



COMMUNICATION 604/16

Dr. Bushra Gamar Hussein Rahama

V

The Republic of Sudan

*Adopted by the
African Commission on Human and Peoples' Rights
During the 84th Ordinary Session held virtually from 21 to 30 July 2025
Banjul, The Gambia*



Hon. Commissioner Idrissa Sow
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



Communication 604/16 – Dr. Bushra Gamar Hussein Rahama v. The Republic of The Sudan

I. Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat), received on 24 April 2015, a Complaint¹ from the African Centre for Justice and Peace Studies (ACJPS) (the author, on behalf of Dr. Bushra Gamar Hussein Rahama (the Victim)).
2. The Complaint is submitted against the Republic of The Sudan (the Respondent State), State Party to the African Charter on Human and Peoples' Rights (the African Charter).²
3. The Complainant submits that the Victim is a Sudanese national of Nubian ethnicity, from South Kordofan – an X-ray technician and founder and Executive Director of Human Rights and Development Organisation (HUDO) – which organisation reported the events that occurred as a result of the war in South Kordofan and the Blue Nile, to various international human rights organisations.
4. The Complainant avered that after realizing that he could no longer stay in South Kordofan, the Victim had fled from South Kordofan to a relative's home in Omdurman, in the outskirts of Khartoum, where he was arrested on 26 June 2011, by four men in plain clothes, who identified themselves as officers of the National Security Services (NSS), after they had examined his identity document, and taken some of his belongings including a laptop, mobile phone, camera, flash drive and clothes. The Complainant claims that the Victim also noticed once led outside, that his house was surrounded by various NSS personnel and had parked in front of it, four (4) civilian cars, one of which he was taken in.
5. The Complainant alleges that the Victim was arrested without an arrest warrant and being told why he was arrested, detained without charge, held incommunicado in an unknown location, denied access to legal representation, and subjected to torture, cruel, inhumane, or degrading punishment and treatment while in detention.
6. Specifically, the Complainant claims that upon the Victim's arrest and during the drive to the detention facility, he was blindfolded and insulted with remarks such as "you are a slave, and you have to remain a slave" and was also beaten once on

¹This Communication is however dated 05 October 2011, and evidence was provided by the Complainant of the previous transmittals to the Commission by email in 2011 and 2012. Please see for details, paragraph 22 under 'Procedure' which clarifies the gap between the date on the Communication and the date on which it was received by the Commission. See also, paragraphs 45 and 77 of this decision, concerning the evidence provided by the Complainant which are on file, pertaining to the dates of the submission and receipt of the Communication, and the Commission's analysis thereof.

² The Republic of The Sudan ratified the African Charter on 18 February 1986.



his back. Also, on arrival at the detention facility, the Victim was allegedly dragged along a staircase, handcuffed, and ordered to sit on the ground and hit on his back and chest. He was also ordered in excruciating pain to put up his hands and stand on his toes facing a wall and was beaten on the back of his head if he rested on his feet, which caused him to fall into the wall, for approximately two hours. In the process of being hit, the Victim struggled to catch his breath and confirmed to the officers when he was asked that he was asthmatic.

7. The Complainant further submits that the Victim was thereafter taken by security personnel to a room where one of the security personnel who had arrested him was present, and another officer who had the Complainant's laptop open in front of him and was going through it, questioned him about the contents of his laptop and the whereabouts of a certain flash disk, and ordered him to open his camera. The Complainant claims that the Victim tried to answer their questions and do their bidding, but the security personnel were not satisfied, and so they beat his feet and back with a water hose pipe, for approximately 20 minutes.
8. After this, the Victim was allegedly taken to another room where his personal details and those of his family and friends were taken, and he was again, blindfolded and hand-cuffed, with his feet chained, and was taken to another destination which he was informed was a clinic to undergo medical consultation and record his medical status – and at this place, the Complainant claims that the Victim informed the doctor upon enquiry about any chronic diseases, that he had cardiac problems and was asthmatic, whereafter his blood sample was taken. Following the medical consultation, the Victim was allegedly taken again, blindfolded, to another prison cell, which he later learnt was at Kober Prison, where he was held together with five other people.
9. Furthermore, the Complainant alleges that on 27 June 2011, the Victim was again blindfolded, handcuffed, chained and taken to a room, at the NSS premises, where one of the officers who arrested him and identified himself as Thu al Noon, interrogated him for three hours about the contents of the reports that he wrote, and his relationships with Amnesty International, Human Rights Watch, the International Criminal Court, human rights officials of the United Nations Mission in Sudan (UNMIS), the Sudan Peoples' Liberation Movement and the war in the Nuba Mountains, among others; after which the Victim was returned to Kober Prison.
10. The Complainant submits further that on 11 July 2011, the Victim was taken to the 'Office of Crimes against the State Prosecutor', where he was detained in a cell, and the following day, on 12 July 2011, he was presented before the Prosecutor who accused him of 'establishing contacts with hostile organisations and compiling reports for them'. the Victim was accused, among others, of sending information about events in South Kordofan to international organisations such as Amnesty International and the UNMIS. After this, the Victim learnt that the President of the Republic of the Sudan had declared a general pardon but that he was excluded. Nonetheless, the Victim was let out of his cell and allowed to see his family for the first time since his arrest, as he was visited by his brothers.
11. It is also alleged that on 14 July 2011, a lawyer's network in Khartoum applied before the Prosecutor for Detainees of Security Service to gain access to the Victim



but the application was ignored, and that on that same day, he was taken to the Central Khartoum Criminal Court, where he was presented before a judge who extended his detention for two weeks. The Victim was repeatedly taken back to Kober Prison and presented to the same Court for the extensions of his detention: for another one week on 27 July 2011 and again on 3 August 2011; and for three days on 10 August 2011. During this period, his family allegedly needed permission to visit him, and only on Mondays.

12. The Complainant avers further that on 14 August 2011, the Victim was again taken to the Office of Crimes against the State Prosecutor where he was told that he would be released the same day or the next, after he signed some papers, which he did. The Victim was however reportedly taken by NSS officials immediately he left that Office to the NSS Political Affairs Department, where he was told that he was needed to discuss a matter. The Victim was again allegedly blindfolded and handcuffed, with his feet chained, and on arrival at the NSS Political Affairs Department, was taken back to Kober Prison, without any explanation. The Complainant claimed that the Victim was initially barred from contacting his family, but however subsequently permitted on 24th August 2011 and 2nd September 2011, and thereafter once a month, for only ten minutes, in the presence of security personnel who recorded the discussions which had to be in Arabic and not relate to political or social matters.
13. The Complainant further avers that on 26 September 2011, the Victim informed the officer-in-charge at Kober Prison of his decision to carry out a hunger strike, after which he was blindfolded and handcuffed, with his feet chained, and taken to the NSS Political Affairs Department. On arrival, the Victim was initially put in solitary confinement, but later that day, brought before a security personnel whom he informed that he had been unlawfully detained for 44 days without charge or trial, released by the Office of the Crimes against the State Prosecutor and re-arrested by NSS, and that he would continue with the hunger strike unless he was released or transferred to Office of the Crimes against the State Prosecutor. Following this, the Victim was assured by the security personnel that he would be released soon and should therefore not proceed with the hunger strike, which was considered a suicide attempt, for which the NSS would not be responsible.
14. The Complainant alleges that on 27 September 2011, the Victim was taken back to Kober Prison and placed in solitary confinement handcuffed with his feet chained. the Complainant also submitted that the Victim was let out of the prison cell five times a day to pray, and that the cell was bare, and he slept on the floor. In addition, the Complainant averred that the health of the Victim deteriorated as he was only drinking water, and on 28th September 2011, the doctor checked him and injected him with sodium and glucose drips, for which the prison guard escorted him from his solitary cell handcuffed and with his feet chained to and from the clinic within the prison premises, each time the drips were administered. the Complainant added that the drips were administered on the Victim with his feet still chained.
15. The Complainant states that on 29 September 2011, the Victim ended his hunger strike on the assurance provided that the NSS was finalising his release, following which he was transferred from solitary confinement to his previous cell, but was again transferred the next day to solitary confinement at Kober Prison. The



Complainant claimed that the Victim was again promised by an investigation officer on 11 October 2011 that he would be released within ten days, which did not materialize. As the security personnel did not fulfil their promises of releasing the Victim, the Complainant alleged that the Victim staged two more hunger strikes, for which he was rather threatened with a charge of attempted suicide instead of being released. Within this period, the Complainant submitted that the Victim was treated for low blood sugar level, back pain, and tingling foot, among others, but was still not released but moved from one cell to another. The Complainant aver that the Victim's access to medical care, which was paid for by his family, was also delayed on many occasions, and he was denied hospital admission which was recommended for his recovery.

16. Following the expiration of his detention extension on 16 June 2012, the Complainant submits that the Victim again protested his continued detention with another hunger strike on 20 June 2012, as a result of which prison authorities transferred him to the Office of Crimes against the State Prosecutor on 21 June 2012, where he was taken to see the Prosecutor. The Complainant avers that by this time, a crowd made up of the Victim's family and several human rights activists had started a protest outside the premises of the Office of Crimes against the State Prosecutor, demanding his release. Upon the presentation of the Victim, the Complainant claims that the Prosecutor indicated that he was unaware that the Victim had been re-detained by NSS on 14 August 2011, and then allowed him to see his family without restriction for an hour, as well as his lawyer for the first time, before he was returned to his cell.
17. The Complainant further submits that the Victim was brought before another prosecutor on 24 June 2012, who demanded that he call off another protest for his release which was ongoing outside the Office of the Prosecutor, which, through his lawyer, he agreed to, on the condition that he should either be released on bail or be tried, and that he should be transferred to a hospital due to his deteriorating health. The prosecutor allegedly agreed, and the Victim was transferred to a hospital.
18. Finally, the Complainant alleges that the Victim was eventually released on bail on 27 June 2012 on the condition that he would obtain one guarantor, would not leave the country, and would report to the State Prosecutor's Office once a week, accompanied by his guarantor. Following this, the guards watching the Victim were withdrawn from the hospital where he had been admitted, and he was discharged from the hospital on 03 July 2012.
19. The Complainant contends that the Victim should not be required to exhaust local remedies due to several factors that hinder access to effective domestic remedies, such as legislative limitations, fear of reprisal, and the lack of any action by the Respondent State despite being aware of his allegations of torture.
20. Further to the receipt of the Complaint, the Secretariat received additional information from the Complainant in its submission on the Merits illustrating the developments that took place after their filing of the initial communication on 24 April 2015 as follows:



21. The Complainant submit that the Victim was arrested on many occasions between the years of 1991 and 2006.
22. The Complainant argues that the Victim fled Sudan in a bid to seek medical care in Germany and later resettled in Uganda. He was however, arrested in 2018 in Uganda and transferred to El Fashir airport by a number of NISS agents. At the airport, he was verbally abused. He was later accompanied by two armed and uniformed NISS officers on the flight to Khartoum.
23. The Complainant aver that on arrival at Khartoum airport, the Victim saw a tinted vehicle parked outside. He was then blindfolded and put in the vehicle. They travelled for about one hour until he was removed from the car and taken into a building. When the blindfold was removed, he found himself in an empty room with no windows or ventilation. He was kept in that room for 10 days and permitted to go to the toilet rarely.
24. The Complainant state that the Victim was detained by the NISS in Khartoum without access to his family or lawyers until his release two months later. Whilst detained in Khartoum he was interrogated regularly and subjected to a range of acts causing mental and physical harm. the Victim was subjected to electric shocks and hit on his head and feet with iron rods. His head was shaved and a chemical solution was applied to his head, causing a large circular bald spot. During one incident, the Victim was taken to a dark room that had puddles of blood on the floor and a bad stench. At that point he was told that he had 72 hours to admit to their accusations or he would be thrown into a hole in that room and left there. According to the Complainant, the Victim felt very unwell for the entire period he was detained but was denied access to a doctor.
25. The Complainant aver that prior to his release, the Victim was forced to sign, with his finger-prints a document that he was not permitted to read and did not know the content of that document. He was released shortly after and ordered to stop advocating on the issue of human rights or any issues related to IDPs and refugees; refrain from giving any information or meeting any organisation about his arrest or his experience in detention; and was informed that he would not be permitted to travel outside.
26. The Complainant states that after his release, the Victim fled Sudan fearing for his safety. He was deeply traumatised owing to the physical and mental pain and suffering he had been subjected to. After his release, he experienced temporary memory losses.; he was in severe pain from the beatings and other torture methods; and also had a terrible back pain and skin condition. He was very afraid for the safety of his family members.

Articles alleged to have been violated:

27. The Complainant alleges violation of Articles 1, 5, 6, 7 and 9³ of the African Charter.

³ The initial complaint also referenced a breach of Article 16 of the Charter, which was subsequently left out of the detailed submissions setting out the prayers and the Admissibility submission. However, during its submissions on the Merits, the Complainant alleges violations of Articles 1, 4, 5, 6, 7, 12(1), 12(2) and 16 of the African Charter.



Prayers:

28. The Complainant requests the African Commission on Human and Peoples' Rights (the African Commission) to:
- a. Recognise the violation of articles 1, 5, 6 7 and 9 of the African Charter;
 - b. Request payment of adequate compensation for the violations of the rights above-mentioned, and the amount awarded by the Commission should reflect the following elements of damages in line with international standards set out in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁴ and the jurisprudence of international human rights treaty bodies and regional human rights courts:⁵
 - i. material damages, including costs for medical treatment, medical, psychological and social services, legal or other expert assistance;
 - ii. loss of earnings and loss of earning potential;
 - iii. lost opportunities, including employment and education, which damages are sometimes referred to as special damages;⁶ and
 - iv. Moral damages.⁷The amount of compensation sought would be specified in a later submission.
 - c. Request the commencement of an effective and impartial investigation into the circumstances of his arrest and detention and the subsequent treatment. In that regard, existing immunities should be lifted with regards to any officer suspected of being responsible for any of the violations, and adequate protection to witnesses, such as grant of anonymity, escorts, and relocation, as necessary, should be provided during the investigation and thereafter if needed. Also, where sufficient evidence of misconduct or criminal conduct is found, the suspected perpetrators should be tried and adequately punished if found guilty;
 - d. Request public acknowledgment and apology to the Complainant for the violations suffered;
 - e. Request amendment of the legislation of the Respondent State that are incompatible with the African Charter so that Sudanese laws, in particular the National Security Act: (i) provide protection, either by removing the powers of arrest and detention altogether [guaranteeing] a right to habeas corpus; (ii) repress violations, such as making torture a criminal offence by using the internationally recognized definition of torture and by making it subject to adequate punishment; and (iii) effectively counter impunity and provide effective remedies. This should entail 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; and
 - f. Request the training of members of the security services on relevant standards concerning adherence to custodial safeguards and the prohibition of torture.

⁴ UN General Assembly Resolution A/RES/60/147, 16 December 2005, Principle 20.

⁵ The Complainant cited: *Mikhejev v. The Russian Federation*, Application No.77617/01, European Court of Human Rights, Judgment of 26 January 2006 & *Case of the Miguel Castro-Castro Prison v. Peru*, (Merits, Reparations and Costs), Int-Am Ct HR, Judgment of 25 November 2006, Series C No.160.

⁶ On this, he relied on *Chief Ebrimah Manneh v the Republic of Gambia*, Suit No: ECW/CCJ/APP/04/07, Judgment of 5 June 2008, para.29.

⁷ Citing as above, paras.30 & 40, and the *Case of the Miguel Castro-Castro Prison v. Peru*, (Merits, Reparations and Costs), Int-Am Ct HR, Judgment of 25 November 2006, Series C No.160, para.50 e.



II. Procedure:

29. Based on the records and evidence provided by the Complainant, the Complaint, was originally submitted to the Commission by email and fax on 5th October 2011⁸ and by email on 25 July 2012⁹, but due to technological challenges, it was only received physically by the Secretariat on 24 April 2015 during the 56th Ordinary Session held from 21 April – 07 May 2015.¹⁰ Upon request by the Secretariat on 10 November 2015,¹¹ additional information on the Complaint was provided on 9 February 2016, receipt of which was acknowledged on 11 February 2016.
30. During its 58th Extra-Ordinary Session held from 6-20 April 2016, the Commission examined the Complaint and decided to be seized thereof.
31. On 26 April 2016, the parties were notified of the Commission's decision, with a request to the Complainant to file written arguments and evidence on the Admissibility of the Communication within two months of notification in terms of Rule 105(1) of the Commission's 2010 Rules of Procedure.
32. On 16 May 2016, the Complainant forwarded his submissions on Admissibility, and this was transmitted to the Respondent State on 26 May 2016, by which correspondence the Respondent State was also requested to forward its submission on Admissibility within 2 months of notification, in accordance with Rule 105(2) of the Commission's 2010 Rules of Procedure.
33. At its 20th Ordinary Session, the Commission deferred consideration of the Communication, pending submission on Admissibility by the Respondent State within the prescribed timeline, and on 27 June 2016, both parties were duly informed of this decision. On 7 September 2017, the Secretariat of the Commission resent to the Respondent State, the correspondence of 26 May transmitting the Admissibility Submission, together with the said submissions. However, the Respondent State failed to make the required submissions within the deadline or at all.
34. Between the 59th Ordinary Session held from 21 October to 4 November 2016 and its 73rd Ordinary Session held from 21 October to 10 November 2022, the Commission deferred consideration of the Communication.
35. During the 74th Ordinary Session, held in Banjul, The Gambia, from 21 February to 07 March 2022, the Communication was declared admissible.
36. On 30th March 2023, the decision declaring the Communication admissible was transmitted to the Parties and the Complainant was requested to submit his arguments on Merits within sixty days.

⁸ Email evidence provided as Annex II to the Admissibility submission.

⁹ Follow-up emails are attached as Annex IV to the Admissibility submission.

¹⁰ Minuted physical copy available on file in the Secretariat's record.

¹¹ Letter Ref. ACHPR/COMPT/1707/15, dated, 10th November 2015.



37. On 29th May 2023, the Complainant submitted arguments on Mertis which were transmitted to the Respondent State on 23rd June 2023, for Reply within sixty (60) days, and the Respondent State failed to do so.

III. Parties' Submissions on the Admissibility of the Communication

A. Complainant's Submission on Admissibility

38. The Complainant submits that the present Communication satisfies all the Admissibility requirements set out in Article 56 of the African Charter and presents arguments in support of that submission.
39. As regards Article 56(1) of the African Charter, the Complainant submits that the Communication clearly indicates its author –ACJPS, which submitted the Communication on behalf of, Dr. Bushra Gamar Hussein Rahama, the Victim, and that the Victim did not request that his identity be withheld from the Respondent State.
40. Concerning Article 56(2) of the African Charter, the Complainant submits that the Communication is compatible with the African Charter and the Constitutive Act of the African Union (AU) for the reasons that: it has been filed against a State Party to the African Charter since 1986 – Republic of The Sudan; it alleges prima facie violations of the Complainant's rights protected by the African Charter¹²: to protection from torture, cruel, inhuman or degrading treatment or punishment; to personal liberty and security of person; to have his cause heard; to freedom of expression; and to be protected from the Respondent State from the violation of his rights by taking requisite measures, as provided for under Articles 5, 6, 7, 9(2) and 1 of the African Charter respectively; and it is brought in respect of violations that occurred after The Sudan's ratification of the African Charter, as the alleged violations occurred between 2011 and 2012, more than 24 years after the ratification of the African Charter by the Respondent State.
41. Furthermore, on Article 56(3) of the African Charter, the Complainant submits that the Communication is not written in disparaging or insulting language directed against either the Respondent State or the African Union (AU), and that the language used is respectful and balanced.
42. The Complainant also submits regarding Article 56(4) of the African Charter that the facts of the Communication are not based exclusively on news disseminated in the mass media, and that the facts presented in the initial Complaint and relevant to the Communication were gathered from an interview conducted by the ACJPS with the Victim at the ACJPS offices in Kampala in January 2016.
43. On the requirement of exhaustion of domestic remedies under Article 56(5) of the African Charter, the Complainant requests to be exempted from having to exhaust domestic remedies because they were unavailable.

¹² Relying on Communication 306/05 - *Muzerengwa and 110 Others v Zimbabwe* (ACHPR)(2011).



44. In that regard, the Complainant recalled the Commission's jurisprudence in *Dawda Jawara v The Gambia* where it held that a remedy is: "considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint"¹³; and in *Article 19 v Eritrea*, where it elaborated that exhaustion of domestic remedies under Articles 56(5) of the African Charter, "...presupposes: (i) the existence of domestic procedures for dealing with the claim; (ii) the justiciability or otherwise, domestically, of the subject-matter of the complaint; (iii) the existence under the municipal legal order of provisions for redress of the type of wrong being complained of; and (iv) available effective local remedies, that is remedies sufficient or capable of redressing the wrong complained of".¹⁴
45. To support this submission, the Complainant submits, firstly, that, the Victim could not challenge his arbitrary detention because it is lawful under Sudanese law, despite being prohibited by the African Charter. The Complainant submits that while the African Charter protects the right to liberty under Article 6 thereof and its Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Guidelines) require that arrests should be carried out by competent authorities pursuant to a warrant, which should contain, 'reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence',¹⁵ Article 50 (1) (e) of the National Security Act, 2010 (NSA 2010) of the Respondent State, on the other hand, vests the NSS with the power to detain any suspected person, and does not require that an arrest warrant be issued before an individual is arrested. It was reiterated that in the present case, the Victim was allegedly arrested on 26 June 2011, without an arrest warrant.
46. Also, the Complainant submits that while the Guidelines require that all individuals in pre-trial detentions should, "either personally or through their representative, take proceedings before a judicial authority, without delay, in order to have the legality of their detention reviewed", Article 50 of the NSA 2010, permits the NSS to detain an individual for four and a half months without judicial review to determine the legality of their detention.¹⁶ In light of this, the Victim was allegedly presented on numerous occasions before a judge simply to extend his detention and not to review the legality of his detention.¹⁷
47. Secondly, the Complainant avers that the Victim was allegedly deprived access to his lawyer, and in this regard, indicates that Article 51 (2) of NSA 2010 provides that a detained person can have access to their lawyer, "only if it does not prejudice the progress of interrogation, enquiry and investigation", for which reason the decision whether a detainee should or should not have access to his lawyer is left to the NSS without judicial oversight. Consequently, the Complainant argues that the Victim was allegedly only able to access his lawyer on, 21 June 2012, a year after his detention, and was therefore unable to challenge his arbitrary detention and deprivation of procedural safeguards because the action taken by the NSS is

¹³ Communication 147/95-149/96, (2000) ACHPR, para.32.

¹⁴ Communication 275/2003, para.47.

¹⁵ Guideline 3 (a).

¹⁶ Article 50 (e), (f), (g), (h)

¹⁷ See details of the extension of the Complainant's detention, as set out in para. 11 above.



lawful under Sudanese law. The Complainant therefore submits that the Victim is pursuing redress for these alleged violations of his rights through the African Commission because the actions committed by the NSS contravene Sudan's obligations under the African Charter.

48. Thirdly, the Complainant submits that NSS officials enjoy broad powers of immunity and so cannot be prosecuted for any wrongdoing domestically, unless the immunity has been lifted. It is averred that Article 52 (3) of NSA 2010 provides that, "no civil or criminal procedures may be brought against a member or associate unless upon the approval of the Director". is the Complainant therefore argues that the Director holds sole discretion over whether NSS immunities are to be lifted, and ultimately decides whether a case can be brought against any security personnel. For this reason, the Complainant alleges that no transparent and effective remedies are available to challenge inaction or refusal to lift the immunity. The Complainant supports this allegation with an extract from the Concluding observations of the United Nation's (UN) Human Rights Committee on Sudan.¹⁸
49. In relation to the above, the Complainant recalled the African Commission's position in *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* that:
- "This kind of remedy [as envisaged under Article 52 (3) of NSA] is purely discretionary and even worse is not subject to judicial oversight and hence is final. In several instances, the Commission has made its position clear that when a remedy is discretionary, extraordinary remedy of a non-judicial nature, then the Complainants are not required to pursue it as part of the requirement of exhaustion of local remedies."¹⁹
50. Based on the foregoing, the Complainant concludes that the Victim was unable to bring any legal action against the NSS for the human rights violations that were committed against him due to the blanket immunities.
51. Finally, and in addition to the above, the Complainant submits that the Victim was unable to pursue legal action in Sudan after release from detention due to a genuine risk of further human rights violations. The Complainant submits that the Victim had to flee from Sudan in 2012 out of genuine fear of further violation on his human rights and has not been back to Sudan since.
52. In this regard, the Complainant recalled that the African Commission had held in *Sir Dawda K. Jawara v The Gambia* that:

"Therefore, if the applicant cannot turn to the judiciary of his country because of a generalized fear for his life (or even those of his relatives), local remedies would be considered unavailable to him".²⁰

¹⁸ UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.9.

¹⁹ Communication 379/09 (2015) ACHPR, para. 67.

²⁰ Fn 13 above, para. 35.



53. Furthermore, the Complainant recalled that the African Commission also recognized in *Alhassan Abubakar v Gambia*, that, it would not be logical to require an individual to return to the state where he has allegedly suffered violations of his fundamental rights and from which he had fled, in order to pursue a complaint and/or bring a claim for reparation.²¹
54. Regarding Article 56(6) of the African Charter, the Complainant submits that the Communication was lodged within a reasonable time. The Complainant avers that the African Charter does not explicitly describe what a reasonable time entails and so the African Commission "treats each case on its own merits".²² The Complainant also submits that cases where remedies were exhausted are treated differently from cases where remedies are found unavailable, ineffective or insufficient, as in the present case, and that in such cases, the African Commission estimates the timeliness of a communication "from the date of the complainant's notice thereof",²³ taking into account the circumstances of the case.²⁴ The Complainant cites such relevant circumstances to include: a victim's security situation, forcing a victim to flee his or her country of origin and settle elsewhere;²⁵ the complexities of getting a representation before an international body;²⁶ and the challenges of communications system in Africa.²⁷
55. It is averred that in the present case, the Complainant submitted the Communication and request for Provisional Measures to the African Commission on behalf of the Victim who was still in NSS detention at the time, through email and fax on 5th October 2011,²⁸ and also physically during the 50th Ordinary Session of the Commission, which was held from October 24 to November 05, 2011, in Banjul, Gambia.²⁹ The Complainant further submitted that the it never received any acknowledgement of receipt from the African Commission and so re-submitted the Communication by email on 25 July 2012³⁰ and subsequently in person on 24 April 2015 during the 56th Ordinary Session, with follow up emails requesting acknowledgement of receipt sent on 28 April 2015.³¹
56. Furthermore, the Complainant submitted that it did not hear from the African Commission about this case until, 10 October 2015, through a letter (ACHPR/COMPT/1707/15) requesting additional information on the complaint submitted. The Complainant avers that it then furnished the African Commission with the additional information and updated the Complaint on 08 February 2016.

²¹ Communication 103/93 (1996) at par. 6. Also cited Communication 205/97: *Kazeem Aminu v. Nigeria*, (2000) at para. 11.

²² Citing Communication 310/2005: *Darfur Relief and Documentation Centre v Sudan*, Communication 310/05, para.75.

²³ Citing Communication 322/2006: *Tsikata v Ghana*, para.37.

²⁴ Relying on fn 21 above para. 75; Communication 288/04: *Gabriel Shumba v Zimbabwe*, para. 44; & Communication 300/05: *Socio-Economic Rights and Accountability Project v Nigeria*, para.42.

²⁵ *Safia Ishaq Mohammed Issa (represented by The Redress Trust and the African Centre for Justice and Peace Studies) v Sudan*, Admissibility Decision, Communication 443/13, para.67.

²⁶ Citing Communication 334/06: *Egyptian Initiative for Personal Rights and Interights v Egypt*, para. 99.

²⁷ As above.

²⁸ Email evidence provided as Annex II to the Admissibility submission.

²⁹ Mr. Mohammed Badawi's testimony is attached as Annex III to the Admissibility submission.

³⁰ Follow-up emails are attached as Annex IV to the Admissibility submission.

³¹ As above, on pg.2.



57. Considering all the above, the Complainant claims that the Communication was submitted within a reasonable time since the original Communication was submitted on 05 October 2011.
58. Finally on Article 56(7) of the African Charter, the Complainant submits that this matter has not been submitted to any other procedure of international investigation or settlement and has therefore 'not been settled in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity, or the provisions of the present Charter'.
59. Based on the above submissions, the Complainant contends that the Communication meets all the cumulative Admissibility criteria under Article 56 of the African Charter and urged the African Commission to find the Communication Admissible.

B. Respondent State's Submissions on Admissibility

60. The African Commission notes that while the Complainant provided arguments on the Admissibility of the Complaint, the Respondent State did not provide any arguments, within the stipulated deadline which expired on 26 July 2016, and despite the notifications and reminders sent by the Secretariat of the Commission.³²

IV. The African Commission's Analysis on Admissibility

61. Article 56(1)-(7) of the African Charter sets out seven requirements that a Communication brought under Article 55 of the African Charter must satisfy to be admissible for consideration by the Commission. Those requirements apply conjunctively and cumulatively, and failure to satisfy any one or more of those requirements renders the Communication inadmissible,³³ unless the Complainant provides sufficient justifications on why any of the requirements could not be met.
62. The Complainant proffers arguments that the present Communication satisfies all the requirements for Admissibility in Article 56 of the African Charter.
63. The Respondent State has not made any submission on Admissibility despite repeated requests addressed to it in that regard.³⁴ In the present circumstances, the African Commission will have no option but to proceed to its analysis and determination of the Admissibility of the Communication based on the information at its disposal, in accordance with its practice and jurisprudence.³⁵

³² See paras 26 & 27 above on procedure. These were sent respectively by: Notes Verbales Ref: ACHPR/COMM/604/16/SUD/1023/16 dated 26 May 2016, Ref: ACHPR/COMM/604/16/SUD/1179/16 dated 23 June 2016, ACHPR/COMM/604/16/SUD/1718/16 dated 14 November 2016, ACHPR/COMM/604/16/SUD/180/17 dated 16 March 2017, ACHPR/COMM/604/16/SUD/370/17 dated 31 May 2017, ACHPR/COMM/604/16/SUD/700/17 dated 25 August 2017, ACHPR/COMM/604/16/SUD/952/20 dated 04 December 2020; and email of 7 September 2017.

³³ Rule 106, Rules of Procedure of the Commission, 2010 & Comm. 275/2003, fn 14 above, para 43.

³⁴ See paras 25, 26 & 50 above.

³⁵ See Communication 292/04: *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connaten & 13 others) v Angola* (2008) ACHPR para. 34. See also Communication 159/1996: *Union Inter Africaine des Droits de l'Homme & Ors. v Angola* (2017) ACHPR; and Communication 276/03 : *Centre for Minority Rights Development & Anor. (on behalf of Endorois Welfare Council) v Kenya* (2009) ACHPR.



64. This established position was enunciated in *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*, where the African Commission stated that in situations where a State Party fails to address itself to the complaint filed against it, the African Commission "has no option than to proceed with its consideration of the Communication in accordance with its Rules of Procedure ... on the basis of the submission of the Complainants and information at its disposal..."³⁶
65. Accordingly, the African Commission must give due weight to the Complainant's allegations insofar as these have been adequately substantiated, and hereby proceeds to undertake its analysis on Admissibility based on the information supplied by the Complainant.
66. The African Commission would also like to emphasize that the absence of a reaction from the Respondent State does not absolve the latter from the decision that it may arrive at in the consideration of the Admissibility of this Communication, as the relevant State had, by ratifying the African Charter, indicated its commitment to cooperate with the African Commission and to abide by all decisions taken by the latter.³⁷
67. In view of the above-stated rules, principles, and jurisprudence, and given that the Respondent State has not made any submissions to dispute or accept whether the Complainant has fulfilled any of the requirements of Article 56 of the African Charter, the African Commission will analyse the arguments of the Complainant based on the entire provisions of Article 56 of the African Charter.
68. Article 56(1) of the African Charter states that "Communications ...received by the Commission shall be considered if they...indicate their authors even if the latter requests anonymity." The African Commission notes that the reasons for the requirement under Article 56(1) of the African Charter are "...that the Commission must receive communications with adequate information with a certain degree of specificity concerning the victims"³⁸ and to ensure that the "Commission must be in communication with the author, to know his identity and status, to be assured of his continued interest in the communication and to request supplementary information if the case requires it".³⁹ In this case, the Communication received by the African Commission clearly indicates that the Victim is Dr. Bushra Gamar Hussein Rahama and that the author/representative who filed it on his behalf is the African Centre for Justice and Peace Studies (ACJPS) i.e. the Complainant. The requirement under Article 56(1) of the African Charter is therefore duly satisfied.
69. Article 56(2) of the African Charter states that "Communications...received by the Commission shall be considered if they...are compatible with the Charter of the Organization of African Unity or with the present Charter." The Commission has expounded that compatibility with the African Charter entails four main aspects,

³⁶ Communication 292/04 (above), para. 34.

³⁷ See Communication 227/99 – *DRC vs. Burundi, Rwanda, Uganda* (2003) ACHPR, paras 51-53.

³⁸ Communication 104/94-109/94_126/94 – *Centre of the Independence of Judges and Lawyers vs. Algeria*, (1995) ACHPR, para 3.

³⁹ Communication 108/93 - *Monja Joana vs. Madagascar* (1997) ACHPR para 6.



namely: (i) the persons involved as parties to the complaint – the Communication must be filed by a rights-bearer under the African Charter against a State party to the African Charter; (ii) the subject matter of the complaint – in that the Communication must allege prima facie violations of rights protected by the African Charter; (iii) the time the impugned events occurred relative to the time the African Charter became applicable to the Respondent State – pursuant to which Communications must allege violations that occurred after the respondent State's ratification of the African Charter, or where the violations began before the State Party ratified the African Charter, the violations must have continued after such ratification; and (iv) the location or territorial jurisdiction where the impugned events occurred – which requires that the alleged violations must have taken place in the State/under the effective control or authority of the Respondent State.⁴⁰

70. In light of the above requirements, the Commission observes that the present Communication alleges violations of the Victim's rights: to dignity and consequent protection from torture, cruel, inhuman or degrading treatment or punishment; to personal liberty and security of person; to have his cause heard; to freedom of expression; and to be protected from the Respondent State from the violation of his rights by taking requisite measures; thus setting out, prima facie, that Articles 5, 6, 7, 9 and 1, respectively, of the African Charter, have been violated. The substantive determination of whether the alleged facts do, in fact, amount to a breach of the referenced Articles of the African Charter, is not a matter for Admissibility but for the Merits stage.⁴¹
71. Article 56(3) of the African Charter states that "Communications ...received by the Commission shall be considered if they... are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity [now African Union]." The Commission has interpreted these terminologies in its jurisprudence, stating that "... disparaging means "to speak slightly [sic] of... or to belittle and insulting means to abuse scornfully or to offend the self-respect or modesty of...". The language must be aimed at undermining the integrity and status of the institution and bring (sic) it into disrepute"⁴² and "insulting means to abuse scornfully or to offend the self-respect or modesty of..."⁴³
72. In view of the above interpretation, the African Commission finds that the Communication does not contain disparaging or insulting language directed against the Respondent State nor its institutions, and therefore satisfies the requirement under Article 56(3) of the African Charter.
73. Article 56(4) of the African Charter states that "Communications ...received by the Commission shall be considered if they... are not based exclusively on news disseminated through the mass media". The African Commission has explained in

⁴⁰ Communication 266/03- *Kevin Mgwanga Gunme et al vs. Cameroon* (2009) ACHPR, paras 71.

⁴¹ See Communication 333/2006 – *Southern Africa Human Rights NGO Network and Others vs. Tanzania* (2010) ACHPR, paras 55-66.

⁴² Communication 268/03 - *Ilesanmi vs. Nigeria* (2005) ACHPR para 39. See also paras 37-40.

⁴³ Communication 284/03 - *Zimbabwe Lawyers for Human Rights & Anor v. Zimbabwe* (2009) ACHPR, para 88. See also paras 83-97.



the case of *Dawda K Jawara vs. The Gambia*⁴⁴ that the rationale for this requirement is to determine whether the facts of a Communication are based “exclusively” on news disseminated through the mass media, without more. Consequently, having reviewed the Communication and supporting documents, the African Commission observed in particular that: (i) the supplementary facts presented in addition to the initial Complaint are indicated to have been gathered from an account provided by the Complainant of the Victim’s personal experiences which formed the basis of the alleged human rights violations in the Communication; (ii) the Communication is also supported by a signed written testimony of the Complainant dated 12 December 2012,⁴⁵ and medical reports that reflect the injuries claimed to have been inflicted on him during the alleged beatings in detention.⁴⁶

74. Consequently, the facts of this Communication are not primarily nor exclusively based on news disseminated through the mass media, but rather on alleged personal experiences of the Complainant pertaining to his alleged: arbitrary detention; torture, cruel, inhuman or degrading treatment or punishment; deprivation of access to a lawyer of choice; inability to challenge his arbitrary detention and attendant deprivation of procedural safeguards; denial of freedom of expression; and denial of protection from the Respondent State from the violation of his rights by taking requisite measures; in violation of the referenced provisions of the African Charter.⁴⁷ Therefore, in the Commission’s view, the Communication meets the requirement of Article 56(4) of the African Charter.
75. Article 56(5) of the African Charter states that “Communications ... received by the Commission shall be considered if they ... are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.” The exhaustion of local remedies rule, codified under Article 56(5) of the African Charter, is a principle under international law of permitting a State to have an opportunity to redress the wrong that has occurred there, within the framework of its own domestic legal order, before its international responsibility is called into question at the international level. It is a well-established rule of customary international law that before international proceedings are instituted, the various remedies provided by the State should have been exhausted.⁴⁸
76. The African Commission has expounded on this principle in its jurisprudence⁴⁹ and has held that “the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice”⁵⁰, and that “the internal remedy

⁴⁴ Fn 13 above, paras 23-27.

⁴⁵ Appendix 2 to the Complaint. Also attached to the Admissibility submission.

⁴⁶ Appendix 1 to the Complaint. Also attached to the Admissibility submission.

⁴⁷ See, paras. 1-17 of the supplemental information, as well as paras. 6, 8-9 of the Admissibility submission of the Complainant.

⁴⁸ See *Article 19 vs. Eritrea*, fn 14 above, para 45.

⁴⁹ There is a plethora of decisions of the Commission on this subject. See generally the *Compilation of Decisions on Communications of the African Commission on Human & Peoples’ Rights: 1994-2001*, (2002) *Institute for Human Rights & Development*, p.429-430; *Decisions of the African Commission on Human & Peoples’ Rights on Communications: 2002-2007* (2008) *Institute for Human Rights & Development*, p.421-424.

⁵⁰ Communication 242/01- *Institute of Human Rights and Development in Africa & Interights vs.*



[to] which article 56(5) refers entails remedy sought from courts of a judicial nature..."⁵¹ Furthermore, "[t]he author [of a Communication] must have taken the matter to all the available domestic legal remedies. That is, he or she must have taken the case to the highest court of the land."⁵² However, when a remedy is a discretionary, extraordinary remedy of a non-judicial nature, then the Complainants are not required to pursue it as part of the requirement of exhaustion of local remedies."⁵³

77. The import of the foregoing is that Article 56(5) of the African Charter contemplates the exhaustion of the ordinary remedies of common law that exist in the judicial courts of the Respondent States. The remedies required to be pursued must also be 'available, effective and sufficient'.⁵⁴
78. Furthermore, in *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*,⁵⁵ the African Commission held that Complainants are required to exhaust local judicial remedies in accordance with the laws of the country concerned, which include laws that govern procedural matters. However, the requirement of exhaustion of local remedies is not an absolute rule, it has exceptions put in place to ensure that complainants will not be hindered from bringing potential human rights violations before the African Commission as a result of procedural impediments emanating from unjust laws or practices.
79. In light of the above-cited jurisprudence of the African Commission in relation to this requirement, and having reviewed the submissions of the Complainant, the African Commission in this case upholds the Complainant's claim for exemption from exhaustion of local remedies in relation to alleged violations of Articles 6 and 7 of the African Charter for the reasons that local remedies are unavailable to challenge the arbitrary detention in alleged violation of Article 6 of the African Charter, because under Sudanese law, the detention is lawful and permitted, and cannot be routinely challenged in court, in view of:
- (i) Article 50(1)(e) of the NSA 2010 of the Respondent State, which vests the NSS with the power to detain any suspected person without an arrest warrant,⁵⁶ as opposed to the African Charter guarantees of the right to personal liberty under Article 6 of the African Charter and the subsidiary Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines) which require that arrests

Mauritania (2004) ACHPR, para 27.

⁵¹ Communication 221/98 - *Alfred B. Cudjoe vs. Ghana* (1999) ACHPR, para 14.

⁵² Information Sheet No. 3 on the Communications Procedure, available at <http://www.achpr.org/communications/procedure/>.

⁵³ Communication 379/09 (fn 19 above), para. 67.

⁵⁴ Communications 147/95-149/96, fn 13 above, & Communication 155/96: *The Social and Economic Rights Action Centre (SERAC) v Nigeria*, para. 37.

⁵⁵ Communication 379/09 (fn 19 above), para 58.

⁵⁶ See generally, S. 50(1), NSA 2010 (available at <https://sgbv-ihda.uwazi.io/en/entity/0jlrotxryodk>). See also paras 26, 31 & 66 of the African Commission's Concluding Observations on the 4th & 5th Periodic State Report of Sudan (2012) (available at https://www.achpr.org/public/Document/file/English/concluding_observation_.pdf); and para. B of Amnesty International's submission on The Sudan to the UN Universal Periodic Review 11th session of the UPR Working Group, May 2011 (available at https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session11/SD/AI_AmnestyInternational-eng.pdf).



should be carried out by competent authorities pursuant to a warrant, which should contain, 'reasonable grounds to suspect that a person has committed an offence or is about to commit an arrestable offence';⁵⁷

- (ii) Article 50(1) of the NSA 2010 which permits the NSS to detain an individual for four and a half months without judicial review to determine the legality of their detention,⁵⁸ as opposed to also, the Luanda Guidelines, which require that all individuals in pre-trial detentions should, "either personally or through their representative, take proceedings before a judicial authority, without delay, in order to have the legality of their detention reviewed"⁵⁹;
 - (iii) Article 51(2) of the NSA 2010, which gives the NSS unfettered powers to take the decision whether or not a detainee should have access to his/her lawyer, without judicial oversight, as a result of which the Complainant could not access his lawyer until a year after his detention, and was therefore unable to challenge his arbitrary detention and deprivation of procedural safeguards; and
 - (iv) Article 52(3) of the NSA 2010 which prohibits civil or criminal procedures being brought against a member or associate of the NSS unless upon the approval of the Director of NSS, for which reason NSS officials enjoy broad powers of immunity and cannot be prosecuted for any wrongdoing domestically, unless the immunity has been lifted at the sole discretion of the Director of NSS. This power of the Director of NSS to lift the blanket immunities from prosecution had earlier been found by the African Commission in another Communication⁶⁰ to be "purely discretionary", and thus not a remedy that a Complainant is required to pursue in exhausting local remedies.
80. In relation to exhausting domestic remedies as concerning Articles 5, 7 and 9 of the African Charter, in addition to the inhibitions to legal redress for the acts of the NSS officials created by the blanket immunity as discussed immediately above, the African Commission takes note of the submissions of the Complainant that the Victim was unable to pursue legal action in Sudan after release from detention due to a genuine risk of further human rights violations. The African Commission understands that the Victim fled Sudan in 2012 out of genuine fear of further violation on his human rights and has not been back there since then.
81. The Respondent State has not disputed the allegation by the Complainant that the Victim was tortured, nor has it responded to the Communication at all. The issue for determination by the African Commission then is whether the Victim's apprehension of fear for his life, would qualify as an exception to Article 56 (5) of the African Charter for purposes of alleged violations of Articles 5, 7 and 9 the African Charter, based on the constructive exhaustion of local remedies rule.

⁵⁷ Guideline 3(a).

⁵⁸ Article 50 (1) (e), (f), (g), (h), NSA 2010.

⁵⁹ Guideline 35, Luanda Guidelines.

⁶⁰ Communication 379/09, fn 19 above.



82. In this regard, the African Commission, relying on its jurisprudence, takes the view that it would not be logical to require an individual to return to the State where he has allegedly suffered violations of his fundamental rights and from which he had fled, in order to pursue a complaint and/or bring a claim for reparation,⁶¹ and also that if a Complainant cannot turn to the judiciary of his country because of a generalized fear for his life, local remedies would be considered unavailable to him.⁶²
83. In the African Commission's considered view, the Complainant was justifiably apprehensive of the integrity of the Respondent State's ability to render justice, especially because facts were also presented by the Complainant, which have not been refuted by the Respondent State, to show that there was considerable publicity and widespread campaign by international organizations such as Amnesty International about the Victim's case,⁶³ and that the Respondent State was therefore, aware of the unlawfulness of the Victim's detention but did not carry out any investigations.
84. The African Commission therefore considers that the Respondent State was notified of the violations, failed to act on them and as a consequence, loses its prerogative to settle the matter domestically, especially bearing in mind its primary obligations under the African Charter in respect of allegations of torture to, among other things, initiate a prompt, impartial and effective investigation, establish readily accessible mechanisms to which victims can bring their complaints and above all, ensure that acts of torture are distinct offences under the law; in addition to ensuring that there is no immunity from prosecution for torture suspects.⁶⁴
85. The African Commission considers that the various impediments outlined above are a significant bar to access to local remedies and upholds the exemption of the Communication from exhaustion of local remedies.
86. On its part, Article 56(6) of the African Charter provides that the African Commission shall consider Communications which "are submitted within a reasonable period from the time domestic remedies are exhausted or from the date the Commission is seized of the matter." The African Charter does not define what constitutes "a reasonable period" of time, and for this reason, the African Commission adopts a flexible approach and treats each case on its own merits, and on a case-by-case basis.⁶⁵ The purpose of this provision is to require a complainant to be vigilant and to discourage tardiness. Where local remedies are available, the timeline is considered from the delivery of final judgement issued from the highest domestic court regarding a Complainant's claim,⁶⁶ and if no local effective or sufficient remedies are available, the time starts once the Complainant realizes that there are no local effective and sufficient remedies available.⁶⁷

⁶¹ See Communication 103/93, para. 6 & Communication: 205/97 (fn 21 above).

⁶² Communication 147/95-149/96 (fn 13 above), para 35.

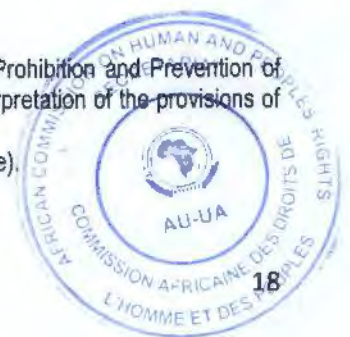
⁶³ Pg. 9-10, supplementary submission of the Complainant on file.

⁶⁴ See Articles 4, 16 (b), 17 and 18 of the Robben Island Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment, which is an authoritative interpretation of the provisions of Article 5 of the African Charter in respect of torture and other forms of ill-treatment.

⁶⁵ Communication 310/05 (fn 22 above) ACHPR, para 75 & Communication 300/05 (fn 54 above).

⁶⁶ Communication 333/06, (fn 41 above), para 73.

⁶⁷ Communication 386/10, Dr. Farouk Mohamed Ibrahim v Sudan (2013), para 71.



87. In this case, the Complainant was able to sufficiently demonstrate, with supporting evidence, that the Complaint was first submitted with a request for Provisional Measures, on 5 October 2011, while the Victim was still in detention and the alleged violations were ongoing, having realized that no local remedies were available to stop the alleged violations. The African Commission notes particularly that the Complaint indicated that a lawyer's network in Khartoum had applied on 14 July 2011 before the Prosecutor for Detainees of Security Service to gain access to the Victim, but the application was ignored, and that on 14 August 2011, the Victim was re-arrested by the NSS despite his release by the Office of Crimes against the State Prosecutor. The Complaint was submitted shortly thereafter.
88. As the African Commission has already confirmed above that the Communication is exempted from the requirement of exhaustion of domestic remedies, it is considered that the filing of the Communication whilst the Victim was in detention and upon realization of unavailability of local remedies, was within "a reasonable period", in satisfaction of Article 56(6) of the African Charter.
89. Finally, Article 56(7) of the African Charter states that "Communications ... received by the Commission shall be considered if they... do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter." This requirement would apply if the matter in contention, which must relate to the same facts and parties, has been "settled" – that is, it must no longer be under consideration under an international dispute-settlement procedure.⁶⁸ Also, the prior settlement of the matter must have been by a body "capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations"⁶⁹; that is, "an international adjudication mechanism, with a human rights mandate".⁷⁰
90. In relation to this requirement, the African Commission does not find any evidence that the issues and claims in the Communication have been settled by any other international forum. Accordingly, the African Commission finds that Article 56(7) of the African Charter has been satisfied.
91. **For these reasons, the African Commission declares this Communication Admissible.**

C. Merits

I. The Complainant's submission on the Merits

92. The Complainant submits that in its original request for provisional measures submitted whilst the Victim was detained incommunicado, the Complainant alleged violations of Article 1 (the right to legal protection of the rights guaranteed in the

⁶⁸ See Communication 40/90 – *Bob Ngozi Njoku V. Egypt* (1997) ACHPR, paras 54-56. See also Frans Viljoen, *International Human Rights Law in Africa* (2012), p320.

⁶⁹ Communication 279/03, 296/05 (joined), *Sudan Human Rights Organisation and the Centre on Housing Rights and Evictions vs. Sudan* (2010) ACHPR, para 105. See also, Viljoen, fn 70 above, p321.

⁷⁰ As above, para 104. See also, Viljoen, fn 19 above, p321.



Africa Charter), Article 4 (Right to life), Article 5 (Prohibition of torture, cruel, inhumane and degrading treatment), Article 6 (Right to personal liberty and protection from arbitrary arrest) and Article 7(Right to fair trial) of the African Charter.

93. The Complainant further submits that the full facts of the case, obtained following the Victim's release, reveal serious violations of additional human rights guaranteed in the African Charter, and hereby also allege violations of the right to freedom of movement and right to leave and return to a country including one's own (Article 12 (1) and 12 (2)), the right to health (Article 16) and, the right to legal protection of the rights guaranteed in the Africa Charter (Article 1).

Alleged Violation of Article 4 of the African Charter

94. The Complainant submits that the Commission has held that it would be a narrow interpretation of the right to life to think it would only be violated when one is deprived of it.⁷¹The Complainant states that in that case, the Commission concurred with the Complainant that the series of arrests and detention suffered by the victim, and his subsequent going into hiding for fear of his life, violated Article 4 of the African Charter.
95. The Complainant argues that the Victim was detained and tortured by the NISS on two occasions, first from 1991 up to 2006 and again in 2011. During the period of the Victim's detention in 2011, he was systematically beaten, whipped and deprived of sleep, as well as being forced to stand in painful positions for hours at a time. According to the Complainant, the Victim was verbally insulted, repeatedly called a slave and a spy, and threatened with death. The Victim was also told that he would be killed if he told anyone about what had unfolded while in custody. After his release, the Complainant states that the Victim received threatening phone calls from individuals claiming to be NISS officials, who told him that the next time he was arrested, he would be killed.
96. The Complainant avers that after the Victim's release, he was closely followed by NISS officers when going about his daily activities, making him increasingly anxious for his safety, and that nine (9) days before his eventual arrest, he relocated from his own home. On another arrest in 2006, live ammunition was shot intensively and at close range by the arresting officers and while in detention, the NISS threatened to kill the Victim and on one occasion. When he was first detained, the head of the NISS ordered another officer to take him outside and "kill him in front of the office", but he luckily survived. The Complainant argues that for over two months, the Victim was subjected to severe mental and physical harm, and on his release, he fled the country, fearing for his life.
97. The Complainant submits that the constant fear for the safety of his life, on account of the death threats and treatment meted out by the NISS while the Victim was in

⁷¹ Communication 205/97, Kazeem Aminu v Nigeria, decided at the 27th ordinary session, May 2000, 13th Annual Activity Report.



detention, violated his right to life as guaranteed under Article 4 of the African Charter.

Alleged Violation of Article 5 of the African Charter

98. The Complainant submits that in interpreting the prohibition of torture under Article 5 of the African Charter, the African Commission has referred to Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which defines torture⁷². According to the ECHR, torture is characterised by "deliberate inhuman treatment causing very serious and cruel suffering."⁷³ The Complainant states that Article 5 of the African Charter explicitly includes a prohibition for cruel, inhuman or degrading punishment or treatment and the African Commission has held that this includes actions which not only cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or consciousness.⁷⁴

Beatings

99. The Complainant submits that, whilst in the custody of the NISS in Khartoum, to extract information from the Victim, the NISS officials subjected him to a series of acts and punishment that singly and in combination, caused severe physical and mental pain and suffering, which amounted to torture.
100. According to the Complainant, during the raid on his uncle's home in 2006 and 2011, and his subsequent arrest and transfer to the NISS office, the Victim was slapped and beaten repeatedly by the arresting NISS officers with the butts of their guns, that caused permanent injury to his back and broke his spine. On one occasion, he was lashed many times for over 2 hours until his skin began to bleed.
101. The Complainant avers that on more than one occasion, the Security officers used electric shock devices on the Victim's chest to punish him for shouting for help and resisting assault. The Victim's nails and shoulders were subjected to electric shocks, water was poured into his eyes and a bright laser light was shone into his eyes. After his release, the Complainant states that the Victim experienced temporary memory loss and was in severe pain from the beatings and other torture methods. He also had an itchy skin condition on his scalp from the chemical solution that was applied to his hair.

Threats

102. The Complainant indicates that the Victim received a series of death threats from individuals claiming to be NISS officials via telephone before his arrest in 2011 and in person, when detained incommunicado in the custody of the NISS in Khartoum.

⁷² any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

⁷³ Ireland v. UK, Application No. 5310/71, Judgment of 18 January 1978, para. 167.

⁷⁴ Communications 137/94, 139/94, 154/96 and 161/97, International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria, decided at the 24th ordinary session, Oct 1998, 12th Annual Activity Report.



103. The Complainant refers to the UN Committee against Torture, indicating that it has determined that “a threat could constitute torture”. The UN Human Rights Commission and its successor, the UN Human Rights Council, has resolved that “intimidation and coercion, ..., including serious and credible threats, as well as death threats, to the physical integrity of the victim or of a third person, can amount to cruel, inhuman or degrading treatment or to torture.” The Complainant argues that the Victim received a series of death threats from individuals claiming to be NISS officials via telephone prior to his arrest in 2011 and in person when detained incommunicado in the custody of the NISS in Khartoum.
104. The Complainant avers that the Victim was forced to sign unknown documents prior to his release in July 2018, and the safety of his family was threatened. The Complainant states that from the moment of his arrest, the Victim was subjected to a pervasive climate of fear in NISS custody, and he was told at the time of arrest that it would be the last day of his life. The Complainant states that the Victim was threatened with the safety of his family in Darfur. On his release, he was told that if he failed to obey the orders of the NISS, including, if he ever spoke to anyone about his treatment in detention, members of his family would be killed.
105. The Complainant submits that each of the threats made to the Victim by the NISS officials concerned the infliction of serious harm and caused extreme mental anguish and suffering. The Complainant submits that the pervasive nature of the threats and the circumstances in which they were made were so serious that both singly and in combination, they caused severe mental pain and suffering and amounted to torture.

Incommunicado Detention

106. The Complainant stated that the African Commission has held that “prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment.”⁷⁵ The Complainant referred to the African Commission’s decision in *Article 19 v Eritrea*,⁷⁶ where it held a violation of Article 5 owing to the incommunicado detention of the victims. The Complainant submits that the Victim was detained incommunicado and denied access to his family and a lawyer for the entire period of his detention by the NISS, for over a year. The Complainant submits that the incommunicado detention of the Victim for over one year, constitutes a violation of Article 5 of the African Charter.

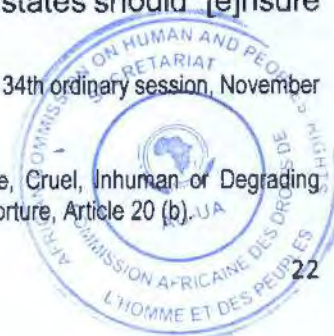
Denial of Medical Treatment

107. The Complainant referred to the African Commission’s Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), which sets out that the right to an independent medical examination is a basic procedural safeguard for the prevention of torture⁷⁷ and that states should “[e]nsure

⁷⁵ Communication 250/2002 *Liesbeth Zegveld and Messie Ephrem v. Eritrea*, Decided at the 34th ordinary session, November 2003, 17th Annual Activity Report, para 55

⁷⁶ *Article 19 v. Eritrea*, Communication 275/2003, para 101-102.

⁷⁷ Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), Part II: Prevention of Torture, Article 20 (b).



that all persons deprived of their liberty have access to medical services and assistance".⁷⁸ The Complainant further referred to other bodies such as the European Court of Human Rights which elaborated on the duty to provide access to adequate health care, finding that failure to do so constitutes inhuman treatment if not torture.⁷⁹

108. The Complainant submits that the Victim made repeated requests, to be seen by a medical doctor during his detention, that were not authorised. According to the Complainant, the prolonged denial of access to a medical doctor and lack of adequate medical treatment was in breach of Article 5 of the African Charter.

Alleged Violation of Article 6 of the African Charter

109. The Complainant argues that the African Commission elaborated that [A]n arrest or detention may be legal according to the letter of domestic law, but arbitrary and therefore illegal by reason of its inappropriate, unjust or unpredictable nature. The Complainant referred to the African Commission's Resolution on the Right to Recourse Procedure and Fair Trial, and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principles and Guidelines on Fair Trial) which provides that States must ensure that no one shall be subject to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause.⁸⁰
110. The Complainant submits that the Victim was detained for over a year. During that time, he was accused of a number of activities, including some that carry heavy criminal penalties in Sudan, but at no point was he informed of any formal charges against him, and he was eventually released without charge. At no point was the Victim shown a warrant for his arrest or any other document relating to the charges under which he was detained. The Complainant further submits that the Victim was also accused of being an "American spy", an agent for the United States Embassy and European Embassies in Sudan, and providing false information to humanitarian and human rights organisations about the situation in Internally Displaced Persons Camps, and information to the ICC about crimes committed in Darfur. The Complainant avers that the Victim's arrest and detention was not based on a reasonable suspicion and at no point was it made clear on what evidence or on what grounds he was suspected of having committed an offence. The Complainant submits that the arrest and detention of the Victim without charge was therefore arbitrary on several counts.
111. Furthermore, the Complainant argues that the applicable domestic legislation, namely the National Security Act 2010, is itself in breach of Article 6 of the African Charter. The Complainant narrates that Article 50 (e-h) of the National Security Act (NSA) 2010, gives NISS officials wide powers to arrest and detain a person on vague grounds for an initial period of up to thirty (30) days (and 45 days upon

⁷⁸ The Robben Island Guidelines, Part II: Prevention of Torture, Article 31.

⁷⁹ *Ilascu and Others v. Moldova and Russia*, (2005) 40 EHRR 46, paras. 428, 438, 445 and *Khudobin v Russia*, Appl. No. 59696/00, 26 October 2006, para. 96.

⁸⁰ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001, M (1) (b)



renewal) and a possible total of four and a half months without the possibility of judicial review⁸¹. Article 51 of the NSA 2010, setting out the rights of the arrested person, also provides that (1) Upon arresting, detaining or putting a person in custody, he/she shall be informed of the reasons why he/she is arrested, detained or put in custody.

112. The Complainant referred to the African Commission's jurisprudence, in *International PEN et al. (on behalf of Ken-Saro Wiwa Jnr.) v. Nigeria*, where the African Commission held that a Decree that permitted the authorities to detain people without charge for as long as three months without the opportunity for the detainees to challenge their arrest and detention before a court of law, presented a *prima facie* violation of the right not to be arbitrarily arrested or detained under Article 6 of the African Charter.

113. The Complainant submits that there is no explicit requirement for the NISS to issue specific criminal charges under the NSA 2010, and therefore, the domestic legislation lacks the specificity required under the African Charter and renders arrests and detention unpredictable.

Alleged Violation of Article 7 of the African Charter

114. The Complainant alleges that Article 7 of the African Charter was violated on several counts, including a) the denial of habeas corpus, b) the failure to provide information on the reasons for arrest and any charges brought, and c) the denial of access to a lawyer.

Denial of habeas corpus

115. The Complainant states that Article 7 (1) (d) of the African Charter provides that every individual has "the right to be tried within a reasonable time by an impartial court or tribunal". According to the Complainant, the African Commission has not defined the meaning of "reasonable time" or "promptness" about the right to judicial oversight of the lawfulness of detention. The Complainant referred to Article 19 v Eritrea, in which the African Commission set out that "[t]he question of what is reasonable cannot be expressed in terms of a blanket time limit which will apply in all cases, but rather must depend on the circumstances. The Complainant argues

⁸¹ . It sets out that any NISS member may:

(e) Arrest or detain any suspected person for a period not exceeding thirty days provided that his/her relatives are immediately informed.

(f) After elapse of the thirty days mentioned in Para (e) above, and if there are reasons that require more investigation, enquiry and maintaining the detained person in custody, NSS member shall refer the issue to the Director and make the recommendations he deems appropriate.

(g) The Director may renew the detention period for not more than fifteen days with the purpose of completing investigation and enquiry.

(h) If it comes to the knowledge of the Director that maintaining any person in custody is necessary for completion of investigation and enquiry in case of an accusation related to a factor threatening the security and safety of the people; intimidating society by way of armed robbery, racial, religious sedition or terrorism; disrupting peace, exercising political violence; or plotting against the country, he shall refer the issue to the Council which may extend the detention period for not more than three months.



that this approach has also been adopted by the European Court of Human Rights, which held that the reasonableness of the length of proceedings is to be assessed under all the circumstances of a case."

116. The Complainant avers that the Victim was detained for months without being charged or brought before a judge and there are no circumstances that would have prevented the Sudanese authorities from doing so. The Complainant states that the pertinent domestic legislation, namely the National Security Act 2010, itself violates Article 7 of the African Charter, as Article 50 of the NSA 2010 permits the NISS to detain an individual for up to four and a half months without judicial review (45 days and an additional three months if sanctioned by the National Security Council), depriving the individual of any judicial protection.

Failure to provide information on the reasons for arrest and any charges brought

117. The Complainant states that the Resolution on the Right to Recourse and Fair Trial adopted by the Commission sets out that Persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them⁸². The Complainant also refer to the jurisprudence of the African Commission in Abdel Hadi, Ali Radi & Others v. Sudan in which it held that the "lack of information about the grounds for arrest ... constituted a violation of Article 7(1) read in conjunction with Article 6 of the African Charter".⁸³

118. The Complainant submits that the Victim was detained for months without being informed of any criminal charges against him. At no point was he shown a warrant for his arrest or any other document relating to the charges under which he was detained. No charges were brought in the course of his detention or after his release and this violated his right to be promptly informed of any charges against him.

Denial of access to a lawyer

119. The Complainant states that Article 7 (1) (c) of the African Charter stipulates that every individual shall have ... the right to defence, including the right to be defended by Counsel of his choice. The Complainant argues that the African Commission has held in its jurisprudence, including in Media Rights Agenda, Constitutional Rights Project v. Nigeria, that "to be denied access to a lawyer is a violation of Article 7(1)(c)."

120. The Complainant submits that the Victim was denied access to a lawyer, in violation of Article 7(1)(c), as he was detained incommunicado with no access to the outside world, and approaches to the NISS by family members and lawyers seeking access to the Victim were rebuffed. Furthermore, the Complainant states that a lawyer known to ACJPS approached the NISS Prosecutor in Khartoum to seek authorization to meet the Victim and ascertain if any charges had been filed, but his requests were ignored.

⁸² Resolution on the Right to Recourse and Fair Trial, The African Commission on Human and Peoples' Rights, meeting in its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992, para. 2(b).

⁸³ Abdel Hadi, Ali Radi & Others v. Republic of Sudan, Communication 368/09, para 88.



121. The Complainant further submits that the applicable domestic legislation, i.e. the NSA 2010, itself violates Article 7(1)(c) of the African Charter. The Complainant argues that Article 51(2) of the NSA 2010 provides that the arrested, detainee or person in custody shall have the right to inform his/her family or employer of his/her detention and shall be allowed to communicate with his/her family or advocate if this does not prejudice the progress of interrogation, enquiry and investigation. The Complainant states that the right to communicate with family members or a lawyer is thus conditional upon the contact not prejudicing the investigation. According to the Complainant, NISS may therefore still hold detainees without contact to the outside world (incommunicado) where it sees fit, as in the Victim's case.

Alleged Violation of Article 12(1) and (2) of the African Charter

122. The Complainant states that Article 12(1) and (2) of the African Charter stipulate that every individual shall have the right to freedom of movement and residence and the right to leave any country, including his own, and to return to his country. The Complainant cites the African Commission's decision in *Rights International v. Nigeria*, in which the African Commission held a violation of Article 12 (1) and (2) in the case of an individual who fled his country fearing for his life, after being detained and tortured at a Nigerian military detention camp. In that case, the complainant attested that his plight was based on a well-founded fear of persecution by the Nigerian government, as evidenced by the granting of refugee status to him by two countries i.e. Republic of Benin and the United States.

123. The Complainant submits that in the present Communication, the Victim experienced persecution at the hands of the NISS between 2011 and 2018 based on his outspoken and public condemnation of human rights violations taking place in Darfur. The Victim was detained without charge or being brought before a judge on two occasions in 2011 and 2018 respectively, and tortured whilst in detention. At no point was the Victim informed of any criminal charges against him and prior to his release, the NISS threatened to kill members of his family if he were to return to her home in Darfur. The Complainant avers that after his release in 2011 and in 2018, the Victim was forced to flee the country owing to a well-founded fear of persecution by the Sudanese authorities. This fear of persecution has prevented him from returning to Sudan. The Complainant submits that the Victim's right to freedom of movement and residence, as well as his right to return to his country, guaranteed under Articles 12(1) and (2) of the African Charter, have been violated.

Alleged Violation of Article 16 of the African Charter

124. The Complainant states that Article 16 of the African Charter provides that every very individual shall have the right to enjoy the best attainable state of physical and mental health and that State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.



125. The Complainant states that the Commission in its jurisprudence has elaborated that the State's responsibility in the event of detention is even more evident to the extent that detention centres are its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities.⁸⁴ According to the Complainant, the right to health indicates a right to be free from torture and a positive obligation to provide access to adequate medical treatment in detention.
126. The Complainant submits that under the submissions related to the violation of Article 5 of the African Charter above, the Victim was denied access to medical treatment for the entire duration of his detention. The Victim was subjected to a range of acts of torture that caused extreme physical and mental pain and anguish in violation of Article 16 of the African Charter.

Alleged Violation of Article 1 of the African Charter

127. The Complainant states that Article 1 of the African Charter provides that Member States parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the African Charter and shall undertake to adopt legislative or other measures to give effect to them. The Complainant further states that the African Commission has held that Article 1 of the African Charter gives the latter a legally binding character and that a violation of any provision of the African Charter automatically means a violation of Article 1.⁸⁵
128. The Complainant avers that the African Commission's jurisprudence has also set out clearly that under Article 1, State Parties have an obligation to respect, protect, promote and fulfil the rights guaranteed in the African Charter,⁸⁶ thus states have not only a negative obligation to refrain from interfering in the enjoyment of all fundamental rights (respect) but also positive obligations to protect, promote and fulfil rights. This includes the positive obligation to protect right-holders against violations through the adoption of appropriate legislation and policies, the effective investigation of any allegations of violations, and ensuring the availability of effective remedies in the event of a breach of fundamental rights in the African Charter.⁸⁷ The Complainant aver that the African Commission held that where abuse does occur, States Parties to the African Charter are also under an obligation to initiate a prompt, impartial and effective investigation in order to bring the perpetrators to justice as well as to afford redress to the victims".⁸⁸
129. The Complainant submits that in addition to a failure to respect the rights outlined in the present Communication, the Respondent State also failed in its positive

⁸⁴ 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, Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98, para 122.

⁸⁵ Lawyers of Human Rights v. Swaziland, Communication 251/02, Para 272. See also Abdel Hadi, Ali Radi & Others v. Republic of Sudan, Communication 368/09, para 91.

⁸⁶ Zimbabwe Human Rights NGO Forum / Zimbabwe, Communication 245/02, para 151.

⁸⁷ Zimbabwe Human Rights NGO Forum / Zimbabwe, Communication 245/02, paras 151, 159.

⁸⁸ Abdel Hadi, Ali Radi & Others v. Republic of Sudan, Communication 368/09, para 76.



obligation under Article 1 to exercise due diligence and effectively prevent and respond to violations of the rights enshrined in African Charter.⁸⁹

130. Specifically, according to the Complainant, the Respondent State failed to put in place adequate legislative framework to protect individuals within its jurisdiction from arbitrary detention, torture, and other ill-treatment by the NISS or to ensure the right to fair trial or the availability of effective remedies and sanctions in the event of a breach. The Complainant further submits that the Respondent State has also failed to investigate allegations of wrongdoing by its agents and took no measures to ensure the availability of an effective remedy for the Victim.

II. Submission of the Respondent State on Merits

131. In accordance with the procedure established by the African Commission, and despite the considerable time that has elapsed beyond the deadlines prescribed under the African Commission's Rules of Procedure 2020, the Respondent State has failed to submit its observations on the Merits of this Communication.

132. Consequently, the African Commission shall proceed with its analysis of the Merits based solely on the submissions and evidence presented by the Complainant⁹⁰.

III. Analysis of the African Commission on the Merits

Alleged Violation of Article 4 of the African Charter

133. Article 4 of the African Charter provides that:

'human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one shall be arbitrary deprived of this right'.

134. The Complainant submits that the constant fear experienced by the Victim for the safety of his life on account of the death threats and treatment meted out on him by the NISS officers while in detention, violated his right to life as guaranteed under Article 4 of the African Charter.

135. The Complainant states that the Victim was detained and tortured by the NISS in 1991 up to 2006 and in 2011. During the period of the Victim's detention, he was systematically beaten; whipped and deprived of sleep; forced to stand in painful positions, verbally insulted, called a slave and spy; and threatened with death. The Complainant further stated that the Victim was told by NISS Officers that he would be killed if he told anyone about what had unfolded and on one occasion, the Head of the NISS ordered an officer to take the Victim outside and "kill him in front of the

⁸⁹ See INTERIGHTS, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme v. Mauritania, Communication 373/06, paras 87-90. In this case the Commission cites the ruling of the Inter-American Court of Human Rights in the Velasquez Rodriguez v. Honduras, (Merits), Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C No. 4 (1988), para. 174.

⁹⁰ 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.



office", but he survived. According to the Complainant, because of the severe mental and physical harm meted on the Victim, on his release, he fled the country, fearing for his life.

136. The African Commission in its General Comment No 3 on the right to life have pronounced that 'where a State or its agent ...has unlawfully threatened the life of a person... a violation of the right to life has occurred.'⁹¹ The African Commission refers to the United Nations Human Rights Committee's General Comment No. 36 which states that "the right to life encompasses the right of persons to be free from acts and omissions intended to cause or expected to cause, their unnatural or premature death, and to live with dignity."⁹²
137. The African Commission remain guided by its position in the *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 vs Mauritania*,⁹³ where it held that it is a violation of Article 4 of the African Charter when individuals were denied food and medical attention, subjected to torture that culminated in death, or forced to go into hiding due to fear for their lives.
138. The African Commission also considers the decision of the European Court on Human Rights in *Makaratzis v. Greece*⁹⁴, where it held that irrespective of whether or not the police actually intended to kill the applicant, the applicant was the victim of a conduct which by its very nature, put his life at risk, even though in the event he survived, violated article 2 of the European Convention.
139. In line with the above reasoning, the African Commission finds that the constant threats by NISS officers to the life of the Victim, as well as the acts of abuse, lack of medical attention, which put his life at risk and eventually resulted in the Victim fleeing the country for fear of his life, violated Article 4 of the African Charter.

Alleged Violation of Article 5 of the African Charter

140. Article 5 of the African Charter provides for:

'every individual to have the right to the respect of the dignity inherent in a human being. It further provides that all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'

141. Freedom from torture is one of the cardinal rules in international law that is absolute and cannot be derogated under any circumstance. This 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.

⁹¹ ACHPR General Comment No 3, para 8.

⁹² General Comment No. 36 of the UN Human Rights Committee on Article 6 of the International Covenant on Civil and Political Rights", para 3

⁹³ Communication 205/97, *Kazeem Aminu v. Nigeria*, 11 May 2000, Para 18.

⁹⁴ Cf. Eur.C.H.R., *Makaratzis v. Greece* [GC], Judgment of December 20, 2004, App. No. 50385/99, para. 51 and 55.



142. The African Charter does not define the meaning of the words or the phrase "torture or degrading treatment or punishment." However, the African Commission in its interpretation of Article 5 of the African Charter adopted the definition of torture contained in Article 1 of United Nations Convention against Torture (UNCAT) ⁹⁵. The African Commission also adopted the interpretation of the United Nations Committee against Torture ⁹⁶ in its General Comment No. 2, which states that "for torture to have occurred, the incriminated acts must intentionally cause severe suffering, be intended to obtain information or a confession, punish the victim for real or alleged acts, and be attributable to a public official or person acting in that capacity.
143. The African Commission refers to the positions adopted by the African Court on Human and Peoples Rights and the European Court on Human Rights in *John K. Modise v Botswana*⁹⁷ and in *Campbell and Cosans v UK*⁹⁸ respectively, that the acts of inhuman and degrading treatment "not only cause serious physical or psychological suffering but also humiliate the individual while exposing them to personal suffering and indignity, and can be interpreted to extend to the widest possible protection against abuses, whether physical or mental".
144. In assessing whether the alleged physical assault, incommunicado detention, and denial of medical attention to the Victim in the present Communication amounts to torture, cruel, inhumane and degrading treatment and punishment, the African Commission will proceed to examine the evidence and arguments presented by the Complainant, to determine whether the actions meet the threshold of severe pain and suffering, to fall within the definition of torture.
145. First, the Complainant asserts that the pervasive nature of the threats and the acts inflicted on the Victim to obtain information were so serious that both singly and in combination, not only caused serious harm but also severe physical and mental pain and suffering, amounting to torture. The Complainant narrated and gave examples of a series of acts of beatings, lashes and threats by the NISS officers during arrest and detention of the Victim, as referenced in paragraph 96 to 105 above, which according to the Complainant, amounts to torture, cruel and inhuman treatment and punishment.
146. The African Commission recalls its decision in *Sudan Human Rights Organization and Center for Housing Rights and Evictions v Sudan*⁹⁹ in which it set out the principal elements that constitute torture under the African Charter, namely that, severe pain or suffering has to have been inflicted for a specific purpose, such as

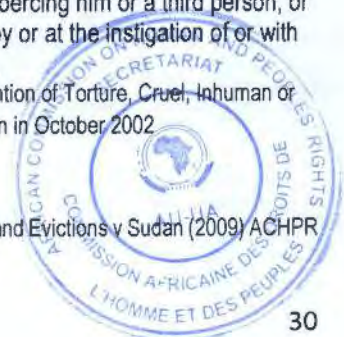
⁹⁵ [T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

⁹⁶ Ibid 19 & See Article 4 of the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) adopted by the Commission in October 2002

⁹⁷ Communication 97/93 Para 71

⁹⁸ (1982) ECHR, para 28.

⁹⁹ Communication 279/03 – 296/05 *Sudan Human Rights Organization and Center for Housing Rights and Evictions v Sudan* (2009) ACHPR para 255 [sic!] & 156



to obtain information, as punishment or to intimidate, or for any reason based on discrimination, by or at the instigation of or with the consent or acquiescence of state authorities. The African Commission in the same vein, held that where the victims were subjected to a series of acts that, singly and in combination caused severe physical and mental pain and suffering,¹⁰⁰ inflicted by officials with the purpose of extracting information, the acts committed amounted to torture.

147. In *Abdel Hadi, Ali Radi & Others v Sudan*¹⁰¹, in which the victims went through various forms of physical torture during their detention ranging from severe beating with whips and sticks, doing the Arannabb Nut (rabbit jump), heavy beating with water hoses on all parts of their bodies, death threats, being forced to kneel with their feet facing backwards in order to be beaten on their feet, the African Commission held that the treatment and the surrounding circumstances were of such a serious and cruel nature that it attained the threshold of severity to amount to torture.

148. The African Commission turns to the facts in paragraphs 96 to 105 above which indicate among others that for the purposes of extracting information, the Victim received several death threats; slapped and beaten repeatedly with butts of guns causing injury to his back and broke his spin; punched whipped and beaten with various objects including an iron and metal wires; lashed for over two hours until his skin bleed; and electric shock devices placed on his chest, nails and shoulders; which subsequently resulted in itchy scalp from the chemical solution poured on his hair; temporary memory loss; and severe pain and suffering¹⁰².

149. Considering these circumstances, the African Commission finds that the physical assaults and their profound repercussions on the Victim's health and wellbeing constitute a serious and cruel nature that amounts to torture, inhumane and degrading treatment or punishment.

150. Second, the Complainant argues that the Victim was detained incommunicado by the NISS and denied access to his family or a lawyer for the entire period of his detention for over a year, and was subjected to terrible prison conditions such as overcrowded and unsanitary prison cells; detention in close proximity to mentally ill death row inmates; and being held in solitary confinement with handcuffs and chained feet. The Complainant further argues that the Victim made repeated requests to be seen by a Medical Doctor while in detention, and the prolonged denial of access to his family, a lawyer and medical doctor was in breach of Article 5 of the African Charter.

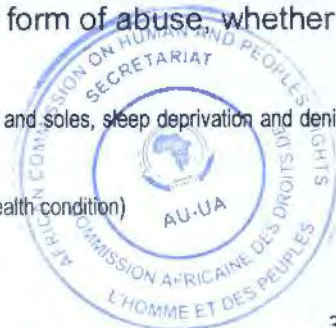
151. As demonstrated in the African Commission's jurisprudence, particularly in the case of *Media Rights Agenda v the Federal Republic of Nigeria*,¹⁰³ the terms "cruel, inhuman, or degrading punishment or treatment" should be interpreted in a manner that affords the broadest possible protection against any form of abuse, whether it

¹⁰⁰ Sustained and severe beatings, punched and hit with a pipe and wooden cane on their feet and soles, sleep deprivation and denied access to medical treatment

¹⁰¹ Communication 368/09- *Abdel Hadi, Ali Radi & Others v Sudan*, para 71-77

¹⁰² (Medical reports attached as annexures showing the injuries suffered by the victims and his health condition)

¹⁰³ Communication 224/1998 *Media Rights Agenda v Federal Republic of Nigeria*



manifests as physical or mental harm. This includes 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.

152. The African Commission in determining acts that constitute torture also remain guided by its position in *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*¹⁰⁴, where the detainees were beaten and forced to make statements; denied the opportunity of sleeping and being held in solitary confinement, detailed instances of torture, cruel, inhuman and degrading treatments. In *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*¹⁰⁵, the African Commission held that aspects of the treatment of victims such as excessive solitary confinement, shackling within a cell, extremely poor-quality food and denial of access to adequate medical care, violated Article 5 of the African Charter.
153. Furthermore, the African Commission's Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) sets out that the right to an independent medical examination is a basic procedural safeguard for the prevention of torture¹⁰⁶ and that states should "[e]nsure that all persons deprived of their liberty should have access to medical services and assistance".¹⁰⁷
154. Given the above, it is the African Commission's view that the lengthy incommunicado detention of the Victim for the entire duration of his detention, including, the prolonged denial of access to family and denial of medical care and treatment, constitutes torture, inhuman and degrading treatment or punishment.
155. The African Commission, therefore, holds that the Respondent State violated Article 5 of the African Charter.

Alleged Violation of Article 6 of the African Charter

156. Article 6 of the African Charter provides that:

'Everyone has the right to liberty and security of person. No one shall be deprived of their liberty except on such grounds and under such conditions as

¹⁰⁴ Communications 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*

¹⁰⁵ Communication 64/92-68/92-78/92_8AR- *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) / Malawi- para*

¹⁰⁶ Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), Part II: Prevention of Torture, Article 20 (b).

¹⁰⁷ The Robben Island Guidelines, Part II: Prevention of Torture, Article 31.



are determined by law. In particular, no one shall be arbitrarily arrested or detained’.

157. The African Commission notes that Article 6 of the African Charter protects two fundamental rights. The first right is composed of several aspects, which can be summarised in two parts: the right not to be detained or imprisoned by public authorities, except for reasons and under conditions prescribed by law, and the right not to have one's freedom restricted or to be confined within a specific space, without reasons and under conditions prescribed by law.
158. The Complainant argues that the Victim was detained for over a year and accused of a number of activities, including some that carry heavy criminal penalties in Sudan, but at no point was he informed of any formal charges against him, and he was eventually released without charge. The Complainant further argued that at no point was the Victim shown a warrant for his arrest or any other document relating to the charges under which he was detained and at no point was it made clear on what evidence or on what grounds he was suspected of having committed an offence, thus the arrest and detention without charge was arbitrary.
159. The African Commission recalls the importance of Article 6 of the African Charter in its Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), which state that no one shall be deprived of their liberty except on grounds and in accordance with procedures established by law.¹⁰⁸ Also, its Principles and Guidelines on the Right to a Fair Trial provide that States must ensure that no one shall be subject to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause.¹⁰⁹
160. The African Commission in *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda*, 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.¹¹⁰ The African Commission echoes its decision in *Constitutional Rights Project/Civil Liberties Organisation vs Nigeria*, in which it observed that "where individuals are detained without charge, [...] this constitutes an arbitrary deprivation of their liberty and therefore a violation of Article 6 of the African Charter".
161. The above emphasize 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. Accordingly, based on the above, vis a vis the arguments put forth by the Complainant- including the lack of a warrant, information on the reasons for the Victims arrest and the

¹⁰⁸ Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, Principle 2(a), (ACHPR 2014), http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf

¹⁰⁹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001, M (1) (b)

¹¹⁰ Communication 339/2007 – *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda* para 107.



prolonged detention without charge, the African Commission finds that the arrest and detention of the Victim was arbitrary and in breach of Article 6 of the African Charter.

162. Moreover, the Complainant argues that the applicable domestic legislation, namely the National Security Act 2010 is itself in breach of Article 6 of the African Charter, as Article 50 (e-h) of the National Security Act (NSA) 2010 gives NISS members wide powers to arrest and detain a person on vague grounds for an initial period of up to thirty days (45 days upon renewal) and a possible total of four and a half months without the possibility of judicial review¹¹¹.

163. The African Commission reiterates its decision in *International PEN et al. (on behalf of Ken-Saro Wiwa Jnr.) v. Nigeria*, where it held that a Decree that permitted the authorities to detain people without charge for as long as three months without the opportunity for the detainees to challenge their arrest and detention before a court of law, presented a *prima facie* violation of the right not to be arbitrarily arrested or detained under Article 6.¹¹²

164. In line with the same reasoning, the African Commission concedes with the Complainant that the applicable domestic legislation i.e. the National Security Act 2010, which allows for a person to be detained for four and a half months without judicial review, is itself in breach of Article 6 of the African Charter.

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

Alleged Violation of Article 7 of the African Charter

166. Article 7 of the African Charter provides that:

- (1) 'everyone has the right to have their case heard, including:
 - a) the right to bring an action before the competent national courts against any act infringing the fundamental rights recognized and

¹¹¹ It sets out that any NISS member may:

(e) Arrest or detain any suspected person for a period not exceeding thirty days provided that his/her relatives are immediately informed.

(f) After elapse of the thirty days mentioned in Para (e) above, and if there are reasons that require more investigation, enquiry and maintaining the detained person in custody, NSS member shall refer the issue to the Director and make the recommendations he deems appropriate.

(g) The Director may renew the detention period for not more than fifteen days with the purpose of completing investigation and enquiry.

(h) If it comes to the knowledge of the Director that maintaining any person in custody is necessary for completion of investigation and enquiry in case of an accusation related to a factor threatening the security and safety of the people; intimidating society by way of armed robbery, racial, religious sedition or terrorism; disrupting peace; exercising political violence; or plotting against the country, he shall refer the issue to the Council which may extend the detention period for not more than three months.

¹¹² *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken-Saro Wiwa Jnr.) / Nigeria*, Communication 137/94-139/94-154/96-161/97, para 83.



- guaranteed by the conventions, laws, regulations, and practices in force;
 - b) the right to be presumed innocent until proven guilty by a competent court;
 - c) the right to a defence, including the right to be assisted by a lawyer of one's choice;
 - d) the right to be tried within a reasonable time by an impartial tribunal.
- (2) No one may be convicted of an act or omission which did not constitute, at the time it was committed, an offence punishable by law. No penalty may be prescribed if it was not prescribed at the time the offence was committed. The penalty is personal and concerns only the offender'.

167. The Complainant alleges that Article 7 was violated in the present Communication on several counts, including a) the denial of habeas corpus b) the failure to provide information on the reasons for arrest and any charges brought; and c) the denial of access to a lawyer. The African Commission will proceed to assess the Complainant's arguments in relation to the alleged violation of the Victim's right under Article 7 of the African Charter.

168. Regarding the denial of habeas corpus, the Complainant argues that the Victim was detained for months without being charged or brought before a judge and there are no circumstances that would have prevented the Sudanese authorities from doing so.

169. The right to be heard is a clearly established norm that anyone who is deprived of his/her liberty through arrest and detention is entitled to initiate proceedings before a judicial body, in order that the judicial body may decide without delay on the lawfulness of the arrest and detention. The African Commission's Principles and Guidelines on the Right to a Fair Trial provides that "...anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a judicial body, in order that, that judicial body may decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful."¹¹³ The Principles and Guidelines on Fair Trial also provide that "judicial bodies shall at all times hear and act upon petitions for habeas corpus...or similar procedures. No circumstances whatever must be invoked as a justification for denying the right to habeas corpus..." Furthermore, the African Commission's Luanda Guidelines provides that "all persons in police custody and pre-trial detention shall have the right, either personally or through their representative, to take proceedings before a judicial authority, without delay, in order to have the legality of their detention reviewed"¹¹⁴.

170. The African Commission in its jurisprudence has held in *Abdel Hadi, Ali Radi and Others v. Republic of Sudan*¹¹⁵ and *Purohit v. The Gambia*¹¹⁶ have held that the denial of habeas corpus which prevented the victims from having the opportunity

¹¹³ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001, M(4).

¹¹⁴ Principle 35 of Guidelines on Arrest, Policy Custody and Pre-Trial Detention (Luanda Guidelines).

¹¹⁵ *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, Communication 368/09, para 90. See also, *Huri-Laws v Nigeria*, Communication No. 225/98 (2000), para.46.

¹¹⁶ Communication 241/01- *Purohit v The Gambia*



of inquiring into the lawfulness of their detention, violated Article 7(1)(d) of the African Charter.

171. In light of the above findings, the African Commission in the present Communication, finds that the denial of habeas corpus to the Victim violates Article 7(1)(d) of the African Charter.

172. Regarding the failure to provide information on the reasons for arrest and any charges brought; the Complainant allege that the Victim was detained for months without being informed of any criminal charges against him; at no point was he shown a warrant for his arrest or any other document relating to the charges under which he was detained; and no charges were brought in the course of his detention or after his release; in violation of Article 7(1)(d) of the African Charter.

173. The African Commission has established in its Principles and Guidelines on Fair Trial and Robben Island Guidelines that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his/her arrest and shall be promptly informed, in a language he/she understands, of any charges against him/her; and ensure that all persons deprived of their liberty are brought promptly before a judicial authority"¹¹⁷. The Luanda Guidelines also provide that all persons under arrest have the right to be informed of the reason for their arrest and any charges against them.¹¹⁸

174. The African Commission is of the view that lack of information for the reasons for the Victims arrest at the time of arrest for the reasons for the Victim's arrest and no charges brought against him during his detention, violates Article 7(1)(d) of the African Charter.

175. Regarding the denial of access to a lawyer, the Complainant argues that the Victim was denied access to a lawyer, in violation of Article 7(1)(c) of the African Charter, as he was detained incommunicado with no access to the outside world and approaches to the NISS by family members and lawyers seeking access to the Victim were refused. Furthermore, the Complainant states that a lawyer known to ACJPS approached the NISS Prosecutor in Khartoum, to seek to meet the Victim and ascertain if any charges had been filed, but his requests were ignored. The Complainant also argues that the applicable domestic legislation, i.e. Article 51(2) of the National Security Act 2010, itself violates Article 7(1)(c) of the African Charter¹¹⁹.

176. The African Commission has considered in its Principles and Guidelines on Fair Trial that in proceedings relating to criminal charges, legal representation is the best means of legal defence against infringements of human rights and fundamental freedoms¹²⁰. The Principles and Guidelines on Fair Trial also provides

¹¹⁷ See M2 (a)(b) and 3 (A) of the Principles and Guidelines on Fair Trial & Article 25, 26 & 27 of the Robben Island Guidelines

¹¹⁸ Luanda Guidelines para 4b

¹¹⁹ The arrested, detainee or person in custody shall have the right to inform his/her family or mother employer of his/her detention and shall be allowed to communicate with his/her family or advocate if this does not prejudice the progress of interrogation, enquiry and investigation.

¹²⁰ N2(a) Principles and Guidelines on Right o Fair Trial



for an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceeding including periods of administrative detention, trial and appeal proceedings; and to have adequate opportunity to prepare a case¹²¹. It further gives States an obligation to ensure that any arrested or detained person is provided with the necessary facilities to communicate with his lawyer, doctor, family and friends.¹²² The Luanda Guidelines provide that arrested persons have the right of access, without delay to a lawyer of his or her choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider, provided by state or non-state institutions¹²³.

177. The African Commission has acknowledged the pivotal role of the right to legal representation in its jurisprudence and recalls its decision in *Malawi African Association and Others v. Mauritania*¹²⁴ and in *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chinua), Amnesty International (on behalf of Orton and Vera Chinua) v Malawi*¹²⁵ where the accused either had no access or only restricted or delayed access to a lawyer, held that the Respondent State violated article 7(1) (c) of the African Charter. In *Media Rights Agenda, Constitutional Rights Project v. Nigeria*, the African Commission held that "to be denied access to a lawyer is a violation of Article 7(1)(c)."¹²⁶

178. The African Commission's acknowledgment of this right highlights its unwavering commitment to protecting individuals from abuse and promoting fairness throughout the detention process. In line with these findings, the Commission of the view that the denial of the Victim to have access to a lawyer during his detention, constitutes a violation of Article 7(1)(c) of the African Charter.

179. Furthermore, the African Commission notes the Complainant's argument that the applicable domestic legislation, i.e. Article 51(2) of the National Security Act 2010, itself violates Article 7(1)(c) of the African Charter, as the right to communicate with family members or a lawyer is thus conditional upon the contact not prejudicing the investigation, and the NISS may therefore still hold detainees without contact (incommunicado) where it sees fit. The African Commission has elaborated on this matter extensively in its decision in *Magdy Moustafa El Baghdady v, The Sudan*¹²⁷ and expressed the view that even though the Respondent State has shown progress in making multiple amendments to the NSA of 2010, with the latest amendment taking place in 2024,¹²⁸ it is essential to note that these amendments

¹²¹ Articles 20 (c) and 31 of the Robben Island Guidelines and Principle A2 (e) (f) of the Principles and Guidelines on the Right to a Fair Trial.

¹²² Ibid Principle M (2) (e).

¹²³ Luanda Guidelines para 4d & 14c.

¹²⁴ Communications No 54/91,61/91,98/93,164-196/97, 210/98 - *Malawi African Association and Others v. Mauritania*.

¹²⁵ Communication 64/92-68/92-78/92 *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chinua), Amnesty International (on behalf of Orton and Vera Chinua) v Malawi*

¹²⁶ *Media Rights Agenda, Constitutional Rights Project v. Nigeria*, para. 88. See also Article 19 v. *Eritrea*, Communication 275/03, para. 103 where the Commission held that, "[t]here had been a violation of Article 7(1)(c), since the detainees have been allowed no access to legal representation, contrary to the right to be defended by counsel which is protected by that provision of the Charter."

¹²⁷ Communication 476/14- *Magdy Moustafa El Baghdady v, The Sudan*, para.157-162.

¹²⁸ Amendments were made to the NSA in 2011, 2017, 2019, 2021, 2022, and 2024.



have not adequately addressed the limitations or drawbacks found in the original 2010 version of the Act.

180. The African Commission highlighted the need for comprehensive and substantive changes to the NSA to ensure the protection of individuals' rights to align with the principles of the African Charter. Mere cosmetic modifications without addressing the underlying issues do not provide the 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.¹²⁹

181. The African Commission therefore holds that the Respondent State violated article 7 (1) (c) and (d) of the African Charter.

Alleged Violation of Article 12(1) & 12(2) of the African Charter

182. Article 12 of the African Charter provides:

- (1) 'Every individual shall have the right to freedom of movement and residence within the borders of a State, provided he abides by the law,
- (2) Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality',

183. The African Commission's General Comment No 5 on the Right to Freedom of Movement and Residence provides that Article 12(1) and 12(2) of the African Charter includes an array of rights and freedoms. While 12 (1) provides for freedom of movement and residence in any part of the State unimpeded, provided that one abides by the laws of the land; 12 (2) it is clear that every individual has the right to leave their country and to return to the same.¹³⁰

184. The Complainant argues that the Victim experienced persecution at the hands of the NISS between 2011 and 2018 and after his release, he was forced to flee the country owing to a well-founded fear of persecution by the Sudanese authorities. The Complainant aver that this fear of persecution has prevented the Victim from returning to Sudan, which violates his right to freedom of movement and residence, as well as his right to return to his country, as guaranteed under Articles 12 (1) and 12(2) of the African Charter.

185. The African Commission recalls its position in *John D. Ouko v. Kenya*¹³¹, concerning an individual who was arrested and detained without trial and subsequently forced to flee the country for fear of persecution based on his political opinions, and in *Rights International v. Nigeria*¹³², concerning an individual who

¹²⁹ Communication 476/14- *Magdy Moustafa El Baghdady v. The Sudan*, para.161.

¹³⁰ See, General Comment No.5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence adopted in 2019.

¹³¹ Communication 232/99 *John D. Ouko v. Kenya*, para 31.

¹³² Communication 215/98 *Rights International v. Nigeria*, paras 30-31.



fled his country for fear of his life after being detained and tortured in a detention camp. The African Commission in both communications held that Articles 12(1) and 12(2) of the African Charter were violated.

186. In the same vein, the African Commission in the present Communication, finds that the Victim fleeing the country and not returning to Sudan due to fear of persecution, violates his right to freedom of movement and residence. Accordingly, the African Commission finds that the Respondent State violated Article 12(1) and 12(2) of the African Charter.

Alleged Violation of Article 16 of the African Charter

187. Article 16 of the African Charter guarantees that:

1. "Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.

188. The Complainant submits that the Victim was denied access to medical treatment for the entire duration of his detention and was subjected to a range of acts of torture that caused extreme physical and mental pain and anguish in violation of Article 16 of the African Charter.

189. The right to the highest attainable standard of health encompasses the availability, accessibility, acceptability, and quality of health care, services, and conditions. This right imposes an obligation on the State: to respect, fulfil, and protect it, ensuring that individuals can effectively exercise their right to health without discrimination or undue restriction. The African Commission's Robben Island Guidelines provide that states should "[e]nsure that all persons deprived of their liberty have access to medical services and assistance".¹³³ The Luanda Guidelines also provide that arrested persons have the right to urgent medical assistance, to request and receive a medical examination and to obtain access to existing medical facilities.

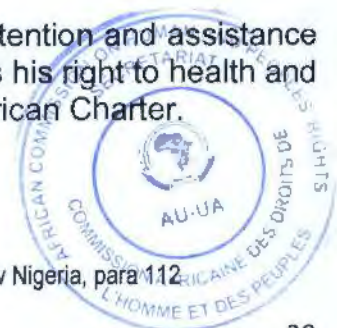
190. The African Commission in *Malawi African Association and Others vs Mauritania and Monim Elgak, Osman Hummeida and Amir Sullivan (Represented by FIDH and OMCT) v Sudan*¹³⁴ and in *International PEN and Others (on behalf of Ken Saro-Wiwa Jnr) v Nigeria*¹³⁵ held that the State has an obligation to respect the right to health in detention and emphasized that the responsibility for the physical integrity and welfare of detainees lies with the competent State authorities.

191. The African Commission finds that the denial of medical attention and assistance to the Victim for the entire duration of his detention, violates his right to health and thus the Respondent State has violated Article 16 of the African Charter.

¹³³ The Robben Island Guidelines, Part II: Prevention of Torture, Article 31.

¹³⁴ Communication 379/09. 14 March 2014, Para 136

¹³⁵ Communication 137/94 *International PEN and Others (on behalf of Ken Saro-Wiwa Jnr) v Nigeria*, para 112



Alleged Violation of Article 1 of the African Charter

192. Article 1 of the African Charter provides that:

'The member states of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them'.

193. The Complainant submits that in addition to a failure to respect the rights outlined in the present Communication, the Respondent State also failed in its positive obligation under Article 1 to exercise due diligence and effectively prevent and respond to violations of the rights enshrined in African Charter; the Respondent State failed to put in place adequate legislative framework to protect individuals within its jurisdiction from arbitrary detention, torture, and other ill-treatment by the NISS or to ensure the right to fair trial or the availability of effective remedies and sanctions in the event of a breach; and the Respondent State also failed to investigate allegations of wrongdoing by its agents and took no measures to ensure the availability of an effective remedy for the Victim.

194. The African Commission remains guided by its decision in *Sir Dawda Jawara v. The Gambia*,¹³⁶ that a violation of any provision of the African Charter automatically means a violation of Article 1, hence, if a State Party to the Africa Charter fails to recognise the provisions of the same, there is no doubt that it violates this Article 1 of the African Charter.

195. In light of the foregoing and having found that the Respondent State in the present Communication violated Articles 4, 5, 6 and 7, 12(1) and 12(2) and 16 of the African Charter, the African Commission finds that the Respondent State has also violated Article 1 of the African Charter.

IV. Decision of the African Commission on the Merits

196. For these reasons, the African Commission:

- i. finds that the Respondent State is in violation of Articles 1, 4, 5, 6, 7(1)(c) and (d), 12(1) and (2) and 16 of the African Charter;
- ii. recommends that the Respondent State should:
 - a) assess and pay the appropriate compensation to the Victim to address the moral and material damages and harm suffered by the Victim, in the amount of which shall be determined through the domestic procedure;
 - b) conduct prompt and impartial investigations into the allegations including the arrest, detention, and torture and ill treatment of the Victim and bring the perpetrators to justice;

¹³⁶ Comm. Nos. 147/95 and 149/96, para 46



- c) issue a public apology as an acknowledgement of the violations of Victims' rights under the African Charter;
- d) adopt and implement procedural safeguards for the prevention of torture and other forms of ill-treatment as required under the Robben Island Guidelines;
- e) conduct reforms of the National Security Act 2010, and policies and practices of the NISS which are incompatible with the African Charter and other regional and international human rights instrument, to bring them in line with the African Charter and other international standards;
- f) provide 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;
- g) establish an Independent Complaint Mechanism with the authority to investigate actions and complaints against law enforcement officers, including the NISS;
- h) improve detention conditions, ensuring access to food, clean water, sanitation facilities, appropriate cell occupancy, and humane treatment of detainees to align with international legal requirements; and
- i) inform the Commission, in accordance with Rule 125 (1) of the Commission's Rules of Procedure (2020), within one hundred and eighty days (180) of the notification of the present decision of the measures taken to implement the present decision.

Done during the 84th Ordinary Session held virtually from 21 July to 30 July 2025.

