

236/2000 - Curtis Francis Doebbler / Sudan

Rapporteur:

27th Session: Commissioner Chirwa
28th Session: Commissioner Chirwa
29th Session: Commissioner Chirwa
30th Session: Commissioner Chirwa
31st Session: Commissioner Chirwa
32nd Session:
33rd Session: Commissioner Chirwa

Summary of Facts:

1. The Complainant alleges that on 13th June 1999, the students of the Nubia Association at Ahlia University held a picnic in Buri, Khartoum along the banks of the river. Although under the law no permission is necessary for such a picnic, the students nevertheless sought permission and got it from the local authorities.
2. After starting off for some hours, security agents and policemen accosted the students, beating some of them and arresting others. They were alleged to have violated 'public order' contrary to Article 152 of the Criminal Law of 1991 because they were not properly dressed or acting in a manner considered being immoral.
3. The Complainant avers that the acts constituting these offences comprised of girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys and sitting and talking with boys.
4. The eight students arrested were Hanan Said Ahmed Osman, Sahar Ebrahim Khairy Ebrahim, Manal Mohammed Ahamed Osman, Omeima Hassan Osman, Rehab Hassan Abdelmajid, Huda Mohammed Bukhari, Noha Ali Khalifa and Nafissa Farah Awad.
5. On 14th June 1999, the eight students referred to in the above paragraph were convicted and sentenced to fines and or lashes. The said punishment was executed through the supervision of the court. This type of punishment is widespread in Sudan.
6. Complainant alleges that the punishment meted out was grossly disproportionate, as the acts for which the students were punished were minor offences, which ordinarily would not have attracted such punishments. The alleged punishments therefore constitute cruel, inhuman and degrading punishment.
7. No written record of the proceedings is publicly available.

8. The Complainant submits on the issue of exhaustion of local remedies that since the sentences have already been executed, domestic remedies would no longer be effective.

Complaint

9. The Complainant alleges violation of Article 5 of the Charter.

Procedure

10. The complaint was received at the Secretariat of the African Commission on 17th March 2000.
11. At the 27th Ordinary Session held from 27th April to 11th May 2000 in Algiers, Algeria, the African Commission heard oral submissions from the parties, decided to be seized of the communication and consolidated it with all the other communications against the Republic of Sudan. The African Commission then requested the parties to address it on the issue of exhaustion of domestic remedies.
12. The above decision was communicated to parties on 30th June 2000.
13. At its 28th Ordinary Session held from 23rd October to 6th November 2000 in Cotonou, Benin, the African Commission decided to defer consideration of this communication to the 29th Ordinary Session and requested the Secretariat to incorporate the oral submissions of the Respondent State to enable the African Commission take a reasoned decision on admissibility.
14. At the 29th Ordinary Session held from 23rd April to 7th May 2001 in Tripoli, Libya, the representatives of the Respondent State present at the session informed the African Commission that they were not aware of the communications 235/00 and 236/00 - Curtis Doebbler/Sudan. During the Session, the Secretariat provided the representatives of the Respondent State with copies of the said communications. The African Commission decided to defer consideration of these communications to the next session.
15. On 19th June 2001, the Secretariat of the African Commission informed the parties of the decision of the African Commission and requested the Respondent State to forward its written submissions within two (2) months from the date of notification of this decision.
16. During the 30th Ordinary Session held from 13th to 27th October 2001 in Banjul, The Gambia, the African Commission heard the oral submissions of the parties with respect to this matter. Following detailed discussions, the African Commission noted that the Respondent State had not responded to the issues raised by the Complainant. The African Commission therefore decided to defer consideration of these communications to the 31st Session, pending receipt of detailed written

submissions from the Respondent State in response to the submissions of the Complainant.

17. On 15th November 2002, the Secretariat of the African Commission informed the parties on the decision of the African Commission and requested the Respondent State to forward its written submissions within two (2) months from the date of notification of this decision.
18. At its 31st Ordinary Session held from 2nd to 16th May 2002, in Pretoria, South Africa, the African Commission heard submissions from both parties and declared the communication admissible.
19. On 29th May 2002, the Respondent State and the Complainants were informed of the African Commission's decision.
20. At the 32nd Ordinary Session, 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.
21. 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.

LAW

Admissibility

22. Article 56(5) of the Charter stipulates that “communications relating to Human and Peoples’ Rights...received by the African Commission shall be considered if they...are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged...”
23. The Complainant alleges that no effective domestic remedies exist as the punishments were carried out immediately after the verdict and sentencing by the Court of First Instance. As a result, any right of appeal was thus illusory and ineffective for preventing the cruel, inhuman and degrading punishment to which the petitioners were subjected. The Complainant submits that a remedy that has no prospect of success does not constitute an effective remedy and states that the Criminal Code of Sudan had been steadfastly applied in numerous cases and hence there was no reasonable prospect of success of having it declared invalid.
24. He adds that a visa was denied to the legal representative of the victims. By failing to ensure that the victims were given a fair hearing in which their lawyers represented them in matters concerning their human rights under the Charter, the government of Sudan denied the victims the right to local effective remedies.

25. The Respondent State claims that the lawyers for the accused have not submitted any appeal against the judgment of the Court of Cassation, and after the expiry of the stipulated period for submitting an appeal to the Supreme Court the judgment became final. The defendants had the possibility of appealing against the judgment of the Court of Cassation to the Supreme Court since Article 182 of the 1991 criminal procedure entitles them to this right.
26. The Respondent State believes that the case does not deserve to be considered and submits that the accused students committed acts deemed criminal by the existing laws of the country; they legally appeared before the courts and enjoyed their right to defence by a lawyer. They had an opportunity to appeal, which they did only once, and have not exhausted the opportunities which the law offered them. Article 56 (5) of the Charter provides for the requirement of exhausting all local remedies before appealing to the African Commission. He therefore requests the African Commission to declare the communication inadmissible.
27. In order to exhaust the local remedies within the spirit of Article 56(5) of the Charter, one needs to have access to those remedies but if victims have no legal representation it would be difficult to access domestic remedies.
28. For the above reasons, the African Commission declares the communication admissible.

Merits

29. Article 5 of the African Charter reads: *“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”*
30. Complainant alleges that eight of the students of the Ahlia University were arrested and convicted by a public order court for acts that violated the ‘public order’. He states that they were all sentenced to fines and between 25 and 40 lashes, the lashes were carried out in public on the bare backs of the women using a wire and plastic whip that leaves permanent scars on the women.
31. He points out that the instrument used to inflict the lashes was not clean and no doctor was present to supervise the execution of punishment and that the punishment therefore, could have resulted in severe infections to the victims.
32. Complainant alleges that the punishment of lashings are disproportionate and humiliating because they require a girl to submit to baring her back in public and to the infliction of physical harm which is contrary to the high degree of respect accorded to females in Sudanese society.

33. The Respondent State argues that the court found the accused guilty and decided to have them flogged with either a fine of fifty thousand Sudanese pounds each, or one-month imprisonment.
34. The Respondent State informed the African Commission that the lashings were justified because the authors of the petition committed acts found to be criminal according to the laws in force in the country.
35. There is little or no dispute between the Complainant and the Government of Sudan concerning the facts recounted above. The only dispute that arises is to whether or not the lashings for the acts committed in this instance violate the prohibition of article 5 as being cruel, inhumane, or degrading punishment.
36. Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.
37. While ultimately whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case. The African Commission has stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses (*See Communication 225/98 Huri-Laws / Nigeria*)
38. The European Court of Human Rights in *Tyler v. United Kingdom*,¹ applying article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, entered into force 3 February 1953, that is substantially similar prohibition of cruel, inhuman, and degrading punishment as article 5 of the Charter, has similarly held that even lashings that were carried out in private, with appropriate medical supervision, under strictly hygienic conditions, and only after the exhaustion of appeal rights violated the rights of the victim. The Court stated that: “the very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long lasting physical effects, his punishment whereby he was treated as an object in the power of authorities—constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects”.

¹ (*Tyler v. United Kingdom*, European Court of Human Rights, 26 Eur.Ct.H.R. (ser. A) (1978), 2 E.H.R.R. 1 (1979-80) at para. 30 and *Ireland v. United Kingdom*, European Court of Human Rights, 25 Eur.Ct.H.R. (1978), 2 E.H.R.R. 25 (1979-80) at para. 162)

39. The Complainant alleges that the punishment meted out was grossly disproportionate, as the acts for which the students were punished were minor offences, which ordinarily would not have attracted such punishments.
40. The Complainant submits that according to Islamic law the penalty of lashings may be meted out for some serious crimes. For example, *hadd* offenses may be punished with lashes under *Shari'a* because they are considered grave offences² and strict requirements of proof apply. Minor offenses, however, cannot be punished as *hadd* because the *Qur'an* does not expressly prohibit them with a prescribed penalty. The acts committed by the students were minor acts of friendship between boys and girls at a party.
41. The African Commission, however, wishes to assert that it was not invited to interpret Islamic *Shari'a* Law as obtains in the Criminal Code of the Respondent State. No argument was presented before it nor did the African Commission consider arguments based on the *Shari'a* Law. The African Commission hereby states that the inquiry before it was confined to the application of the African Charter in the legal system of a State Party to the Charter.
42. There is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the Charter and contrary to the very nature of this human rights treaty.
43. The facts in this communication have not been disputed by the Respondent State. In their oral submissions at the 33rd Ordinary Session, the Respondent State confirmed this by stating that it was the opinion of the Respondent State that it was better for the victims to have been lashed rather than hold them in detention for the said criminal offences and as such deny them of the opportunity to continue with their normal lives.
44. The law under which the victims in this communication were punished has been applied to other individuals. This continues despite the government being aware of its clear incompatibility with international human rights law.

For these reasons, the African Commission,

Finds the Republic of Sudan violation of Article 5 of the African Charter on Human and Peoples' Rights and,

Requests the Government of Sudan to -:

² There are six crimes to which the *hadd* ("fixed") penalties apply, namely, *zina* (fornication, *Qur'an* 24:2), *qadhf* (false accusation of fornication, *Qur'an* 24:4), *sukr* (drunkenness, prescribed in the *Qur'an* and *Sunnah*), *sariqa* (theft, *Qur'an* 5:38), *rida* (apostasy), and *haraba* (rebellion, *Qur'an* 5:33). Also see Abdullahi Ahmed An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (1990) at 108 and accompanying endnotes.

- **Immediately amend** the Criminal Law of 1991, in conformity with its obligations under the African Charter and other relevant international human rights instruments;
- **Abolish** the penalty of lashes; and
- **Take** appropriate measures to ensure compensation of the victims.

*Done at 33^d Ordinary Session in Niamey, Niger
from 15th to 29th May 2003*