



ACHPR
African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

Communication 377/09

Mendukazi Patricia Monakali and Others

v

Republic of South Africa

*Adopted by the
African Commission on Human and Peoples' Rights
During the 76th Ordinary Session done virtually from 19 July to 2 August 2023.*



Hon. Commissioner Remy Ngoy Lumbu
Chairperson to the African Commission
on Human and Peoples' Rights



Ms. Abiola Idowu-Ojo
Executive Secretary to the African
Commission on Human and Peoples' Rights



ACHPR

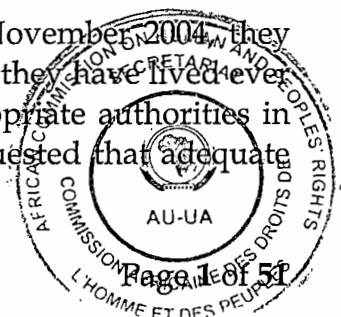
African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

Communication 377/09 - Mendukazi Patricia Monakali and Others v. Republic of South Africa

Summary of the Complaint:

1. The Communication was filed by the Complainant, Menduzaki Patricia Monakali, on behalf of herself and 75 other families occupying an informal settlement known as Portion 41 of the farm Rooikop 140 (the Property) in the Ekurhuleni Metropolitan Municipality, Germiston, in the Gauteng Province of South Africa (the Municipality).
2. The Complainants are citizens of South Africa, the Respondent State in this Communication. South Africa is a state party to the African Charter on Human and Peoples' Rights 1981 (the African Charter), having ratified the African Charter on 9 July 1996.
3. The Complainants live in temporary shack dwellings situated on the Property. The Property allegedly belongs to the Islamic Dawah Movement Trust (IDM Trust) and is part of the Roodekop Informal Settlement sheltering thousands of families who have no proper housing.
4. The Complainants allege that prior to occupying the Property in November 2004, the 76 households represented in this case previously resided on Portion 40 of the Roodekop Informal Settlement situated next to a river and wetland. This portion of the settlement is prone to frequent flooding and uninhabitable during raining summer seasons.
5. The Complainants allege that Portion 40 was also severely overcrowded and that the overcrowding created unhygienic conditions and various social problems for them, including regular conflict over living space. They also claim that the heavy summer rains on Portion 40 regularly caused damages to their shack dwellings, drew mosquitoes, and resulted in the rapid spread of infectious diseases. The resulting heavy floods and the absence of proper drainage infrastructure for the storm water led to the deaths of three children by drowning in October 2004.
6. The Complainants allege that due to heavy flooding in November 2004, they had to vacate Portion 40 and move on to Portion 41, where they have lived ever since. They claim that they have complained to the appropriate authorities in South Africa over their problem of homelessness and requested that adequate priority and resources be given to their needs.





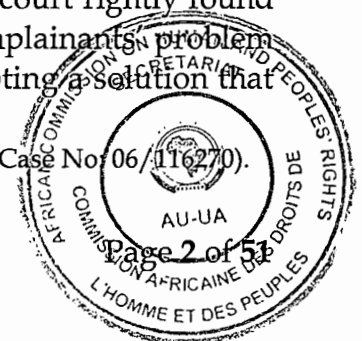
ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

7. The Complainants also allege that they have submitted applications for alternative housing for shack dwellers to the Municipality under the plans and programmes of the Gauteng Provincial Government in South Africa which ought to have been built within five years from 1997. Due to a lack of ample provision for their informal settlement in the housing plans of the Municipality, there is no supply of electricity to their shack residences. They rely on the burning of coal fire for cooking and warmth which often cause shack fires, injuries and deaths. They claim that in July 2009, a fire incident which arose from the burning of coal on the Property led to the untimely deaths of two residents.
8. The Complainants claim that they have been frustrated by waiting endlessly without any houses in sight from the government; that they have held a series of meetings with representatives of the Gauteng Provincial Government to address their housing crisis; and that despite several commitments on the part of the authorities including an offer by the Municipality to buy the property from the IDM Trust, there has been no meaningful outcome.
9. The Complainants claim that in a bid to recover possession of the Property, the IDM Trust brought an application in 2006 in the Witwatersrand Local Division of the High Court to evict them from the Property pursuant to South African law. The Complainants opposed the application and filed a counter application against the Municipality praying the Court to declare that the Municipality was under a constitutional and statutory obligation to have a policy and programme in place to address the applicants' homeless situation by purchasing the property from the Trustees for a specific sum and give adequate priority and resources to their needs. They also sought an order to prevent the IDM Trust from evicting them from the Property until suitable alternative accommodation or land is available to them.
10. Based on court documents provided to the Commission, it is shown that the High Court found that the Municipality failed to put into action an appropriate emergency plan to address the plight of homelessness in the Rooikop Informal Settlement and ordered the Municipal government to purchase the Property from the IDM Trust for the sum of R250 000.00 within 30 days of the order as well as make provision for essential services to the occupiers.¹
11. The Municipality lodged an appeal against the High Court's order for the purchase of the property at the South African Supreme Court of Appeal (SCA). In upholding the appeal, the SCA noted that while the trial court rightly found that the Municipality had not adequately dealt with the complainants' problem of homelessness on the Property, it was not justified in adopting a solution that

¹ See *Ebrahim Dada NO & Others v Unlawful Occupiers of Portion 41* (Unreported Case No. 06/116270).





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

was outside the limits of its powers. As such, the SCA set aside the trial court's decision.² The Complainants' further appeal to the Constitutional Court was unsuccessful.³

12. The Complainants claim that their continued illegal occupation of the Property is due to the Municipality's failure to provide adequate housing in line with the government's basic obligations under the South African Constitution and housing legislation.

Articles alleged to have been violated

13. The Complainants allege that the Respondent State, by failing to provide adequate housing for the 76 families represented in this case, has violated the provisions of Articles 5, 17, 18, 19, 22 and 24 of the African Charter.

Prayers of the Complainants

14. The Complainants:
 - (a) prayed that the Commission refers the Communication to the African Court for adjudication; and
 - (b) requested permission to make oral submissions to the Commission during its 46th Ordinary Session, scheduled for 11 - 25 November 2009, in Banjul, The Gambia, for the referral of the Communication to the African Court.
15. The Complainants having elected at the admissibility stage that the Commission adjudicate over the matter, the prayer for referral of the Complaint to the Court has been dispensed with. What is left of the substance of the complaint before the Commission is for a determination of the question of whether the Respondent State has violated the provisions of Articles 5, 17, 18, 19, 22 and 24 of the African Charter in relation to them.

Procedure

16. The Secretariat of the Commission ("Secretariat") received this Communication on 13 August 2009. Upon sending its acknowledgement of receipt on 17 August 2009, the Commission received a request from the Complainants to make oral submission at the 46th Ordinary Session of the Commission. The Complainants

² See *Ekurhuleni Metropolitan Municipality v Ebrahim Dada NO & Others* (Unreported Case No. 280/2008) [2009] ZASCA 21 (27 March 2009).

³ See decision of the Constitutional Court of South Africa in *The Unlawful Occupiers of Portion 41-7 Ebrahim Dada NO & Others* (Unreported Case No.: CCT 32/09).





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

pleaded urgency of the Complaint based on a fire accident that occurred at the settlement which claimed two lives.

17. On 18 August 2009, the Secretariat acknowledged receipt of the request for oral hearing and informed the Complainants that their Complaint would be tabled before the 46th Ordinary Session of the Commission for seizure, and only after such determination on seizure that parties could be invited to make written and oral submissions on the merits of the case. During its 46th Ordinary Session, the Commission examined the Complaint and decided to be seized of the matter. On 8 December 2009, the Complainants were informed of the Commission's seizure decision.
18. On 23 February 2010, the Secretariat received the Complainants' submissions on the admissibility of the Communication, which was transmitted to the Respondent State on 16 April 2010, for its response.
19. On 16 June 2010, the Respondent State and the Complainants were informed that the Communication had been deferred to the 48th Ordinary Session of the Commission in November 2010, pending the Respondent State's submission on admissibility. The Respondent State was also requested to make its submission on admissibility before 18 August 2010.
20. On 18 May 2012, the Respondent State and the Complainants were informed that during its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia, the Commission decided to defer the Communication to its 52nd Ordinary Session to be held from 9 to 22 October 2012 in Abidjan, Côte d'Ivoire due to the non-submission of the Respondent State's observations on Admissibility. The Respondent State was also informed that the Commission would proceed at its 52nd Ordinary Session to take a decision on the admissibility of the Communication based on the facts before it.
21. On 28 June 2012, the Secretariat re-sent to the Respondent State the Complainants' submissions, together with previous correspondences from the Secretariat with a request to enter its submission on admissibility within two months of the date of the notification. On 1 August 2012, the Secretariat forwarded the annexures accompanying the Communication to the Respondent State. On 13 August, the Secretariat received a further request from the Respondent State for the annexures to the Communication, which were required for preparing its submission on admissibility.
22. In November 2012, the Respondent State forwarded its First Submission on Admissibility, which was transmitted to the Complainants. The Complainants forwarded their response on 28 November 2012, which was also transmitted to the Respondent State on 30 November 2012.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

23. On 31 January 2012, the Respondent State forwarded its Second Submission on Admissibility, which was transmitted to the Complainants on 11 February 2013. On 8 March 2013, the Complainants forwarded their response to the Respondent State's Second Submission on Admissibility, which was transmitted to the Respondent State on 13 March 2013.
24. On 13 April 2012, the Respondent State forwarded its Third Submission on Admissibility, which was transmitted to the Complainants on 2 May 2013. Also on 2 May 2013, both parties were informed that at its 53rd Ordinary Session held from 9 to 23 April 2013, in Banjul, The Gambia, the Commission decided to defer the consideration of the Communication to its next Session.
25. At its 54th Ordinary Session, held in Banjul, The Gambia from 22 October to 5 November 2013, the Commission considered the admissibility of the Communication.
26. The Commission on 8 March 2014 requested the Complainants to confirm whether they would be amenable to the matter being adjudicated upon by the Commission should the Commission not grant their prayer for a referral to the African Court on Human and Peoples' Rights. On 12 March 2014, the Complainants confirmed that they were disposed to the matter being determined by the Commission.
27. At its 16th Extra-Ordinary Session held in Kigali, Rwanda, from 20-29 July 2014, the Commission considered the admissibility of the Communication.
28. Following the admissibility of the Communication, in September 2014, the Commission offered its good offices to broker an amicable settlement between the Complainants and the Respondent State without success.
29. On 28 January 2016, the Commission invited the Complainants to enter submissions on the merits of the communication in accordance with Rule 108(1) of the 2010 Rules of Procedure of the Commission. In the response to this request, the Complainants through their legal representative indicated that they have adopted as their submissions on the merits their Written Submissions on the Admissibility of Communication 377/09 (dated 4 March 2010), especially parts 5 and 7, rather than present a special set of written submissions on the merits.
30. Upon further request to the Complainants to enter written submissions on the merit, the Complainants by email dated 16 May 2016 reaffirmed their election of 28 January 2016 to rely on sections 5 and 7 of their Written Submissions on the Admissibility of the Communication.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

31. On 25 October 2016, the Commission received the Respondent State's First Submission on Merits dated 1 August 2016, which was transmitted to the Complainants.

Admissibility

Submissions of the Complainants

32. The Complainants submitted that the present Communication fulfils all the admissibility requirements set out in Article 56 of the African Charter.
33. According to the Complainants, the Communication sets out a prima facie violation of Articles 5, 17, 18, 19, 22 and 24 of the African Charter, which they contend cannot be fulfilled unless their right to housing is fulfilled. They contend that they currently live under inhumane circumstances which are an affront to their dignity and humanity and, worse, face an application for their eviction.
34. The Complainants asserted that the Municipality opposed their application for an order prohibiting eviction until the Municipality provided suitable alternative accommodation for them. The Municipality has since then not only failed to offer alternative accommodation, but also has never indicated when such an offer might be forthcoming or whether it will be forthcoming. They claim that the Respondent State is in these circumstances denying their right to housing, and thus, that there is a prima facie violation of their aforesaid rights under the African Charter.
35. Specifically, and in response to the Respondent State's contention that the Communication does not set out a prima facie violation of the African Charter, the Complainants submitted that the actions and inactions of the Municipality which has led to their living in poor housing conditions, as well as the fact that they now face an eviction application due to the Municipality's misrepresentation and neglect, "shows a serious violation of the Applicants' right to respect of the dignity that is inherent in a human being" and amounts to degrading and inhuman treatment, contrary to Article 5 of the African Charter.⁴
36. Furthermore, the Complainants submitted that the Communication is not only based on the outcome of the pending eviction application, but also on the following:

⁴ See Applicants' Response to Respondent's Second Submission on Admissibility on behalf of the Republic of South Africa (dated 8 March 2013) paras 1.1.5.



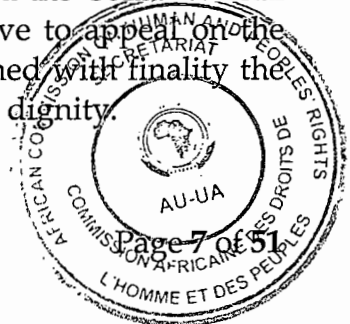


ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

- (i) A breach of Article 19 of the African Charter, on the basis that the Municipality failed to deliver on its duties to assist the Complainants as they face eviction, and also to deliver on its promise to upgrade their living conditions. They note that the Supreme Court of Appeal had agreed with the finding of the High Court that "the municipality had not dealt with the problems of informal settlement on the property with measures of alacrity which could reasonably be expected of them". To this end, they argue that they deserve to enjoy the same right and respect as the rest of the country, which can only be achieved by the Municipality - a sub-national government of the Respondent State - in living up to its commitment to address the Complainants' housing crisis or in providing alternative accommodation, which it has failed to do.
 - (ii) The decision of the Constitutional Court to dismiss the Complainants' application for leave to appeal denied them an effective remedy in the form of suitable accommodation either on portion 41 or any other suitable alternative property.
 - (iii) A breach of Article 22 of the African Charter, as the Complainants had "lived in a severely overcrowded place that resulted in dangerously unhygienic conditions and various social problems" prior to being moved to Portion 41, from which they now face eviction.
37. The Complainants further state that it makes no sense to wait for the court to grant an eviction order against them from Portion 41, given that they do not have anywhere else to go, and did not put themselves in their current situation. They claim that "the Respondent [State] must take necessary measures to ensure that [they] have alternative accommodation." They further argued that this is not only a case of right to housing (as alleged by the Respondent State), but one which goes to the dignity and respect deserving of the Complainants by virtue of being human. That it is a case that revolves around the fundamental rights guaranteed to all in the Bill of Rights of the Respondent State.
38. The Complainants also submitted that all domestic legal remedies have been exhausted based on the following facts: that the counter-claim for a relief that no eviction takes place before they are afforded suitable alternative accommodation, which they asked for in their notice of motion in the court proceedings, has been decided upon the outcome of which has been unsuccessful; that the Order of the High Court that the municipality purchase the land was set aside by the Supreme Court of Appeal; and the Constitutional Court's dismissal of the Complainants' application for leave to appeal on the basis that it had no prospect of success on appeal determined with finality the claim for enforcement of their right to housing and to live in dignity.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

39. The Complainants submitted that, as there is no court superior to the Constitutional Court, its decision leaves them in a position where they are without any other practical legal remedy other than eviction. They further argued that it is no answer to say in these circumstances that the case for the eviction of the Complainants must proceed, because waiting for the courts to evict them first before taking action to protect their rights would be illogical. They argued that they have no other alternative remedies, due to the fact that the Municipality and the appellate courts have refused to assist them. They also claimed that if evicted, they will have no shelter over their heads, and if not evicted, they will be condemned to continue living in their current inhumane circumstances without any relief in sight.
40. The Complainants further argued that the Communication is aimed at a State Party to the African Charter, because the Respondent State has by virtue of the provisions of the Housing Act 107 of 1997, placed on municipalities, the duty to deliver housing, which it has failed or refused to do notwithstanding a pending case for their eviction. They also noted that pursuant to the Housing Act of the Respondent State, it is the duty of the national government to "set housing policy, to set delivery goals and budgets and to promote the capacity of provincial and municipal government"; and that all levels of Government in the Respondent State are interrelated and interdependent.
41. On the requirement of Article 56(6) of the African Charter, the Complainants averred that the present communication was submitted within a reasonable period. They submitted that the Constitutional Court order dismissing their appeal was made on 7 May 2009, and that they submitted the Communication on 13 August 2009; that is, within a period of three months after the dismissal of the appeal. In support of their position, they appended to their submissions, correspondences exchanged with the Secretariat of the Commission in August 2009.
42. Concerning Article 56(7), the Complainants submitted that the case has not been referred to any other international investigation or settlement mechanism.

Submissions of the Respondent

43. The Respondent State argued that the communication is not compatible with Article 56(2) of the African Charter because no violation of rights in the African Charter has taken place and that the Complainants have not made out a case for the prima facie violation of rights in the African Charter. It therefore submitted that the Communication is manifestly unfounded.
44. The Respondent State submitted that: (i) the Complainants do not contend that they have been evicted, and they admit that they currently have accommodation; (ii) at the present time, the Complainants are only facing an





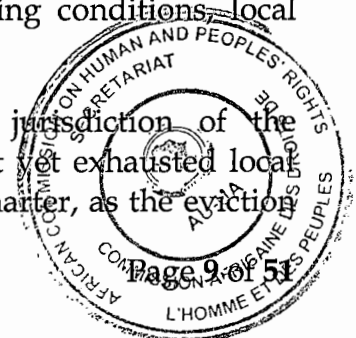
ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

application for eviction; and (iii) there is currently only a pending case for eviction of the Complainants in the domestic courts.

45. The Respondent State, therefore, submitted that it is unclear what the basis of the complaint is, or when the alleged violation of the African Charter arose. The Government also argued that the Complainants expect the Commission to examine the Communication on the presumption that if the pending application for an eviction of the Complainants in the domestic courts succeeds, they will have no shelter, or that if the application fails, the Complainants will continue to live in unacceptable circumstances, and to this end, contends that in either scenario, the alleged violation of the African Charter is reliant on the outcome of the South African Court proceedings. It, therefore, submitted that the Commission lacks the jurisdiction to hear the matter.
46. In addition, the Respondent State averred that the Complainants' sole purpose in bringing the communication to the Commission is to have the Commission act as a "supra-national court of appeal" over matters of domestic law that has already been decided by the domestic courts; pointing out that the text of the communication replicates that of the appeal filed by the Complainants at the domestic level, and that the communication contends the violation of domestic law, and does not explain how the facts alleged violate rights under the African Charter, which cannot be considered compatible with the African Charter.
47. Furthermore, as regards the requirement of Article 56(2), the Respondent State submitted that the communication is not addressed to a State Party to the African Charter.
48. The Respondent State argued that even if, in due course, an eviction order is handed down against the Complainants, the question still remains which right in the African Charter could allegedly be violated, as the African Charter does not provide a right to access to housing.
49. The Respondent State further argued that if the Complainants are attempting to rely on their current allegedly inhumane living conditions as a basis for their complaint, such an application has not yet been brought before the South African courts, as a result of which the Complainants would be basing the Communication on a cause of action that has not yet been brought before the domestic courts. It further argues that regardless of whether the Complainants rely on their eviction or on their alleged inhumane living conditions, local remedies are available to them.
50. The Respondent State also raised objections to the jurisdiction of the Commission on the basis that the Complainants have not yet exhausted local remedies as required under Article 56(5) of the African Charter, as the eviction





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

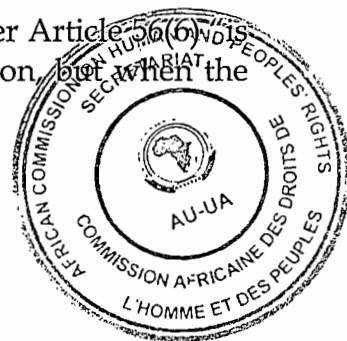
application is still pending in the national Courts. The Government argued that until such time as an eviction order is granted by the domestic courts, no action has taken place which may violate a right under the African Charter.

51. The Respondent State relied on the decisions of the Commission in *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v. Guinea*,⁵ and *Jawara v The Gambia*,⁶ to support its argument that domestic remedies must be exhausted and that the Commission cannot act as a court of first instance. It contends that local remedies are available to the Complainants, and they have not explained why these remedies would not be effective or sufficient.
52. The Respondent State further contends that the decision which the Constitutional Court declared inadmissible only relates to the Complainants' counter-application to the eviction application brought by the property owners in the South African Courts, and that the effect of the Constitutional Court's decision is that the decision of the Supreme Court of Appeal, ordering that the matter be referred back to the High Court of South Africa, stands.
53. With respect to Article 56(6) of the African Charter, the Respondent State contended that, assuming that local remedies were exhausted (which the State disputes), the Complainants have not submitted the communication within a reasonable time. Relying on the decision of the Commission in *Majuru v Zimbabwe*, it averred that the Commission has found a period of six months to be the international standard in determining a "reasonable time" in this regard.⁷
54. To this end, the State submitted that the order of the Constitutional Court of South Africa indicates that the Complainants' appeal was dismissed on 7 May 2009, while it appears that the Commission became seized of the Communication after 22 February 2012, which is the date indicated on the Communication – a period of more than nine months after the Complainant's appeal was dismissed. It also contends that there are no good and compelling reasons why the Commission should not apply the six-month timeline, strictly, in this case.
55. Furthermore, the Respondent State contends that the test under Article 56(6) is not when the complaint was first submitted to the Commission, but when the Commission was first seized of the matter".

⁵ (2004) AHRLR 57 (ACHPR 2004).

⁶ (2000) AHRLR 107 (ACHPR 2000).

⁷ (2008) AHRLR 146 (ACHPR 2008).





56. Consequent to the foregoing, the Respondent State prays that the communication should be declared inadmissible for the following reasons:

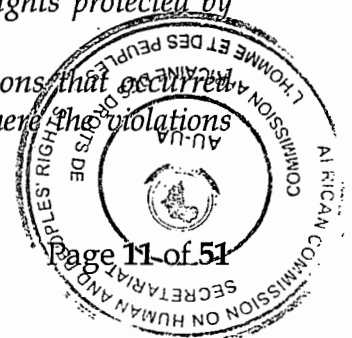
- (a) The communication is not addressed to a State Party to the African Charter;
- (b) The Commission was not seized of the Complaint within a reasonable time;
- (c) The Communication does not set out prima facie violations of the African Charter and is manifestly unfounded; and
- (d) The Complainants have not exhausted local remedies before seizing the Commission.

The African Commission's analysis on admissibility

57. Article 56 of the African Charter sets out seven requirements that a Communication brought under Article 55 of the African Charter must satisfy in order to be admissible for consideration by the Commission. The requirements apply conjunctively and cumulatively. Failure to satisfy any one or more of the prescribed requirements renders the Communication inadmissible, unless a Complainant provides sufficient justifications as to why any of the requirements could not be met.
58. The Complainants submitted that all the requirements under Article 56 of the African Charter have been complied with, while the Respondent State disputed that the Complainants have fulfilled the requirements of Article 56(2), (5) and (6). Upon careful examination of the facts and submissions, the Commission considers that the requirements under the uncontested Articles 56(1), (3) and (4) have been complied with and will, therefore, only analyze the arguments of both parties based on the contested provisions of Article 56 of the African Charter.
59. Article 56(2) of the African Charter states that "Communications... received by the Commission shall be considered if they... are compatible with the Charter of the Organization of African Unity or with the present Charter." In the case of *Kevin Mgwanga Gunmeet al v Cameroon*, the Commission held that:

The condition relating to compatibility with the African Charter basically requires that:

- *The Communication should be brought against a State party to the Charter;*
- *The Communication must allege prima facie violations of rights protected by the African Charter;*
- *The Communication should be brought in respect of violations that occurred after [the] State's ratification of the African Charter; or where the violations*





ACHPR

African Commission on
Human and Peoples' Rights

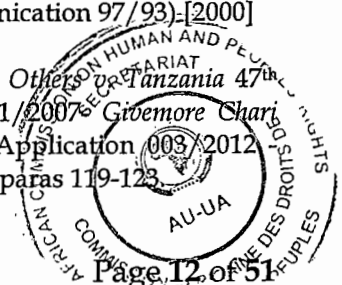
Human Rights our
Collective Responsibility

began before the State Party ratified the African Charter, have continued after such ratification.⁸

60. As regards alleging a prima facie violation of the African Charter (*ratione materiae*), the Respondent State contends that the Complainants have not made out a case for the prima facie violation of rights in the African Charter and thus that the Communication is manifestly unfounded. The Respondent State also alleges that by seeking to rely on their current allegedly inhumane living conditions as a basis for their complaint, the Complainants would be basing the communication on a cause of action that has not yet been brought before the domestic courts.
61. From the facts and arguments presented, the Commission observes that the allegations by the Complainants in the present Communication are two-fold: (i) allegation of the violations of Articles 5, 19 and 22 of the African Charter, which are stated to have in fact occurred, as a result of the reported acts of the Municipality - a sub-national government of the Respondent State; and (ii) allegation of the violations of Articles 5, 17, 18, 19, 22 and 24 of the African Charter, which they contend cannot be fulfilled unless the Complainants' right to housing is fulfilled; which in turn, is predicated on the outcome of the pending application for eviction before the domestic courts.
62. The Commission notes that the term *prima facie* as used in its jurisprudence simply requires that at face value or upon mere sighting, without requiring either party to adduce any evidence, it should be possible to come to a conclusion that the Communication can be accommodated within the competence of the Commission on the grounds that it alleges that rights recognized by the African Charter have been violated.
63. In Communication 333/2006 - *Southern Africa Human Rights NGO Network & Others v. Tanzania*, this Commission held that "the Commission is only concerned with whether there is preliminary proof that a violation occurred", and there is no obligation on a complainant to "show with sufficient clarity" the alleged violations that have triggered the submission of a complaint.⁹
64. In the present case, the facts alleged by the Complainants and the attached documentary evidence of the housing situation of the Complainants (including the annexed judgments, the photographs of the housing and living conditions

⁸ (2009) AHRLR 9 (ACHPR 2009) para 71. Also see *Modise v Botswana* (Communication 97/93) [2000] ACHPR 25 (6 November 2000).

⁹ Communication 333/2006 - *Southern Africa Human Rights NGO Network & Others v. Tanzania* 47th Ordinary Session ACmHPR 12-26 May 2010 para 51; Communication 351/2007 - *Givemore Chari (represented by Gabriel Shumba) v Republic of Zimbabwe* para 57. Also see Application 003/2012 *Chacha v. The United Republic of Tanzania* [2014] AfCHPR 48 (28 March 2014) paras 119-123.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

and the ongoing housing crisis) paint an impending danger of homelessness sufficient to invite the attention of the Commission. The Respondent State does not disprove the living conditions of the Complainants, the claims of non-provision of basic services and the risk of homelessness that the Complainants face.

65. In the light of the requirement of preliminary proof and the arguments presented, the Commission finds that the facts presented in the Communication and the preliminary evidence supporting them (see Annexures B, C, D, E1, E2, E3 and E4 attached to the Complaint) sufficiently indicate violations of one or more of the provisions of the African Charter may have occurred (in this case, Articles 5, 19 and 22 of the African Charter).
66. The Commission is of the view that, on the surface, there is an indication that there is a violation of a right or rights protected under the African Charter by the Respondent State. The determination whether other rights have been violated or the extent to which they have been violated is not relevant at this stage because such an analysis is required only at the Merits stage. To this end, the Commission finds that the Complainants have met the requirement to show a *prima facie* violation of the African Charter.
67. Meanwhile, the issue concerning whether or not the alleged violations have been dealt with by the domestic courts of the Respondent State will be appropriately dealt with under the Commission's analysis of compliance with Article 56(5), further below.
68. Furthermore, without prejudice to its above finding and for jurisprudential purpose, with reference to the allegation that violations of the provisions of the African Charter "would occur" in the event of a denial of the right to housing which would be occasioned by an eviction of the Complainants, the Commission is mindful of and aligns itself with the best practices of similar international bodies, which entertain petitions on the basis of allegations of the real risk of petitioners being subjected to human rights violations. This position would be in line with Articles 60 and 61 of the African Charter, which encourage the Commission to draw inspiration from international human rights law.
69. As regards the requirement that the Communication must be addressed to a State Party to the African Charter (*ratione personae*), this, as demonstrated by the established jurisprudence of the Commission, only requires that a Communication be brought against a State party to the African Charter, alleging violations for which the State Party is allegedly responsible.
70. Further on this point, the Commission wishes to note that while the complaint in its original format, listed the "Ekurhuleni Metropolitan Municipality" and



ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

"the Republic of South Africa" as respondents, the Commission recognizing that its jurisdiction is limited to State Parties to the African Charter, became seized of the present Communication only in relation to the Republic of South Africa. This position is reflected in: the registered name of the Communication, the Commission's communications to the Parties, as well as the parties' various submissions on Admissibility.

71. Article 56(5) of the African Charter states that "Communications ... received by the Commission shall be considered if they ...are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged." This requirement is premised on the principle that "the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual."¹⁰
72. On the other hand, the Complainants claim that all domestic legal remedies have been exhausted, in view of the fact that the relief which they sought for the protection of their rights - that is, that the Municipality should provide them with alternative and adequate housing, as constitutionally obligated and that they should not be evicted pending such provision by the Municipality - has not been granted. They also submitted that the highest court in the Respondent State has declared that there was no prospect of success in the Complainants' appeal against the lower court's decision.
73. The Complainants also submitted that as there is no court superior to the Constitutional Court, its decision leaves them in a position that they have no remedy and face possible eviction. They attached to the complaint, relevant decisions of the national courts, from the High Court, through to the Constitutional Court (see Annexures B, C and D annexed to the Complaint).
74. In the present case, the Respondent State argued that the Complainant has not exhausted domestic remedies as the Eviction Application is still pending in the national Courts. Whilst the Respondent State contended that local remedies are available to the Complainants, it has not shown how the local remedy indicated to be available, would sufficiently redress the rights alleged by the Complainants to have been violated, bearing in mind that a remedy is 'sufficient' if it is capable of redressing the wrong complained against. On this point, the Commission finds that the Respondent State has not discharged the onus to show that the local remedy it is holding out is "sufficient"
75. In this regard, the Commission notes that the Eviction Application before the national courts which is referenced by the Respondent State relates to the

¹⁰ *Purohit & Anor v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 25.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

recovery of a personal property by a third party, being the Trustees, and does not involve the determination of the rights of the Complainants, which are alleged to have been violated by the Respondent State.

76. The Commission notes further that it was in response to the Eviction Application that the Complainants had filed a counter-application against the Municipality in which they sought reliefs for purposes of protecting their rights – that is, to alternative and adequate housing and the constitutional obligation of the Respondent State's municipal government to ensure that they are not to be evicted pending such provision by the Municipality. The reliefs sought in this counter-application have been litigated before all the national courts of the Respondent State, including the highest court in the land – the Constitutional Court – with no success.
77. The pending suit before the local courts relates to the application for eviction by the private owners of the Property. That suit no longer endures against the Respondent State. By the Respondent State's account, the Complainants are expected to defend that suit against the private owners even though, from the evidence presented to the Commission, the Complainants have in documents filed before local courts prejudicially acknowledged that they are in illegal occupation of the property. They are on record to admit that they "never obtained the permission of the Trust to reside on the property" and have repeatedly referred to themselves as the "Unlawful Occupiers of Portion 41" in documents before the courts.¹¹ However, they not only dispute the circumstances of their illegal occupation on the basis that they moved unto the property at the instance of the Respondent State, they also invoke the obligation of the Respondent State to provide alternative housing and essential services pursuant to South Africa's Bill of Rights and the African Charter.
78. From the Commission's vantage point, the present Communication before the Commission pertains to allegations of human and peoples' rights violations, not by the private owners of the Property but, by the Respondent State. The communication proceeded after the counter claim against the Respondent State had been determined with finality by the courts. The counter claim pertained to the housing crisis of the Complainants and the necessity for alternative accommodation and essential services. The decision by the Respondent State's appellate courts that the Eviction Application by the private owners before the High Court should proceed seems to foreclose the Complainants' claims against the Respondent State for alternative and adequate housing.

¹¹ See Annexure B – *Ebrahim Dada NO & Ors v Unlawful Occupiers of Portion 41 (a portion of Portion 15 of the farm Rooikop 140 as described in the Deed of Transfer No: T2849/2004) Case No: 06/16270 Judgment delivered by NA Cassim AJ on 15 February 2008 para 13.*





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

79. Given the appellate courts' order dismissing the Complainants' appeal against government, the Counter Claim for alternative accommodation against the Government is considered to have been determined with finality. What is left of the suit is the Eviction Application brought by the trustees as the private owners of the property. Based on this fact, the Commission holds the view that the Complainants have exhausted local remedies against the Respondent State in line with the requirement of Article 56(5), considering that the pending Eviction Application has no bearing on the responsibility of government to provide, at the very least, temporary alternative accommodation to address the Complainants' housing situation.
80. The Commission further holds the view that the Respondent State has not shown that there is any other practical domestic remedy available to the Complainants other than the referenced Eviction Application, which has been found to be insufficient. To this end, having obtained a final judgment in respect of the counter-application, the Respondent State has not demonstrated how the Complainants may initiate another action in the domestic court, based on the same claims and reliefs sought in the counter-application, without being estopped from doing so, based on the doctrine of *res judicata* (which means, the matter has already been adjudicated upon by a competent court).
81. The above view of the Commission also extends to the contention by the Respondent State that the alleged inhumane living conditions of the Complainants, which is being relied upon as one of the bases for the alleged violations, has not been dealt with by its domestic courts. This is not quite the case. In the decision of the High Court (Annexure B attached to the Complaint), it can be seen that the issue of the living conditions and the urgent need for alternative accommodation for the Complainants was duly raised and formed the basis of the counter claim adjudicated upon by the courts up to finality on appeal.
82. In this regard, the Commission finds that the Respondent State has not shown how the Complainants may solely litigate this cause-of-action against the municipal government, without being estopped by the courts on the basis that it falls within a matter which has already been exhaustively dealt with by the courts. In any event, the Commission finds that this contention will fail to the extent that it has observed from the text of the decisions of the national courts which were provided by the Complainants, that there were ample references to the Complainants' living conditions, in the context of the absence of provision of essential services to them.
83. Moreover, even accepting the argument of the Respondent State that the Complainants indeed still have local remedies, the Commission finds that this requirement will not apply literally in cases where it is illusory for the





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

Complainant to seize the domestic courts. The Commission has stressed that, remedies the availability of which is not evident, cannot be invoked by the state to the detriment of the complainant.¹² In this regard, the Commission recalls its decision in *Jawara v. The Gambia*,¹³ where it held that, even if certain domestic remedies were available, "[t]he existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness."

84. The Commission observes that the Complainants in the present case currently face the risk of homelessness upon the determination of the pending Eviction Application, and is therefore convinced by the argument of the Complainants that "it makes no sense to wait for the court to grant an eviction order against [them] from Portion 41, whereas they do not have anywhere to go", before approaching the Commission. For the reasons that the Complainants do not deny that they are unlawful occupiers of the property and the failure of the counter claim against the government suggests that they have no other immediately available remedies against the Respondent State or its sub-national government.
85. The Commission holds the view that the Complainants' submissions in the present Communication indicate that the authorities of the Respondent State were sufficiently notified of the violations allegedly perpetrated against the Complainants, the case having been heard by the highest court in the land.
86. On the basis of the foregoing, and given that the likelihood of the Complainants succeeding in obtaining a remedy that would redress their current housing crisis and living conditions is so minimal as to render it illusory, the Commission finds that the requirement of Article 56(5) of the African Charter have been met by the Complainants.
87. Regarding the requirement of Article 56(6) of the African Charter which stipulates that Communications received by the Commission shall be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter, the Respondent State contends that the Communication was submitted after an unreasonable period. The Government argued that "the Commission could not have been seized of the matter before 22 February 2012, which is the date indicated on the Communication, [and which date] is more than nine months after the Applicants' application was dismissed by the Constitutional Court". Furthermore, it contended that "the test is not when the complaint was

¹² *Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 34 (*Jawara case*).

¹³ *Jawara case*, para 35.





ACHPR

African Commission on
Human and Peoples' Rights

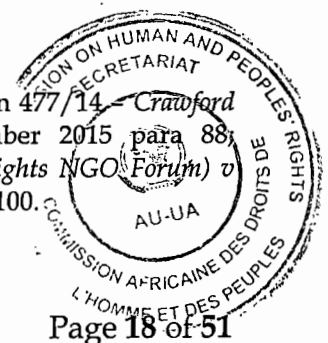
Human Rights our
Collective Responsibility

first submitted to the Commission, but when the Commission was first seized of the matter.”

88. In reply, the Complainants argued that they submitted the Communication on 13 August 2009 and, therefore, argued that this Communication had been submitted within a period of three months after the dismissal of their appeal by the Constitutional Court.
89. The Commission notes that the requirement under Article 56(6) provides for two events from which the timeline within which a Communication has been submitted may be computed, being: (i) “from the time local remedies are exhausted”; or (ii) “from the date the Commission is seized with the matter”.¹⁴
90. The Commission held in *Tsatsu Tsikata v Ghana*, that this requirement “is quite related to the principle of the exhaustion of local remedies in accordance with Article 56(5). This means that the Commission estimates the timeliness of a communication from the date that the last available local remedy is exhausted by the Complainant....”¹⁵
91. The African Charter does not specifically state what it means by “reasonable time”, and thus, the Commission has always ruled based on the contexts and characteristics of each case. In this regard, the Commission has in its jurisprudence employed as a yardstick, the six months timeline stipulated in the American Convention on Human Rights (Article 46(1(b)) and the European Convention on Human Rights (Article 35(1)), beyond which the Commission would require the complainant to proffer a compelling reason for the further delay.
92. From the Commission’s analysis on Article 56(5) in the preceding paragraphs, the last available local remedy was exhausted by the Complainants – with the dismissal of their application for leave to appeal by the Constitutional Court – on 7 May 2009. Furthermore, the Commission observes from its records that the present Communication was received at its Secretariat on 13 August 2009; a period of three months after the exhaustion of domestic remedies, and well within the international standard of a “reasonable time”.
93. Accordingly, the Commission finds that the requirements of Article 56(6) have been fulfilled.

¹⁴ *Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008) para104; Communication 477/14 - Crawford Lindsay von Abo v Zimbabwe 57th Ordinary Session ACHPR 4-18 November 2015 para 88; Communication 340/07 - Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe 11th Extra-Ordinary Session ACHPR 21 February - 1 March 2012 para 100.

¹⁵ Communication 322/2006 - *Tsatsu Tsikata v. Republic of Ghana* (2014) para 51.





Decision on Admissibility

94. In view of the above, the African Commission declares this Communication admissible in accordance with Article 56 of the African Charter.

Merits

Summary of the parties' submissions

A. Complainants' submissions

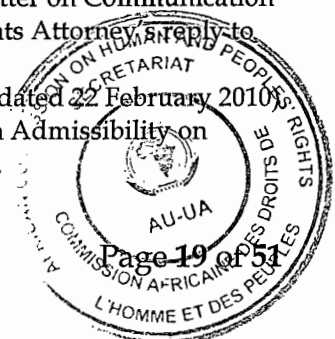
95. The Complainants submitted that by failing to provide adequate housing for the 76 families occupying Portion 41 of the Farm Rooikop 140, the Respondent State is in violation of the provisions of Articles 5, 17, 18, 19, 22 and 24 of the African Charter. For their submissions on the merits, the Complainants relied on their submissions on admissibility.¹⁶

(i) Alleged violation of Article 5 of the African Charter

96. The Complainants alleged that the actions of the municipal government of the Respondent State amounted to a total lack of respect for their dignity contrary to Article 5 of the African Charter.
97. Article 5 of the African Charter provides for the right of every individual to the respect of the dignity inherent in a human being.
98. The Complainants contended that by failing to provide adequate housing for residents of the Property which they temporarily occupy without the consent of its rightful owners, the inaction of the Municipality in the Respondent State amounts to a violation of their right to dignity under the African Charter.¹⁷
99. The Complainants further argued that the non-provision of housing by the Respondent State's municipal government warranted their initial temporary occupation of Portion 40. They argued that living in Portion 40, an overcrowded marshland, was dangerously unhygienic and unsuitable for human habitation. They claim that their subsequent relocation from Portion 40 and illegal occupation of Portion 41 was based on representations by officials of the Municipality to acquire Portion 41 and progressively provide adequate housing on the property. They claim these representations turned out to be untrue.

¹⁶ See Complainants Attorney's reply to the Commission's email titled "Re: Letter on Communication 377 of the Complainant" dated 28 January 2016 para 3. Also see Complainants Attorney's reply to the Commission's email dated 16 May 2016 para 3.

¹⁷ See Complainants' Written Address on the Admissibility of the Complaint (dated 22 February 2010) paras 7.1-7.1.1; Applicants' Response to Respondent's Second Submission on Admissibility on behalf of the Republic of South Africa (dated 8 March 2013) paras 1.1.1-1.1.7.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

100. The Complainants argued that the neglect by the Respondent State's municipal government to fulfil its obligations to provide housing amounts to a violation of their right to respect for human dignity. They argued that the fact that the Applicants now face imminent eviction and homelessness at the hands of the IDM Trust due to the Municipality's misrepresentation and neglect is degrading and that such inhuman treatment is prohibited by the African Charter.
101. The Complainants also submitted that before occupying Portion 41, many of the current occupiers of the Property submitted their C forms, containing an application for housing, to the Municipality.¹⁸ They argued that it was their understanding that Reconstructive and Development Programme (RDP) houses would be built for them within five years, if not earlier as from 1997. They claimed that on 20 August 2004, frustrated by years of waiting for houses, they met the Councillor for Ward 35, Germiston, Aerial Mabalane, who advised that the Property had been purchased by the Municipality and that the residents were now free to move on to the Property, since the RDP houses would be built thereon. They further claimed that this representation by the Municipality was reinforced by the Municipality's procurement of a Grader on 6 November 2004 to grade roughly half of the Property for their dwelling on the property in early December by the 76 households.
102. The Complainants also submitted that the mere fact that the Applicants took the initiative to resolve their housing and living problems in Portion 40 by engaging with the provincial and local government proves their desperate need for a better life. They claimed that the decision of the Municipality to leave them high and dry at such a critical time of need while giving assurances that their problem of homelessness was being addressed is reprehensible and unacceptable, and amounted to a violation of their dignity under the African Charter.

(ii) Alleged violation of Articles 17, 18 and 19 of the African Charter

103. The Complainants submitted that the Respondent State has violated the provisions of Article 19 of the African Charter. They contended that by failing to address the housing problem they face, 'the Municipality has forgotten that the Applicants have human rights that need to be protected.'¹⁹ They further contended that the Municipality not only has a duty to assist them in terms of the Housing Act and the Constitution of the Republic of South Africa, but also has a duty to provide them with alternative accommodation in the face of eviction.

¹⁸ Complainants' Written Address on the Admissibility dated 22 February 2010 paras 1.4.

¹⁹ Applicants' Response to Respondent's Second Submission on Admissibility dated 8 March 2013 paras 1.1.7.1.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

104. The Complainants further argued that although the Supreme Court of Appeal in its judgment at paragraph [14], set aside the High Court Order mandating the Municipality to purchase Portion 41 from the IDM Trust, the Supreme Court of Appeal agreed that the High Court Judge "was right in coming to the conclusion that the Municipality had not dealt with the problems of informal settlement on the property with measures of alacrity which could reasonably be expected of them".²⁰
105. The Complainants submitted that they deserve to enjoy the same rights and respect as the rest of the country and the only way to enjoy such right is by the Municipality, a sub-national government of the Respondent State, delivering on its housing obligations with respect to the occupants of Portion 41. They argued that given that they entered upon Portion 41 at the instance of the Municipality, the Municipality should assist in preventing their eviction or in providing alternative accommodation, which it has refused to do.
106. The Complainants further submitted that given that the South African Government and the Constitutional Court exist to protect the human rights enshrined in the Bill of Rights of the South African Constitution, the dismissal of the Complainants' application for leave to appeal on the ground that the application had no prospect of success denied them access to an effective remedy which would have addressed their housing problem on Portion 41 or their need for alternative housing.
107. The Complainants submitted that they do not live in humane or suitable accommodation and eviction without the remedy of alternative accommodation would put them and their families in an even more degrading situation than they currently are. They further argued that the inhuman nature of their current accommodation crisis on Portion 41 is tragically illustrated by the shack fire which killed two men in July 2009.

(iii) *Alleged violation of Articles 22 and 24 of the African Charter*

108. The Complainants submitted that the Respondent State is in violation of Article 22 of the African Charter. They argued that Article 22 is *prima facie* violated by the mere fact that they have had to live in a severely overcrowded Portion 40 that resulted in dangerously unhygienic conditions and various social problems as neighbours constantly fought with each other over living space.
109. The Complainants also pointed out that apart from the water damage caused to their shack structures, the constant flood in and around the shacks and the

²⁰ Applicants' Response to Respondent's Second Submission on Admissibility dated 8 March 2013, paras 1.1.7.2.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

presence of mosquitoes caused diseases to spread quickly. Added to this, in October 2004, three children from the Rooikop Informal Settlement drowned in the flood due to heavy rains and the lack of critical infrastructure to handle the storm waters on Portion 40.

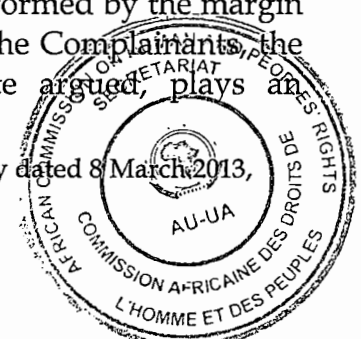
110. The Complainants submitted that it is a violation of their dignity and humanity under Article 22 to now face eviction on Portion 41, after moving onto the property with their shacks at the instance of the Municipality.²¹ They argued that it is no fault of theirs that they are in illegal occupation of the property and currently facing eviction proceedings.
111. The Complainants submitted that in the face of the eviction proceedings against them, they are currently in desperate need of accommodation and have nowhere else to go to. They do not currently have housing and they live in deplorable circumstances, in self constructed shacks with minimal public utility services. The only service they have is the communal water points.
112. The Complainants further averred that the Respondent State, as the primary duty bearer responsible for addressing the housing crisis must take all necessary measures to ensure that they get alternative accommodation.

B. Respondent State's submissions

113. The Respondent State submitted that, in considering the arguments in support of its case, the Commission must consider the following four principles, namely: the doctrine of *margin of appreciation*, the principle of *subsidiarity*, the principle of *progressive realisation of rights*, and the principle of *proportionality* in relation to the rights alleged by the Complainants to have been violated in this case.
114. The Respondent State argued that based on the allegations of violations of the African Charter, the following rights require the Commission's consideration, to wit: the right to housing, the right to human dignity (Article 5), the right to education (Article 12), the right to protection of the family unit (18), the right of peoples to equality and equal respect (Article 22), and the right to a general satisfactory environment favourable to their development (Article 24).
115. The Respondent State submitted that, based on the Commission's decision in *Prince v Republic of South Africa*,²² the African Charter is informed by the margin of appreciation. In considering the violations alleged by the Complainants, the margin of appreciation doctrine, the Respondent State argued, plays an

²¹ Applicants' Response to Respondent's Second Submission on Admissibility dated 8 March 2013, paras 1.1.7.4.

²² (2004) AHRLR 105 (ACHPR 2004), paras 50-51.



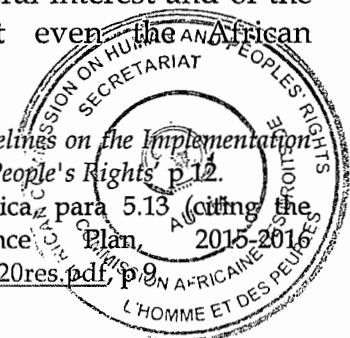


important role for the Commission. And that, in this case, its legal framework responds specifically to the realities of South Africa. The Respondent State amplified this point by illustrating that within its national context, it is for the Respondent State to determine what procedures need to be followed in order to realise the rights protected both within the South African Bill of Rights and the African Charter on Human and Peoples' Rights.

116. The Respondent State also invoked the principle of subsidiary. The Government argued that the Commission is not competent to substitute its decision for that of the South African courts at the instance of the Complainants. The Government drew the attention of the Commission to the decision in *Prince v Republic of South Africa*, where this Commission held that the principle of subsidiarity informs the African Charter like any other international or regional human rights instrument does to its supervisory body established under it. As such, the Commission cannot substitute itself for domestic procedures found in the Respondent State.
117. The Respondent State also relied on the principle of progressive realisation of rights in the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter* to the extent that states are required to "progressively and constantly move towards the full realisation of rights within the resources available to the State."²³ The Government argues that South Africa is taking steps to progressively realise the rights contained both in the Bill of Rights in the South African Constitution and in the African Charter.
118. The Respondent State emphasised that for the period from 1994 ending in the 2013/2014 financial year, the State has provided 3.7 million houses to those in need of housing, constituting approximately 24% of the formal housing stock available in the Republic, thereby giving access to housing to about 12.5 million South Africans. The Respondent State noted that according to official figures from its Department of Human Settlements as of 3 May 2016, 4.3 million houses and housing subsidies had been delivered to more than 20 million South Africans. And that the Department of Human Settlements has set a target of 1.5 million more houses to be delivered by 2019.²⁴
119. On the principle of proportionality, the Respondent State argued that a fair balance must be struck between the demands of the general interest and of the public interest. The Respondent State argued that even the African

²³ African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' p 12.

²⁴ First Submission on Merits on behalf of the Republic of South Africa, para 5.13 (citing the Department of Human Settlements' Annual Performance Plan, 2015-2016, http://www.dhs.gov.za/sites/default/files/annual_reports/APP_low%20res.pdf, p 9).





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

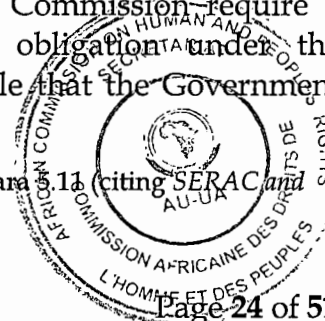
Commission's own guidelines acknowledges that the rights of the Complainants cannot trump the rights of the community at large, but must be balanced in order to achieve a fair result.

120. The Respondent State submitted that the Commission must apply this principle to the facts of this case by recognising that the Respondent State must balance between the rights of the Complainants with that of, first, the wider South African community in avoiding wasteful expenditure on land that cannot be developed and, second, other people in a similar situation with that of the Complainants who also must follow the procedure for acquiring housing, and, third, protection of the proprietary rights of the owners of the Property.

(i) Right to housing

121. The Respondent State submitted that the primary recourse of the Complainants in terms of the right to housing is section 26 of its Constitution. Section 26 of the South African Constitution provides for the right of access to adequate housing. The Respondent State noted that although this right recognised in its Constitution has no direct equivalent in the African Charter, this Commission has held that the right to housing is protected in the African Charter through a combination of provisions protecting the right to property (Article 12), the right to the highest attainable standard of mental and physical health (Article 16), and the right accorded to the family (Article 18).²⁵ As such, the Respondent State elected to address the right to housing in terms of the combined effect of these rights.
122. The Respondent State submitted that the right of access to housing under section 26 of the South African Constitution has been dealt with extensively by South African courts and legislature. The Respondent State alluded to various pieces of legislation that have been enacted under section 26 of the Constitution to give effect both to the right to access to housing and the prohibition against arbitrary evictions. These include the Extension of Security of Tenure Act 62 of 1997, the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, the Housing Act 108 of 1997, the Development Facilitation Act 67 of 1995, the National Environment Act 107 of 1998, and the Municipal Finance Management Act 56 of 2003.
123. The Respondent State submitted that the competing interests between South African law and the Complaint currently before the Commission require a balance between the South African government's obligation under the Constitution to provide housing and the basic principle that the Government

²⁵ First Submission on Merits on behalf of the Republic of South Africa, para 5.13 (citing *SERAC and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001)).





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

must uphold the rule of law that prevents the illegal occupation of law. Added to that, the Respondent argued, is the obligation of the Municipality to ensure that expenditure is incurred in accordance with the Municipal Finance Management Act, which ensures the fiscal responsibility of municipalities.

124. The Respondent State submitted that as part of its responsibility to make adequate and safe housing available to the applicant, the Municipality has to conduct a number of studies on the property under consideration, including a feasibility study, a technical survey, a demolite stability investigation, and an environmental impact study.²⁶
125. The Respondent State submitted that if the Municipality were to simply purchase the property or any other property for that matter without complying with the necessary legislative requirements, such expenditure would be considered wasteful expenditure in terms of the Municipal Finance Management Act, which could have serious legal consequences for the government officials involved including criminal prosecution.
126. The Respondent State submitted that South African law aims at implementing section 26 of the Constitution in a balanced manner, the property rights of landowners, the rights of occupiers, specifically of vulnerable groups, as well as the rights and obligations of government with regard to housing.²⁷
127. The Respondent State submitted that in implementing its obligation to provide housing, the Complainants were moved onto the Property as an emergency measure following a flood in the area where they were living. However, following an application for eviction of the Complainants from the Property by the lawful owners, the IDM Trust, the Municipality has been and is still in the process of providing appropriate housing for the Complainants.²⁸
128. The Respondent State submitted that the Municipality has provided basic services to the Complainants in response to the High Court's judgment. The Government argued that it has been determined that the Municipality cannot purchase the Property as it is not suitable for habitation. The Government, however, claimed that it has identified alternative land for development and is in the process of finalising the last legislative requirements before construction of houses can commence. The Respondent State added that the Complainants

²⁶ First Submission on Merits on behalf of the Republic of South Africa, para 5.25.

²⁷ Citing the Extension of the Security of Tenure Act 62 of 1997; Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998; Housing Act 108 of 1997; Development Facilitation Act 67 of 1995; National Environmental Act 107 of 1998; Municipal Finance Management Act 56 of 2003.

²⁸ First Submission on Merits on behalf of the Republic of South Africa, paras 5.29-5.30.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

will be among the persons to benefit from the housing once it has been constructed.²⁹

129. The Respondent State submitted that while the administrative process to be followed in the delivery of housing may seem overly cumbersome and time consuming, the Municipality has no choice in the matter. It is a process that is "required to ensure that all competing interests (that of home seekers, the Municipality and other citizens of South Africa) are accommodated. The Government also argued that in accordance with the doctrine of margin of appreciation, South Africa is best placed to determine how to accommodate all competing interest, and that the process currently contained in South African legislation has been approved by South African courts.
130. The Respondent State also submitted that the Municipality has followed due process under South African law and in terms of assisting the Complainants. And that the Complainants have acted in bad faith or abused due process considering that at the time they approached the Commission, the Municipality was already implemented ongoing actions to address their plight of homelessness.
131. The Respondent State submitted that the case of *Social Economic Rights and Action Centre v Nigeria* (SERAC case) on the right to housing under the African Charter does not apply to this case because the facts are distinguishable on two grounds: firstly, no eviction order has been made and, secondly, South African law provides appropriate protection for the Complaints against forced eviction.³⁰
132. For these reasons, the Respondent State submitted that it has not violated the right to housing of the Complainants under the combined provisions of Articles 12, 16 and 18 of the African Charter.

(ii) *Respect for human dignity* (Article 5)

133. The Respondent State submitted that the alleged violation of Article 5 of the African Charter lacks merit as the Complainants have made no specific factual allegations about the right to respect for human dignity. The Government argues that it would be unfair to expect the Respondent State to make submissions on this alleged violation because "the Respondent has no indication from the Applicants' submissions regarding the alleged actions of the Respondent that allegedly gave rise to this violation."³¹

²⁹ First Submission on Merits on behalf of the Republic of South Africa, para 5.31.

³⁰ SERAC case (n 25 above).

³¹ First Submission on Merits on behalf of the Republic of South Africa, para 5.31.





134. As such, the Respondent State submitted that no violation of this right has occurred.

(iii) Right to education (Article 17)

135. The Respondent State submitted that the alleged violation of Article 17 of the African Charter is not in contention as the Complainants have not contended a violation of the right to education. The Government referred the Commission to paragraph 2 of the Report where it is stated that the new housing development will encompass educational use.³²

136. The Respondent State contends that this complaint is a ploy by the Complainants to abuse process and gain some preferential treatment over other house seekers who may be living in comparable circumstances or who may also require emergency housing from the Municipality.

137. On the basis, the Government submitted that the complaint has been instituted in bad faith and that there has not been a violation of Article 17 of the African Charter.

(iv) Protection of the family unit (Article 18), equality of persons and rights (Article 19), and economic, social and cultural development (Article 22)

138. The Respondent State submitted that the Complainants have made no specific factual allegation about violations of the right to protection of the family unit under Article 18, the right to equality of persons and rights under Article 19 of the African Charter, and the right to economic, social and cultural development under Article 22 of the African Charter. The Government argued that it would be unfair to expect the Respondent State to make submissions on these alleged violations as the Respondent has no indication from the Complainants submissions regarding the alleged actions of the Respondent State that allegedly gave rise to this violation.

139. The Respondent State urged the Commission not to entertain these allegations.

(v) General satisfactory environment favourable to their development (Article 24)

140. The Respondent State submitted that the Complainants made no specific factual allegations about the Respondent State's violation of Article 24 of the African Charter.

141. In response to the Complainants' contentions that the Municipality's Integrated Development Plan does not truthfully represent the Municipality's actions

³² First Submission on Merits on behalf of the Republic of South Africa, para 5.42.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

because it does not adequately ensure that the Complainants have access to housing,³³ the Respondent State submitted that the question of truthfulness of the Municipality's actions or whether the Municipality's Integrated Development Plan provides for housing has not been put to or considered by South African courts. And that although the Plan has been submitted for consideration by the courts, based on the principle of judicial difference, it is not for the courts to prescribe to the Municipality what project it should undertake or who it should prioritise; provided it is satisfied that the Plan meets the requirements of South African law.

142. The Respondent State further submitted that in light of the Municipality's plans to accommodate the Complainants in the development of Villa Liza Ext 5, the question of whether the Municipality's Integrate Development Plan provides access to housing is moot.³⁴
143. The Respondent rejected the averment by the Complainants that the Municipality has not submitted a plan for emergency housing to the Provincial Housing Department and therefore in contravention of municipal obligations under the South African Housing Code to provide for emergency housing and *in situ* development.³⁵ The Government argues that the issue before South African has never been whether or not the Municipality contravened the South African Housing Code – an issue for which local remedies must be exhausted.
144. The Respondent State submitted that, on the basis of the principle of subsidiarity, it is not for the Commission to determine whether South African judges have misinterpreted South African law.
145. The Respondent State also submitted that to the extent that Article 24 of the African Charter is relevant to the right to water and sanitation, the Municipality did not appeal the decision of the High Court to provide basic services to the Complainants on the property and that, in fact, water and sanitation services have been provided to the applicants.³⁶
146. As such, the Respondent State submitted that there has been no violation of Article 24 of the African Charter.

³³ Complainants' Written Submission on the Admissibility of the Complaint dated 22 February 2010, para 5.3.

³⁴ First Submission on Merits on behalf of the Republic of South Africa, para 5.60.3.

³⁵ Complainants' Written Submission on the Admissibility of the Complaint dated 22 February 2010, paras 5.5-5.6.

³⁶ Citing the African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights.





ACHPR

African Commission on
Human and Peoples' Rights

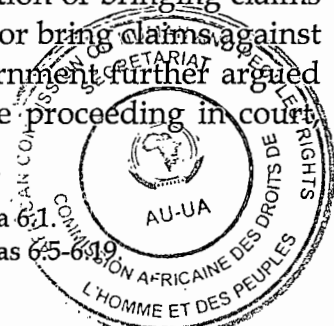
Human Rights our
Collective Responsibility

(vi) Response to the decision on admissibility

147. By Note Verbale LEG/ACHPR/COMM/377/09.23022015 (30107) dated 23 February 2013, the Respondent State indicated to the Commission that the Government intends to reopen the issue of admissibility in its written and oral pleadings on the merits of the Complaint.³⁷
148. While acknowledging that the Commission's Rules of Procedure of the Commission does not allow a reopening of admissibility proceedings, the Respondent State submitted that local remedies have not been exhausted. The Government argued that the Commission did not have all the facts of the case at its disposal when the decision on admissibility was made in terms of the reliefs sought by the Complainants before South African courts, the availability of sufficient remedies, and the impracticability of pursuing the remaining remedies.³⁸
149. In terms of the relief sought by the Complainants before South African courts, the Respondent State argued that the issue of relief from eviction of the Complainants has not yet been decided by any of the superior courts of South Africa. The Respondent State argued that while a part of the eviction claim, which has to do the purchase of the Property for the sum of R250 000.00, has been considered by the courts, the substantive issues on eviction are yet to be decided by the High Court.
150. The Respondent State also argued that no matter concerning the violation of human rights as contained in the South African Constitution was brought before the courts.
151. In terms of the availability of remedies, the Respondent State submitted that it is not sufficient for the Complainants merely to show that the possibility of success is low or that further appeals are difficult or costly. To the Government, the test should be whether the municipal system of the Respondent State is reasonably capable of providing effective relief. As such, the Respondent State submitted that effective relief is available to the Complainants in the courts system of the Respondent State.
152. The Respondent State submitted that effective reliefs are available in the Respondent State and that the Complainants have an option of bringing claims against the IDM Trust to dismiss the eviction application or bring claims against the Municipality for human rights violations. The Government further argued that even if the Complainants do not intend to institute proceeding in court

³⁷ First Submission on Merits on behalf of the Republic of South Africa, para 61.

³⁸ First Submission on Merits on behalf of the Republic of South Africa, paras 645-649.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

their rights remain protected under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act which balances the rights of illegal occupiers with that of the land owner. The Respondent State submitted that it is not guaranteed that the IDM Trust's application for eviction will succeed in the event that the matter proceeded in the High Court.

153. In terms of the impracticability of pursuing the remaining remedies, the Respondent State submitted that the Commission's finding that it would be impracticable for the Complainants to pursue their remedies in the South African court is unclear. Relying on the principle of subsidiarity, the Respondent State argues that South African courts are best placed to interpret South African law and that South African judges are best placed to understand the plight of vulnerable South Africans. Citing a number of cases decided by the courts, the Respondent State argued that South African courts have come to the aid of victims of alleged human rights abuses based on the outcome of several decided cases.³⁹ And that the Complainants have advanced no submissions as to what prejudice they stand to suffer in South African courts, if they ran the ordinary course of the eviction proceedings before the High Court.
154. The Respondent State submitted that local remedies have not been exhausted and the Complainants have advanced no reasons why it would not be possible to pursue any of the remedies demonstrated by the Respondent State.
155. On the basis of these arguments, the Respondent State urged that Commission to make a finding that the Respondent State has not violated any of the rights in the African Charter.

The Commission's analysis on the Merits

Respondent's challenge to the Complainant's written submissions

156. Before addressing the parties' submissions, the Commission notes that the Respondent State has taken issue with the way the complainants have presented their arguments on the merits before the Commission.⁴⁰ The Respondent State argued that the Complainants' submissions are vague 'as it is not clear what the allegations against the Respondent State are that need to be answered', and that the vagueness of the Complainants' submissions violates the Respondent State's right to a fair hearing and due process. The Respondent State argued that such uncertainty places South Africa at a disadvantage in these proceedings because it is forced to submit pleadings that may be overly wide in scope.

³⁹ First Submission on Merits on behalf of the Republic of South Africa, para 6.18

⁴⁰ First Submission on Merits on behalf of the Republic of South Africa, paras 5.1-5.4





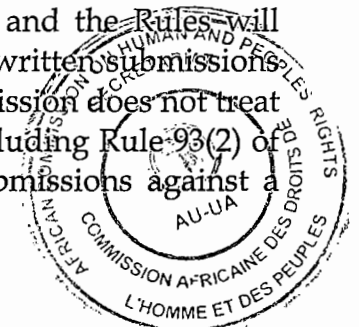
ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

157. These observations on the form of presentation of submissions strike at the procedure of the Commission, which is guided by its Rules of Procedure and, therefore, worth addressing.
158. Generally, the Commission receives and deals with communications pursuant to its protective mandate under the African Charter. Article 45(2) of the African Charter stipulates the responsibility of the Commission to '[e]nsure the protection of human and peoples' rights under conditions laid down by the present Charter.' One of the conditions laid down for the Commission to fulfil this mandate is the ability of the Commission to develop its own rules of procedure, including with respect to the adjudication of communications submitted to it.⁴¹
159. In this case, the operative rules of procedure under which this communication was filed were the 2010 Rules of Procedure of the Commission. The 2010 Rules of Procedure stipulate the specific information that must be contained in communications filed before the Commission for such communications to be seized by the Commission. This includes the provision of Rule 93(2)(d) of the Rules of Procedure of the Commission, which provides that the Secretary of the Commission shall ensure that Communications addressed to the Commission contain, among other things, *"an account of the act or situation complained of, specifying the place, date and nature of the alleged violations."*
160. From the allegations filed by the Complainants before the Commission, the Commission finds that, by themselves, the claims against the Respondent State are sufficiently clear and meet the basic requirements of Rule 93(2) for the following reasons. Firstly, there is a known author of the complaint whose name, nationality and signature are identified in the complaint. Secondly, the account of the act or situation complained of, including the nature of the alleged violations (in this case, the non-provision of housing or alternative housing and basic services), the place of the alleged violations and the period when the violation are considered to have occurred are contained in the complaint. It is based on these reasons of sufficient clarity that the Commission became seized of the matter at its 46th Ordinary Session.
161. The Commission notes, however, that the assertion of vagueness by the Respondent State is with respect to the Complainants' submissions, and not the complaint itself. A careful perusal of the African Charter and the Rules will show that neither instrument prescribes a specific form of written submissions in the proceedings of the Commission. However, the Commission does not treat its Rules in isolation. A community reading of the rules, including Rule 93(2) of the Rules of Procedure, suggests that a complainant's submissions against a

⁴¹ African Charter arts 42(2) & 46.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

State Party should be just as clear and coherent as the complaint itself and should have sufficient detail as to inform the State concerned of the specific acts or omissions that have occasioned a violation of the African Charter.

162. Yet, unlike the established practice of submitting a dedicated written submission on the merits advancing arguments in support of the allegations that specific Articles of the African Charter have been violated, the Complainants in this Communication decided not to submit their written arguments on the merits when called upon by the Commission to do so. Rather, in their email to the Commission on 28 January 2016, they elected to rely on their "written submissions on the Admissibility of Communication 377/09 – Mendukazi Patricia Monakali."⁴² In particular, they relied on parts 5 and 7 of their Written Submissions on the Admissibility of the Communication dated 8 March 2013. This information was relayed to the Respondent State on the basis of which the Respondent State filed their First Written Submission on Merits.
163. As a party before the Commission, the Complainants are entitled to conduct their case as best possible as they choose, so long as there is substantial compliance with the Commission's Rules of Procedure. In doing so, they take full responsibility for the strengths and weaknesses of how their case is presented before the Commission. Based on Rule 93 read together with the rest of the 2010 Rules of Procedure, it can be seen that the Complaint by which this communication was initiated contains specific allegations by the Complainants that the Respondent State violated the provisions of Articles 5, 17, 18, 19, 22 and 24 of the African Charter. The nature of these allegations has been articulated in the Complainants' written submissions on admissibility and the reply to the Respondent State's submissions.
164. At the time the Complainants opted to rely on their admissibility arguments, the Secretariat did not reject it. This implies that the reliance on those arguments by the Complainants, by itself, was considered acceptable to the Commission. Similarly, the Respondent State had ample knowledge of the nature of the Complaint and the main arguments of the Complainants. Having been duly served with all the written submissions on which the Complainants chose to place reliance and having specifically responded to each of the Complainants' substantive arguments in its own written submissions, the Respondent State cannot be heard to argue that "it is not clear what the allegations against the Respondent are that need to be answered".⁴³

⁴² See Complainants Attorney's reply to the Commission's email titled "Re: Letter on Communication 377 of the Complainant" dated 28 January 2016 para 3. Also see Complainants attorney's reply to the Commission's email dated 16 May 2016 para 3.

⁴³ First Submission on Merits on behalf of the Republic of South Africa, para 5.2.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

165. This is more so because the substance of the Complainants' written submissions on the merits in this Communication are based on the lack of access to adequate housing and basic services, the poor living conditions they have currently and the impending threat of homelessness that the Complainants face. These have been duly forwarded to the Respondent State; and these have been received and robustly and appropriately responded to by the Respondent.
166. The Commission finds that the complaint itself and the documentary evidence by which it is supported as well as the written submissions of the Complainants, when taken together, give sufficient clarity to the Respondent State of the nature of the allegations levelled against it. While the Complainants' processes may be untidy for conducting one's case, it does not contravene the Commission's 2010 Rules of procedure. Absent any expressly stipulated form in the African Charter and the Commission's Rules of Procedure, written submissions of the parties are not intended to be so technical or overly mechanical as to make it difficult for the unlettered or unsophisticated litigant or his or her legal representatives to articulate allegations of human rights violations.
167. While written submissions in proceedings before the Commission should be presented logically and with sufficient detail to enable the other party fully comprehend and adequately respond to the allegations, the requirement of written submissions is not intended to block the vast majority of litigants who may not be lettered in the processes and procedure of the Commission or be such as to make it so formally prescribed as to prevent litigants from being able to simply bear their minds on the substance of the case as best possible as they can. The Respondent State has properly challenged the Complainants' submissions. However, the Commission finds that there is no uncertainty in the latter's submissions that places the Respondent State at a disadvantage in the proceedings.
168. Considering that the specific allegations of violations in this Communication are in respect of Articles 5, 17, 18, 19, 22 and 24 of the African Charter, the Complainants' reliance on their submissions on admissibility as their arguments on the merits does not reasonably create a degree of uncertainty for the Respondent such that violates the Respondent's right to a fair hearing and due process.
169. As such, the Commission finds that the nature of the allegations is reasonably certain and that the Respondent State's observation - that the Complainants' submissions are unclear - cannot stand.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

Revisitation of the Commission's admissibility decision

170. The Respondent State has sought to reopen the issue of admissibility of this Complaint, despite it having been decided upon by the Commission.⁴⁴ While conceding that reopening of the admissibility decision is not proper at this stage of the proceedings, the Respondent State's arguments in support of this attempt to revisit the Commission's admissibility decision are based on points already canvassed at the admissibility stage, namely: the relief sought by the Complainants in the domestic courts of the Respondent State, the domestic remedies available to the Complainants, and the various remedial options open to the Complainants in the Respondent State.

171. Worthy of note is that the 2010 Rules of Procedure offers some guidance on the condition(s) for granting a review. In particular, **Rule 107(4)** provides that:

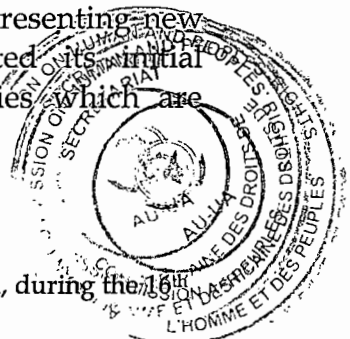
If the Commission has declared a Communication inadmissible this decision may be reviewed at a later date, upon the submission of new evidence, contained in a written request to the Commission by the author.

172. This means that under the 2010 Rules of Procedure of the Commission, a review of the Commission's decision on admissibility can occur where three conditions are present: Firstly, the Commission must have found that a communication is "inadmissible"; Second, the written request for a review must be accompanied by a "submission of new evidence"; and third, the request must come from the author of the Communication, not the Respondent State.

173. Assuming the Respondent is able to make such a request – and the Respondent is not able to do so in this instance – it is clear from the Rules that a review of the Commission's decision on admissibility is preconditioned on fulfilling the other two conditions; that is, the decision must have been declared *inadmissible* by the Commission, and the Respondent State must have produced new evidence.

174. The Respondent State submitted that the Commission did not have all the facts at its disposal when the decision on admissibility was made. Yet, the facts on which the Respondent State relies in its submissions have already been brought before the Commission and taken due cognisance of. Without presenting new and compelling facts, the Government has merely reiterated its initial arguments on the requirement of exhaustion of local remedies which are

⁴⁴ The Admissibility decision on this Communication was adopted in Kigali, Rwanda, during the 16th Extra-Ordinary Session of the Commission held from 20 to 29 July 2014.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

already contained in its First, Second and Third Written Submissions on admissibility and duly noted by the Commission.⁴⁵

175. After revisiting its decision on admissibility, it is the position of the Commission that, unless (a) it is a request to revise its decision on the *inadmissibility of a Communication* and (b) a new and decisive fact is adduced by the author of the Communication in support thereof, a review is unwarranted. As such, the decision of the Commission on the admissibility of the Communication stands.
176. Regarding the substantive issues before the Commission, the Respondent State submitted that, in considering the arguments in support of its case, the Commission must consider the principles of *margin of appreciation*, *subsidiarity*, the *progressive realisation of rights*, and *proportionality* in relation to the rights alleged by the Complainants to have been violated in this case. The Commission has opted to treat these principles in the course of its analysis below.

Alleged violation of Articles 5

177. The Complainants allege a violation by the Respondent State of Article 5 of the African Charter with respect to their right to live in dignity. Article 5 provides thus:

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.

178. By the tenor of Article 5 of the African Charter, the protection of the dignity and respect inherent in every human being is affirmed. In the case of *Purohit and Another v. The Gambia*, the Commission declared that 'human dignity is an inherent basic right to which all human beings... are entitled to without discrimination.'⁴⁶ In *Modise v. Botswana*, the Commission also noted that exposing victims to 'personal suffering and indignity' violates the right to human dignity under Article 5 of the African Charter.⁴⁷

⁴⁵ See First Submission on Admissibility on behalf of the Republic of South Africa (dated November 2012); Second Submission on Admissibility on behalf of the Republic of South Africa (dated 31 January 2013); First Submission Third Submission on Admissibility on behalf of the Republic of South Africa (dated 13 April 2013) paras 7.2.2-7.4.

⁴⁶ (2003) AHRLR 96 (ACHPR 2003) para 57.

⁴⁷ Comm. No. 97/93 - *John K. Modise v. Botswana* (1997) African Commission on Human and Peoples' Rights para 32.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

179. The right to live in dignity under Article 5 of the African Charter has direct implications on other rights, including the right to work, food, housing, health, water and sanitation; and creates corresponding obligations for the state. In the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights* (Principles and Guidelines on ESR), the Commission recognizes that the right to adequate housing includes the right to live in dignity and entails the obligation of State Parties under the African Charter to ensure that vulnerable and disadvantaged groups such as those at risk of homelessness have access to acceptable living conditions in a healthy environment.⁴⁸
180. The Commission also affirmed that the right to water and sanitation is implied in a number of rights under the African Charter including the right to dignity under Article 5 of the African Charter. In the *Principles and Guidelines on ESR*, the Commission noted that:
- While the African Charter does not directly protect the right to water and sanitation, it is implied in the protections of a number of rights, including but not, limited to the rights to life, dignity, work, food, health, economic, social and cultural development and to a satisfactory environment.*⁴⁹
181. This means that the right to live in dignity entails an obligation on the part of a State Party to ensure that individuals and groups resident on its territory live under residential conditions that are reasonably conducive to life, habitation, and health. To guarantee the right to live in dignity, State Parties under the African Charter have an obligation to regulate and monitor the living conditions of residential dwellings to ensure that they do not become dangerous to life, human health and wellbeing of residents. This obligation includes the responsibility to prevent and address overcrowding in residential areas that may prove dangerous to dignified life and social interactions, the provision of clean public toilets or public latrines, the collection, disposal and treatment of human excreta, and the removal of wastewater, storm water and solid waste.⁵⁰
182. In the present case, the Complainants claimed that prior to moving onto the Portion 41, they lived in temporary shack structures and neighbourhoods in Plot 40. Plot 40 was overcrowded and frequently flooded during the summer raining seasons until they were requested by the Municipal Authority to move

⁴⁸ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights paras 78.

⁴⁹ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights para 87.

⁵⁰ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights para 91.





ACHPR

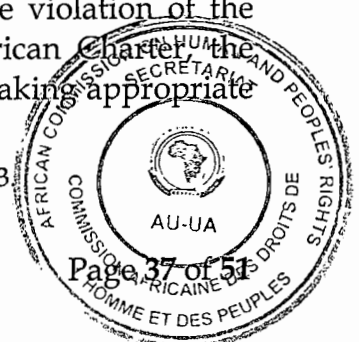
African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

temporarily to Plot 41. They claimed that the overcrowding and regular flooding not only created dangerously unhygienic conditions for them, but also gave rise to diseases and fatal accidents including fire incidents and the drowning of children. They further argued that despite having moved on to Portion 41, they have no access to basic services by the Municipal government. They also argued that the Respondent's neglect, failure or refusal to urgently address their housing crisis and living conditions on the Property impinges on their dignity as human beings.

183. The Respondent State does not dispute these horrifying conditions in its written submissions. In fact, the Respondent State acknowledges in its arguments that the Property on which the Complainants yet reside – albeit unlawfully – is “dangerous for human habitation.”⁵¹
184. Also, besides the communal waterpoints provided to the Complainants, they seem to lack access to other basic services conducive for life and day-to-day living. The Respondent argued that the Municipality provided basic services to the applicants, but falls short of providing any proof or indication of what specific services have been provided and if it was done so on a regular or once-off basis.
185. Living in temporary shack structures comes with tremendous challenges which can make life exceptionally difficult. The lack of basic services such as, for example, electricity, transportation and waste disposal can make life a living hell for the residents. As such, governments have a responsibility to take necessary measures using available resources to the maximum extent possible to ensure that squatters, vulnerable groups and homeless people have access to basic services beyond communal water points such as electricity and sanitation pending when adequate housing or alternative accommodation is made available.
186. In this case, there is no evidence on the record that the applicants are being provided with basic services besides communal water points on the property. The non-provision of such other important basic services to the Complainants will be contrary to the right of the Complainants to live in dignity under the African Charter.
187. In seeking to refute an allegation of violation of the right to respect for human dignity, it is not sufficient for the Respondent State to simply argue that the Complainants make no specific factual allegations about the violation of the right to respect for human dignity. As a party to the African Charter, the Respondent State has an obligation to demonstrate that it is taking appropriate

⁵¹ First Submission on Merits on behalf of the Republic of South Africa para 4.20.3





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

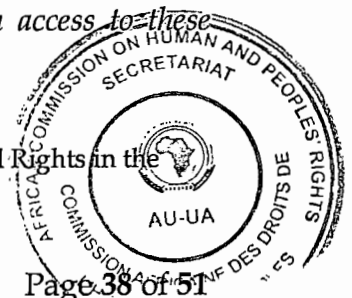
measures to ensure access to the basic necessities required for a minimum level of a life of dignity. This includes the obligation to address the problem of overcrowding and the various social problems associated with overcrowding.

188. The Respondent State also has an obligation to take appropriate measures using all available resources to address the challenge of dangerous flooding in human settlements as well as the non-provision of basic services which have an impact on human dignity. As the African Commission stated in respect to the right to water, it is critical that States demonstrate that they adopt 'deliberate, concrete and targeted steps to move as expeditiously and effectively as possible towards the goal of full realisation.'⁵² This applies to socio-economic rights generally.
189. In the present case, while the Respondent State did not deny that the conditions of life of the Complainants does exist, the Complainants did not argue that the Respondent State is not doing anything about the housing problem in South Africa. The main charge of the Complainants, however, is the failure or neglect of the Respondent State to urgently address their housing problems and living conditions. On this question of urgency, the African Commission recognizes that while socio-economic rights are of immediate application, their realization is subject to available resources and the use of concrete and targeted plans.
190. State Parties under the African Charter have an obligation to respect, protect, promote and fulfill socio-economic rights such as the right of access to adequate housing, water, sanitation and hygiene, and other basic services that safeguard the dignity of individuals and vulnerable groups.⁵³ However, they have some discretion as to how the resources needed for the implementation of such obligation are to be allocated and utilized. The discretion a State Party has with regard to resource allocation should, however, not be a limitation on the obligation to fulfil economic, social and cultural rights. This is because State Parties under the African Charter are under a duty to expeditiously fulfil the socio-economic aspect of the right of vulnerable groups to live in dignity and proper conditions in overcrowded spaces or in spaces provided as temporary accommodation.
191. In the Principles and Guidelines on ESR, the Commission has noted in its authoritative interpretation of the African Charter that:

The duty to fulfil includes the adoption of measures that enable and assist individuals and communities to gain access to these rights on their own. In cases where individual and communities are unable to gain access to these

⁵² Guidelines on the Right to Water in Africa 2019 para 3.3.

⁵³ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights paras 78, 79ff, 79hh, 87 & 92





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

rights by the means at their disposal, the obligation will be, "to take measures necessary to ensure that each person within its jurisdiction may obtain basic economic, social and cultural rights satisfaction."⁵⁴

192. In the instant case, while the evidence adduced by the Complainants sufficiently depicts highly concerning living conditions in the Rooikop Informal Settlement, they do not sufficiently tie the Respondent State with liability for those conditions. The Respondent State cannot be held responsible for the living conditions of the Complainants in Portion 40 for the period that they lived there, having not authorized the Complainants' accommodation in the first place.
193. With regards to the living conditions of the Complainants in Portion 41, the Commission finds that the Respondent State has an obligation to take appropriate measures for addressing their housing problems and difficult living conditions that is unbefitting of their human dignity. The Commission also finds that the Respondent State should show its particular programme or plan for addressing these problems including with specific reference to the situation of the Complainants. Beyond this, there is no specific obligation for the Respondent State to address the housing and associated problems of the Complainants within a time limit demanded by the Complainants.
194. The Respondent State would be held responsible for violation of this right with respect to the Complainants in the present case, if it failed to take any appropriate measures including mobilization of resources to respect, protect, promote and fulfill these rights for all South Africans lacking access to these basic services; or if it discriminated against the Complainants in the process of providing access to these services to South Africans in the same situation.
195. Indeed, a primary consideration for finding a violation of the right of the Complainant by the Respondent State with respect to the fulfillment of the socio-economic rights of the Complainants is whether the Respondent State has an obligation specific to the Complainant for providing *within a particular time* the services that the Complainants are lacking access to.
196. From the foregoing and in the absence of any evidence by the complainants that the government is not following due process in its effort to meet the demand for housing, there is no clear indication that the Respondent State has violated Article 5 of the African Charter. For that reason, the Commission finds that the Respondent State has not violated Article 5 of the African Charter.

⁵⁴ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights para 11.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

Alleged violation of Article 17

197. The Complainants alleged that the Respondent State violated Article 17 of the African Charter. Article 17 of the African Charter affirms the right of every individual to education and freely take part in the cultural life of his or her community. The Article also affirms the obligation of State Parties to promote and protect morals and traditional values recognized by the community.
198. However, although no categorical submissions have been advanced by the Complainants to support the allegation that the Respondent State is in violation of this right, the depositions in support of the allegations stated that children reside in approximately 68 out of the 75 affected households on the Property. The children in those households attend schools which are within walking or commuting distance to the Property. The Government does not dispute this claim and the implication that evicting the Complainants from the property could have on the right to education of the children in the 68 households.
199. The Respondent State has an obligation to ensure that the problem of housing faced by the Complainants do not negatively affect the right to education of their children.
200. Should the problem of housing faced by the Complainants lead to their homelessness, children from affected households stand to be out of school. The Respondent State has a responsibility to ensure that this does not happen.
201. The Commission must, however, come to the conclusion that the evidence made available to it does not allow it to establish with certainty that there has been a violation of Article 17 of the African Charter along the lines alleged here. In the absence of any evidence proving a violation of this right, the Commission finds that no violation of Article 17 has occurred.

Alleged violation of Article 18

202. The Complainants alleged that the Respondent State violated Article 18 of the African Charter. Article 18(1) and (2) of the African Charter guarantees the protection of family life and affirms the duty of the state to protect and assist the family.
203. There is no doubt that the right to family life is closely connected to the right to housing implicitly protected in the African Charter. In the case of *Social and Economic Rights Action Center (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* (SERAC case),⁵⁵ this Commission held that although the right

⁵⁵ Communication 155/96 - *Social and Economic Rights Action Center (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* (SERAC Case) (2001) ACHPR.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

to housing is not explicitly provided for under the African Charter, the combined provisions of Article 14 on the right to property, Article 16 on the right to enjoy the best attainable state of mental and physical health, and Article 18(1) on the protection accorded to the family read into the African Charter a right to housing.

204. In making this inference that the right to housing is implied in the African Charter, the Commission underscored the need to not interpret the right so narrowly as to equate it only with shelter, by stating that the right to housing goes beyond shelter or having a roof over one's head.⁵⁶ It includes the right to live somewhere in dignity, peace and security.⁵⁷ In the Principles and Guidelines on ESR, the Commission notes that:

The human right to adequate housing is the right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity. It includes access to natural and common resources, safe drinking water, energy for cooking, heating, cooling and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.⁵⁸

205. The Commission can also be inspired by the United Nations General Comment No. 4 on the Right to Adequate Housing (Article 11(1) of the International Covenant on Economic, Social and Cultural Rights) in which the Committee on Economic, Social and Cultural Rights declares thus:

the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have

⁵⁶ SERAC case (n 55 above) para 61.

⁵⁷ United Nations Committee on Economic, Social and Cultural Rights General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant) (1991) UN Doc E/1992/23 para 7.

⁵⁸ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights para 78.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

stated: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost".⁵⁹

206. In the present case, the Respondent State submitted that it recognizes the right to housing under Section 26 of Constitution of South Africa. That it has further given effect to this right in several pieces of legislation adopted by the South African legislature.
207. The Respondent State also argued that it is doing everything within its power to address the housing crisis of the Complainants. However, to do so, the Municipality is required to comply with South African domestic law that give effect to the right to housing under the Constitution before it may proceed to purchase the Property or secure alternative accommodation for the Complainants.
208. The Respondent State also argued that under South African law, the Government is obliged to balance between competing interests - that is, the obligation of the Government to provide access to housing, and the obligation to uphold the rule of law (by discouraging and preventing the illegal occupation of property).
209. The Respondent State also submitted that the Municipality has an obligation to conduct various studies on the Property to determine the appropriateness and habitability of the Property based on domestic law and to ensure that expenditure is incurred in line with South Africa's fiscal responsibility legislation. The Respondent State further submitted that if the Municipality were to simply purchase the Property or any other property for that matter without compliance with relevant legal rules, such expenditure could be considered "wasteful expenditure" under its fiscal responsibility laws, which could have serious legal ramifications for the government officials involved.
210. It is the case of the Complainants that although they are upon property that is owned by a private third party, they entered upon the property at the instance of and with the permission of the Government. In fact, the Respondent State admitted in its arguments that, indeed, the Complainants "were moved onto the Property as an emergency measure following a flood in the area where they

⁵⁹ United Nations Committee on Economic, Social and Cultural Rights *General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)* (1991) UN Doc E/1992/23 para 7





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

were living.”⁶⁰ This aligns with the Complainants’ claim on how they occupied the property.

211. The situation of the Complainants seems precarious. They have argued that if they are evicted from the property by the owners, they have nowhere else to go and will, in the process, be rendered homeless. That having entered upon the Property at the instance of the Municipality, the threat of homelessness they face is not being addressed with the urgency that it deserves.
212. The Respondent State has argued that in weighing its obligations to fulfil the right to housing, the Commission must have regard to the principles of margin of appreciation, subsidiarity, progressive realization of rights and proportionality.
213. The African Commission recalls its decision in the case of *Prince v South Africa* with regard to the margin of appreciation doctrine and the principle of subsidiarity. The Commission is aware that both doctrines establish the primary competence and duty of the Respondent State to promote and protect human and peoples’ rights within its domestic order.⁶¹
214. As a regional body, the Commission cannot claim to be better situated than local courts in advancing human and peoples’ rights in member states.⁶² That is why the African Charter gives member states some latitude in specific Articles to impose specific limitations, and requires complainants to exhaust local remedies. However, the African Commission will not allow a restrictive interpretation of these two principles by the Respondent State in this matter.
215. To be clear, the purport of the dictum on the two principles in the *Prince* case was not to oust the mandate of the Commission to monitor and oversee the implementation of the African Charter. While the doctrines of margin of appreciation and subsidiarity recognize the primary responsibility of States Parties to promote and protect human and peoples’ rights domestically, they do not deny the Commission’s mandate to guide, assist, supervise and insist upon States Parties’ compliance with the provisions of the African Charter where they fall short in that respect. The doctrines do not advocate for a hands-off approach by the African Commission on the mere assertion by the Respondent State that its domestic procedures meet more than the minimum requirements of the African Charter.⁶³

⁶⁰ First Submission on Merits on behalf of the Republic of South Africa para 5.29.

⁶¹ *Prince v South Africa* (n 22 above) para 52.

⁶² *Prince v South Africa* (n 22 above) para 52.

⁶³ *Prince v South Africa* (n 22 above) para 53.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

216. With regard to progressive realization of rights relied upon by the Respondent State, the African Commission notes the important strides made by the Respondent State towards the progressive realisation of the right to housing in South Africa.⁶⁴ In particular, the Government has between 1994 and 2016 provided 4.3 million houses and housing subsidies to about 20 million South Africans, and with a target to deliver 1.5 million more houses by 2019.
217. Progressive realization of rights is the obligation of states to gradually and constantly move towards the full realization of economic, social and cultural rights within the resources available to them.⁶⁵ In the Principles and Guidelines on ESC Rights, the African Commission notes that while the principle of progressive realization of economic, social and cultural rights is not expressly recognized in the African Charter, it is widely accepted in the interpretation of economic, social and cultural rights and, in accordance with Articles 61 and 62 of the African Charter, has been implied into the African Charter.
218. Therefore, States are under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights in their countries.⁶⁶ It is worth noting that the background to the preparation of the African Charter shows that the drafters of the Charter were mindful of the principle of progressive realization in crafting the list of socio-economic rights of the Charter.
219. The Commission is, however, be mindful that progressive realization does not give the State total leeway for determining the fulfilment of its obligations on socio-economic rights as it deems fit. The Commission wishes to affirm that the principle of progressive realization imposes specific obligations for which the state can be held responsible. It thus would like to draw the attention of States that central to the principle of progressive realization of socio-economic rights is the obligation the State bears for putting in place evidence-based strategies and specific plans and programs that clearly specify with measurable benchmarks the steps and general timelines towards availing access to socio-economic rights to people with no access to various basic social services such as electricity, water, housing, health care, education, sources of employment or livelihoods and social security. The State has accordingly to demonstrate that it has put in place such strategies and specific plans and programmes supported by the requisite resources. It also bears a responsibility to demonstrate progress at a speed and scale corresponding to the magnitude of the needs for access.

⁶⁴ First Submission on Merits on behalf of the Republic of South Africa para 5.13.

⁶⁵ Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights para 13.

⁶⁶ General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) para 40.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

Finally, it has to also show that it is deploying its available resources in a manner that displays both commitment to expand access to socio-economic rights and to the implementation of its responsibility.

220. As the Commission notes in the Principles and Guidelines on ESC Rights:

The concept of progressive realisation means that States must implement a reasonable and measurable plan, including set achievable benchmarks and timeframes, for the enjoyment over time of economic, social and cultural rights within the resources available to the state party. Some obligations in relation to progressive realisation are immediate. For example, States have an obligation to take concrete and targeted steps to realise economic, social and cultural rights. The essential needs of members of vulnerable and disadvantaged groups should be prioritised in all resource allocation processes.

221. In the present case, the impending threat of homelessness that the Complainants face should ordinarily elicit some urgent response from Government without prompting. As a particularly vulnerable group, the Respondent State has an obligation to urgently take concrete and targeted steps to address the essential needs of the Complainants.

222. On the issue of proportionality, the Respondent State submitted that there is a need to balance the individual interests of the Complainants against that of the public interest. The Respondent State submitted that the Municipality has been and still is in the process of providing appropriate housing for the Complainants. The Respondent State indicated that the Municipality has identified alternative land for development and is in the process of finalizing the last legislative requirements before construction of houses can commence. The Respondent State also submitted that the administrative process for the provision of housing under South African law may be cumbersome and time consuming, and that the Municipality has no choice in the matter. And that the Complainants "will be amongst the persons to benefit from the housing once it has been constructed."⁶⁷ The Respondent State argued that the government is best placed to determine how to accommodate all competing interests.

223. Considering the length of time that has gone by since the Complainants first allegedly submitted their application for housing, the Complainants have argued that they are not satisfied that there is any real seriousness or commitment on the part of government to address their housing crisis in an urgent way.

⁶⁷ First Submission on Merits on behalf of the Republic of South Africa para 5.31





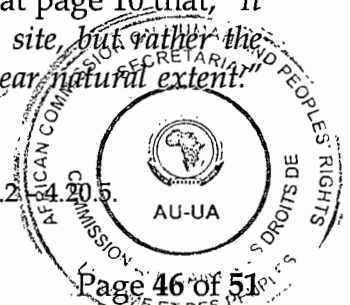
ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

224. It is the position of this Commission that the necessity to follow legal rules in the progressive realisation of economic, social and cultural rights must not be used as a yardstick by states to evade the responsibility to fulfil the obligation to provide housing for those that are desperate for housing. The requirement for the Respondent State to act in compliance with domestic law does not trump its domestic and international human rights obligations to prioritise the Complainants and any other set of vulnerable groups in the process of allocating its resources, and to act fast in the process.
225. The Complainants have repeatedly admitted, including on the record before South African courts that they are in illegal occupation, but that their occupation was at the behest of the Municipality. The Respondent State confirms that their occupation of the Property was an emergency measure to remove them from harms way in the previously flooded Portion 40. This suggests that unless the Respondent State takes urgent steps to address the unintentional illegal occupation by the Complainants, they are more likely than not to be evicted and rendered homeless. If the Respondent State were to opt for purchasing the property, it may substantially reduce the cost of relocating the 76 affected households. However, if the Respondent State were to opt for providing alternative accommodation, it would need to devote more resources for that purpose. Either action will address the Complainants' housing concern, the right of the lawful owners of the Property and the responsibility of government under the South African Constitution as well as the African Charter. However, this Commission leaves that determination to the Respondent State.
226. Between 2004 and 2022, the Government has had nearly two decades to seek alternative accommodation or buy and develop the property for the settlement of the Complainants as previously expressed by the Municipality. There is no indication that the Government plans to utilize the option of formalizing the Complainants' settlement on the Property. Rather, the Government relied on Annexures RM8 titled "Wetland Delineation and Functional Assessment for Wadeville Ext. 41" by Wetland Consulting Services (Pty) Ltd dated October 2007, and RM 10 titled the "Rooikop Station Report" by the Ekurhuleni Metropolitan Municipality dated June 2016, to buttress the point that the property is unfit for human habitation.⁶⁸
227. Indeed, in Annexure RM8, the experts who undertook the wetland assessment report of the Rooikop Station informal settlement area noted at page 10 that, *"It is our recommendation that ideally no development take place on site, but rather the wetland be rehabilitated and allowed to return to its natural or near natural extent."*

⁶⁸ First Submission on Merits on behalf of the Republic of South Africa para 4.20.2





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

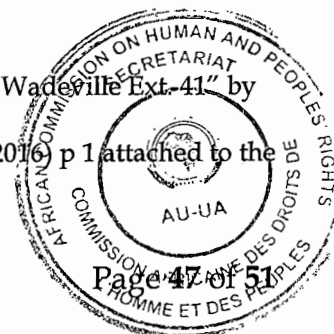
However, the experts also noted that while removing the Complainants and their dwellings and relocating them elsewhere would help to manage the stormwater generated by regular floods:

Given the demand for housing it [the Complainants' Settlement], and the already altered state of the wetland, might be more appropriate to accept and improve the current residential development rather than to move the people and their infrastructure to a new greenfields area, as undisturbed grassland within the Gauteng area is likely to have a higher conservation value than this particular section of the wetland.⁶⁹

228. The Respondent State seems to have totally ignored this recommendation in preference for the more worrying option of eviction, albeit at the instance of the private owners through the domestic judicial process. The Government argued that Villa Liza Ext 4 - a government-owned property - referenced in Annexure RM10 page 2 is an alternative land parcel which is under development to address the Complainants' housing crisis.
229. However, a careful look at Annexure RM10 at page 2(Background) shows that the 348 households which the Municipality plans to relocate to Villa Liza Ext 4 are the households "located on the remaining extent of portion 25 of portion 4 of farm Rooidekop 139-IR" - a plot privately owned, not by the IDM Trust it does seem but, by the Plesberg Investment (Pty) Ltd.⁷⁰
230. Clearly, the settlements in this portion of the farm Rooidekop (that is, portion 25 of portion 4 of farm Rooidekop 139-IR) is not nearly the same as the residence of the 76 households of Portion 41 of farm Rooidekop 140, who are the Complainants in this Communication. This suggests that the Complainants may be justified in their fears that they are not adequately catered for in the planned relocation and alternative housing programme of the Municipality.
231. Whilst the Respondent State has an obligation to uphold the rule of law by enforcing legislation that prevents the unlawful occupation of private property, the Complainants' illegal occupation of private property in this case was an emergency measure by the Respondent State to protect the Complainants from the flooding crisis at the previous residence on Portion 40. Having put them on the property or permitted their entering upon the property, the Respondent State cannot turn around to claim that the Complainants are in unlawful

⁶⁹ Annexures RM8 titled "Wetland Delineation and Functional Assessment for Wadeville Ext. 41" by Wetland Consulting Services (Pty) Ltd dated October 2007 p 11.

⁷⁰ See Ekurhuleni Metropolitan Municipality, "Rooidekop Station Report" (June 2016) p 1 attached to the Respondent State's First Submission on Merits as Annexure RM10.





occupation without either dealing fairly with the owners or correcting its own mistake.

232. From the facts of this case, it is clear that the Complainants are in no position to afford proper housing otherwise they would not be living in temporary shack structures. If they get evicted from the Property, there is no alternative land on which to erect their temporary shelters. This will unfairly expose the Complainants to the elements and undoubtedly violate their dignity as human beings. As a group of people, who have nowhere else to go, they are entitled to insist on their right to housing under the Constitution of the Respondent State and the African Charter and to invoke the obligations of the Respondent State to fulfil it.
233. Having come upon the Property at the instance of the Government, it is no fault of the Complainants that they became unlawful occupiers of private property. The Government has an obligation to address the unlawful occupation of property belonging to a third party which was a temporary measure it took when it brought the Complainants upon the property by providing temporary shelter for them pending when they have access to adequate housing. As such, while the Commission does not find a violation of Article 18 of the African Charter, it urges the Government to address the illegal occupation associated with the temporary accommodation of the Complainants in order to protect their right to family life in line with the African Charter.

Alleged violation of Article 19

234. The Complainants also alleged a violation of Article 19 of the African Charter. Article 19 of the African Charter provides that:

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

235. Article 19 affirms the equality of all peoples, and the right as a collective to enjoy the same respect and have the same rights as other South Africans who have been provided housing by the Respondent State.
236. The Complainants submitted that they deserve to enjoy the same rights and respect as the rest of the country and the only way to enjoy such right is by the Municipality delivering on its housing obligations with respect to the occupants of Portion 41.⁷¹

⁷¹ Applicants' response to respondent's second submission on admissibility on behalf of the republic of South Africa (date 8 March 2013) para 1.1.7.2.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

237. The Respondent State did not challenge this contention but rather argued that no specific factual allegations about violation of Article 19 has been made.

238. While the Commission agrees that the Complainants have a right to be treated on the same basis as other South Africans who have received housing from the Respondent State, it however finds that the information provided by the Complainants does not allow it to make a finding that they are treated differently from others of similar conditions. As such, the Commission finds no violation of Article 19 of the African Charter by the Respondent State.

Alleged violation of Article 22

239. The Complainants also alleged that Article 22 of the African Charter has been violated by the Respondent State.

240. Article 22 of the African Charter provides as follows:

1. *All 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*

241. The Commission has developed jurisprudence on the right to development under the African Charter. In the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, the Commission held that:

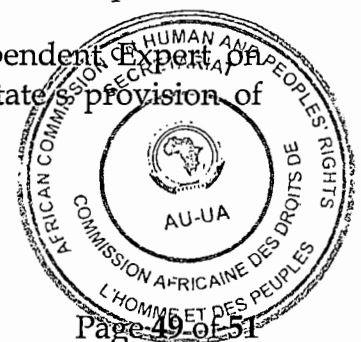
the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development.⁷²

242. The right to development is constitutive to the extent that it is recognized and protected by law; it is instrumental to the extent that it empowers its holders to be consulted, to contribute to and participate in the decision-making processes concerning them so that other rights are not violated. In all of this, the freedom of choice must be present as a fundamental part of the right to development.⁷³

243. In the *Endorois* case, the Commission citing the UN Independent Expert on Development noted that development is not simply the State's provision of

⁷² (2009) AHRLR 75 (ACHPR 2009).

⁷³ *Endorois* case (n 72 above) para 278.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

housing for particular individuals or peoples; but also entails providing people with the ability to choose where to live.⁷⁴

244. In the instant case, the Complainants argued that after living under deplorable circumstances in self constructed shacks with minimal public utility services, their having to face eviction amounts to a violation of their right under Article 22 of the African Charter. The reality of the deplorable living conditions of the Complainants were not challenged by the Respondent State and the latter has advanced no rebuttal to the Complainants' submissions.

245. Regardless of the non-rebuttal by the Respondent State, no evidence has been advanced by the Complainants to demonstrate that the state is to blame for their deplorable socio-economic conditions and hence to support the allegation that Article 22 of the African Charter has been violated. For this claim to succeed, the evidence before the Commission must support the allegation that there has been a violation of Article 22 of the African Charter by showing the responsibility of the state for their socio-economic deprivation.

246. From the arguments presented, the Complainants have not adequately justified this allegation by adducing cogent evidence in support of the circumstances of the alleged violation under Article 22. The Commission cannot be left to conjecture in its determination of whether or not there has been a violation of the provision. As such, the Commission finds that the Respondent State has not violated the provision of Article 22 of the African Charter.

Alleged violation of Article 24

247. The Complainants also alleged that the Respondent State is in violation of Article 24 of the African Charter.

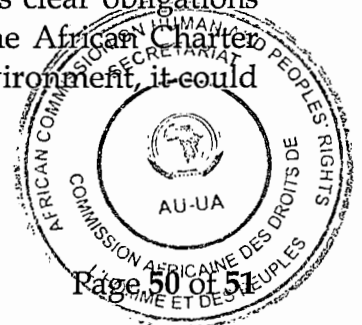
248. Article 24 of the African Charter protects the right of a people to a general satisfactory environment favourable to their development.

249. The right enshrined in Article 24 of the African Charter affirms the importance of a clean and safe environment that is closely linked to economic and social rights to the extent that the environment affects the quality of life and safety of the individual.⁷⁵

250. In the *SERAC* case, the Commission noted that the right to a general satisfactory environment under Article 24 of the African Charter imposes clear obligations on government. This suggests that where a State Party to the African Charter fails to ensure that its citizens reside in a clean and health environment, it could

⁷⁴ As above.

⁷⁵ *SERAC* case (n 55 above) paras 51-52.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

amount to a violation of its international obligations under Article 24 of the African Charter.

251. A State will be said to have violated the right to a healthy environment of a people under Article 24 of the African Charter when it interferes with the living environment of the people, or when it fails to protect them from interference by others or when it does not take the necessary measures for creating a healthy atmosphere for people living in an unsafe environment as expeditiously as available resources used judiciously allow.
252. In the present case, while there is room for the Respondent State to improve its programme for creating a healthy environment for the Complainants, the submissions made and available evidence do not support a conclusion that the gaps in the Respondent State's efforts are to a level that meets the requirements for finding a violation of its obligations under Article 24 of the Africa Charter.
253. The fact that the African Commission was unable to make a finding of specific violations of the rights in the Charter does not mean that the Commission does not find the conditions of the affected people to be concerning. Indeed, as can be discerned from the Commission's analysis in the foregoing pages, the Commission finds these conditions to be very concerning given that these conditions both put the wellbeing of the affected people in jeopardy and thus impede their access to and enjoyment of socio-economic rights. In the light of this, the Commission is of the view that the Respondent State should go beyond a minimalist and legalistic approach to addressing the concerns of the affected communities. For the Respondent State to be considered as a State that takes its obligations for human and peoples' rights seriously, it should make extra effort by adopting targeted measures to address the housing conditions of the affected people with urgency.

Decision of the Commission on the Merits

254. For these reasons, the African Commission:

- Finds no violation of Articles 5, 17, 18, 19, 22 and 24 of the African Charter.

Adopted during the 76th Ordinary Session of the African Commission on Human and Peoples' Rights, held virtually from 19 July to 2 August 2023.

