

15-29 May 2003
Communication No. 222/98, 229/99

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Thirty-Third Ordinary Session
15-29 May 2003

LAW OFFICE OF GHAZI SULEIMAN
v.
SUDAN

DECISION

BEFORE: CHAIRPERSON: Kamel Rezag-Bara
VICE CHAIRPERSON: Jainaba Johm
COMMISSIONERS: A. Badawi El Sheikh, Andrew R. Chigovera, Vera M. Chirwa,
Emmanuel V. O. Dankwa, Yasser Sid Ahmed El-Hassan, Angela Melo, N. Barney Pityana,
Hatem Ben Salem, Salimata Sawadogo

Citation: Law Office of Ghazi Suleiman v. Sudan, Comm. 222/98, 229/99, 16th ACHPR AAR Annex VII (2002-2003)

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RAPPORTEUR

24th ordinary session: Commissioner Pityana

25th ordinary session: Commissioner Pityana

26th ordinary session: Commissioner Pityana

27th ordinary session: Commissioner Pityana

28th ordinary session: Commissioner Pityana

29th ordinary session: Commissioner Pityana

30th ordinary session: Commissioner Pityana

31st ordinary session: Commissioner Pityana

32nd ordinary session:

33rd ordinary session: Commissioner Dankwa

SUMMARY OF FACTS

1. Communication 222/98 was submitted by Law Office of Ghazi Suleiman, a law firm based in Khartoum, Sudan, on behalf of Abdulrhaman Abd Allah Abdulrhaman Nugdalla (unemployed), Adb Elmahmoud Abu Ibrahim (religious figure) and Gabriel Matong Ding (engineer).

2. It is alleged that the three persons were put in jail and the necessary investigations carried out in accordance with the 1994 law relating to national security. The acts of these persons had terrorist and propaganda objectives aimed at endangering the security and peace of the country and innocent civilians.

3. The Complainant alleges that these individuals were arrested on 1st July 1998 or around this date and that they were detained by the Government of Sudan without charge and were refused contact with their lawyers or their families.

4. He adds that their lawyers requested, in vain, the competent authorities, including the Supreme Court (Constitutional Division), authorisation to visit their clients. The last of these requests was rejected on 5th August 1998. There are reasons to believe that these detainees are subjected to torture.

5. The same Law Office of Ghazi Suleiman submitted a similar communication 229/99 on behalf of 26 civilians. These are civilians being tried under a military court, accused of offences of destabilizing the constitutional system, inciting people to war or engaging in the war against the State, inciting opposition against the Government and abetting criminal or terrorist organisation under the law of Sudan.

6. It is alleged that this court was established by Presidential decree and that it is mainly composed of military officers. Of the four members of the court, three are active servicemen. The communication adds that the court is empowered to make its own rules of procedure which does not have to conform to the established rules of fair trial.

7. The Complainant claims also that all these suspects were refused the right to assistance of defenders of their choice and sufficient time and access to their files with a view to preparing their defense. Violation of the right to defense by lawyers of their choice is allegedly based on the judgment delivered by the military court on 11th October 1998 with a view to preventing the lawyers chosen by the accused to represent them. Mr. Ghazi Suleiman, main shareholder of the complaining law firm, is one of these lawyers. It is also reported that the decisions of this court are not subject to appeal.

PROVISIONS THE AFRICAN CHARTER ALLEGEDLY VIOLATED

8. The Complainant alleges that Articles 5, 6 and 7(a), (b), (c) and (d) of the African Charter have been violated.

PROCEDURE

9. The communication was received at the Secretariat on 28th September 1998.
10. During its 25th Ordinary Session held from 26th April to 5th May 1999 in Bujumbura, Burundi, the African Commission decided to consider the communication.
11. On 11th May 1999, the Secretariat of the African Commission notified the two parties of this decision.
12. The African Commission considered the communication during its 26th ordinary session held in Kigali, Rwanda, from 1st to 15th November 1999 and requested the Complainant to submit in writing his comments on the issue of exhaustion of local remedies. Furthermore, it requested the parties to provide it with the relevant legislation and court decisions (in English or French).
13. On 21st January 2000, the Secretariat of the African Commission wrote to the parties informing them of the decision of the African Commission.
14. During its 27th Ordinary Session held from 27th April to 11th May 2000 in Algiers, Algeria, the African Commission heard the oral submissions of the parties and decided to consolidate all the communications brought against Sudan. The African Commission requested the parties to provide their written submission on the issues of exhaustion of local remedies.
15. On 30th June 2000, these decisions were communicated to the parties.
16. At the 28th Ordinary Session held from 23rd October to 6th November 2000 in Cotonou, Benin, the African Commission decided to defer consideration of this case to the 29th Ordinary Session and requested the Secretariat to incorporate the oral submissions of the State delegate and the written submissions of the Counsel into the draft decision to enable the African Commission take a reasoned decision on admissibility.
17. During the 29th Ordinary Session held in Tripoli, Libya, 23rd April to 7th May 2001, the African Commission heard the parties on the case. Following detailed discussions, the African Commission noted that the Complainant had submitted a comprehensive dossier on the case. It was therefore recommended that consideration of the communication be deferred to the 30th ordinary session, pending the submission of detailed replies of the Respondent State.
18. On 19th June 2001, the Secretariat of the African Commission informed the parties of the above mentioned decision and requested the Respondent State to send its written submissions within two months from the date of notification of the African Commission's decision.
19. During the 30th Ordinary Session held from 13th to 27th October 2001 in Banjul, The Gambia, the Respondent State and Dr Curtis Doebler presented their oral submissions. The African Commission decided to defer consideration of these communications to the 31st Ordinary Session and requested the Government of Sudan to reply to the Complainant's submissions.
20. On 15th November 2001, the Secretariat of the African Commission informed the parties of the decision of the African Commission and requested the Respondent State to submit its written comments within two months from the date of the notification of the said decision.

21. During its 31st Ordinary Session held from 2nd to 16th May 2002 in Pretoria, South Africa, the African Commission heard oral submissions from the two parties and declared the communication admissible. The African Commission also decided to consolidate communications 222/98 and 229/99 due to the similarity of the allegations.

22. On 29th May 2002, the Respondent State and the Complainants were informed of the decision adopted by the African Commission.

23. At the 32nd Ordinary Session held from 17th to 23rd October 2002 in Banjul, The Gambia, the representative of the Respondent State made oral and written submissions requesting the African Commission to review its decision on admissibility relating to all the communications brought by the Complainant against the government of Sudan. The African Commission informed the Respondent State that the issue of admissibility of the communications had been settled and that the Respondent State should submit its arguments on the merits.

24. At its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission considered this communication and decided to deliver its decision on the merits.

SUBMISSIONS OF THE COMPLAINANT

25. The Complainant informed the African Commission that the victims were released at the end of 1999 following the pardon granted by the President of Sudan. When they were released, the Government announced that the case was closed and that no other legal proceedings could or would be initiated. The pardon was granted on condition that the victims renounce their right to appeal.

26. The Complainant informed the African Commission that there exists no effective means of obtaining redress, and that even when an appeal is made to the Constitutional Court, this has no effect because of the state of emergency in force. He added that lack of appropriate means of obtaining redress is a result of political restrictions which prevent its implementation.

SUBMISSIONS OF THE RESPONDENT STATE

27. In its written submissions, the Respondent State stresses that the acts committed by the accused amounted to a terrorist crime endangering national peace and security. Considering the cruel nature of the crime characterised by the use of lethal weapons and given that these crimes are provided for in Parts 5, 6 and 7 of the 1991 criminal code of Sudan, the accused were judged by a military court in conformity with the 1986 law relating to the peoples' armed forces, following the assent of the Minister of Justice as applied for by the military authorities under the law. The court's sessions were open to the public and the accused were treated in accordance with the law which guarantees them the right to fair trial. They exercised their right to freely choose their legal counsel. The legal counsel was composed of nine prominent names from the Sudanese Bar, presided by Abel Alaire Esq., former Vice President of the Republic of Sudan.

28. The defense counsel submitted an appeal to the Constitutional Court, thus suspending the course of military proceedings. The Constitutional Court delivered a final judgment rendering void the decision of the military court.

29. The President of the Republic then pardoned the accused in this criminal case so as to promote national harmony and peace to which Sudan has always aspired, and prepare a climate of

understanding and comprehensive peace. In the light of this Presidential proclamation, the Minister of Justice instructed that the legal proceedings be discontinued and that the accused to be released immediately.

30. The pardon was published in the media and neither the declaration of the President of the Republic nor the decision of the Minister of Justice expressly states the condition prohibiting the accused from appealing to the courts or that they should renounce any of their rights.

31. The Respondent State is convinced that the Government of Sudan, has, in all the procedures, complied with the provisions of the African Charter on Human and Peoples' Rights as well as the principles of International Law on Human Rights.

LAW

ADMISSIBILITY

32. The admissibility of the communications submitted in conformity with Article 55 of the Charter is governed by the conditions set out in Article 56 of the same Charter. The applicable provision in this particular case is Article 56(5) which stipulates that:

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

33. The case under consideration is a consolidation of two communications with similar allegations.

34. In his oral submissions, the delegate of the State informed the African Commission that after the adoption of the new 1998 Constitution, the political situation in Sudan was marked by important political developments which were characterised by the return to Sudan of many opposition figures and leaders of political parties living abroad, and these could go about their political activities in the country in a climate of peaceful coexistence, freedom, pardon and dialogue with a view to building the unity of Sudan. During this period, Sudan was distinguished by its respect and commitment to the United Nations Charter and the OAU Charter in its relations with neighbouring States, and it was able to re-establish relations with a view to realizing cooperation and trust so as to strengthen African unity and solidarity. Following these developments, the State discontinued the legal proceedings against the Complainants. Since then, they exercise their political activities freely and in a climate of forgiveness and brotherhood.

35. The Respondent State insists that the Complainants were allowed access to justice and were not deprived of their right to submit their applications for the protection of their constitutional rights. It considers that the Complainants did enjoy all their rights provided for by Article 9 of the International Covenant on Civil and Political Rights.

36. The Complainant alleges that there are no effective means of obtaining redress because the victims were forced to renounce their right to take legal action against the Government. They were pardoned and released on condition that they renounce their right to claim damages from the Government. By renouncing the right to claim damages, the Complainants had been denied access to domestic remedies but they had not renounced their right to bring the matter before an international body.

37. The Complainant and the Respondent State are in agreement about the fact that the applicants

brought an action before the Supreme Court (Constitutional Division) which on 13th August 1998 decided that the 1994 law on national security took precedence over international law on individual's rights, including the African Charter on Human and Peoples' Rights.

38. The Complainant adds that though the applicants were released at a later date, there has been no compensation for violation of their human rights. He affirms on the other hand that the applicants have exhausted all local remedies with regard to compensation for violation of their human rights by the decision of the Supreme Court (Constitutional Division) of 13th August 1998.

39. The African Commission feels that the obligations of the States are of an erga omnes nature and do not depend on their citizens. In any case, the fact that the victims were released does not amount to compensation for violation. The African Commission has taken note of the changes introduced by the Government of Sudan with a view to more protection of human rights but wishes to point out that these changes have no effect whatsoever on past acts of violation and that, under its mandate of protection, it must make a ruling on the communications.

40. Supported by its earlier decisions, the African Commission has always treated communications by ruling on the alleged facts at the time of submission of the communication (See communications 27/89, 46/91 and 99/93 - Organisation Mondiale Contre la Torture et al/Rwanda). Accordingly, even if the situation has changed for the better allowing the release of the suspects, the position has not changed with regard to the accountability of the Government in terms of the acts of violation committed against human rights.

41. For these reasons, the African Commission declares this communication admissible.

MERITS

42. Article 5 of the Charter stipulates that:

"Every 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."

43. The Complainant alleges that in the two months of their detention, the suspects were imprisoned, tortured and deprived of their rights. They disputed their detention and treatment inflicted on them as being against the international law on human rights and the law of Sudan.

44. Furthermore, detaining individuals without allowing them contact with their families and refusing to inform their families of the fact and place of the detention of these individuals amounts to inhuman treatment both for the detainees and their families.

45. Torture is prohibited by the criminal code of Sudan and the perpetrators are liable to imprisonment for three months or a fine.

46. The African Commission appreciates the Government's action of taking legal action against those who committed torture but the scope of the measures taken by the Government is not proportional to the magnitude of the abuses. It is important to take preventive measures such as stopping secret detentions, the search for effective solutions in a transparent legal system and continuation of investigations of allegations of torture.

47. Considering that the acts of torture have been recognised by the Respondent State, even though it did not specify whether legal action was taken against those who committed them, the African Commission considers that these acts illustrate the government's violation of the provisions of Article 5 of the African Charter.

48. Article 6 of the Charter stipulates 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 the law. In particular, no one may be arbitrarily arrested or detained."

49. Communication 222/98 alleges that the plaintiffs were arrested and detained without being told the reason for their arrest and without charge. The Complainant submits that their arrest was illegal and was not based on the legislation in force in the country and that their detention without access to their lawyers was a violation of the norms which prohibit inhuman and degrading treatment and provide for the right to fair trial.

50. The Respondent State confirms that the detainees submitted their application contesting their arrest and treatment received during their detention. However, the Respondent State indicates that the plaintiffs did not follow the lengthy procedure required for the restoration of their rights and that, accordingly, the court rejected the said application by decision no. M/A/AD/1998. It should be stressed particularly that the Respondent State does not dispute that the victims were arrested without being charged. This is a prima facie violation of the right not to be illegally detained as provided for by Article 6 of the African Charter.

51. The Complainant alleges that Article 7(1) of the African Charter was violated, in that it stipulates 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 violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in use;
- (b) The right to be presumed innocent until proven guilty by a competent court or tribunal;
- (c) The right to defense, including the right to be defended by counsel of his choice;
- (d) The right to be tried within a reasonable time by an impartial court or tribunal."

52. All these provisions are inter-linked and when the right to have one's cause heard is violated, other acts of violations may also be committed such that the detentions become illegal and are detrimental to the proceedings of a fair trial in the proper form.

53. Furthermore, in terms of form, the fact that the decisions of the military court are not subject to appeal and that civilians are brought to a military court constitutes a de jure procedural irregularity. Additionally, to prevent the submission of an appeal to competent national courts violates Article 7(1)(a) and increases the risk of not redressing the procedural defects.

54. In the communication under consideration, the Complainant alleges that the victims were

declared guilty in public by investigators and highly placed Government officers. It is alleged that the Government organised wide publicity around the case, with a view to convincing the public that there had been an attempted coup and that those who had been arrested were involved in it. The Government showed open hostility towards the victims by declaring that "those responsible for the bombings" will be executed.

55. The Complainant alleges that in order to reconstitute the facts, the military court forced the victims to act as if they were committing crimes by dictating to them what to do and those pictures were filmed and used during the trial. It is claimed that the authorities attested to the guilt of the accused on the basis of these confessions. The African Commission has no proof to show that these officers were the same as those who presided over or were part of the military court that tried the case. These pictures were not presented to the African Commission as proof. In such conditions, the African Commission cannot carry out an investigation on the basis of non-established proof.

56. However, the African Commission condemns the fact that State officers carried out the publicity aimed at declaring the suspects guilty of an offence before a competent court establishes their guilt. Accordingly, the negative publicity by the Government violates the right to be presumed innocent, guaranteed by Article 7(1)(b) of the African Charter.

57. As shown in the summary of facts, the Complainants did not get permission to get assistance from counsel and those who defended them were not given sufficient time nor access to the files to prepare their defense.

58. The victims' lawyer, Ghazi Suleiman, was not authorised to appear before the court and despite several attempts, he was deprived of the right to represent his clients or even contact them.

59. Concerning the issue of the right to defense, Communications 48/90, 50/91, 52/91, 89/93 - Amnesty International & others/Sudan are clear on this subject. The African Commission held in those communications that:- "the right to choose freely one's counsel is fundamental for the guarantee of a fair trial. To recognise that the court has the right of veto on the choice of a counsel of one's choice amounts to an unacceptable violation of this right. There should be an objective system of registration of lawyers so that those lawyers so registered are no longer prevented from assisting in given cases. It is essential that the national Bar is an independent organ which regulates the profession of lawyers and that courts do no longer play this role contrary to the right to defense."

60. Refusing the victims the right to be represented by the lawyer of their choice, Ghazi Suleiman, amounts to a violation of Article 7(1)(c) of the African Charter.

61. It is alleged that the military court which tried the victims was neither competent, independent nor impartial insofar as its members were carefully selected by the Head of State. Some members of the court are active military officers. The Government did not refute this specific allegation, but just declared that the counsels submitted an appeal to the constitutional court, thus suspending the course of military proceedings. The constitutional court delivered a final judgment, rendering void the decision of the military court against the accused.

62. In its Resolution on Nigeria (adopted at the 17th session), the African Commission stated that among the serious and massive acts of violation committed in the country, there was "the restriction of the independence of the court and the establishment of military courts which had no independence nor rules of procedure to try individuals suspected of being opponents of the military

regime"

63. The Government confirmed the allegations of the Complainants concerning the membership of the military court. It informed the African Commission in its written submissions that the military court had been established by a Presidential decree and that it was mainly composed of military officers; of the four members, three were active servicemen and that the trial had taken place legally.

64. This composition of the military court alone is evidence of impartiality. Civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial. Likewise, depriving the court of qualified staff to ensure its impartiality is detrimental to the right to have one's cause heard by competent organs.

65. In this regard, it is important to recall the general stand of the African Commission on the question of civilians being tried by military courts. In its Resolution on the right to a fair trial and legal aid in Africa, during the adoption of the Dakar Declaration and Recommendations, the African Commission noted that:- In many African countries, military courts or specialised criminal courts exist side by side with ordinary courts to hear and determine offences of a purely military nature committed by military staff. In carrying out this responsibility, military courts should respect the norms of a fair trial. They should in no case try civilians. Likewise, military courts should not deal with offences which are under the purview of ordinary courts.

66. Additionally, the African Commission considers that the selection of active military officers to play the role of judges violates the provisions of paragraph 10 of the fundamental principles on the independence of the judiciary which stipulates that: "Individuals selected to carry out the functions of judges should be persons of integrity and competent, with adequate legal training and qualifications." (Communication 224/98 - Media Rights Agenda/Nigeria)

67. Article 7(1)(d) of the Charter requires the court to be impartial. Apart from the character of the membership of this military court, its composition alone gives an appearance, if not, the absence of impartiality, and this therefore constitutes a violation of Article 7(1)(d) of the African Charter.

FOR THESE REASONS, THE AFRICAN COMMISSION

Finds the Republic of Sudan in violation of the provisions of Articles 5, 6 and 7 (1) of the African Charter;

Urges the Government of Sudan to bring its legislation in conformity with the African Charter;

Requests the Government of Sudan to duly compensate the victims.

Done at the 33rd ordinary session held in Niamey, Niger, from 15th to 29th May 2003.