication constitute a violation of the rights guaranteed under the African Charter to which the Respondent State is a party.
111. It is submitted that the Respondent State failed to respect and protect the human rights of the Darfur people. Regarding the obligation to respect, it is submitted that government forces attacked villages, injuring and killing civilians, raping women and girls, and destroying homes. The State also failed to prevent the Janjaweed militiamen from killing, assaulting and raping villagers, hence failing in its obligation to protect the civilian population of Darfur. The Communication also alleges that at times the Janjaweed and government forces conducted joint attacks on villages.
112. The Complainant argues further that attacks by militias prevented Darfurians from farming land, collecting fireweed for cooking, and collecting grass to feed livestock, which constitute a violation of their right to adequate food.
113. The Complainant submits that the forced eviction and the accompanying human rights abuses in the Darfur region tantamount to violations of the right to life, and the right to security of the person respectively protected under Articles 4 and 6 of the Charter, as thousands of people were killed, injured, and raped.
114. The Complainant submits further that attacks carried out by the Respondent State and the Janjaweed have forced thousands of people to flee their homes and habitual places of residence. According to the Complainant, those actions constitute a violation of the right to freedom of residence under Article 12(1) of the Charter.
115. The Complainant states that the forced evictions and destruction of housing and property in the Darfur region violated the right to property enshrined in Article 14 of the Charter. It is the Complainant’s view that those attacks cannot be compared to a lawful dispossession as they have not been carried out “in accordance with the provisions of

appropriate law...” and did not contribute to public need nor was it in the general interest of the community.

116. The Communication recalls the decision of the Commission in the case of **Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria (the SERAC Case)** <sup>6</sup> where the Commission found, *inter alia*, that forced evictions by government forces and private security forces is an infringement of Article 14 and the right to an adequate housing which is implicitly guaranteed by Articles 14, 16 and 18(1) of the Charter.
117. Regarding the right to adequate housing, the Complainant urges the Commission to draw inspiration from other international human rights law standards. It submits that the right to adequate housing is well-defined under international human rights law, including the Universal Declaration of Human Rights (Article 25(1)), and the International Covenant on Economic, Social and Cultural Rights (Article 11(1)), and other international human rights instruments.
118. The Complainant also submits that the Committee on Economic, Social and Cultural Rights gave a precise content to the right to housing in its General Comment No. 4 adopted on 12 December 1991, concerning the State’s obligation to respect, protect and fulfil security of tenure. In its General Comment No. 7, the Committee defines and proscribes the practice of forced evictions.
119. The Complainant recalls that in General Comment No. 4, the Committee on Economic, Social Cultural Rights held that “many of the measures required to promote the right to housing would only require the abstention by the [Respondent State] from certain practices”. Furthermore, in General Comment No.7, it is affirmed that: “The State itself *must* refrain from forced evictions and *ensure* that the law is enforced against its agents *or third parties* who carry out forced evictions.”
120. The Complainant further invites the Commission to find the State in violation of Article 7 as it failed to “adequately investigate and prosecute” the authors of the forced evictions and destruction of housing.
121. The Complainant submits that the African Commission relied on international law to define the right to adequate housing implied by Articles 14, 16 and 18(1) of the Charter, in its decision on the **SERAC Case**.

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<sup>6</sup> Communication 155/1996.

122. The Complainant also relies on the jurisprudence of the European Court of Human Rights in **Akdivar and Others v. Turkey**<sup>7</sup>, where, in a situation similar to the one prevailing in the Darfur, that is, destruction of housing in the context of a conflict between the government and rebel forces, the European Court of Human Rights ruled that Turkey was responsible for violations perpetrated by both its own forces and the rebel forces because it has the duty to both respect and protect human rights.
123. The Complainant submits that forced evictions and destruction of housing constitute cruel or inhuman treatment prohibited by Article 5 of the Charter, which is consistent with international human rights standards. It quotes the Concluding Observations on Israel in 2001 where the Committee Against Torture (CAT) found that forced evictions and destruction of housing cause “indescribable suffering to the population”. Regarding forced evictions and destruction of housing carried out by non-state actors, the Communication relies on the jurisprudence of the CAT in **Hijrizi v. Yugoslavia**<sup>8</sup> where the Committee ruled that the State is responsible for failing to protect the victims from such a violation of their human rights not to be subject to cruel, inhuman and degrading treatment or punishment under Article 16 of the Convention Against Torture.
124. The Complainant also submits that forced evictions and accompanying human rights violations constitute violations by the Respondent State of the right to adequate food and the right to water implicitly guaranteed under Articles 4, 16 and 22 of the Charter as informed by standards and principles of international human rights law.
125. The Complainant relies on the Committee on Economic, Social and Cultural Rights General Comment No. 12 of 1999, which obligates States to respect, protect and fulfil the right to adequate food, and General Comment No. 15 of 2003, where the Committee declares that “the human rights to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal domestic uses”.
126. The Complainant invites the Commission to develop further its reasoning in the **SERAC Case** by holding that the right to water is also guaranteed by reading together Articles 4, 16, and 22, of the African Charter. It urges the Commission to find that the Respondent State has violated that right by “being complicit in looting and destroying

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<sup>7</sup> No. 21893/93, 1996-IV, no. 15.

<sup>8</sup> Communication No. 161/2000: UN Doc. CAT/C/29/D/161/2000 (2 December 2002).

foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur region.

### **Respondent State's submissions on the merits**

127. The Respondent State avers that it is addressing the alleged human rights violations through the framework of implementation of the Darfur Peace Agreement (DPA) adopted on 5 May 2006, containing a number of remedies on the situation in Darfur, including addressing the content of the present Communication. As a result of the Agreement, the Respondent State indicates that, it has taken a number of measures to implement the DPA and at the same time deal with the issues raised by the Complainant.
128. The Respondent State submits that following the signing of the Peace Agreement with the Major Armed Movements in Darfur, the signatory partners began to implement all the components of the Agreement (that is, power sharing, wealth sharing, the security arrangements, and the Darfur/Darfur Dialogue). Consequently, Presidential and States decrees and decisions to establish Commissions, development funds, appointing their heads and members, were issued in accordance with the provisions of the Darfur Peace Agreement.
129. The Respondent State submits further that , all the major organs stipulated in the Agreement were duly established, notably the Darfur Interim Authority. These organs have since begun to discharge their duties, since April 2007. In addition, the Respondent State argues that the official positions allocated to Darfurians in all the Organs, Commissions and Committees to a large extent have been occupied by them. The State added that a total of 87 posts have been filled and 16 posts, at lower levels, are yet to be filled.
130. The Respondent State further indicates that with regard to the core aspect of wealth sharing, specialized mechanisms and committees, such as the Darfur Fund for Re-construction and Development and the Compensation Fund for the War Victims, as well as the Rehabilitation Commission have been formed.
131. Regarding the establishment of the Darfur Joint Assessment Mission (DJAM) responsible for defining the development needs and services in Darfur, comprising the Government and the Movements representatives', donors and specialized International Agencies), the State submits that Committees have conducted land surveys in Darfur with a view to defining the needs, adding that the process of data analysis and statistics in preparation for the anticipated International Conference on Development and Re-construction of Darfur sponsored by Holland, is also being undertaken.

132. With respect to the security and military arrangements, the Respondent State submits that work was underway in earnest involving the Government and the Movements, as well as the AU Mission to consolidate the cease fire to which the concerned parties are committed, as well as to make the other security arrangements, notably the specification of military positions, re-integration and demobilization work. The Respondent State added that it has presented disarmament plan regarding the Janjaweed/Militias to the African Union in July 2006. The Respondent State added that a Joint Committee formed by the African Union and the Government was assigned to look into the implementation of the plan in accordance with the provision of the Darfur Peace Agreement.
133. The Respondent State submits further that the commitment of the parties to the Darfur Peace and Cease-fire Agreement has brought about a considerable improvement in the security situation, adding that the State of insecurity has now been confined to some pockets of North Darfur (only 6 localities in North Darfur out of a total of 34 localities which make up the three States of Darfur).
134. The Respondent State argues that it has improved the humanitarian situation and facilitated the flow of relief aid to internally displaced persons. Its fast track policy adopted in 2004, aims at removing all the administrative and procedural restrictions to the flow of relief. As such the level of coverage of relief supplies is 98% access by the needy leaving a balance of (2%) which was not covered due to insecurity in certain localities of North Darfur.
135. With respect to the voluntary repatriation of the refugees, the Respondent State indicates that it has embarked on the rehabilitation of a great number of the villages in Darfur by providing basic services such as water, health, education and housing, aimed at encouraging the return of internally displaced persons , (hereinafter, IDPs) and refugees to their villages and cities. Such efforts have resulted in the return of more than 100,000 IDPs and refugees to their villages in the 3 States of Darfur. The number includes returnees to 70 villages, in West Darfur, 22 villages in South Darfur and 10 villages in North Darfur, The State adds that, a number of major roads have been re-opened in order to facilitate the return of the refugees and the IDPs, including the Nyala-Quraidha-Bram Road, the Nyala-Labdu Road, the Nyala-Mohajiria Road, the Nyala-Dhuain Road and the Kalbas-Eljinaina Road.
136. The Respondent State submits that, following the signing of the Peace Agreement, a great number of the IDPs have begun to exercise

pasturing and farming activities. In this regard, the Respondent State notes that, it has assisted in distributing agricultural inputs to the IDPs and those affected by the war. In the same context the efforts of social reconciliation have contributed to confidence building which, in turn, helped in the return of a high percentage of IDPs and the refugees to their villages.

137. The State avers that it has made contributions to humanitarian programmes in Darfur in 2006, to the tune of (\$110,889,000 US Dollars) as follows:-

	<b><u>US Dollars</u></b>
1) Food	42, 409, 000
2) Water	23, 015, 000
3) Health	36, 465, 000
4) Shelter	9, 000, 000
<b>Total:</b>	<b>110, 889, 000</b>

138. The Respondent State believes that “.....the implementation of the Darfur Peace Agreement .....could indeed help in addressing all the humanitarian issues regarding the situation in Darfur, including the Communication under reference. As stated in our previous memorandum..., the Sudanese government shall not be held responsible for the subject of the Communication but it will bear its consequences by virtue of the responsibility it has towards its citizens. The Sudanese Government shall in this regard, be enlightening the esteemed African Commission on all the developments regarding the Communication under reference”.

#### **African Commission’s decision on the Merits**

139 The Respondent State made a general denial of the allegations and stated that due to its geographical location, the security situation in the surrounding countries had a destabilising influence on the domestic situation in the country.

140 The Respondent State submits that further consideration of this Communication is no longer relevant. It argues that several issues raised have been addressed by the President of the Republic. The State notes that on 9 March 2004, a general amnesty was granted to combatants who surrendered their arms, that the signing of the first peace agreement at Abeche and N’djamena, and the Abuja May 2006 Agreement, the launching of the reconstruction of infrastructure destroyed by the rebels to allow international aid organizations’ assistance, the return of internally

displaced persons, the creation of an independent Commission of Inquiry on the human rights violations, and the convening of a meeting for all Darfurians to discuss the restoration of peace, have all contributed to addressing the crisis in the Darfur.

141 The State notes that the commitment of the parties to the Darfur Peace and Cease-fire Agreement has brought about a considerable improvement in the security situation, adding that the State of insecurity has now been confined to some pockets of North Darfur.

142 From the above submissions, the Respondent State doesn't seem to be contesting the allegations made by the Complainants. Rather the State notes that following the signing of the Darfur Peace Agreement, measures have been put in place by the parties to the Agreement to ensure a resolution of the crisis in Darfur, and consequently address the grievances raised in the present Communication.

143 Could it be said that by not contesting the allegations, the State has conceded to violating the provisions cited by the Complainants, that is, Articles 4, 5, 6, 7, 9, 12 (1), 14, 16, 18 (1) and 22?

144. It must be noted that the Respondent State has not conceded to the violations either. It simply informs the Commission that the grievances highlighted in the Communications will be addressed by the political developments initiated, in particular, the Signing of the Darfur Peace Agreement. The African Commission will therefore have to address each and every allegation made by the Complainants to ascertain their veracity.

#### **Alleged violation of Articles 4 and 5**

145. With respect to allegations of violation of Articles 4 and 5 of the African Charter, the Complainants allege large-scale and indiscriminate killings, torture, poisoning of wells, rape, forced evictions and displacement, destruction of property, etc.

146. Article 4 of the Charter protects the right to life and provides that *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his right"*. The right to life is the supreme right of the human being. It is basic to all human rights and without it all other rights are without meaning. The term 'life' itself has been given a relatively broad interpretation by courts internationally, to include the right to dignity and the right to livelihood.

147. It is the duty of the State to protect human life against unwarranted or arbitrary actions by public authorities as well as by private persons.

The duty of the State to protect the right to life has been interpreted broadly to include prohibition of arbitrary killing by agents of the State and to strictly control and limit the circumstances in which a person may be deprived of life by state authorities. These include the necessity to conduct effective official investigations when individuals have been killed as a result of the use of force by agents of the State, to secure the right to life by making effective provisions in criminal law to deter the commission of offences against the person, to establish law-enforcement machinery for the prevention, suppression, investigation and penalisation of breaches of criminal law. In addition to the foregoing, the State is duty bound to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.<sup>9</sup> In **Article 19 v Eritrea**<sup>10</sup> this Commission noted that 'arbitrariness is not to be equated with against the law but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process...'.<sup>11</sup>

148. States as well as non-state actors, have been known to violate the right to life, but the State has duo legal obligations, to 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. In **Zimbabwe Human Rights NGO Forum/Zimbabwe**<sup>11</sup>, the Commission noted that an act by a private individual or [non-state actor] and therefore not directly imputable to a State, can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence on the part of the State to prevent the violation or for not taking the necessary steps to provide the victims with reparation.<sup>12</sup>

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<sup>9</sup> See European Court judgments in **McCann v. United Kingdom** (1995) 21 EHRR 97 and **Tanrikulu v. Turkey** (1999) 30 EHRR 950.

<sup>10</sup> Communication 275/2003.

<sup>11</sup> Communication 245/2002.

<sup>12</sup> In human rights jurisprudence this standard was first articulated by a regional court, the Inter- American Court of Human Rights, in looking at the obligations of the State of Honduras under the American Convention on Human Rights - *Velasquez-Rodriguez*, ser. C.,No.4, 9 Hum. Rts.I.J. 212 (1988). The standard of *due diligence* has been explicitly incorporated into United Nations standards, such as the Declaration on the Elimination of Violence against Women which says that states should 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'. Increasingly, UN mechanisms monitoring the implementation of human rights treaties, the UN independent experts, and the Court systems at the national and regional level are using this concept of due diligence as their measure of review, particularly for assessing the compliance of states with their obligations to protect bodily integrity.

149. In the present Communication, the State claims it has investigated some of the allegations of extra-judicial and summary executions. The Complainant submits that no effective official investigations were carried out to address cases of extra-judicial or summary executions.

150. To effectively discharge itself from responsibility, it is not enough to investigate. In **Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan**<sup>13</sup> the African Commission held that “investigations into extra-judicial executions must be carried out by entirely independent individuals, provided with the necessary resources, and their findings must be made public and prosecutions initiated in accordance with the information uncovered. In **Jordan v United Kingdom**<sup>14</sup> the European Court of Human Rights held that, “an effective official investigation must be carried out with promptness and reasonable expedition. The investigation must be carried out for the purpose of securing the effective implementation of domestic laws, which protect the right to life. The investigation or the result thereof must be open to public scrutiny in order to secure accountability. For an investigation into a summary execution carried out by a State agent to be effective, it may generally be regarded as necessary for the person responsible for the carrying out of the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence”.

In the present Communication, the State claims to have investigated the alleged abuses, put in place mechanisms to prevent further abuses and to provide remedies to victims. The question is – were all these initiatives done in accordance with international standards? Did they meet the test of effective official investigations under international human rights law?

151. The Fact-finding Report of the African Commission to the Darfur Region of Sudan<sup>15</sup> states that some women IDPs who were interviewed during the mission stated that “.....their villages were attacked by government forces, supported by men riding horses and camels. The attacks resulted in several deaths and injury of people. Some of these women who sustained injuries, showed their wounds to the Commission. The women furthermore stated that during the attacks, a number of

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<sup>13</sup> Communications 48/90, 50/91, 52/91, 89/93.

<sup>14</sup> Application no. 24746/94 ((2003) 37 EHRR 2), Judgment of 4/8/2001.

<sup>15</sup> The African Commission conducted a Fact Finding Mission to the Darfur Region of Sudan between 8-18 July 2004. The Report of the Mission was adopted by the African Commission during the 3<sup>rd</sup> Extraordinary Session, held in Pretoria, South Africa, and was published in its Activity Report presented to the AU Executive Council. See paras 86, 87, and 88, at page 20 **EX.CL/364(XI)Annex III**.

cases of rape were committed, some of the raped women became pregnant. Complaints were lodged at the police but were yet to be investigated. They declared that the attackers came back at night to intimidate the villagers who had not fled, accusing them of supporting the opposition. Everyone had to run away from the villages.

The women indicated that they were traumatized by the violent nature of the attacks and said that they would not want to return to the villages as long as their security is not assured. They lamented lack of water and a school in the camp. The mission visited the police station to verify complaints and the level of progress made on the reported cases of rape and other offences, but the mission was unable to have access to the files as the officer in charge of the said cases was absent at the time. At one of its meetings in El Geneina, the mission was informed by the authorities of West Darfur State that even though cases of rapes were reported to the police, investigations could not be conducted because the victims could not identify their attackers. Therefore the files were closed for lack of identification of the perpetrators.”

152. UN and Reports of International Human Rights Organisations attest to the fact that the Respondent State has fallen short of its responsibility. For instance, in her 2006 Report, the UN Special Rapporteur on the human rights situation in The Sudan noted 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.” She added 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 crisis in Darfur”..... “only one of the cases involved charges brought against a high-ranking official, and he was acquitted.”

153. The Special Rapporteur also found that “the Government has taken other justice initiatives, but they too have fallen short of producing accountability”<sup>16</sup> noting that “national laws ... effectively protect Sudanese law enforcement officials from criminal prosecution [and that these laws] contribute to a climate of impunity in the Sudan.” The fact that the abuses have persisted and are ongoing since the submission of the Communications clearly demonstrates a weakness in the judicial system and lack of effectiveness to guarantee effective investigations and suppression of the said violations. In the opinion of the African Commission, lack of effective investigations in cases of arbitrary killings and extra-judicial executions amount to a violation of Article 4 of the African Charter.

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<sup>16</sup>

Id. para 48.

154. Regarding the allegation of Article 5, the Complainants simply make a generalized allegation of human rights violations, adding that 'methods used included extra-judicial executions, *torture*, rape of women and girls and arbitrary arrests and detentions, evictions and burning of houses and property, etc. Article 5 of the Charter provides that *'[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'*.
155. Article 5 of the African Charter is aimed at the protection of both the dignity of the human person, and the physical and mental integrity of the individual. The African Charter does not define the meaning of the words, or the phrase "torture or degrading treatment or punishment.." However, Article 1 of the United Nations Convention Against Torture<sup>17</sup> defines, the term 'torture' to mean "...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."
156. Torture thus constitutes the intentional and systematic infliction of physical or psychological pain and suffering in order to punish, intimidate or gather information. It is a tool for discriminatory treatment of persons or groups of person who are subjected to the torture by the State or non-state actors at the time of exercising control over such person or persons. The purpose of torture is to control populations by destroying individuals, their leaders and frightening entire communities.
157. The Complainant has submitted that the various incidences of armed attacks by the military forces of the Respondent State, using military helicopters and the Janjawid militia, on the civilian population, forced eviction of the population from their homes and villages, destruction of their properties, houses, water wells, food crops and livestock, and social infrastructure, the rape of women and girls and displacement internally and outside national borders of the Respondent State, constitute violation of the various cited articles of the African Charter, one of which is Article 5. The totality of the aforesaid violations

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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

amount to both psychological and physical torture, degrading and inhuman treatment, involving intimidation, coercion and violence.

158. In **Media Rights Agenda v Nigeria**<sup>18</sup>, the Commission stated that the term 'cruel, inhuman and degrading punishment or treatment' is to be interpreted so as to extend the widest possible protection against abuse, whether physical or mental. In **John Modise v Botswana**<sup>19</sup>, the Commission elaborated further and noted that 'exposing victims to personal sufferings and indignity violates the right to human dignity. It went on to state that 'personal suffering and indignity can take many forms, and will depend on the particular circumstances of each Communication brought before the African Commission'.
159. Based on the above reasoning, the African Commission agrees with the UN Committee Against Torture in **Hijrizi v. Yugoslavia**<sup>20</sup> that forced evictions and destruction of housing carried out by non-state actors amounts to cruel, inhuman and degrading treatment or punishment, if the State fails to protect the victims from such a violation of their human rights. **Hijrizi v. Yugoslavia** involved the forced eviction and destruction of the Bozova Glavica settlement in the city of Danilovgrad by private residents who lived nearby. The settlement was destroyed by non-Roman residents under the watchful eye of the Police Department, which failed to provide protection to the Romani and their property, resulting in the entire settlement being leveled and all properties belonging to its Roma residents completely destroyed. Several days later the debris of Bozova Glavica was completely cleared away by municipal construction equipment, leaving no trace of the community.
160. The Committee Against Torture found that the Police Department did not take any appropriate steps to protect the residents of Bazova Glavica, thus implying acquiescence and that the burning and destruction of their homes constituted acts of cruel, inhuman or degrading treatment or punishment within the meaning of Article 16 of the Convention Against Torture or other Cruel, Inhuman Degrading Treatment or Punishment.<sup>21</sup> Consequently, the Committee held that the Government of Serbia and

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<sup>18</sup> Communication 2245/1998.

<sup>19</sup> Communication 97/1993.

<sup>20</sup> Communication No. 161/2000: UN Doc. CAT/C/29/D/161/2000 (2 December 2002).

<sup>21</sup> Article 16 of the Convention Against Torture states in part that "...Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Montenegro had violated Article 16 of CAT by not protecting the rights of the residents of Bozova Glavica.

161. In a similar case dealing with allegations that the applicants' property had been destroyed by Turkish security forces, the European Court of Human Rights arrived at the same conclusion, that the destruction of homes and property was cruel and inhuman treatment. In **Selçuk and Asker v Turkey**<sup>22</sup>, the complainants were both Turkish citizens of Kurdish origin living in the village of Islamköy. In the morning of 16 June 1993, a large force of gendarmes arrived in Islamköy and set fire to the houses and other properties of the said complainants,
162. The Court held that "even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment." The Court concluded that the treatment suffered by the applicants in this case was so severe as to constitute a violation of Article 3<sup>23</sup>, adding that "...bearing in mind in particular the manner in which the applicants' homes were destroyed ... and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3."
163. Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities are entitled to without discrimination. It is an inherent right which every State is obliged to respect and protect by all means possible.<sup>24</sup>
164. In the present Communication, the Respondent State and its agents, the Janjawid militia, actively participated in the forced eviction of the civilian population from their homes and villages. It failed to protect the victims against the said violations. The Respondent State, while fighting the armed groups, targeted the civilian population, as part of its counter insurgency strategy. In the opinion of the Commission this kind of treatment was cruel and inhuman and threatened the very essence of human dignity.
165. The African Commission wishes to remind States Parties to the African Charter to respect human and peoples' rights at all times including in times of armed conflict. This was emphasised in **Constitutional Rights Project, et al/Nigeria** in which this Commission stated that:

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<sup>22</sup> European Court of Human Rights, Case of Selçuk and Asker v. Turkey, Judgment of 24 April 1998, Reports 1998-II, p. 900, paras. 27-30.

<sup>23</sup> Article 3 of the European Convention provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

<sup>24</sup> See Purohit & Moore v The Gambia, Communication 241/2001.

*“[I]n contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitation on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitation of the rights and freedoms of the African Charter are found in Article 27(2), that is, that the rights of the Charter ”shall be exercised with due regard to the rights of others, collective security, morality and common interest.”*

166. The forced eviction of the civilian population cannot be considered permissible under Article 27(2) of the African Charter. Could the Respondent State legitimately argue that it forcefully evicted the Darfur civilian population from their homes, villages and other places of habitual residence, on grounds of collective security, or any other such grounds or justification, if any? For such reasons to be justifiable, the Darfurian population should have benefited from the collective security envisage under Article 27(2). To the contrary, the complaint has demonstrated that after eviction, the security of the IDP camps was not guaranteed. The deployment of peacekeeping forces from outside the country is proof that the Respondent State failed in its obligation to guarantee security to the IDPs and the civilian population in Darfur.

167. In its decision in the **Commission Nationale des Droits de l’Homme et Libertes/Chad**<sup>25</sup>, the Commission reiterated its position that; “[t]he African Charter , unlike other human rights instruments does not allow for states to derogate from their treaty obligations during emergency situations. Thus, even with a civil war in Chad [derogation] cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.”

168. In view of the above, the African Commission finds that the Respondent State did not act diligently to protect the civilian population in Darfur against the violations perpetrated by its forces, or by third parties. It failed in its duty to provide immediate remedies to victims. The Commission therefore finds that the Respondent State violated Articles 4 and 5 of the African Charter.

### **Alleged violation of Articles 6 and 7**

169. The Complainant alleges arbitrary arrests and detentions of hundreds of Darfurians. It argues that the Respondent State has legal obligations pursuant to Article 6 of the African Charter to respect the right to liberty 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 militia.

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<sup>25</sup> Communication No 74/92, 9<sup>th</sup> Annual Activity Report, 1995-1996 at paragraph 21.

170. Article 6 of the African Charter provides that “every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”. Article 6 of the Charter has two arms – the right to liberty and the right to security of the person.
171. The Complainant alleges that Article 6 has been violated. This presupposes that the victims of the Darfur conflict, have through the actions and omissions of the Respondent State, been subjected to among other violations, the loss of their right to liberty, arbitrary arrest and detention. Personal liberty is a fundamental condition, which everyone should generally enjoy. Its deprivation is something that is likely to have a direct and adverse effect on the enjoyment of other rights, ranging from the right to family and private life, through the right to freedom of assembly, association and expression, to the right to freedom of movement.
172. A simple understanding of the right to liberty is to define it as the right to be free. Liberty thus denotes freedom from restraint – the ability to do as one pleases, provided it is done in accordance with established law. In the **Purohit and Moore/The Gambia Case**,<sup>26</sup> the Commission held that prohibition against arbitrariness requires that deprivation of liberty ‘shall be under the authority and supervision of persons procedurally and substantively competent to certify it’.
173. The second arm of Article 6 deals with the right to security of the person. This second arm, even though closely associated with the first arm, the right to liberty, is different from the latter.
174. Security of the person can be seen as an expansion of rights based on prohibitions of torture and cruel and unusual punishment. The right to security of person guards against less lethal conduct, and can be used in regard to prisoners' rights.<sup>27</sup> The right to security of the person includes, inter *alia*, national and individual security. National security examines how the State protects the physical integrity of its citizens from external threats, such as invasion, terrorism, and bio-security risks to human health.
175. Individual security on the other hand can be looked at in two angles - public and private security. By public security, the law examines how the State protects the physical integrity of its citizens from abuse by

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<sup>26</sup> Communication 241/01 published in the 16<sup>th</sup> Activity Report.

<sup>27</sup> Rhona K.M. Smith, *Textbook on International Human Rights*, second edition, Oxford University Press, 2005, p. 245.

official authorities, and by private security, the law examines how the State protects the physical integrity of its citizens from abuse by other citizens (third parties or non-state actors).

176. The Complainant submits with respect to the present Communication that the forced eviction, destruction of housing and property and accompanying human rights abuses amounted to a violation of Article 6 of the African Charter. The majority of the thousands of displaced civilians who were forcibly evicted from their homes and villages have not returned, in spite of the measures taken by the Respondent State. By its own account, the Respondent State admitted that only 100,000 IDPs<sup>28</sup> have returned to their villages. It submitted further that insecurity prevails in only 6 of the 34 Darfur localities. The numbers of needy IDPs camped in various relief centres remains high, notwithstanding the said improvements.
177. The Commission observes that IDPs and refugees can only return when security and safety is guaranteed and the Respondent State provides the protection in the areas of return. Voluntary return under situation of forced displacement must be in safety and dignity. The Commission believes that the right to liberty complements the right to freedom of movement under Article 12. If the IDPs or the refugees are not able to move freely to their homes, because of insecurity, or because their homes have been destroyed, then their liberty and freedom is proscribed. Life in an IDP or refugee camp cannot be synonymous with the liberty enjoyed by a free person in normal society. The 2004 Mission of the African Commission to Darfur found that male IDPs could not venture outside the camps for fear of being killed. Women and girls who ventured outside the camps to fetch water and firewood were raped by the Janjawid militia.
178. Cases of sexual and gender based violence against women and girls in and outside IDP camps have been a common feature of the Darfur conflict. The right to liberty and the security of the person, for women and girls, and other victims of the Darfur conflict has remained an illusion. The deployment of the African Union Mission in Sudan (AMIS) forces, could not guarantee the implementation of the Abuja Darfur Peace Agreement. The United Nations had to supplement the AU with the United Nations/African Union Mission to Darfur hybrid forces, (UNAMID) to provide protection to the civilian population.
179. In the present Communication, the Respondent State, in spite all the information regarding the physical abuse the victims were enduring,

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The figures given by UN and Non Governmental Humanitarian agencies operating in Darfur indicate that the number of IDPs have for the most part during the Darfur conflict ranged between 1,500,000 and 2,500,000.

has not demonstrated that it took appropriate measures to protect the physical integrity of its citizens from abuse either by official authorities or other citizens/third parties. By failing to take steps to protect the victims, the Respondent State violated Article 6 of the African Charter.

180. The Complainant argues that the victims' right guaranteed under Article 7 (1) of the African Charter has been violated due to the failure by the Respondent State to investigate and prosecute its agents and the third parties responsible for the abuses. Article 7 (1) of the Charter provides that 'Every individual shall have the right to have his cause heard. This comprises a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; b) The right to be presumed innocent until proved guilty by a competent court or tribunal; c) The right to defence, including the right to be defended by counsel of his choice; *and* d) The right to be tried within a reasonable time by an impartial court or tribunal'.
181. The right to be heard requires that the complainants have unfettered access to a tribunal of competent jurisdiction to hear their case. A tribunal is competent having been given that power by law, it has jurisdiction over the subject matter and the person, and the trial is being conducted within any applicable time limit prescribed by law. Where the competent authorities put obstacles on the way which prevent victims from accessing the competent tribunals, they would be held liable.
182. Given the generalized fear perpetrated by constant bombing, violence, burning of houses and evictions, victims were forced to leave their normal places of residence. Under these circumstances, it would be an affront to common sense and justice to expect the victims to bring their plights to the courts of the Respondent State.
183. In *Recontre Africaine pour la Defense des Droits de l'Homme/Republic of Zambia*,<sup>29</sup> the African Commission held that the mass expulsions, particularly following arrest and subsequent detentions, deny victims the opportunity to establish the legality of these actions in the courts. Similarly, in *Zimbabwe Human Rights NGO Forum/Zimbabwe*<sup>30</sup>, the African Commission noted that the protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief. The Commission added

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<sup>29</sup> Communication 71/1992.

<sup>30</sup> Communication 245/2002.

that “If there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard.”

184. To borrow from the Inter-American human rights system, the American Declaration of the Rights and Duties of Man<sup>31</sup> provides in Article XVIII that every person has the right to "resort to the courts to ensure respect for [their] legal rights," and to have access to a "simple, brief procedure whereby the courts" will protect him or her "from acts of the authority that ... violate any fundamental constitutional rights....".
185. In the present Communication, the forced evictions, burning of houses, bombardments and violence perpetrated against the victims made access to competent national organs illusory and impractical. To this extent, the Respondent State is found to have violated Article 7 of the African Charter.

#### **Alleged violation of Article 12 (1)**

186. The Complainant alleges that the forced evictions constitute a violation of the right to freedom of movement and residence as guaranteed in Article 12 (1) of the African Charter on Human and Peoples' Rights. The Complainant argues that the forceful displacement of thousands upon thousands of persons from their chosen and established places of residence clearly contravenes the right to residence.
187. Freedom of movement is a fundamental human right to all individuals within States. Freedom of movement is a right which is stipulated in international human rights instruments, and the constitutions of numerous States. It asserts that a citizen of a State, generally has the right to leave that State, and return at any time. Also (of equal or greater importance in this context) to travel to, reside in, and/or work in, any part of the State the citizen wishes, without interference from the State. Free movement is crucial for the protection and promotion of human rights and fundamental freedoms.
188. Freedom of movement and residence are two sides of the same coin. States therefore have a duty to ensure that the exercise of these rights

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<sup>31</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

is not subjected to arbitrary restrictions. Restrictions on the enjoyment of these rights should be proportionate and necessary to respond to a specific public need or pursue a legitimate aim.

Under international law, it is the duty of States to take all measures to avoid conditions which might lead to displacement and thus impact the enjoyment of freedom of movement and residence. Principle 5 of the Guiding Principles on Internal Displacement<sup>32</sup> requires States to adhere to international law so as to prevent or avoid situations that might lead to displacement.

189. The right to protection from displacement is derived from the right to freedom of movement and choice of residence contemplated in the African Charter and other international instruments. Displacement by force, and without legitimate or legal basis, as is the case in the present Communication, is a denial of the right to freedom of movement and choice of residence.

190. The Complainant submitted that thousands of civilian were forcibly evicted from their homes to make-shift camps for internally displaced persons or fled to neighbouring countries as refugees. People in the Darfur region cannot move freely for fear of being killed by gunmen allegedly supported by the Respondent State. The Respondent State failed to prevent forced evictions or to take urgent steps to ensure displaced persons return to their homes. The Commission therefore finds that the Respondent State has violated Article 12 (1) of the African Charter.

#### **Alleged violation of Article 14**

191. The Complainants also alleged violation of Article 14 of the Charter which provides that *'[t]he right to property shall be guaranteed. It 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'*.

192. The right to property is a traditional fundamental right in democratic and liberal societies. It is guaranteed in international human rights instruments as well as national constitutions, and has been established by the jurisprudence of the African Commission.<sup>33</sup> The role of the State is

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<sup>32</sup> OCHA/Brookings Institution on Internal Displacement, 1999 and Implementing the Collaborative Response to Situations of Internal Displacement, IASC, 2004.

<sup>33</sup> See Communications 71/92 - Rencontre Africaine pour la Défense des Droits de l'Homme/Zambia, Communication 292/2004 - Institute for Human Rights and Development in Africa/Republic of Angola, and Communication 159/1996 - Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola.

to respect and protect this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone, taking public interest into due consideration.

193. The right to property encompasses two main principles. The first one is of a general nature. It provides for the principle of ownership and peaceful enjoyment of property. The second principle provides for the possibility, and conditions of deprivation of the right to property. Article 14 of the Charter recognises that States are in certain circumstances entitled, among other things, to control the use of property in accordance with the public or general interest, by enforcing such laws as they deem necessary for the purpose.
194. However, in the situation described by the present Communication, the State has not taken and does not want to take possession of the victims' property. The property has been destroyed by its military forces and armed groups, acting on their own, or believed to be supported by the Respondent State. Could it be said that the victims have been deprived of their right to property? The answer to this is yes, and this is supported by international jurisprudence.
195. In **Dogan and others v Turkey**<sup>34</sup>, the applicants allege that State security forces forcibly evicted them from their village, given the disturbances in the region at that time, and also destroyed their property.
196. The applicants complained to the European Court of Human Rights about their forced eviction from their homes and the Turkish authorities' refusal to allow them to return. They relied on among other provisions, Article 1 (obligation to respect human rights), Article 6 (right to a fair hearing), Article 8 (right to respect for family life and home), and, Article 1 of Protocol No. 1 (protection of property).
197. The Court also recalled that the state of emergency at the time of the events complained of was characterised by violent confrontations between the security forces and members of the PKK which forced many people to flee their homes. The Turkish authorities had also evicted the inhabitants of a number of settlements to ensure the safety of the population in the region. In numerous similar cases the Court had found that security forces had deliberately destroyed the homes and property of applicants, depriving them of their livelihoods and forcing them to leave their villages.
198. The Court recognised that armed clashes, generalised violence and human rights violations, specifically within the context of the PKK

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Applications nos. 8803-8811/02, 8813/02 and 8815-8819/02) 29 June 2004.

insurgency, compelled the authorities to take extraordinary measures to maintain security in the state of emergency region. Those measures involved, among others, the restriction of access to several villages, including Boydaş, as well as the evacuation of some villages.

199. The Court noted that the applicants all lived in Boydaş village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ancestors or lived in houses owned by their fathers and cultivated their fathers' land. They also had unchallenged rights over the common lands in the village and earned their living from breeding livestock and tree-felling. Those economic resources and the revenue the applicants derived from them, according to the Court, qualified as "possessions" for the purposes of Article 1 of Protocol No. 1.
200. The Court found that the applicants had had to bear an individual and excessive burden which had upset the fair balance which should be struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one's possessions. The Court made a finding that Article 1 of Protocol No. 1 had been violated<sup>35</sup>.
201. The victims in the present Communication, have been forced out of their normal places of residence by government military forces and militia forces believed to be supported by the Respondent State. Their homes and other possessions destroyed. The African Commission recognises that the Darfur Region has been engulfed in armed conflict and there has been widespread violence resulting in serious human rights violations. It is the primary duty and responsibility of the Respondent State to establish conditions, as well as provide the means, to ensure the protection of both life and property, during peace time and in times of disturbances and armed conflicts. The Respondent State also has the responsibility to ensure that persons who are in harms way, as it seems the victims were, are resettled in safety and with dignity in another part of the country.
202. In **Akdivar and Others v. Turkey case**<sup>36</sup>, a situation similar to the one prevailing in the Darfur, involving the destruction of housing in the context of a conflict between the government and rebel forces, the European Court of Human Rights held that the State is responsible for violations perpetrated by both its own forces and the rebel forces because it has the duty to respect and protect human rights.

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<sup>35</sup> Protocol to the Convention (European) for the Protection of Human Rights and Fundamental Freedoms, UNTS, Vol 213 No I-2889.

<sup>36</sup> No. 21893/93, 1996-IV, no. 15.

203. The United Nations Sub-Commission on the Promotion and Protection of Human Rights on 11 August 2005 endorsed a set of guidelines, known as the Pinhero Principles, and recommended them to UN agencies, the international community, including States and civil society, as a guide to address the legal and technical issues concerning housing, and property restitution when the rights thereof are violated. Principle 5 addresses the right to protection from displacement. Paragraphs 5.3 and 5.4 of the Principles state the following;

*“ States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of lands as a punitive measure or as a means or methods of war.*

*“ 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”*

204. The African Commission is aware that the Pinhero Principles are guidelines and do not have any force of law. They however reflect the emerging principles in international human rights jurisprudence. When these principles are read together with decisions of regional bodies, such as the cited European Court decisions, the African Commission finds great persuasive value in the said principles, albeit as a guide to interpret the right to property under Article 14 of the African Charter.

205. In the present Communication, the Respondent State has failed to show that it refrained from the eviction, or demolition of victims' houses and other property. It did not take steps to protect the victims from the constant attacks and bombings, and the rampaging attacks by the Janjaweed militia. It doesn't matter whether they had legal titles to the land, 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. The Commission therefore finds the Respondent State in violation of Article 14.

#### **Alleged violation of Article 16**

206. The Complainant also alleges violation of Article 16 of the African Charter. Article 16 provides that, *‘[e]very individual shall have the right to enjoy the best attainable state of physical and mental health... States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick’.*

207. The Complainant submits that the Respondent State was complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur region.
208. In recent years, there have been considerable developments in international law with respect to the normative definition of the right to health, which includes both health care and healthy conditions. The right to health has been enshrined in numerous international and regional human rights instruments, including the African Charter.
209. In its **General Comment No. 14** on the right to health adopted in 2000, the UN Committee on Economic, Social and Cultural Rights sets out that, *'the right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as, access to safe and portable water, an adequate supply of safe food, nutrition, and housing...'*. In terms of the General Comment, the right to health contains four elements: availability, accessibility, acceptability and quality, and impose three types of obligations on States – to respect, fulfil and protect the right. In terms of the duty to protect, the State must ensure that third parties (non-state actors) do not infringe upon the enjoyment of the right to health.
210. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. According to **General Comment 14**, *'states should also refrain from unlawfully polluting air, water and soil, ... during armed conflicts in violation of international humanitarian law... States should also ensure that third parties do not limit people's access to health-related information and services, and the failure to enact or enforce laws to prevent the pollution of water...[violates the right to health]'*.
211. In its decision on **Free Legal Assistance Group and Others v. Zaire**<sup>37</sup> the Commission held that the failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine ... constitutes a violation of Article 16.
212. In the present Communication, the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks and amounts to a violation of Article 16 of the Charter.

### **Alleged violation of Article 18 (1)**

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Communications 25/89, 47/90, 56/91 and 100/93.

213. With respect to the alleged violation of Article 18 (1), the Complainants argue that the destruction of homes and evictions of the victims constituted a violation of this sub-paragraph of Article 18. Article 18 (1) recognizes that '*[t]he family shall be the natural unit and basis of society*'. It goes further to place a positive obligation on States, stating that '*[t]he family shall be protected by the State which shall take care of its physical health and moral*'. This provision thus establishes a prohibition on arbitrary or unlawful interference with the family.
214. In its **General Comment No. 19**, the Human Rights Committee stated that '*ensuring the protection provided for under article 23 of the Covenant requires that States parties should adopt legislative, administrative or other measures...*'. Ensuring protection of the family also requires that States refrain from any action that will affect the family unit, including arbitrary separation of family members and involuntary displacement of families. In the **Dogan case**, the European Court of Human Rights also held that the refusal of access to the applicants' homes and livelihood constituted a serious and unjustified interference with the right to respect for family life and home. The Court concluded that there had been a violation of Article 8 of the European Convention, which protects the right to family, similar to Article 18 (1) of the African Charter.
215. In ***Union Inter Africaine des Droits de l'Homme, Federation Internationale des Liges des Droits de l'Homme and Others v. Angola***<sup>38</sup>, the Commission found that massive forced expulsion [whether in peace time or war time] of population has a negative effect on the enjoyment of the right to family. In that Communication, it was alleged that between April and September 1996, the Angolan government rounded up and expelled West African nationals from its territory. These expulsions were preceded by acts of brutality committed against Senegalese, Malian, Gambian, Mauritanian and other nationals. The victims lost their belongings, and in some cases, families were separated. The African Commission held that mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations "constitute a special violation of human rights". The Commission added that 'by deporting the victims, thus separating some of them from their families, the Defendant State had violated and violates Article [18 (1) of the Charter].
216. The Respondent State and its agents, the Janjaweed militia forcefully evicted the victims from their homes, some family members were killed, others fled to different places, inside and outside the territory of the Respondent State. This kind of scenario threatens the very foundation of the family and renders the enjoyment of the right to family

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Communications 159/1996.

life difficult. By not ensuring protection to the victims, thus allowing its forces or third parties to infringe on the rights of the victims, the Respondent State is held to have violated Article 18 (1) of the African Charter.

### **Alleged violation of Article 22**

217. The Complainant alleges violation of Article 22 (1) of the Charter. Article 22 (1) provides that *'[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. (2). States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'*
218. The right to economic, social and cultural development envisaged in Article 22 is a collective right endowed on a people. To determine violation under this article, the Commission will first have to determine whether the victims constitute a "people" within the context of the African Charter.
219. The population in the Darfur Region, alleges the Complainant, is made up of three major tribes, namely the Zaghawa, the Fur, and the Marsalit. These tribes are described as being "people of black African origin". The Respondent State is the largest state in Africa. Part of its population is of Arab stock. A common feature shared between the people of Darfur and the population of the other parts of the Respondent State, except for Southern Sudan, is that they predominantly subscribe to the Islam religion and culture.
220. By attempting to interpret the content of a "peoples' right," the Commission is conscious that jurisprudence in that area is still very fluid. It believes, however, that in defining the content of the peoples' right, or the definition of "a people," it is making a contribution to Africa's acceptance of its diversity. An important aspect of this process of defining "a people" is the characteristics, which a particular people may use to identify themselves, through the principle of self identification, or be used by other people to identify them. These characteristics, include the language, religion, culture, the territory they occupy in a state, common history, ethno - anthropological factors, to mention but a few. In States with mixed racial composition, race becomes a determinant of groups of "peoples", just as ethnic identity can also be a factor. In some cases groups of "a people" might be a majority or a minority in a particular State. Such criteria should only help to identify such groups or sub groups in the larger context of a States' wholesome population.
221. It is unfortunate that Africa tends to deny the existence of the concept of a "people" because of its tragic history of racial and ethnic

bigotry by the dominant racial groups during the colonial and apartheid rule. The Commission believes that racial and ethnic diversity on the continent contributes to the rich cultural diversity which is a cause for celebration. Diversity should not be seen as a source of conflict. It is in that regard that the Commission was able to articulate the rights of indigenous people and communities in Africa. Article 19 of the African Charter recognizes the right of all people to equality, to enjoy same rights, and that nothing shall justify a domination of a people by another.

222. There is a school of thought, however, which believes that the “right of a people” in Africa can be asserted only vis-à-vis external aggression, oppression or colonization. The Commission holds a different view, that the African Charter was enacted by African States to protect human and peoples’ rights of the African peoples against both external and internal abuse.

223. In this regard it protects the rights of every individual and peoples of every race, ethnicity, religion and other social origins. Articles 2 and 19 of the Charter are very explicit on that score. In addressing the violations committed against the people of Darfur, the Commission finds that the people of Darfur in their collective are “a people,” as described under Article 19. They do not deserve to be dominated by a people of another race in the same state. Their claim for equal treatment arose from the alleged underdevelopment and marginalization. The response by the Respondent State, while fighting the armed conflict, targeted the civilian population, instead of the combatants. This in a way was a form of collective punishment, which is prohibited by international law. It is in that respect that the Commission views the alleged violation of Article 22.

224. The Complainant alleged that the violations were committed by government forces, and by an Arab militia, the Janjaweed, against victims of black African tribes. The attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities. The displacement interfered with the right to education for their children and pursuit of other activities. Instead of deploying its resources to address the marginalisation in the Darfur, which was the main cause of the conflict, the Respondent State instead unleashed a punitive military campaign which constituted a massive violation of not only the economic social and cultural rights, but other individual rights of the Darfurian people. Based on the analysis hereinabove, concerning the nature and magnitude of the violations, the Commission finds that the Respondent State is in violation of Article 22 of the Africa Charter.

225. In Conclusion, the Commission would like to address the Complainant’s prayer that the Commission draws the attention of the Assembly of the Africa Union to the serious and massive violations of

human and peoples' rights in the Darfur, so that the Assembly may request an in-depth study of the situation. The Commission wishes to state that it undertook a fact finding mission to the Darfur *suo motu*, in July 2004. Its findings and recommendations were sent to the Respondent State and the African Union. The Commission has continued to monitor the human rights situation in the Darfur through its country and thematic rapportuers and has presented reports on the same to each Ordinary Session of the Commission, which are in turn presented to the Assembly of the African Union.

226. The African Union has deployed its peacekeepers together with the United Nations under the UNAMID hybrid force. In the Commission view, these measures constitute what would most likely ensue, if an in-depth study were undertaken under Article 58. The request by the Complainant would have been appropriate had no action been taken by the African Commission or the organs of the African Union.

227. The African Commission concludes further that Article 1 of the African Charter imposes a general obligation on all States parties to recognise the rights enshrined therein and requires them to adopt measures to give effect to those rights. As such any finding of violation of those rights constitutes violation of Article 1.

228. Based on the above reasoning, the African Commission holds that the Respondent State, the Republic of The Sudan,

a. has violated Articles 1, 4, 5, 6, 7(1), 12(1) and (2), 14, 16, 18(1) and 22 of the African Charter.

229. The African Commission recommends that the Respondent State should take all necessary and urgent measures to ensure protection of victims of human rights violations in the Darfur Region, including to:

a. conduct effective official investigations into the abuses, committed by members of military forces, i.e. ground and air forces, armed groups and the Janjaweed militia for their role in the Darfur;

b. undertake major reforms of its legislative and judicial framework in order to handle cases of serious and massive human rights violations;

c. take steps to prosecute those responsible for the human rights violations, including murder, rape, arson and destruction of property;

- d. take measures to ensure that the victims of human rights abuses are given effective remedies, including restitution and compensation;
- e. rehabilitate economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces in order to provide conditions for return in safety and dignity for the IDPs and Refugees;
- f. establish a National Reconciliation Forum to address the long-term sources of conflict, equitable allocation of national resources to the various provinces, including affirmative action for Darfur, resolve issues of land, grazing and water rights, including destocking of livestock;
- g. desist from adopting amnesty laws for perpetrators of human rights abuses;  
and
- h. consolidate and finalise pending Peace Agreements.

**Adopted during the 45<sup>th</sup> Ordinary Session, held between 13 and 27 May 2009, Banjul, The Gambia.**