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Communication 476/14

MAGDY MOUSTAFA EL-BAGHDADY

V

REPUBLIC OF THE SUDAN

Adopted by the:

African Commission on Human and Peoples' Rights

During the 80th Ordinary Session held virtually from 24 July to 2 August 2024.



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



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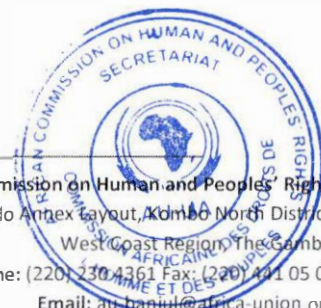
DECISION ON MERITS

COMMUNICATION 476/14 - MAGDY MOUSTAFA EL-BAGHDADY V. REPUBLIC OF THE SUDAN

Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 25 October 2013 from Magdy Moustafa El-Baghdady (the Complainant), represented by REDRESS (the Representative).
2. The Complaint is submitted against the Republic of Sudan (Respondent State), a State Party to the African Charter on Human and Peoples' Rights (the African Charter)¹.
3. The Complainant submitted that he is a British citizen whose father is of Egyptian descent and his mother is of Polish descent. The Complainant stated that on 17 August 2009, he relocated from Britain to Egypt and that on 27 January 2011, he flew to the Respondent State from Egypt with a Sudanese friend, Omar al-Mahdi, to invest in a restaurant business, as well as venturing into a telecommunications business. He stated that he and his friend took telecommunications equipment to Sudan, which they declared to the Customs Officers.
4. The Complainant submitted that on 14 February 2011, his apartment was raided by National Intelligence and Security Services (NISS) officers, who arrested him without a warrant and confiscated his passport and business goods. He submitted that he was accused of being a British/Israeli spy, was blindfolded, hand and foot cuffed, and taken to an unknown location, which he later learned was the NISS Headquarters. His friend, Mr. al-Mahdi, was also arrested on the same day.
5. The Complainant added that he was interrogated in Arabic upon his arrest, although he only speaks English and Polish, and his hair was removed during the interrogation. The following day, he and Mr. al-Mahdi were transferred to

¹ The Republic of Sudan ratified the African Charter on 18 February 1986.





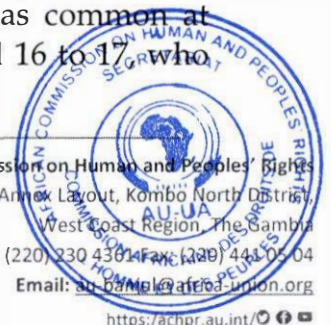
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Kober Prison, where they suffered torture in the form of severe beatings, were injected with a sedative-like substance, and were humiliated and insulted.

6. The Complainant submitted that he was denied medical attention for injuries resulting from torture and diseases caused by poor detention conditions. He submitted that he was taken to NISS Headquarters for interrogation at least four times while at Kober Prison.
7. The Complainant submitted that on either 19 or 20 February 2011, he, Mr. al-Mahdi, and other prisoners experienced a mock execution whereby prison officers placed guns at the back of their heads and the call of a high-ranking officer, the officers cocked their guns as if to shoot. The Complainant submitted that mock executions are common at Kober Prison and that political prisoners faced a firing squad in this manner, with some being shot on occasion. He added that this experience has left him with psychological trauma.
8. The Complainant alleged that Kober Prison is in a secret location, and prisoners are not called by their names to make tracing them difficult in case of death. The Complainant added that the conditions of detention are poor, and torture is rampant. Prisoners were suspended from the ceiling and beaten; made to squat on glass bottles until the bottles were half full of blood from their anus; others had their penis tied to prevent them from urinating until their kidneys burst; some were injected with a substance which made them insane to prevent them from speaking of the horrors; and Darfurian prisoners were forced to sign confessions under threat of violence, death and rape of their families. The Complainant claimed that even after the Darfurian prisoners signed the confessions, they were executed.
9. The Complainant alleged that he and Mr. al-Mahdi were compelled at gunpoint to sign documents stating that they were never to mention what happened while in detention or face re-arrest and imprisonment.
10. The Complainant stated that on 13 March 2011, the day of their release from Kober Prison, he and Mr. al-Mahdi were blindfolded, handcuffed, driven around for six hours, then finally taken to a National Security Office, labeled 'Crimes against Sudan,' where they were remanded for three to four weeks, without access to toilet or water, worsening the Complainant's kidney pains. The Complainant averred that they were then transferred to 'Information Police,' also known as 'Mubalis,' where they spent approximately fifteen days with minimal food. The Complainant alleged that torture was common at Mubalis, occasionally involving children, including some aged 16 to 17, who





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were arrested for breakdancing. The Complainant averred that they were finally transferred to 'Omdurman Prison,' where they spent ten days before being released.

11. The Complainant alleged that upon release from Omdurman Prison, following 78 days of *incommunicado* detention. During this period, he suffered severe physical and psychological harm, losing approximately 37kg of his original weight; he was forced to remain in Sudan for eight months because both he and Mr. al-Mahdi faced charges under 'Article 23 of the Electronics Act/Informatic Offences (Combating) Act.'², which prevented them from leaving the country until the charges were adjudicated. The Complainant averred that he could not afford his legal representative and relied on Mr. al-Mahdi's lawyer to represent him in the case.
12. The Complainant stated that on 06 December 2011, the judge found Mr. al-Mahdi not guilty, while he was found guilty under the Act and was ordered to either pay a fine of 5000 Sudanese Pounds (SDG) or return to Omdurman Prison for six months. The Complainant refused to pay the fine and was taken into custody. Mr. al-Mahdi's lawyer appealed the guilty verdict on the same day on behalf of the Complainant. However, on the same day, Mr. al-Mahdi's mother paid the fine, and the Complainant was released. Upon his release, the Complainant left the Respondent State and arrived in London on 31 December 2011. In February 2012, the Court stated in the Complainant's absence that the appeal, which was filed on 06 December 2011, "... had been canceled, not denied".
13. The Complainant submitted that upon leaving Sudan on 31 December 2011, he could not raise a complaint about his treatment as he faced threats of re-arrest and imprisonment while in Sudan. To this end, the Complainant stated that he has repeatedly called on the Respondent State to investigate his case through the Government of the United Kingdom (UK). The Complainant added that the Respondent State, in a letter dated 26 May 2013 and received by the Complainant on 02 June 2013, acknowledged the Complainant's arrest but failed to mention the Complainant's allegations against the Respondent State nor any investigations into these allegations.

Articles alleged to have been violated:

14. The Complainant alleged that the Respondent State violated Articles 1, 2, 5, 6, 7, 14, and 16 of the African Charter.

² Complainant's statement of fact para 105; See also Representative's facts, para 42.





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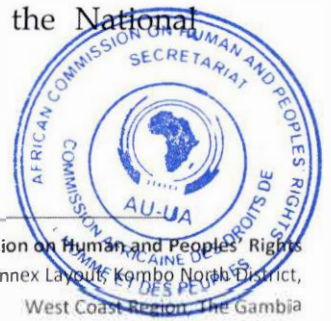
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Prayers:

15. The Complainant prays for the African Commission on Human and Peoples' Rights (the Commission) to:

- a. Find that the Respondent State has violated Articles 1, 2, 5, 6, 7, 14 and 16 of the African Charter;
- b. Request the payment of adequate compensation to the Complainant for the violations of his Charter rights, including:
 - i. Material damages for cost of medical treatment, psychological and social services;
 - ii. legal and other expert assistance;
 - iii. loss of earnings and loss of earnings potential;
 - iv. lost opportunities, including employment and education;
 - v. special damages in the form of moral damages/ non-pecuniary damages;
- c. Request the Respondent State to commence an effective and impartial investigation into the circumstances of the Complainant's arrest and arbitrary detention and his subsequent torture and ill-treatment, including:
 - i. Lifting existing immunities with regards to any officer suspected of being responsible for any of the violations listed herein;
 - ii. Providing adequate protection for witnesses in the course of the investigation and thereafter if needed, such as guaranteeing anonymity, escorts, and relocation;
 - iii. Where sufficient evidence of misconduct or criminal conduct is found, the suspected perpetrators should be tried and adequately punished if found guilty;
- d. Request a public acknowledgment and apology to the Complainant for the violations suffered.
- e. Request the Respondent State to amend relevant legislation that is incompatible with the African Charter, in particular, the National Security Act of 2010 (NSA), to:





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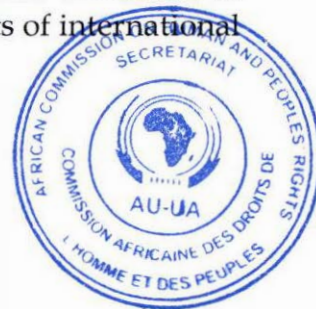
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- i. Provide protection, either by removing the powers of arrest and detention altogether or by granting a right to prompt access to a lawyer and a doctor and a right to habeas corpus;
 - ii. Repress violations, such as making torture a criminal offence by using the internationally recognised definition of torture and by making it subject to adequate punishment; and
 - iii. Effectively counter impunity and provide effective remedies. This entails the repeal of immunity provisions and the provision of an explicit right to a remedy and reparation for victims of serious human rights violations, including torture and arbitrary arrest and detention.
- f. Request the Respondent State to undertake institutional and practical reforms to ensure that anyone alleging to have been subjected to torture or other ill-treatment can effectively pursue complaints, which are subject to a prompt, impartial, and effective investigation, including:
 - i. Ensuring the confidentiality of and protection of victims at the time of making complaints, investigation and prosecution;
 - ii. The provision of adequate medical care and access to physicians able to produce medical reports in line with recognised standards;
 - iii. Designing and implementing policies for the confidential storage of medical records of torture victims in hospitals and the provision of such records to a victim on request;
 - iv. Training members of the NISS on relevant standards concerning adherence to custodial safeguards, the prohibition of torture, and any form of discrimination in exercising their functions; and
 - v. Establishment of an independent complaint mechanism with powers to investigate actions and complaints against law enforcement personnel, including the NISS.
- g. Request to improve the conditions of detention in terms of access to clean water, food, toilets, cell occupancy, and detainee treatment to bring detention standards in line with the requirements of international law.

Procedure:

16. The Secretariat received the Complaint on 25 October 2013.



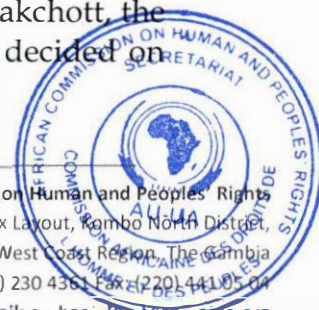


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17. The Complainant wrote to the Secretariat following up on the status of the Complaint on 29 May 2014. The Secretariat responded on 05 June 2014.
18. At its 16th Extra-Ordinary Session, the Commission decided to be seized of the Complaint, which was registered as Communication **476/14 - Magdy Mostafa El-Baghdady v. Republic of Sudan** and both parties were duly informed of the decision on 28 August 2014. The Complainant was invited to submit its Submission on Admissibility within two (2) months.
19. On 03 November 2014, the Complainant's submissions on Admissibility were received at the Secretariat, which was subsequently forwarded by Note Verbale Ref: ACHPR/COMM/476/14/SUDAN/1807/14 to the Respondent State on 10 November 2014, requesting the latter to submit their written submissions on Admissibility within two (2) months.
20. The Commission deferred consideration of the Communication between the 56th Ordinary Session and the 19th Extra-Ordinary Session of the Commission.
21. On 07 April 2016, following the 19th Extra-Ordinary Session of the Commission, the Secretariat by Note Verbale Ref: ACHPR/COMM/476/14/SUDAN/594/16 and letter Ref: ACHPR/COMM/476/14/SUDAN/595/16 informed the parties that the Respondent State had been granted an extension of thirty (30) days within which to make its overdue submissions on Admissibility, failing which the Commission will proceed to adopt a default decision.
22. On 10 April 2016, following the non-receipt of the Respondent State's submissions on Admissibility, the Secretariat, by email, re-transmitted the Note Verbale of 07 April 2016 Ref: ACHPR/COMM/476/14/SUDAN/594/16 to the Respondent State for the second time imploring the State to make its overdue submissions within the extended timeline granted by the Note Verbale.
23. On 06 May 2016, both parties were informed of the Commission's decision to defer the consideration of the Communication during the 58th Ordinary Session pending submissions on Admissibility by the Respondent State.
24. Again, between its 59th Ordinary Session and the 23rd Extra-Ordinary Session, the Commission deferred consideration of the Communication.
25. At its 62nd Ordinary Session, held from 25 April to 09 May in Nouakchott, the Islamic Republic of Mauritania, the Commission considered and decided on the Admissibility of the Communication.





26. Both Parties were notified of the Admissibility decision on 22 June 2018. The Complainant was instructed to submit arguments on the merits within 60 days from the notification date of the decision.
27. In September 2018, the Secretariat received the Complainant's submissions, which were relayed to the Respondent State on 09 October 2018, with a 60-day timeframe for providing feedback on the Complainant's submissions.
28. A reminder and the Admissibility decision were dispatched to the Respondent State on November 26, 2018.
29. The decision on the Merits was postponed from the 63rd to the 79th Ordinary Sessions of the Commission, with repeated prompts for the Respondent State to present its arguments on the Merits.
30. The Commission deliberated and adopted a decision on the Merits during its 80th Ordinary Session, conducted virtually from July 24 to August 2, 2024.

Admissibility

The Complainant's Submissions on Admissibility

31. The Complainant submitted that the Communication satisfies all the Admissibility requirements set out in Article 56 of the African Charter and presents arguments supporting that submission.
32. In relation to Article 56(1) of the African Charter, the Complainant averred that the organisation representing the Applicant, REDRESS, is the author of the Communication and is identified in the Communication in accordance with Article 56(1) of the African Charter.
33. Regarding Article 56(2) of the African Charter, the Complainant submitted that the Communication proffers several provisions of the African Charter, which were violated by the Respondent State. The Complainant further averred that the alleged violations occurred after the ratification of the African Charter by the Respondent State.





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34. On Article 56(3) of the African Charter, the Complainant submitted that the Communication is presented using respectful language and does not contain disparaging or insulting language.
35. In relation to Article 56(4) of the African Charter, the Complainant submitted that the allegations proffered in the Communication are substantiated using eyewitness testimony, medical and psychological reports, official documents, as well as reports of non-governmental organisations and are not exclusively based on news disseminated through the media.
36. Regarding Article 56(5) of the African Charter, the Complainant submitted that it does not need to exhaust local remedies because the exceptions to exhaust local remedies apply to this Communication on the grounds that the remedies within the Respondent State do not meet the Commission's requirements of availability, effectiveness, and sufficiency.
37. The Complainant adduced three arguments on the grounds that the local remedies within the Respondent State are not available or effective.
38. First, the Complainant argued that the exhaustion of domestic remedies requirement is premised on the principle that the Respondent State should have the first opportunity to redress an alleged wrong. The Complainant contended that the Respondent State had ample opportunity to redress the alleged violations but failed to do so. The Complainant averred that he brought the allegations to the attention of prison staff wherever he was detained, and through the UK officials made multiple representations to the Respondent State calling for a prompt investigation into the allegations of torture and arbitrary detention to no avail.
39. Citing the Commission's decision in multiple Communications, including *Centre on Housing Rights and Evictions v The Sudan*, the Complainant argued that the exhaustion of domestic remedies is not required in cases where it can be shown that the State failed to remedy a situation despite ample notice and time to do so and further that failure on the part of the State in this regard means that domestic remedies are either not available or if they are, they are not effective or sufficient to redress the alleged violations³.
40. Secondly, the Complainant submitted that he was unable to access domestic remedies on the basis that he was held in *incommunicado* detention, where he was denied access to a lawyer, the British Embassy, and his family.

³ Communication 296/05, (2000) ACHPR, para 32.



41. Thirdly, the Complainant argued that he could not access these remedies even after his release due to fears that there was a real threat to his life and safety if he sought to pursue domestic remedies while in Sudan. Citing threats of re-arrest and imprisonment, amongst other factors to buttress this argument, the Complainant further argued that the threats and harassment had forced him to leave the Respondent State, creating a further impediment to his accessing domestic remedies.
42. On the ground that local remedies are not sufficient, the Complainant argued that the legal system in the Respondent State fails to provide effective and sufficient remedies for victims of torture, noting particularly that the definition of torture in the Sudanese Constitution and the Criminal Act of 1991(CPA) does not align with internationally recognised standards nor provide adequate punishment for perpetrators. The Complainant argues further that NISS officials, the perpetrators in this regard, enjoy immunity from criminal and civil procedures in terms of the NSA. The Complainant further alleged that notwithstanding the NISS Director's prerogative to lift immunity, there is no practice indicating that this prerogative has been exercised nor any judicial remedies around the immunity provision. As a result, the Complainant contended there is no realistic prospect of successfully redressing the complaint in the Respondent State.
43. Regarding Article 56(6) of the African Charter, the Complainant submitted that the Communication had been submitted within a reasonable time from when he realized that local remedies were not available, effective, or sufficient. The Complainant noted that the African Charter does not provide for the exact timeframe of a "reasonable period of time" and thereby treats each case individually, explicitly differentiating between cases where remedies could and were exhausted and those cases where they could not and were not exhausted. Arguing that the present Communication falls within the latter category and citing the Commission's decision in *Tsikata v Ghana*, the Complainant submitted that the Commission estimates the timeliness of a Communication within the latter category from the date where a Complainant becomes aware that local remedies are unavailable, ineffective or insufficient⁴. Flowing from that premise, the Complainant averred that he realized local remedies were insufficient and ineffective around 05 August 2013 on receipt of the UK Foreign and Commonwealth Office's (FCO) letter and, within three months thereafter, filed his Complaint with the Commission.

⁴ Communication 322/2006, (28 April to 12 May 2014) ACHPR, para 37.



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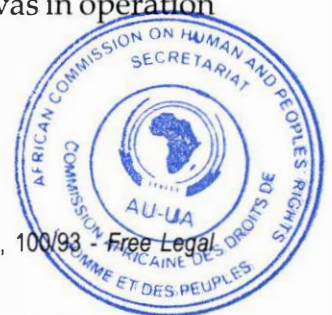
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44. Regarding Article 56(7) of the African Charter, the Complainant declared that the Communication has not been submitted to any other procedure of investigation or settlement and thus accords with Article 56(7) of the African Charter.

Analysis of the African Commission on Admissibility:

45. As indicated above, the Respondent State has not submitted its observations on Admissibility despite the opportunity accorded it in terms of Rule 105 of the Commission's Rules of Procedure.
46. In the present circumstances, and in accordance with the jurisprudence of the Commission as articulated in the case of *Institute for Human Rights and Development in Africa v. Republic of Angola*, "in the face of the State's failure to address itself to the complaint filed against it, the African Commission has no option but to proceed with its consideration of the Communication in accordance with its Rules of Procedure." Additionally, "... it would proceed to consider Communications based on the submission of the Complainants and information at its disposal, even if the State fails to submit."⁵. Accordingly, the Commission must consider the Complainant's allegations insofar as these have been adequately substantiated.
47. The Commission recalls that Article 56 of the African Charter provides seven admissibility requirements, in which a Communication submitted under Article 55 of the African Charter must comply cumulatively to be Admissible.
48. Regarding Article 56(1) of the African Charter, the Commission notes that the Communication identifies the author as REDRESS and is, therefore, in accordance with the requirement under Article 56(1) of the African Charter.
49. In relation to Article 56(2) of the African Charter, the Communication is compatible with the provisions of the African Charter and the Constitutive Act of the African Union as it details a *prima facie* violation of Articles 1, 2, 5, 6, 7, 14 and 16 of the African Charter; it is submitted by a Complainant competent to do so against the Republic of Sudan, a State Party to the African Charter; the alleged violations occurred at a time when the African Charter was in operation in the State Party and within its territory.

⁵ Communication 292/04, (2008) ACHPR, para 34; See also Communication 25/89, 47/90, 56/91, 100/93 - *Free Legal Assistance Group and Others / Zaire*, (1995) ACHPR, para 40.





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50. The Communication complies with Article 56(3) of the African Charter as it does not contain disparaging or insulting language directed against the Respondent State or its institutions.
51. Concerning Article 56(4) of the African Charter, the Commission notes that the Communication contains eyewitness testimony of the alleged violations, medical and psychological reports, official documents, as well as reports of non-governmental organisations. Consequently, there is no evidence that any of the information provided is based on news disseminated through the media, and therefore, the Communication accords with Article 56(4) of the African Charter.
52. Article 56(5) of the African Charter requires that Communications be submitted after exhausting local remedies, if any, unless it is evident that this procedure is unduly prolonged.
53. The Commission has expounded extensively on the exhaustion of local remedies provision, most prominently in the case of *Sir Dawda Jawara v Gambia*, where the Commission held that for the domestic remedies referred to in Article 56(5) of the African Charter to be exhausted, they must be available, effective and sufficient, establishing further that a Communication is considered *available* if the Complainant can pursue it without impediment, *effective* if it offers a prospect of success, and *sufficient* if it is capable of redressing the complaint⁶.
54. In the present Communication, the Complainant submits that he should be exempted from the requirement to exhaust local remedies on the grounds that the remedies within the Respondent State are not available, effective, or sufficient.
55. The first submission of the Complainant contests the availability and effectiveness of domestic remedies within the Respondent State. In support of this submission, the Complainant proffers three arguments.
56. Firstly, the Complainant argues that he is exempted from the requirement to exhaust local remedies because the Respondent State failed to redress the alleged violations even though it had ample notice and time to do so. Therefore, as a result of its failure to conduct a prompt and effective investigation, the State either has no available remedy or the available remedies are not effective or sufficient.

⁶ Communication 147/95 and 149/96, (2000) ACHPR, para 31.



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57. Regarding the first argument, pertaining to prompt and effective investigation, the primary concern in the instant case is whether representations made by UK officials to political organs of the Respondent State on behalf of the Complainant and allegations laid by the Complainant to police officers while in detention are sufficient for satisfying Article 56(5) of the African Charter considering that they are not judicial proceedings. In *Monim Elgak, Osman Hummeida, and Amir Suliman (represented by FIDH and OMCT) v Sudan*, the Sudanese Government argued likewise, namely that representations made outside the legal or judicial process do not constitute legal proceedings required for the purpose of satisfying the requirements of Article 56(5) of the African Charter⁷. Citing, in particular, Article 34(2) of the Sudanese Criminal Procedure Act of 1991 (CPA) provides that persons can approach the Prosecution Attorney to initiate criminal cases.
58. The Commission recalls that the *rationale* for the exhaustion of local judicial remedies is to ensure that prior to initiating proceedings before an international body, the State concerned must have the opportunity to remedy the matter through its own domestic system⁸. However, this requirement is not absolute and contains exceptions to ensure that Complainants will not be hindered from submitting Complaints to the Commission due to procedural impediments arising from unjust laws or practices.
59. Accordingly, the Commission's jurisprudence has on several occasions recognised that a State may become aware of a particular violation of rights occurring within its territory through means other than a formal legal process. In the case of *Amnesty International and Others v Sudan*, the Commission found that "even where no legal action has been brought by the alleged victims at the domestic level, the government has been sufficiently aware to the extent that it can be presumed to know the situation within its own territory as well as the content of its international obligations."⁹. Furthermore, in *Article 19 v Eritrea*, the Commission held that "if it is shown that the State has had ample notice and time within which to remedy the situation, even if not within the context of the domestic remedies of the State ... the State may still be said to have been properly inform[ed] and is expected to have taken appropriate steps to remedy the violation alleged."¹⁰.

⁷ Communication 379/09, (2014) ACHPR, para 57.

⁸ *Elgak* case para 58.

⁹ Communication 48/90, 50/91, 52/91, 89/93, (1999) ACHPR, para 33.

¹⁰ Communication 275/03, (2007) ACHPR, para 77.





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60. In the present case, the correspondence between the State and the UK officials, primarily the admission by the State that it was aware of the Complainant's arrest, means that the State was aware of the violations alleged and had ample notice and time to investigate these allegations. Based on this, the Commission finds that the failure of the Respondent State to take any action indicates that domestic remedies are either not available or, if they are, not effective or sufficient to redress the violations alleged¹¹.
61. The second and third arguments of the Complainant aver that even if he was required to exhaust local remedies, he could not do so. The question arises whether the Complainant could have attempted to exhaust local remedies during his detention and/or upon his release.
62. Regarding exhaustion of local remedies during his detention, the Complainant submits that he was held in *incommunicado* detention, where he was denied access to a lawyer, the British Embassy, and his Family and could, therefore, not factually access domestic remedies. The Commission has noted in previous Communications that incommunicado detention of victims without charge and without legal or other representation effectively bars Complainants from accessing domestic remedies, if any¹². Thus, during his incommunicado detention, which lasted for approximately 78 days, the Complainant could not factually access domestic remedies.
63. Regarding exhaustion of local remedies after his release, the Complainant submits that due to threats of re-arrest and re-imprisonment, the Complainant was afraid to access domestic remedies while in Sudan. In the *Elgak* case, the Commission noted that the question of availability of domestic remedies refers to whether the Applicant may use the domestic remedy "in the circumstances of their case."¹³ In the instant case, based on the Complainant's allegations of torture, the document he was forced to sign preventing him from discussing his treatment while in Kober prison, his conviction, and the threats of re-arrest and imprisonment, the general environment of impunity surrounding torture in Sudanese prisons¹⁴; all expounded by the lack of investigation into his allegations of torture and the concerted effort by officials to prevent the surfacing of information on conditions in prisons, the Commission is of the

¹¹ *Elgak* case para 64.

¹² Id, para 51.

¹³ Id, para 54.

¹⁴ United Nations Human Rights Committee (UNHRC), Report of the Independent Expert on the situation of human rights in the Sudan, A/HRC/36/63, 11-19 September 2017, <https://daccess-ods.un.org/TMP/1653158.06865692.html>; see also UNHRC, Concluding observations on the fourth periodic report of the Sudan, CCPR/C/SDN/CO/4, 19 August 2014, http://bitinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/SDN/CO/4



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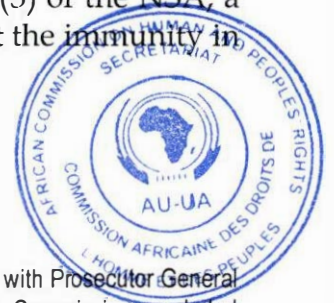
view that the Complainant could not be expected to access domestic remedies in the circumstances of his case. In the case of *Gabriel Shumba v. Zimbabwe*, the Commission took cognisance of the particular fear that torture victim's harbor when deciding to institute a case within a State.¹⁵ Consequently, the Commission believes that domestic remedies were unavailable, and even if they were, the Complainant would face impediments in attempting to access them.

64. The second submission of the Complainant is that local remedies are insufficient. The Complainant argues that the legal system in the Respondent State fails to provide effective and sufficient remedies for victims of torture, citing particularly the provisions of the NSA, which provides NISS officials, some of whom the Complainant alleges tortured him, with immunity from criminal and civil procedures thereby ensuring that there is no realistic prospect of successfully redressing the Complaint in the Respondent State. The Complainant notes further that although the NISS Director may lift this immunity, past practice indicates that this has never happened.

65. The Commission will look at the provisions of the NSA and the CPA to determine the extent of immunity provided to NISS officials and the nature of the power granted to the NISS Director to lift such immunity:

Section 52(3) of the NSA provides that: Without prejudice to the provisions of this Act and any right to claiming compensation against NSS, no civil or criminal procedures may be brought against a member or associate unless upon the approval of the Director. The Director shall give such approval whenever it appears that the subject of such accountability is not related to official business, provided that the trial of any staff or associates shall be before a closed criminal court, during their service or after its termination, concerning acts committed by them.

Section 34 and 35 of the CPA, in the *Elgak case*, the Sudanese government argued that notwithstanding the provisions of Section 52(3) of the NSA, a complainant may file a petition to the NISS Director to lift the immunity in terms of section 35 of the CPA.¹⁶



¹⁵ Communication 288/04, (2012) ACHPR, para 75.

¹⁶ *Elgak case* para 34. In this case, the Sudanese Government argued that a petition may be filed with Prosecutor General to proceed with Director of the NISS to lift the immunity of the alleged perpetrator, however, the Commission concluded that the only person who may lift the immunity is the NISS Director.



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66. Drawing from the above provisions – noting that they are still in force in Sudan – an inference can be made that the Complainant had no legal recourse within which he could successfully submit a claim before the domestic remedies within the Respondent State. Additionally, the Complainant could not be expected to approach the domestic remedies in the hopes that the NISS Director would choose to waive the immunity of the suspected officials. This kind of remedy is purely discretionary and is not subject to any judicial oversight, thus making it a final decision¹⁷. As noted by the Commission in its jurisprudence, a Complainant cannot be expected to exhaust a "... discretionary, extraordinary remedy of a non-judicial nature". Consequently, Complainants are not required to pursue such remedies if they are neither adequate nor effective.
67. Lastly, the Commission notes that Article 35 of the Interim National Constitution of Sudan 2005 provides for the right to litigation¹⁸. As such, the question arises whether the Complainant could have submitted a case through a representative to the Constitutional Court of Sudan.¹⁹ alleging a violation of his right to litigation in light of the State's failure to investigate and the immunity provided to NISS officials. In the *Elgak case*, the Commission held that where local remedies are not accessible, effective, or adequate to Complainant or their representatives, as is the instant case, "it would be an affront to justice to expect them or anyone else for that matter to approach the Constitutional Court for the later to protect their right to litigation as enshrined under Article 35 of the 2005 Interim National Constitution of Sudan."²⁰
68. For the above-listed reasons, the Commission considers that local remedies are not available, effective, or sufficient. Hence, the Complainant has constructively exhausted local remedies pursuant to Article 56(5) of the African Charter.
69. Concerning Article 56(6) of the African Charter, the Commission recalls that the African Charter does not provide a fixed period for submitting Complaints within "a reasonable period of time"; this is determined on a case-by-case basis. Additionally, the initial period from which the "reasonable period" is

¹⁷ *Elgak case* para 57; see also Communication 87/93 – *Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v Nigeria*, (1994) ACHPR, para 8; Communication 60/91 – *Constitutional Rights Project (in respect of Wahab Akamu, G. Adegbe and Others) v Nigeria*, (1994) ACHPR, para 10.

¹⁸ "The right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to justice".

¹⁹ Art 122(1) (b) of the 2005 Interim National Constitution of Sudan: The Constitutional Court shall "... have original jurisdiction to decide disputes that arise under this Constitution at the instance of government, juridical entities or individuals"; Art 122(1) (d) of the 2005 Interim National Constitution of Sudan: The Constitutional Court shall "protect human rights and fundamental freedoms".

²⁰ *Elgak case* para 70.



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determined in a particular case depends on whether the case concerns an instance where domestic remedies could and were exhausted, and the converse applies. In the latter instance, as in the present Communication, the initial period is when the Complainant becomes aware that domestic remedies are not available, effective or sufficient, or unduly prolonged. In the instant case, the Complainant avers that he realized domestic remedies could not be exhausted after correspondence from UK officials indicated as much on 05 August 2013. The Communication was subsequently submitted to the Commission on 25 October 2013, approximately two to three months after the initial awareness.

70. Consequently, the Commission considers that the Communication was submitted within a reasonable time after the Complainant realized domestic proceedings were impossible.
71. There is no information at the Commission's disposal to the effect that the subject matter of the Communication has been settled through other international procedures in terms of Article 56(7) of the African Charter. This requirement is accordingly met.

Decision of the Commission on Admissibility

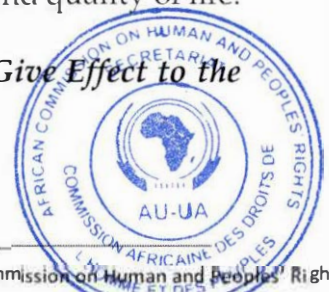
72. In view of the foregoing, the Commission declares this Communication Admissible in accordance with Article 56 of the African Charter.

The Merits

The Complainant's Submissions on Merits

73. The Complainant asserted that the Respondent State acted arbitrarily by apprehending and imprisoning him without substantial evidence. The Complainant was accused of being a British or Israeli spy, purportedly to instigate revolution during his stay in Sudan. Additionally, the Complainant contends that he endured various forms of torture, leading to considerable physical and psychological damage that surpasses the limits of medical intervention. These lingering effects continue to have a substantial and detrimental impact on the Complainant's overall well-being and quality of life.

Alleged violation of Article 1 of the African Charter (The Duty to Give Effect to the African Charter)





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74. The Complainant argued that the Respondent State should have exercised due diligence in enacting legislation, conducting investigations, and providing effective remedies to uphold the principles of the African Charter. According to the Complainant, the existing Sudanese legislation inadequately addresses and prevents human rights violations, particularly concerning arbitrary arrest, detention, and torture, as well as safeguarding rights such as legal representation, medical consultation, and habeas corpus.
75. The Complainant asserted that the laws of the Respondent State do not impose a clear obligation on the Prosecution Attorney to initiate investigations into allegations of torture either *ex officio* or following a complaint. He further highlighted that initiating a criminal case against a member of the NISS necessitates lifting legal immunity, typically authorized by the head of the NISS. However, in practice, such authorization is rarely granted, leading to a lack of investigations and a culture of impunity in cases involving torture.
76. The Complainant contended that the Respondent State failed in its positive obligation to conduct an effective investigation. According to the Complainant, despite the violations occurring in May 2011, there was no apparent progress in terms of investigative measures, and a substantial delay of over two years occurred before an investigation was even initiated. This delay is seen as a violation of the duty to promptly, effectively, and impartially investigate allegations of torture. The Complainant further argued that there are no apparent or compelling reasons for the authorities' failure to initiate an investigation despite being fully aware of the allegations.

Alleged violation of Article 2 of the African Charter (Right to non-discrimination)

77. The Complainant alleged that he was subjected to derogatory labeling based on his perceived Jewish background. Additionally, he was questioned about his ancestry and subjected to interrogation due to his inability to speak Arabic despite being fluent in Polish. The Complainant further claimed that certain mistreatment directed at him seems to be rooted in his part-Polish ethnicity, which raised suspicions about his potential Jewish identity and potentially associated him with being either a British or Israeli spy.
78. In regard to the interrogation at the NISS headquarters, the Complainant asserted that he was subjected to targeted questioning concerning his visits to Poland, his proficiency in Polish instead of Arabic, and his associations with



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Poland, Israel, and Jewish heritage. The Complainant contended that this discriminatory treatment amounts to a violation of Article 2 of the African Charter.

Alleged violation of Article 5 of the African Charter (Right to dignity and prohibition from Torture and ill-treatment)

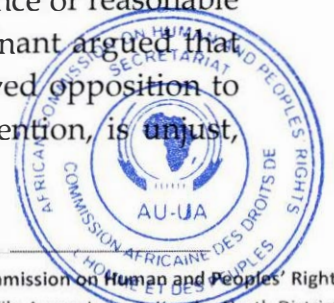
79. The Complainant alleged that officials of the Respondent State intentionally subjected him to severe pain and suffering through two means: (a) deliberate acts of torture and (b) subjecting the Complainant to inhumane conditions with the purpose of punishment, instilling fear, extracting a confession, and engaging in discriminatory practices.
80. Furthermore, the Complainant asserted that he endured a period of *incommunicado* detention lasting between 71 and 78 days. Throughout this time, he was denied the right to communicate with his family, obtain legal representation, or contact the British Embassy despite repeated requests to do so.
81. The Complainant alleged that he suffered repeated and brutal physical assaults at the hands of the NISS. The Complainant claimed that on 15 February 2011, he was subjected to violent strikes to the throat, crushing of a nail with a metallic object, forceful stomping on the feet, and kicks to the genitals. Furthermore, between 14 and 15 February 2011, he was allegedly forcibly restrained at gunpoint, and his head was violently shaken, resulting in the forceful tearing of hair from his scalp. Additionally, the Complainant asserted that he endured prolonged sleep deprivation, inadequate and irregular access to food and water, and intentional cigarette burns at both the National Security Offices and Omdurman Prison, as well as a traumatic mock execution. According to the Complainant, these sustained acts of mistreatment led to him experiencing hunger, dehydration, anxiety, and psychological distress.
82. The Complainant further contended that he was held in an overcrowded cell with insufficient access to bedding (and never provided a separate bed), a toilet, a bath, or necessary medical treatment. In support of this claim, the Complainant cites the case of *Kalashnikov v. Russia*, where the European Court of Human Rights (ECtHR) emphasized that prison overcrowding can potentially lead to a violation of the prohibition against torture and other forms of cruel, inhuman, or degrading treatment or punishment.



83. The Complainant further alleged that on 16 February 2011, the officers assaulted him with plastic pipes, specifically targeting his right shoulder, the right side of his ribs, and his thighs during his transfer from Kober Prison to NISS headquarters. He also stated that between 16 and 23 February 2011, his head was forcefully struck against a metal bar in the transit vehicle, and he was subjected to physical assaults, accompanied by derogatory references to him as a "Lebanese Dog." Additionally, the Complainant asserted that he was forcibly injected with unknown substances while being threatened, with the Respondent State Agent pointing a gun at his genitals.
84. The Complainant further alleged that on or around 24 February 2011, the guards at Kober Prison subjected him to severe mistreatment. This mistreatment included stomping on his right foot, burning his foot with cigarettes, crushing his finger with a padlock, and kicking him in the genitals. As a result of these acts, he experienced difficulty walking properly and suffered damage to a fingernail.
85. Furthermore, the Complainant submitted that the treatment inflicted upon him by the officials of the Respondent State, with the intention of punishment, intimidation, extracting a confession, and discrimination, amounts to torture. As such, the Complainant contended that these actions violate Article 5 of the African Charter, which prohibits torture and other cruel, inhuman, or degrading treatment or punishment.

Alleged violation of Article 6 of the African Charter (Right to Liberty and Security)

86. The Complainant asserted that the manner in which he was arrested by NISS officers, along with the subsequent interrogation characterized by beatings and insults, indicates that the arrest and detention were arbitrary in nature. The Complainant contended that this pattern of arbitrary arrests and detentions is evident in his treatment.
87. Furthermore, the Complainant submitted that he was not charged with any criminal offense throughout the 71 to 78 days of his detention. He asserted that this lack of formal charges suggests a lack of *prima facie* evidence or reasonable suspicion of his having committed an offense. The Complainant argued that the deprivation of his liberty, primarily based on his perceived opposition to the regime, coupled with the manner of his arrest and detention, is unjust,



inappropriate, and fundamentally incompatible with the principle of due process.

88. The Complainant asserted that he, despite being informed in general terms of suspicion related to inciting revolution using telecommunication materials and being labeled as a British or Israeli spy, was not officially notified of the specific reasons for his arrest. The Complainant emphasized that he was denied the right to know the precise grounds for his arrest, which violates his right to be informed promptly and in detail of the charges against him.
89. Additionally, the Complainant contended that he was denied the right to contact his family, lawyer, and relevant diplomatic and consular representatives, alleging that the arrest and subsequent treatment violates Article 6 of the African Charter.

Alleged violation of Article 7 of the African Charter (Right to a Fair Trial)

90. The Complainant asserted that he was denied access to a lawyer throughout his detention and was not brought before a court. This resulted in him being held *incommunicado* for 71 to 78 days, which, according to the Complainant, constitutes a violation of his right to a fair trial. He asserted that the denial of legal representation and the absence of a timely judicial review deprived him of the opportunity to challenge the lawfulness of his detention and present his case before a competent tribunal.
91. The Complainant also asserted that Article 51(2) of the NSA of 2010 states that individuals arrested or in custody have the right to notify their family, mother, or employer about their detention. They can also communicate with their family or advocate, provided it does not hinder the interrogation, inquiry, or investigation progress. However, the Complainant argued that this provision only grants access to a lawyer or family under certain conditions. Access is permitted if it does not impede the ongoing interrogation, inquiry, and investigation processes. Consequently, the NISS appears to possess unrestricted discretion to deny access when deemed detrimental to the investigation. The Complaint further contended that this practice violates Article 7(1) of the African Charter, which guarantees unconditional access to a lawyer for defense purposes.

Alleged violation of Article 14 of the African Charter (Right to Property)



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92. The Complainant submitted that his property, including clothing, standard electronics, and books, which had been cleared for entry into Sudan by customs officials, was subjected to a search and seizure. He further asserts that some of the confiscated property was not returned, and some returned items were found to be broken or damaged.
93. The Complainant argued that he was not provided with any evidence or justification for the search and seizure of his property, nor was he provided with any explanation of the public need or community interest that would have justified such actions. Additionally, the Complainant contended that the subsequent destruction of the confiscated property without offering any reimbursement or compensation further compounds the violation.
94. Based on these circumstances, the Complainant alleged that the confiscation and damage to his property violate Article 14 of the African Charter.

Alleged violation of Article 16 of the African Charter (Right to Health)

95. The Complainant asserted that he was denied access to medical care and subjected to the injection of an unknown substance by the Respondent State, thereby violating his right to enjoy the best attainable state of physical and mental health.
96. The Complainant argued that the resulting deterioration in his health, as a direct consequence of the torture inflicted upon him, can be attributed to the Respondent State as the perpetrator of the torture.
97. The Complainant asserted that his deteriorating health, which resulted from acts of torture, the denial of access to medical care, and the injection of an unknown substance, constitutes a violation of Article 16 of the African Charter.

Commission's Analysis of the Merits

98. The Respondent State has failed to respond to the Secretariat's requests for submissions on the Merits. In this circumstance, the Commission will make decisions based on the information provided by the Complainant.²¹ To do so entails reviewing the evidence and/or submissions put forward by the Complainant and ascertaining the veracity of the evidence/or submissions.

²¹ Communication 105/93, 128/94, 130/94, 152/96 – *Media Rights Agenda & Others v Nigeria* para 86; Communication 232/99 – *John Ouko v Kenya* para 21.





Alleged violation of Article 2 of the Charter (Right to non-discrimination)

99. Article 2 of the African Charter provides that:

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

100. Non-discrimination is a fundamental pillar in ensuring equal treatment and opportunities for all individuals, regardless of race, ethnicity, origin, gender, religion, disability, or other characteristics.²²

101. The Complainant asserts that he endured derogatory labels, inquiries regarding his heritage, and discriminatory questioning due to his inability to speak Arabic despite being proficient in Polish. It is contended that the mistreatment directed at him possibly stemmed from his mixed Polish heritage, sparking unwarranted suspicions about his potential Jewish background and unjust connections to British or Israeli espionage. Additionally, he was reportedly referred to as a "Lebanese Dog."

102. The Complainant's argument raises concerns about discriminatory treatment based on his ethnicity and potential Jewish identity. The labeling, questioning, and inquiries directed at him during the interrogation at the NISS headquarters appear to focus on his connections to Poland, Israel, and Jewish heritage rather than relevant factors such as the nature of the alleged offense.

103. In evaluating whether there is a violation of Article 2 of the African Charter, it is essential to consider the provisions and interpretations of the African Charter, which guarantees the right to equality and prohibits discrimination on various grounds, including ethnicity and religion.

104. In *Communication Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*, the Commission provided a comprehensive definition of discrimination. According to the Commission, discrimination encompasses any action seeking to differentiate, exclude, limit, or favor individuals based on race, color, or other status. Such discriminatory acts are deemed to have the

²² Communication 443/13 – Safia Ishaq Mohammed Issa (represented by The REDRESS Trust) v. Republic of Sudan para 161 Application 006/2012 – *African Commission on Human and Peoples' Rights v Kenya*, Judgment, 26 May 2017 para 138





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intention or consequence of invalidating or impeding the acknowledgment, enjoyment, or exercise of all rights and freedoms by all individuals on an equal basis.²³ By encompassing various grounds, such as race, color, and other status, the definition acknowledges the multifaceted nature of discrimination and the diverse characteristics that can become the basis for discriminatory acts.

105. Furthermore, the Commission's definition recognizes that discrimination can take various forms, including acts aimed at distinction, exclusion, restriction, or preference. This broad understanding ensures that all manifestations of discrimination, regardless of their specific nature, are encompassed within the definition. By doing so, the Commission acknowledges the complexity of discrimination and the need to address it comprehensively.

106. In the case of *Kenneth Good v. Republic of Botswana (the Kenneth Good Case)*, the Commission established three pivotal criteria for assessing instances of discrimination, setting a comprehensive framework for such evaluations.²⁴

- i. **Differential Treatment of Equal Cases:** Discrimination manifests when individuals or groups in identical or similar circumstances face disparate treatment. It signifies that individuals who should receive equal treatment are instead subjected to differing standards based on specific traits like race, gender, or nationality.
- ii. **Lack of Objective and Reasonable Justification:** Discrimination necessitates that the differential treatment lacks a valid and reasonable rationale. This implies that no legitimate explanation can justify the different treatments. When the variance in treatment lacks a justifiable basis, discrimination concerns are raised, particularly when motives do not align with safeguarding public welfare or advancing a significant state interest.
- iii. **Lack of Proportionality:** The principle of proportionality is critical in discrimination assessments. It demands a rational correlation between the desired objective and the means employed to achieve it. Essentially, the actions taken must be proportionate and essential in

²³ Communication 294/04 – ZLHR & IHRDA v. Zimbabwe (2006) ACHPR, para 91

²⁴ Communication 313/05- Kenneth Good v. Republic of Botswana (2010) ACHPR para 219





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attaining a lawful goal. If the methods used to validate differing treatment are excessive or disproportionate, it may indicate discriminatory practices.

107. The Commission emphasized that these three criteria for evaluating discrimination are cumulative, meaning that meeting any of these conditions suffices to establish a violation of the right to non-discrimination.
108. The contentions raised by the Complainant imply mistreatment and discriminatory behavior directed towards him. While definitively proving differential treatment without specific details or contrasting evidence among individuals in similar circumstances poses challenges, it is crucial to question whether demonstrating varying treatment towards others in comparable situations is a prerequisite when subjected to treatment based on lineage or faith.
109. In situations where treatment seems correlated to one's status—such as beliefs, lineage, or nationality—discriminatory behavior can be reasonably inferred. This inference stems from the notion that the treatment stems from specific characteristics like faith, creed, lineage, or nationality. In the present Communication, the assertions concerning being identified as a Jew, reprimanded for not speaking Arabic, or subjected to derogatory epithets like "Lebanese dog" potentially signify discriminatory conduct directed at the Complainant based on these specific attributes. The Commission opines that the act of mislabeling tied to his ethnicity and the imposition of a linguistic requirement that is unfamiliar to him not only exacerbated his distress but also underscored the discriminatory essence of the treatment he endured. In this context, the Commission, as evidenced in the case of *Institute for Human Rights and Development in Africa (acting on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, underscored that although States retain the right to prosecute individuals they deem as security risks, the extensive human rights transgressions targeting Sierra Leoneans due to their origin contravene Article 2 of the Charter²⁵.

²⁵ Communication 249/02-Institute for Human Rights and Development in Africa (acting on behalf of Sierra Leonean refugees in Guinea) v. Guinea, para 72



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110. Furthermore, the Complainant faced allegations of being a British or Israeli spy solely based on his part-Polish heritage, with no substantial evidence to substantiate these claims. The treatment of the Complainant, grounded in ethnic stereotypes rather than factual evidence, exemplifies a discriminatory practice that infringes upon the right to freedom from discrimination. In the case of *Union Interafricaine des Droits de l'Homme et al. v. Angola*, the Commission emphasized the duty of State Parties to ensure that all individuals within their jurisdiction, whether citizens or non-citizens are entitled to the rights guaranteed in the Charter, regardless of their origin.²⁶
111. The Commission asserts that the utilization of derogatory language aimed at the Complainant's ethnic heritage not only heightened the discrimination but also played a role in the mistreatment he experienced. These baseless suspicions and actions, devoid of factual and legal support, resulted in unjust conduct infringing upon his entitlement to be treated without discrimination.
112. Therefore, considering the lack of submissions to the contrary by the Respondent State, it can be concluded that there is a violation of Article 2 of the African Charter, particularly as the outlined criteria for discrimination have been met without rebuttal.

Alleged violation of Article 5 of the African Charter (Right to dignity and prohibition from Torture and ill-treatment)

113. Article 5 of the African Charter stipulates that every person:

"...shall have the right to respect the dignity inherent in a human being and to recognize his legal status. All forms of exploitation and degradation of man

²⁶ Communication 159/96: *Union Interafricaine des Droits de l'Homme et al. v. Angola*, para 18



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particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment, and treatment shall be prohibited."

114. Article 5 of the African Charter guarantees the right to respect inherent human dignity and the recognition of one's legal status. It explicitly prohibits all forms of exploitation and degradation, including slavery, slave trade, torture, and cruel, inhuman, or degrading punishment or treatment. This interpretation indicates that Article 5 of the African Charter does not allow for any restrictions or limitations on the right to be free from torture and cruel, inhuman, or degrading punishment or treatment. The language in the Article indicates that this right is absolute and cannot be derogated under any circumstances.
115. The Complainant asserts that the officials of the Respondent State deliberately inflicted severe pain and suffering upon him through acts of physical assault and *incommunicado* detention. According to the Complainant, he endured severe mistreatment while in custody, which involved instances such as stomping on his right foot, burning his foot with cigarettes, forcibly crushing his finger with a padlock, and subjecting him to genital kicks. As a consequence of these acts, the Complainant encountered challenges in walking normally and suffered damage to one of his fingernails. The Complainant argues that these actions amount to acts of torture, thus violating Article 5 of the African Charter.
116. In the **Article 19 case**, the Commission held that the right to freedom from torture and cruel, inhuman, and degrading treatment cannot be subject to derogation.²⁷ This means that States cannot justify any actions that would infringe upon this fundamental right, regardless of the circumstances or reasons invoked.
117. The Commission's interpretation and jurisprudence reinforce the understanding that the right to be free from torture and cruel, inhuman, or degrading punishment is an absolute right protected by Article 5 of the African Charter. It is a non-derogable right that must be upheld and respected without any exceptions.
118. In assessing whether the alleged *incommunicado* detention and physical assault amount to torture, the Commission will carefully examine the evidence and arguments presented by the Complainant. The Commission will analyze

²⁷ Ibid, 11 para 98



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whether the actions inflicted upon the Complainant meet the threshold of severe pain and suffering and whether they fall within the definition of torture as defined in international human rights standards.

Incommunicado Detention

119. The Complainant alleges that the Respondent State subjected him to incommunicado detention for 71 to 78 days. During this time, despite repeated requests, he was denied the right to contact his family, seek legal representation, or establish communication with the British Embassy. The Complainant argues that regardless of their legal status, all detainees are entitled to basic human rights standards, including prompt access to legal representation and the ability to communicate with their families.

120. Through its jurisprudence, the Commission has held that secret detentions are not permissible, and States must allow prisoners to maintain contact with their lawyers and families. In the *Article 19 case*, the Commission reiterated that holding an individual without allowing them to have contact with their family and refusing to inform the family of the detainee's location is considered inhuman treatment, affecting both the detainee and their concerned family.²⁸ The Commission further emphasized that no political situation or circumstances can justify holding detainees *incommunicado*, as the right to be free from torture is an absolute right.²⁹

121. Furthermore, The Commission, in the case of *Zegveld and Ephrem v. Eritrea*, emphasized that prolonged *incommunicado* detention and/or solitary confinement alone could be considered a form of cruel, inhuman, or degrading punishment and treatment.³⁰ This was also echoed in *Law Ghazi Suleiman v. Sudan*, where the Commission explicitly stated that the act of detaining individuals without permitting them to have contact with their families and withholding information about the detention from their families amounted to inhuman treatment.³¹ This ruling emphasized that such treatment affected not only the detainees themselves but also their families, who are left in a state of uncertainty and distress. The Commission recognized the profound impact of this practice on the well-being and dignity of the detainees and their loved ones, underscoring the obligation to uphold the right to family contact and to provide timely and accurate information regarding the detention of individuals.³²

²⁸ Ibid, para 101

²⁹ Ibid

³⁰ Communication 250/02 : Liesbeth Zegveld and Mussie Ephrem v Eritrea, para 55

³¹ Communications 222/98 and 229/99- *Law Office of Ghazi Suleiman v Sudan*

³² Ibid





122. The Commission, therefore, recognizes that *incommunicado* detention, which prevents a person from accessing legal representation, family, or relatives, constitutes a severe violation of human rights, as it creates an environment conducive to the perpetration of torture. The Commission also notes that such isolation not only deprives individuals of their fundamental rights but also increases the risk of abuse and mistreatment, thereby undermining the principles of justice and human dignity. This aligns with the Commission's decision that complete isolation of imprisoned individuals and detainees can amount to acts of torture, inhuman treatment, and degrading treatment.³³

123. Additionally, the Robben Island Guidelines explicitly prohibit *incommunicado* detention and deem it an offense to detain individuals in undisclosed or unofficial detention facilities. Furthermore, these Guidelines outline specific safety measures that must be observed when initiating detention, such as notifying a family member or a known third party about the detainee's situation. The Robben Island Guidelines also emphasize that States guarantee access to legal and medical services for all individuals deprived of their liberty and uphold their right to receive visits from and correspond with their family members.

124. Considering the specific circumstances presented in the current case, where the Complainant endured a prolonged period of *incommunicado* detention lasting between 71 and 78 days, during which period he was utterly cut off from communication with the outside world, including his lawyers, family, and the British Embassy, the Commission determines that the Complainant's rights under Article 5 of the African Charter have been violated. The *incommunicado* detention deprived him of his fundamental rights, subjected him to mistreatment, and caused immense psychological distress and suffering.

Physical Assaults by NISS

125. The Complainant alleges that he endured numerous instances of severe and brutal physical assaults while under the control of the NISS. The alleged acts of violence include forceful strikes to the throat, intentional crushing of his nail using a metallic object, stomping on the feet with force, kicks to the genitals, deliberate cigarette burns, and various other forms of physical abuse, as previously mentioned. Furthermore, it is claimed that the Complainant was subjected to being forcefully restrained at gunpoint, violently shaken, deprived

³³ Communication No. 458/1991, -Mukong v. Cameroon, para 28



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of sleep for prolonged periods, injected with unknown substances, held in overcrowded conditions, deprived of regular and adequate food and water, and exposed to a traumatic mock execution. The Complainant asserts that these horrifying acts inflicted intense suffering upon him, resulting in extreme hunger, dehydration, heightened anxiety, and profound psychological distress.

126. The Commission upholds that the prohibition of torture represents an absolute right, acknowledged as a peremptory norm (*jus cogens*) in international law. The detailed account of the physical assaults endured by the Complainant serves to underscore the extreme severity and cruelty of the treatment inflicted upon him. The absolute prohibition of torture highlights the profound gravity of such actions and imposes a definite and compelling obligation on all States to prevent and prohibit torture in any manifestation.
127. Several international and regional instruments, including the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules),³⁴ the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,³⁵ International Covenant on Civil and Political Rights (ICCPR),³⁶ Convention on Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment,³⁷ and Body of principles for the Protection of All Persons under Any Form of Detention or Imprisonment³⁸ acknowledges the inherent power imbalance created by the deprivation of liberty and emphasizes the obligation of States to ensure the protection and humane treatment of individuals throughout their period of detention.
128. Principle 1 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment firmly establishes the following fundamental principle: *"Every individual held in any form of detention or imprisonment must be treated in a manner that upholds their humanity and recognizes the inherent dignity of every human being."* This principle emphasizes the imperative to ensure that the treatment of detainees or prisoners respects their fundamental rights and preserves their inherent worth as human beings.
129. Principle 6 of the same body of principles reinforces this fundamental principle by stating that *"No person in any form of detention or imprisonment should be subjected to torture or any form of cruel, inhuman, or degrading treatment or punishment."* It explicitly rejects any justification or circumstance that could be

³⁴ United Nations Standard Minimum Rules for the Treatment of Prisoners Rules 1

³⁵ the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

³⁶ International Covenant on Civil and Political Rights (ICCPR) under Article 7

³⁷ Convention on Torture and other cruel, inhuman or degrading treatment or punishment

³⁸ Body of principles for the Protection of All Persons under Any Form of Detention or Imprisonment principle 6 and 33





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invoked to justify engaging in torture or any other form of cruel, inhuman, or degrading treatment or punishment. This principle underscores the absolute and non-negotiable prohibition of such practices, emphasizing the uncompromising stance against any form of mistreatment or abuse towards individuals in detention or imprisonment.

130. A crucial aspect to highlight is that the term "*cruel, inhuman or degrading treatment or punishment*" should be interpreted in a manner that provides the broadest possible safeguard against any form of abuse, whether it be physical or mental in nature (as outlined in the UN Body of Principles).³⁹ This interpretation emphasizes the importance of comprehensive protection against acts or conditions that may inflict unnecessary suffering, ensuring the utmost respect for human rights and dignity.
131. Furthermore, as demonstrated in the Commission's jurisprudence, particularly in the case of *Media Rights Agenda v the Federal Republic of Nigeria*,⁴⁰ the terms "cruel, inhuman, or degrading punishment or treatment" should be interpreted in a manner that affords the broadest possible protection against any form of abuse, whether it manifests as physical or mental harm. This encompasses a wide range of acts that violate human dignity, including but not limited to denying individuals contact with their families, subjecting them to overcrowded prison conditions, physical assault or beatings, depriving them of adequate lighting, withholding sufficient food and water, denying access to necessary medicine or medical care, and inflicting other forms of physical and psychological torture. The Commission recognizes the need for a comprehensive and inclusive understanding of these terms to ensure the utmost protection against all forms of mistreatment.
132. It is, therefore, crucial to comprehend that the interpretation of the terms "*cruel, inhuman, or degrading punishment or treatment*" must be broad and all-encompassing, aiming to provide the most comprehensive protection against any type of abuse. This interpretation ensures that individuals are shielded from acts that inflict needless pain, suffering, or humiliation. By adopting this inclusive interpretation, the Commission recognizes and upholds every individual's inherent dignity and rights, emphasizing the imperative to prevent and prohibit any mistreatment that may result in physical or mental harm.



³⁹ Communication 225/98-Huri-Laws v. Nigeria, para 40

⁴⁰ Communication 224/1998 Media Rights Agenda v Federal Republic of Nigeria





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133. The Commission has consistently affirmed this position, as exemplified in the case of *HuriLaws v. Nigeria*,⁴¹ where it ruled that the "*treatment meted out to the victim*" constituted a violation of Article 5 of the African Charter. This ruling further reinforces the Commission's commitment to upholding the rights and well-being of individuals. It emphasizes the need to hold States accountable for any actions that breach the prohibition of cruel, inhuman, or degrading punishment or treatment.
134. The detailed account of the physical assaults and their profound repercussions on the Complainant's well-being underscores the gravity of the circumstances. The medical evidence not only corroborates the Complainant's assertions regarding the torture endured by the Complainant but also underscores the severity of the physical attacks detailed in his medical assessment. This report affirms that the physical and psychological ramifications align with the defining traits of torture, as per established standards. Consequently, this medical documentation bolsters the Complainant's claims that he was subjected to acts of torture.
135. Upon thorough scrutiny of the facts and evidence presented by the Complainant, the Commission decisively concludes that the treatment meted out to the Complainant unequivocally meets the criteria for torture, thereby constituting a clear violation of Article 5 of the African Charter.

Alleged violation of Article 6 of the African Charter (Right to Liberty and Security)

136. Article 6 of the African Charter provides that:
Every individual shall have the right to liberty and the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.
137. According to the Complainant, his arrest by NISS officers and the subsequent interrogation were marked by beatings and insults, suggesting that the underlying purpose of the arrest and detention aligns with a pattern of arbitrary arrests and detentions. The Complainant argues that during the 71 to

⁴¹ n 39 above.



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78 days of his detention, no criminal charges were brought against him, indicating a lack of sufficient *prima facie* evidence or reasonable suspicion of his involvement in any offense. Furthermore, the Complainant contends that his deprivation of liberty, primarily based on his perceived opposition to the regime, along with how he was arrested and detained, renders the situation unjust, inappropriate, and fundamentally incompatible with the principle of due process.

138. In the case of *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda*, the Commission held that the right to liberty functions as a significant safeguard, ensuring that every arrest or detention is conducted in a manner that is neither unlawful nor arbitrary.⁴²

139. The Commission has also held that the right to liberty is a significant guarantee that any arrest or detention should not be unlawful or arbitrary.⁴³ Therefore, any deprivation of liberty that occurs without due process, the legal safeguards of a fair trial, or for unacceptable or arbitrary reasons constitutes a violation of Article 6 of the African Charter. The Commission affirms that the right to liberty entails more than just physical freedom—it encompasses the fundamental principle that individuals should not be subjected to arbitrary or unlawful deprivation of their liberty. The right to liberty includes the right to due process and fair treatment in accordance with the law.⁴⁴

140. Therefore, any act depriving individuals of their liberty without proper legal justification or violating their right to a fair trial violates Article 6 of the African Charter. The Commission's stance emphasizes the critical importance of upholding the principles of due process, fair trial, and non-arbitrary detention to protect individuals' rights to liberty and shield them from unlawful or arbitrary deprivation of their freedom.

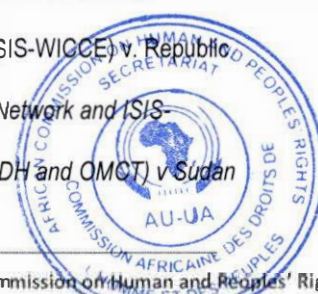
141. Moreover, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa further underscore the obligations of State Parties

⁴² Communication 339/2007 – *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda* para 107.

⁴³ In the case of *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda*,

⁴⁴ Communication 339/2007 – *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda* para 107.

⁴⁴ Communication 379/09 – *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan* para 103.





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under Article 6 of the African Charter. They emphasize that States must ensure that no one is subjected to arbitrary arrest or detention. Any arrest, detention, or imprisonment act should strictly adhere to the provisions of the law and be carried out by competent officials or authorized individuals based on a warrant, reasonable suspicion, or probable cause. These Guidelines highlight the need to adhere to legal safeguards and procedures to safeguard individuals' rights and liberty.

142. This signifies that the security personnel in the Respondent State are obligated to abstain from conducting arrests, detentions, or imprisonments in a manner that disregards the principles of due process or lacks legal justification. In the Article 19 Case context, the Commission noted that even if arrests and detentions are deemed lawful under domestic legislation, they can still be regarded as arbitrary and thus unlawful if they are inappropriate, unreasonable, unjustified, or unpredictable.⁴⁵
143. Based on the arguments presented and the applicable jurisprudence of the Commission, it is evident that the Complainant's arrest and subsequent detention by NISS officers raise serious concerns regarding the violation of his right to liberty and due process. The allegations put forth by the Complainant, including the use of physical violence, insults, and the absence of criminal charges, strongly suggest a pattern of arbitrary arrests and detentions.
144. Furthermore, the absence of any *prima facie* evidence or reasonable suspicion to justify the prolonged detention of the Complainant further undermines the legitimacy of his arrest and confinement. The lack of transparency and legal justification for his continued deprivation of liberty for 71 to 78 days raises questions about the adherence to fundamental principles of justice and the rule of law. Moreover, the Complainant rightly emphasizes that his perceived opposition to the regime should not serve as a basis for his arrest and detention without due process. Such actions, coupled with how he was apprehended and held, highlight the unjust and inappropriate nature of the situation, which is fundamentally incompatible with the principle of due process.
145. Drawing from the Commission's established jurisprudence, it is clear that the arbitrary arrest and detention of individuals without proper legal justifications or in violation of their right to a fair trial constitutes a violation of Article 6 of the African Charter. The principles and guidelines on the right to a

⁴⁵ Ibid 11, para 98



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fair trial further emphasize the obligation of State Parties to ensure that arrests, detentions, and imprisonments are conducted in accordance with the law, avoiding arbitrariness and upholding due process.

146. In light of these considerations, that is, the circumstances surrounding his apprehension, the absence of criminal charges, and the perceived political motives behind his confinement underscore the urgent need for a thorough investigation into this matter. It is imperative to ensure that the principles of justice, fairness, and the right to liberty are respected and that accountability is upheld to safeguard individuals' fundamental rights and dignity.

147. Accordingly, the Commission, finds a violation of Article 6 of the African Charter by the Respondent State.

Alleged violation of Article 7 of the African Charter (Right to a Fair Trial)

148. Article 7 of the African Charter guarantees the right to a fair trial, encompassing several essential components. These include:

- A. The right to appeal to competent national organs against acts that violate one's fundamental rights as recognized and guaranteed by applicable conventions, laws, regulations, and customs;
- B. The right to be presumed innocent until proven guilty by a competent court or tribunal;
- C. The right to a defense, including the right to be represented by counsel of one's choice; and
- D. The right to be tried within a reasonable time by an impartial court or tribunal.

149. The Commission has reaffirmed the importance of fair trial rights by adopting key frameworks such as the Robben Island Guidelines and the Principles and Guidelines on Fair Trial and Legal Assistance in Africa. These frameworks highlight the essential nature of access to free legal assistance and the right to a fair and public hearing before a competent, independent, and impartial judicial body. They aim to ensure that individuals have the necessary means to defend their rights and interests effectively.

150. Furthermore, the Resolution on the Right to Recourse and Fair Trial, in conjunction with the Principles and Guidelines on the Right to a Fair Trial and





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Legal Assistance in Africa, emphasizes the fundamental nature of the right to a fair trial. This includes vital elements such as access to legal counsel and the courts.

151. These comprehensive guidelines and resolutions recognize the significance of safeguarding fair trial rights as a fundamental aspect of upholding justice and protecting human rights. They stress the need for individuals to have access to legal representation, ensuring a fair and public hearing and timely resolution of cases. Failing to uphold these rights not only undermines the principle of fairness but has broader implications for the overall enjoyment of human rights in any society.
152. In the current case, the Complainant has alleged that he was denied the right to legal representation and was not presented before a court, resulting in a prolonged period of isolation lasting between 71 and 78 days. According to the Complainant, this deprivation of access to legal counsel, his *incommunicado* detention, the failure to be brought before a competent court within a reasonable time, and the absence of a fair trial violates his right to a fair trial as guaranteed by Article 7 (1)(C) of the African Charter.
153. Furthermore, the Complainant highlights a concern regarding Article 51(2) of the NSA of 2010. This provision grants individuals arrested or in custody the right to notify their family, mother, or employer about their detention. However, the Complainant points out that this right is conditional, as the NISS appears to have unrestricted discretion to deny access if it is considered detrimental to an ongoing investigation.
154. Article 7 (1)(C) of the African Charter encompasses a comprehensive set of rights, including the right to adequately prepare a defense, timely and confidential consultations with the counsel of one's choice, and the right to be tried within a reasonable timeframe by an impartial court or tribunal. These rights are fundamental aspects of ensuring a fair trial. It is essential to recognize that the right to legal representation and access to the court should be available to all individuals deprived of their liberty, regardless of their nationality or the severity of the offense they are suspected of.
155. The jurisprudence of the Commission has held the fundamental importance of the right to counsel for individuals deprived of their liberty. This right serves as a crucial procedural safeguard, playing a vital role in preventing maltreatment throughout the various stages of detention. By ensuring access to legal representation, the right to counsel becomes a powerful tool in protecting



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the rights of individuals in custody and upholding the principles of justice. The Commission's acknowledgment of this right highlights its unwavering commitment to shielding individuals from abuse and promoting fairness throughout the detention process.

156. A notable example illustrating the Commission's emphasis on the significance of legal representation is the case of the *Egyptian Initiative for Personal Rights and Interights v the Arab Republic of Egypt*, where the Commission identified a clear violation of Article 7(1)(c) of the African Charter.⁴⁶ The violation stemmed from the victims being denied access to legal counsel during their detention, which significantly impeded their ability to defend themselves effectively. The Commission firmly acknowledged that access to legal counsel is a fundamental prerequisite for individuals to exercise their right to a fair trial. The Commission underscored that depriving the victims of this access for an extended period hindered their capacity to prepare their defense adequately. This denial of legal representation undermined their ability to present their case effectively and safeguard their rights throughout the proceedings.⁴⁷ The Commission also stressed that access to legal representation should be guaranteed at all stages of criminal proceedings, encompassing preliminary investigations, evidence collection, periods of administrative detention, and trial and appeal proceedings. This recognition by the Commission demonstrates its understanding of the pivotal role legal representation plays as a crucial safeguard in protecting individuals' rights.

157. Moreover, the case of *Abdel Hadi, Ali Radi & Others v Republic of Sudan* stands as yet another significant illustration of the Commission's acknowledgment of the pivotal role of legal representation in ensuring a just trial. In this instance, the Commission identified a clear breach of Article 7(1)(c) of the African Charter.⁴⁸ The violation arose from the victims being denied the opportunity to consult with legal counsel during their detention, severely hampering their capacity to mount an effective defense. The Commission recognized that access to legal representation is a fundamental prerequisite for individuals to exercise their right to a fair trial. It stressed that denying this access for an extended duration significantly impeded the victims' ability to prepare their defense adequately and that depriving them of legal assistance

⁴⁶ Communication 334/06 - Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt, para 209

⁴⁷ Ibid

⁴⁸ Communication 368/09 – Abdel Hadi, Ali Radi & Others v Republic of Sudan, para 90





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would compromise their capacity to present their case proficiently and safeguard their rights throughout the legal proceedings.⁴⁹

158. In addition to the guarantees provided in Article 7 of the African Charter, which protects the right to legal representation and a fair trial, it is noteworthy that the 2019 Constitution of Sudan reinforces these rights. Article 52(6) of the Sudanese Constitution explicitly acknowledges that "*the accused has the right to defend himself personally or through an attorney he selects.*"⁵⁰ The inclusion of this provision in the Sudanese Constitution serves as a testament to the country's dedication to upholding the rights of individuals within the criminal justice system. It recognizes the accused's entitlement to present their defense personally or by their chosen legal counsel. This constitutional provision underscores the significance of ensuring effective legal representation and that individuals can actively participate in their defense. It emphasizes autonomy and the right to make informed choices in safeguarding one's rights during legal proceedings. By enshrining this provision, Sudan demonstrates its commitment to the principles of fairness, justice, and ensuring the proper administration of the criminal justice system.

159. The Sudanese Constitution aligns with the principles articulated in Article 7 of the African Charter by explicitly acknowledging the right to self-defense or legal representation. Both legal instruments underscore the fundamental importance of the right to legal counsel and the freedom to choose one's defense strategy. These provisions are crucial for safeguarding individuals' rights and upholding the principles of fairness and justice within the legal process. The Sudanese Constitution demonstrates its commitment to ensuring a fair and equitable legal system by recognizing and upholding these rights.

160. After careful consideration of the allegations and analysis presented, it is evident that denying access to legal representation during the Complainant's *incommunicado* detention for an extended period raises significant concerns. The Commission recognizes that this deprivation hampered the Complainant's ability to consult with his chosen counsel and undermined his right to a fair trial. Moreover, it exposed him to a heightened risk of potential torture and other forms of ill-treatment by prison officials.

⁴⁹ Ibid

⁵⁰ The 2019 Constitution of Sudan, Article 52(6).





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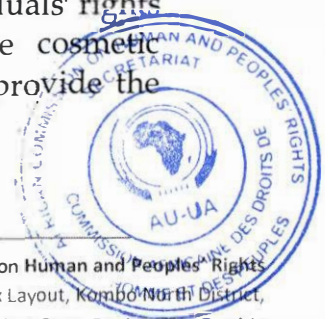
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161. Furthermore, the Commission acknowledges that the NSA of 2010, with its restrictions and conditions on access to legal representation, indeed grants discretionary powers to deny individuals the right to a lawyer. This broad discretion raises concerns regarding the right to a fair trial and the ability of individuals to defend themselves effectively. It allows the NISS to potentially restrict access to legal assistance arbitrarily and without clear guidelines or safeguards of the rights of suspects or accused persons.
162. This situation violates Article 7(1)(c) of the African Charter, as well as the Resolution on the Right to Recourse and Fair Trial Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, and the Commission's jurisprudence. In the *Zegveld and Ephrem case*, the Commission ruled that detained individuals must have prompt access to a lawyer and the ability to contact their families. Furthermore, their physical and mental health rights must be protected, and they are entitled to proper detention conditions.⁵¹
163. The Commission notes that the Respondent State has shown progress in making multiple amendments to the NSA of 2010, with the latest amendment taking place in 2024.⁵² However, it is essential to note that these amendments have not adequately addressed the limitations or drawbacks found in the original 2010 version of the Act. As a result, the provisions and discretionary powers granted to the NISS continue to undermine the rights guaranteed by the African Charter and established principles.
164. Ensuring timely and meaningful access to legal representation for detained individuals, as well as their well-being and fair treatment during detention, is of utmost importance. Although the Commission acknowledges the willingness of the Respondent State to make amendments, it is evident that the provisions under dispute remain essentially unchanged, with only minor syntactical and non-substantive modifications. For example, Article 51(2) in the 2024 amendment states, "*The Detainee has the right to inform their family or the entity they belong to of the detention and is allowed to contact their family or lawyer if it does not harm the investigation.*" While the wording has been slightly altered, the substantive content remains unchanged.
165. These observations highlight the need for comprehensive and substantive changes to the NSA to ensure the protection of individuals' rights and align with the principles of the African Charter. Mere cosmetic modifications without addressing the underlying issues do not provide the

⁵¹ n 59 above, para 55

⁵² Amendments were made to the NSA in 2011, 2017, 2019, 2021, 2022, and 2024





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necessary safeguards for detainees and their access to legal representation. It is essential for the Respondent State to address these concerns and make substantive amendments that genuinely improve the protection of human rights within the framework of the NSA.

166. In light of these findings, the Commission concludes that denying access to a lawyer and court during the Victim's detention constitutes a clear violation of Article 7 (1) (c) of the African Charter. This provision guarantees the right to be defended by counsel of one's choice. In this case, denying that right has transpired, undermining the Complainant's prospects of receiving a fair trial and leaving him vulnerable to potential human rights abuses.
167. In addition to the above, the Complainant alleges that he was not brought before a Court during his 71 to 78 days of detention.
168. The right to a fair trial encompasses being tried within a reasonable time by an impartial court or tribunal, which holds significant importance in international human rights law, including Article 7(d) of the African Charter. This Commission notes that the right to be tried by an impartial court or tribunal within a reasonable time is a well-established international norm. It guarantees individuals deprived of their liberty through arrest or detention the opportunity to initiate proceedings before a judicial body.
169. It is worth noting that the interplay between the right to a fair trial, the right to be tried within a reasonable time, and the right to legal representation highlights the essential nature of these rights in protecting individuals against arbitrary detention and ensuring that their cases are heard in a timely and impartial manner. Upholding these rights is vital for safeguarding the principles of justice, the rule of law, and the protection of individual liberties.
170. The Commission firmly asserts that the right to a fair trial encompasses the principle of access to appropriate justice. It emphasizes that individuals should have their cases adjudicated by competent and impartial courts capable of delivering efficient and unbiased judgments. This ensures that the legal process is conducted to uphold the principles of fairness, justice, and the rule of law. The Commission recognizes the crucial role of competent and unbiased courts in safeguarding the rights of individuals and maintaining public trust in the judicial system. Upholding the right to access appropriate justice is essential.



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for ensuring the effective protection of individuals' rights and promoting the overall integrity of the legal process.⁵³

171. The Commission, therefore, acknowledges that the right to a fair trial extends beyond procedural safeguards, emphasizing the significance of access to appropriate justice. This entails that individuals competent in legal matters who demonstrate impartiality in decision-making can present their cases before courts. By underscoring the importance of access to appropriate justice, the Commission highlights the need for a comprehensive understanding of fair trial rights, which encompasses procedural guarantees and the fundamental requirement of an impartial and competent judiciary. This ensures that individuals are afforded a genuine opportunity to have their cases heard in a manner that upholds the principles of fairness, justice, and the rule of law. Upholding the right to access appropriate justice is essential for maintaining public trust in the legal system and safeguarding the integrity of the judicial process.

172. In the case of *Marcel Wetsh'okonda Koso and others v Democratic Republic of Congo*, the Commission underscored the comprehensive nature of the guarantee of sound justice, as outlined in Articles 7 and 26 of the African Charter. The Commission identified two primary obligations encompassed within this guarantee. Firstly, it entails providing an accessible and appropriate court system for individuals seeking justice. Secondly, it comprises the right to a fair trial, which includes the fundamental entitlement to have one's cause heard fairly and unbiasedly.⁵⁴ These obligations reflect the importance of ensuring that individuals have meaningful access to justice and are afforded a fair opportunity to present their case before a competent and impartial tribunal. By recognizing and upholding these obligations, the Commission reinforced the principles of fairness, justice, and the rule of law within the legal framework of the Democratic Republic of Congo.

173. Article 7 of the African Charter embodies the spirit of safeguarding individuals' rights to a timely and efficient legal process, ensuring that justice is not unduly delayed or denied. The obligation to establish an accessible and appropriate court entails that individuals should have reasonable access to a court or tribunal capable of effectively addressing their legal matters. This obligation encompasses factors such as physical accessibility, availability of

⁵³ Communication 281/2003 - Marcel Wetsh'okonda Koso and Others v Democratic Republic of Congo para 77
Communication 151/96 - Civil Liberties Organisation v Nigeria,

⁵⁴ Marcel Wetsh'okonda Koso and others v Democratic Republic of Congo, para 76





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legal assistance, and procedural mechanisms that enable individuals to present their cases before a competent judicial body.

174. The Commission's recognition of these obligations underscores the comprehensive nature of the right to sound justice. It goes beyond mere access to a court and encompasses the guarantee of a fair trial. By emphasizing the importance of providing individuals with both an accessible and appropriate court and the opportunity to have their cause heard fairly, the Commission ensures that justice is effectively served. This approach reinforces the principles of fairness, equality, and the rule of law, which are fundamental to realizing the right to sound justice as enshrined in Article 7 of the African Charter.
175. The Commission underscores that the right to a timely and impartial trial holds immense significance in upholding the fairness and integrity of legal proceedings. It encompasses two crucial elements: timeliness and impartiality, essential for ensuring justice. It is important to emphasize that no circumstances can justify the denial of the right to be brought before a court, as it serves as a foundational principle for the realization of a fair trial.
176. In the case of *Purohit v The Gambia*, the Commission established a precedent that individuals subjected to detention should, at the very least, have the opportunity to challenge the lawfulness of their detention before competent jurisdictions.⁵⁵ This ruling highlights the fundamental principle that those detained must be granted the right to contest their deprivation of liberty and have their cases reviewed by independent and competent courts.
177. By recognizing the significance of timely access to justice and the requirement of impartiality, the Commission reaffirms the essential nature of these elements in upholding the principles of fairness, equality, and the rule of law. Upholding the right to a timely and impartial trial ensures that individuals have the necessary safeguards to contest their detention and have their cases heard by competent and independent courts. This approach is vital for safeguarding individual rights, promoting transparency and accountability, and maintaining public trust in the justice system.
178. Upon thorough examination of the facts and analysis, it is evident that the failure to present the Complainant before a court during his 71 to 78 days of detention gives rise to significant concerns regarding the Respondent State's compliance with the requirement of a timely trial. It is crucial to emphasize that

⁵⁵ Communication 241/2001 *Purohit and Moore v. The Gambia* (May 2003) ACHPR.



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the right to a fair trial encompasses the actual trial proceedings and the pre-trial phase, which includes the prompt presentation of the accused before a court.

179. Therefore, the prolonged period of detention without being brought before a court signifies a failure on the part of the Respondent State to fulfill its obligation of ensuring a timely trial. This failure violates the right to a fair trial as enshrined in Article 7(1)(d) of the African Charter.

Alleged violation of Article 14 of the Charter (Right to Property)

180. Article 14 provides that:

The property right shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

181. According to the principles outlined in Article 14 of the African Charter, individuals have a rightful expectation to own and enjoy their property without arbitrary interference. The principle of non-arbitrariness provides that any search, seizure, or deprivation of property must be grounded in lawful reasons, serve the interest of the community, be reasonably justified, and adhere to due process. Actions that are arbitrary and lack legal basis or proper justification would consequently violate Article 14 of the African Charter.

182. In the case of *Sudanese Civilians in South Kordofan and Blue Nile (represented by Sudan Democracy First Group, REDRESS, Human Rights Watch, INTERIGHTS, and Enough Project) v Sudan*, the Commission emphasized the importance of Article 14 of the African Charter. The Commission specifically stated that this article guarantees the right to property and peaceful enjoyment of property and prohibits arbitrary deprivation of property.⁵⁶

183. As per the Complainant, his belongings, including clothing, standard electronics, and books, were searched and seized by customs officials upon entering Sudan. However, certain items were not returned, and others were handed back in a damaged condition. The Complainant argues that no evidence was provided to justify the search and seizure of his property on the grounds of public need or community interest. Moreover, the Complainant asserts that the subsequent destruction of the confiscated property without any

⁵⁶ Communication 402/11 – 420/12: *Sudanese Civilians in South Kordofan and Blue Nile (represented by Sudan Democracy First Group, REDRESS, Human Rights Watch, INTERIGHTS and Enough Project) v Sudan*, para 175





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form of compensation constitutes a violation of Article 14 of the African Charter.

184. The allegations put forth by the Complainant raise concerns regarding the arbitrary nature of the search and confiscation. Moreover, the fact that certain items were not returned and others were returned in damaged condition appears to undermine the Complainant's fundamental right to peacefully enjoy his property.

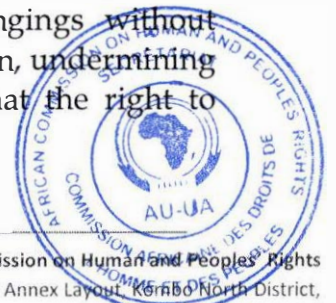
185. The Commission notes that in the absence of submissions from the Respondent State, it is conceivable to argue that a legitimate public need or community interest might have justified the search and seizure of the Complainant's property. Factors such as national security concerns or preventing illicit activities could potentially explain the actions taken. However, since the Respondent State has not provided any submissions, the Commission will solely rely on the facts presented by the Complainant.

186. The Commission's jurisprudence has established that the destruction of property should be accompanied by compensation; otherwise, it is deemed arbitrary.

187. Within the context of *the Institute for Human Rights and Development in Africa (IHRDA) v Angola*, the violation of Article 14 of the African Charter was established by the Commission through the search and seizure of the Complainant's personal effects, including electronic devices, clothing, and timepieces upon their entry into Sudan. This act, where certain items were either not returned or were returned damaged, was deemed by the Commission as a breach of the Charter's provisions under Article 14.⁵⁷

188. The Commission's ruling in the *IHRDA Case* emphasized the critical absence of justification provided to the Complainant for the confiscation, failing to demonstrate public necessity or communal interest grounds. Moreover, the subsequent destruction of the seized belongings without compensation was identified as the crux of the alleged violation, undermining the Complainant's property rights. While acknowledging that the right to

⁵⁷ Communication 292/04: Institute for Human Rights and Development in Africa v Angola, para 72





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property under the African Charter is not absolute, the Commission also highlighted the Respondent State's failure to substantiate the necessity of its actions based on public interest or communal welfare. In light of this absence of justification and the neglect to provide adequate compensation to the Complainant, the Commission concluded that the actions of the Respondent State contravened the right to property enshrined in Article 14 of the African Charter.⁵⁸

189. Furthermore, drawing parallels with the precedent set in the *Social and Economic Rights Action Center and Center for Economic and Social Rights (SERAC v. Nigeria*, although distinct from the present matter, the Commission explicitly underscored the significance of compensation. It ruled that the forced eviction of individuals without adequate recompense violated their property rights, as delineated in Article 14 of the African Charter.⁵⁹ The *SERAC case* emphasized the importance of fair compensation to mitigate the harm caused by the deprivation of property.

190. Within the context of the current Communication, the absence of compensation for the damaged or confiscated property of the Complainant mirrors the concerns elucidated in both the *IHRDA and the SERAC case*. The failure to provide suitable restitution dismisses the foundational principle of equitable and just treatment, negating the indispensable compensation that should accompany any infringement upon property rights. This glaring absence of compensation in the current Communication further compounds the potential violation of the Complainant's property rights. It emphasizes disregarding the well-established principles of fair treatment, adequate compensation, and due process when intervening in individuals' property rights.

191. The Commission emphasizes that although encroachments on property rights may be acceptable when serving a genuine public necessity or communal benefit, such interventions must adhere to the principle of proportionality. This entails that they should be essential in a democratic society, pursued through legal channels, and constrained within reasonable and justifiable limits.

192. In the present case, no information indicates that the interference was proportionate. Additionally, when property rights are infringed upon, individuals are entitled to certain procedural safeguards. These safeguards may include being informed of the reasons for the interference, the opportunity

⁵⁸ Ibid, para 73

⁵⁹ Communication 294/2004 -Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria





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to challenge the interference before an impartial authority, and the right to seek compensation for any damage or loss suffered. Unfortunately, the submissions before this Commission do not indicate the presence of these safeguards.

193. Based on the preceding analysis, the Commission concludes that there has been a violation of the Complainant's right to property, as enshrined in Article 14 of the African Charter.

Alleged violation of Article 16 of the African Charter (Right to Health)

194. Article 16 of the African Charter guarantees that “[e]very individual shall have the right to enjoy the best attainable state of physical and mental health.”

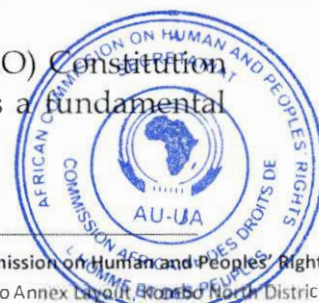
195. In the present Communication, the Complainant asserts that his health significantly deteriorated as a result of torture, lack of safe drinking water and electricity, denial of access to medical care, and the injection of an unknown substance. These allegations raise concerns regarding the potential violation of the Complainant's right to health, as guaranteed by Article 16 of the African Charter.

196. The right to health encompasses the responsibility of States to undertake measures aimed at safeguarding the health of their citizens and ensuring that they receive suitable medical care when they are ill. The right to the highest achievable standard of physical and mental health also includes a dual obligation on the part of the State. Firstly, it involves a positive duty to gradually fulfill the right of individuals to access fundamental prerequisites for good health, including food, water, and healthcare. Secondly, it entails a negative duty to refrain from obstructing the civilian population's access to these essential provisions.⁶⁰

197. The right to health also encompasses various aspects, including both physical and mental well-being. States are obligated to establish conducive conditions that guarantee access to vital healthcare services, prevention measures, treatment options, and rehabilitation programs. Additionally, it is the responsibility of States to safeguard individuals from any form of harm that could have adverse effects on their health.

198. The Preamble of the World Health Organization (WHO) Constitution emphasizes that the highest achievable standard of health is a fundamental

⁶⁰ n 51 above, para 181





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right of every human being, irrespective of race, religion, political beliefs, economic or social status. This right is closely interconnected with various other human rights, such as the rights to life, food, water, non-discrimination, privacy, and the prohibition of torture.

199. Furthermore, it is important to recognize that human rights are inherent, universal, and indivisible. Consequently, the right to health of individuals, including prisoners, is critical to human rights, ensuring that individuals within the criminal justice system receive humane and dignified treatment. Like any other individuals, the Commission firmly believes prisoners possess the right to enjoy the highest attainable physical and mental health standards, as guaranteed under Article 16 of the African Charter.
200. This perspective acknowledges that individuals should not be deprived of their right to health solely due to their incarcerated status. Rather, it emphasizes the importance of upholding the right to health for all individuals, irrespective of their circumstances, including those within the criminal justice system. This approach is consistent with the principles of dignity, non-discrimination, and the promotion of well-being.
201. In the present case, the Complainant alleges that officials of the Respondent State deliberately inflicted severe pain and suffering on him, amounting to acts of torture that have had significant adverse effects on his health. Furthermore, despite the Complainant's repeated pleas, access to necessary medical care was unjustly denied. These allegations find support in the Medical Report, which documents scars on his body consistent with torture and indicates the presence of Post-traumatic stress disorder (PTSD) as a result of the traumatic experiences endured.
202. The Commission recognizes the seriousness of these allegations, which raise substantial concerns regarding violating the Complainant's right to health. The deliberate infliction of severe pain and suffering, coupled with the denial of access to medical care, not only poses risks to the Complainant's physical and mental well-being but also undermines core principles such as human dignity and the prohibition of cruel, inhuman, or degrading treatment as already established by the Commission.
203. In the case of *Free Legal Assistance Group et al. v Democratic Republic of Congo*, the Commission highlighted that the failure to provide fundamental services, including access to safe drinking water and medicine within prisons,



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violates prisoners' right to health.⁶¹ This position underscores the Commission's recognition that the State is obligated to provide adequate healthcare and essential services to prisoners. Denying prisoners access to basic necessities and medical treatment not only undermines their right to health but also contravenes principles of human dignity, non-discrimination, and the prohibition of cruel, inhuman, or degrading treatment.

204. The significance of ensuring adequate healthcare, sufficient food, and proper hygiene within the correctional system was prominently emphasized in the decision of the Commission in the case of *Malawi African Association et al. v Mauritania*. In this particular case, the Commission held the Respondent State responsible for the deaths of prisoners resulting from a lack of medical attention, as well as the worsening health conditions of numerous prisoners due to insufficient provisions of food and inadequate hygiene practices.⁶² The Commission's ruling in the *Malawi African Association et al. case* underscores the importance of fulfilling the State's obligation to protect the well-being of individuals in its custody. It recognizes that the failure to provide necessary medical attention to prisoners can have dire consequences, including loss of life. The State has a duty to ensure that prisoners receive timely and appropriate medical care to address their health needs and mitigate potential risks to their lives.

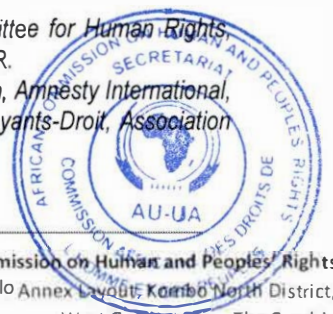
205. Furthermore, the Commission emphasized that inadequate food and poor hygiene conditions within correctional facilities can significantly impact prisoners' health. It recognized that access to sufficient and nutritious food and proper hygiene practices are essential for maintaining good health and preventing the spread of diseases in custodial settings. Neglecting these aspects not only infringes upon prisoners' right to health but also diminishes their dignity and overall well-being.⁶³

206. The decision in the *Malawi African Association et al. case* also serves as a testament to the Commission's commitment to holding states accountable for the conditions and treatment of individuals within the correctional system. It reinforces the imperative of upholding prisoners' rights to health, access to medical care, adequate nutrition, and proper hygiene.

⁶¹ Communication No. 25/89-47/90-56/91-100/93, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Témoins de Jehovah v DRC* (October 1995) ACHPR.

⁶² Communications No. 54/91-61/91-96/93-98/93-164/97_196/97-210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania* (11 May 2000) ACHPR.

⁶³ *ibid*





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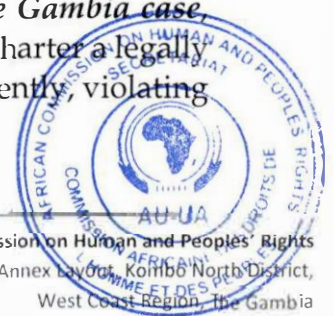
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207. The Commission's established jurisprudence provides valuable guidance for interpreting and implementing the right to health concerning prisoners. They emphasize that individuals should not be denied their right to health simply because they are incarcerated. Furthermore, they highlight the State's responsibility to ensure that prisoners have access to appropriate healthcare and essential services without any form of discrimination.
208. The Commission's recognition of the significance of providing basic necessities, such as safe drinking water and medicine, reinforces the understanding that the right to health applies to all individuals, including those within the criminal justice system. This recognition underscores the State's obligation to safeguard prisoners' right to health, thereby preserving their dignity and overall well-being.
209. Based on the preceding, the Commission concludes that the torture inflicted upon the Complainant by officials of the Respondent State had a profound and detrimental impact on his physical and psychological well-being. Moreover, the Respondent State's failure to provide the Complainant with necessary healthcare exacerbated the situation, worsening his condition and resulting in further adverse physical and psychological health effects. Consequently, the Commission declares that the actions of the Respondent State contravene the Complainant's fundamental rights to health, as protected under Article 16 of the African Charter.

Alleged Violation of Article 1 of the African Charter

210. Article 1 of the African Charter stipulates: *"The Member States...parties to the present Charter shall recognize the rights, duties, and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."*
211. The Complainant asserts that the Respondent State failed to initiate investigations into the allegations of torture against him. The Complainant contends that this failure on the part of the Respondent State to provide sufficient protection and redress for the violations amounts to a violation of Article 1 of the African Charter.
212. The Commission refers to its ruling in the *Jawara v The Gambia case*, wherein it held that Article 1 of the African Charter grants the Charter a legally binding nature similar to that of international treaties. Consequently, violating





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any provision within the African Charter inherently constitutes a violation of Article 1 itself.⁶⁴

213. Furthermore, in the case of *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, the Commission highlighted that Article 1 of the African Charter requires States not only to recognize the rights, duties, and freedoms outlined in the African Charter but also to take measures to effectively implement them.⁶⁵ This implies that if a State fails to ensure the rights protected by the African Charter, it would constitute a violation, even if the State or its agents are not the immediate cause of the violation.

214. Consequently, the Commission conclusively determines that by neglecting its duty to investigate the alleged acts of torture, the Respondent State demonstrates a lack of commitment to upholding justice and accountability. The failure to initiate a proper investigation denies the Complainant the opportunity for justice and perpetuates a culture of impunity. Such inaction violates the fundamental principles of the African Charter, which require State Parties to recognize and protect the rights of individuals within their jurisdiction.

215. This Commission also opines that a breach of the duty of upholding the rights, duties, and freedoms outlined in the African Charter constitutes a clear violation of Article 1 of the African Charter. This opinion underscores the fundamental significance of State Parties adopting and implementing measures to ensure the comprehensive recognition and protection of the rights delineated in the African Charter. The Commission firmly holds that the Respondent State's disregard for this obligation undermines the principles and objectives set forth by the African Charter, and failure to conduct investigations and address allegations of torture directly contradicts this obligation and undermines the integrity and purpose of the African Charter.

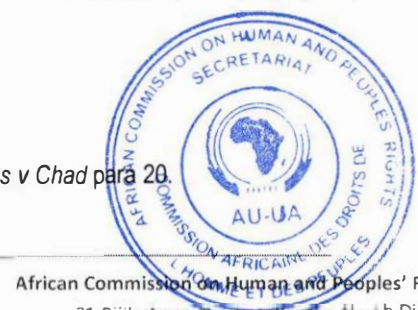
Decision of the Commission on the Merits

216. Based on the aforementioned considerations, the Commission declares the following:

A. The Respondent State has violated **Articles 1, 2, 5, 6, 7, 14, and 16** of the African Charter;

⁶⁴ Communication 147/1995, 149/1996 – *Sir Dawda K. Jawara v The Gambia* para 46.

⁶⁵ Communication 74/92 – *Commission Nationale des Droits de l'Homme et des Libertés v Chad* para 20.





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B. The Respondent State must promptly investigate, prosecute, and punish the individuals responsible for the victim's ordeal;

C. The Respondent State should assess and determine the appropriate compensation to address the harm suffered by the Victim;

D. The Respondent State should undertake institutional and practical reforms to ensure that individuals alleging torture or ill-treatment can effectively pursue complaints. This includes:

- i. Safeguarding the confidentiality and protection of victims during the complaint, investigation, and prosecution processes;
- ii. Providing adequate medical care and access to qualified physicians who can produce medical reports in line with recognized standards;
- iii. Implementing protocols for the secure retention of medical records of all detainees and inmates subjected to torture in detention facilities and ensuring accessibility to these records upon request by the victims;
- iv. Offering comprehensive training to NISS personnel on pertinent guidelines concerning custodial protections, the absolute prohibition of torture, and the imperative of non-discriminatory practices in the discharge of their responsibilities.

iii. Establishing policies for the secure storage of medical records of torture victims in hospitals and providing such records to victims upon request;

iv. Providing training to members of the NISS on relevant standards regarding custodial safeguards, the prohibition of torture, and non-discrimination in carrying out their duties; and



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v. Establishing an independent complaint mechanism with the authority to investigate actions and complaints against law enforcement personnel, including the NISS.

E. The Respondent State should improve detention conditions, ensuring access to clean water, food, proper sanitation facilities, appropriate cell occupancy, and humane treatment of detainees to align with international legal requirements.

217. Despite multiple amendments to the 2010 National Security Act of Sudan in 2011, 2017, 2019, 2021, 2022, and 2024, the concerns raised by the Complainant have not been adequately addressed. Therefore, further amendments are necessary to align the legislation with the provisions of the African Charter. The Respondent State should consider the following specific amendments:

- i. **Protection and access:** Either remove arrest and detention powers entirely or ensure the right to prompt access to legal representation, medical assistance, and the right to habeas corpus.
- ii. **Criminalization of torture:** Explicitly criminalize torture in accordance with internationally recognized definitions and establish appropriate penalties for such heinous acts.
- iii. **Combatting impunity and providing remedies:** Take effective measures to combat impunity by repealing immunity provisions to ensure that victims receive justice and adequate redress for the harm they have suffered.

218. The Respondent State should report on the steps it has taken to implement these decisions in accordance with Rule 125 (1) of its 2020 Rules of Procedure within one hundred and eighty (180) days.

Done in Banjul, The Gambia, during the 80th Ordinary Session held virtually from 24 July to 2 August 2024.

