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Communication 402/11 & 420/12

Sudanese Civilians in South Kordofan and Blue Nile (represented Sudan Democracy First Group, REDRESS, Human Rights Watch, INTERIGHTS and Enough Project)

v

Sudan

*Adopted by the
African Commission on Human and Peoples' Rights
During the 74th Ordinary Session done virtually from 21 February to 07 March 2023.*



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



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



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

Summary of the Complaint:

1. This Complaint was received separately at the Secretariat of the African Commission on Human and Peoples' Rights ("the Secretariat") on 21 July 2011 and 23 April 2012, respectively. It was subsequently consolidated during the 12th Extra-Ordinary Session of the Commission held in Algiers, Algeria, from 30 July to 4 August 2012.
2. The Complaint was submitted by Sudan Democracy First Group, REDRESS, Human Rights Watch, INTERIGHTS and Enough Project (the Complainants), on behalf of Sudanese Civilians in South Kordofan and Blue Nile (the Victims) against the Republic of Sudan (the Respondent State).
3. The Respondent State is a State Party to the African Charter on Human and Peoples' Rights 1981 (African Charter), having ratified the same on 18 February 1986.
4. The Complainants claimed that starting on 5 June 2011, the Sudanese Armed Forces (SAF) and militia groups, under the control of the Government of the Republic of Sudan, launched a series of assaults against civilians in South Kordofan. On 1 September 2011, a similar pattern of attacks began against civilians in Blue Nile State.
5. The Complainants stated that more than 31 attacks have been documented since the assaults began. Among them are the 26 June 2011 bombing of the market in Kurchi, South Kordofan, which killed 13 civilians and injured more than 20 others, most of whom were women and children.
6. According to the Complainants, eyewitnesses in Tilo, South Kordofan, reported that the SAF sealed the doors of civilian homes and then set fire to the buildings, burning alive the civilians who were trapped inside. Further reports, which are corroborated by satellite imagery, showed that on or about 8 June 2011, the SAF





removed the bodies of slain Sudanese Civilians from the Tilo and El Gardud villages in South Kordofan and placed them in mass graves that had been freshly dug for that purpose.

7. The Complainants claimed that the pattern has been the same in Blue Nile State. On 1 September 2011, SAF forces attacked Damazin, the capital of Blue Nile. Refugees recounted that Government war planes targeted civilian areas and armed soldiers chased, captured, and killed civilians fleeing from the attacks. Agents of the Government reportedly captured and killed some of the civilians. The Complainants submitted that the precise casualty numbers are unavailable, because the Respondent State has prevented independent observers from accessing the war zones in either South Kordofan or Blue Nile.
8. The Complainants submitted that, as of January 2012, the United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA) estimated that approximately 366,000 individuals had been internally displaced or severely affected by the violence in the two States. Since June 2011, more than 140,000 refugees fled South Kordofan or Blue Nile to either Ethiopia or South Sudan.
9. The Complainants alleged that the victims do not necessarily find safety in refugee camps. This is because, in November 2011, the SAF bombed the Yida refugee camp in Unity State, South Sudan, which is home to many of those displaced from South Kordofan.
10. The Complainants further submitted that the Respondent State has justified its assaults under the guise of targeting the Sudan People's Liberation Movement-North ("SPLM-N"), an organised armed group that has been active in these two areas.
11. The Complainants alleged that the assaults on Sudanese Civilians have nothing to do with military operations and that agents of the Respondent State have deliberately bombed civilian homes, schools and medical facilities, causing untold loss of life, massive displacements, injuries and damage to property.
12. The Complainants further alleged that in addition to civilian dwellings, schools and hospitals, the SAF also targeted fields used for civilian food cultivation. Since these assaults took place during the planting season, the Victims will be left without a harvest, creating grave food insecurity. In certain parts of Blue Nile State, it is estimated that only 15% of arable land was planted. When Amnesty International reportedly visited South Kordofan in August 2011, it found that many of those displaced by the conflict had abandoned their fields during prime





cultivation time, and were faced with impending starvation. On 14 February 2012, the UN Security Council warned that if food insecurity in some areas of Southern Kordofan and Blue Nile States were not addressed immediately, it could reach emergency levels.

13. The Complainants further alleged that the Respondent State has refused to allow international organisations to deliver humanitarian aid, including food and medical supplies, into the affected areas. According to the Complainants, in November 2011, the Famine Early Warning Systems Network estimated that areas of southern Blue Nile and South Kordofan were approaching emergency levels of food insecurity - one level short of famine.
14. The Complainants alleged that the predominantly Arab Government in the Respondent State has made clear its intention to cleanse South Kordofan and Blue Nile States of the ethnic and racial groups who live there. The Complainants made reference to a video published by Al Jazeera of the governor of South Kordofan, Ahmad Haroun, telling SAF soldiers deployed to the Nuba Mountains, in South Kordofan, to "take no prisoners . . . hand over the place swept, rubbed, crushed."

Articles alleged to have been violated

15. The Complainants submitted that the Respondent State violated the Victims' rights under **Articles 1, 2, 3, 4, 6, 7(1)(a), 12(1), 14, 16, 18, 19, 20, 21 and 23 of the African Charter**.

Prayers of the Complainants

16. The Complainants jointly prayed the Commission:

1. To recognise violations of Articles 1, 2, 3, 4, 5, 6, 7(1)(a), 9(1), 12, 14, 16, 18, 19, 20, 21 and 23 of the African Charter;
2. To request the Respondent State to guarantee all the violated rights detailed in this Submission;
3. To accept a separate submission on remedies and reparation and to allow for a hearing on reparation if it has found the Respondent State to be in violation of the African Charter in order to address the:
 - i. appropriate forms of reparation as provided for by the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations



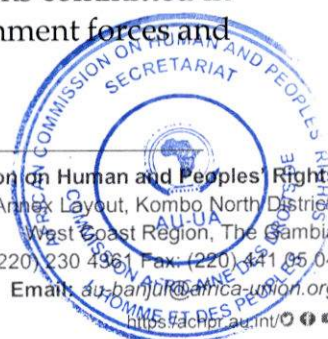


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- of International Humanitarian Law, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for the victims of these violations, including for the next of kin of those who were unlawfully killed by SAF, PDF, or other state forces and authorities, or who suffered harm as a result of the failure of the state to provide adequate protection against violations and to request the Government of Sudan to give effect to such findings;
- ii. appropriate collective measures of reparation to repair collective or group harm caused by the Respondent State's campaign of massive and serious human rights violations;
4. In addition, to request the Respondent State to set up an independent inquiry to carry out prompt, effective and impartial investigations into the circumstances of the abovementioned violations, and ensure that where sufficient evidence exists, the perpetrators are brought to justice and held accountable for any violations;
5. To call on the Respondent State to:
- (a) immediately release all arbitrarily detained civilians and ensure that those detained on a lawful basis enjoy full due process rights;
 - (b) urgently facilitate unimpeded access by humanitarian aid groups to deliver assistance to civilians in all parts of Southern Kordofan and Blue Nile;
 - (c) allow full and effective access for international monitors, including human rights officers, to Southern Kordofan and Blue Nile States;
 - (d) provide appropriate housing and basic needs to the displaced persons in accordance with the UN Guiding Principles on Internal Displacement and the AU Convention for the protection and assistance of internally displaced persons in Africa;
 - (e) ensure the safe return of the displaced persons to their communities after the unrest has ceased;
 - (f) reform its national legislation so that it provides:
 - i. for adequate and effective safeguards against abusive use of force as well as abuse of powers in the course of arrest and detention by government forces, law enforcement and security officials;
 - ii. that arbitrary or abusive use of force as well as violations committed in the course of arrest and detention procedures by government forces, and





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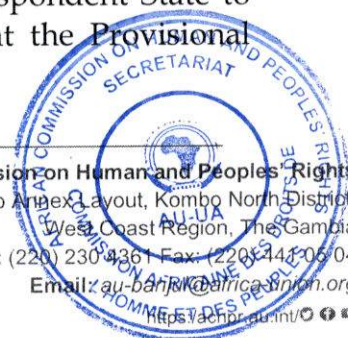
law enforcement officials, including torture and ill-treatment, enforced disappearances and rape, are effectively recognised as a criminal offence under the law in Sudan;

iii. For criminal accountability of officials responsible for violations, including by removing immunity legislation for such crimes that officials enjoy under Sudanese legislation.

(g) ensure training in international human rights and international humanitarian law to law enforcement and military personnel and National Intelligence and Security Service (NISS) agents.

Procedure

17. The Secretariat received the Complaint on 21st July 2011 and the Communication was seized during the 50th Ordinary Session held from the 24 October to 5 November 2011 in Banjul, The Gambia.
18. On 7 November 2011, the Commission issued Provisional Measures and respectfully requested the Respondent State to intervene with a view to preventing irreparable harm being caused to the Victims.
19. By letter dated 16 November 2011, the Complainant was informed about Seizure of the Communication and a copy of the Provisional Measures was forwarded to the same. A *Note Verbale* informing the Respondent State about the Complaint was also sent on the same date.
20. **Communication 420/12** was subsequently received at the Secretariat on **23 April 2012**.
21. At its 12th Extra-Ordinary Session which took place from 30 July to 4 August 2012 in Algiers, Algeria, the Commission decided to join **Communication 420/12** with **Communication 402/11** and consider them together as a single Communication in line with Rule 96(1) of its Rule of Procedure 2010. The Respondent State and the Complainants were notified accordingly.
22. The Commission at its 12th Extra-Ordinary Session also considered the implementation of its Provisional Measures and decided that the Provisional Measures be resent.
23. On 21 August 2012, the Secretariat forwarded a *Note Verbale* to the Respondent State resending the Provisional Measures. It requested the Respondent State to report to the Commission on the actions taken to implement the Provisional





Measures issued against it within fifteen (15) days of the receipt of the request for Provisional Measures.

24. The Commission during its 52nd Ordinary Session which took place from 9 to 22 October 2012 in Yamoussoukro, Cote d'Ivoire, took note of the non-response of the Respondent State and decided to bring the matter to the attention of the relevant organs of the African Union (AU) and to proceed to consider the Communication at the admissibility level.
25. On 7 November 2012, the Complainants' submissions on Admissibility were forwarded to the Respondent State and the State was requested to submit on Admissibility within sixty (60) days.
26. On 1 March 2013, the Embassy of the Republic of Sudan in Dakar, Senegal, informed the Secretariat that the submissions of the Complainants which they had received were illegible. In response, the Secretariat re-transmitted the submissions on 5 March 2013, and informed the Complainants.
27. On 9 April 2013 and 10 June 2013, the Secretariat received letters from the Complainants raising preliminary objections relating to the Respondent State's submission on Admissibility and requesting that the Commission proceed to decide on the Admissibility of the Communication solely on the basis of the Complainants' submissions.
28. On 10 April 2013, the Secretariat received a *Note Verbale* from the Embassy of the Republic of Sudan in Dakar stating that the Respondent State is still not able to read the Complainants' submissions on Admissibility which were re-sent by the Secretariat on 5 March 2013.
29. On 21 June 2013, the Secretariat wrote to the Respondent State and the Complainants informing them that the matter will be tabled before the Commission at its next Session.
30. The Commission took a decision on the Admissibility of the Communication during its 14th Extra-Ordinary Session which took place in Nairobi, Kenya, from 20 to 24 July 2013 and both Parties were informed on 6 August 2013.
31. The Communication was deferred during the 55th Ordinary Session, and subsequent Extra-Ordinary Sessions of the Commission and both Parties were informed in March and June 2014 consecutively.





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32. On 4 June 2015, the Secretariat sent a *Note Verbale* reference number ACHPR/COMM/402/11-420//12/SUD/903/15 by post to the Respondent State's Embassy in Senegal notifying the Respondent's State that it has been granted a period of 30 calendar days from the date of the notification within which to file its written observations; and that the Commission will proceed to adopt a decision on the merits if the said observations are not received within the time prescribed.
33. On 3 November 2016, the Complainants requested the Commission to stay proceedings for a period of 12 months due to the steps that were being taken by the Respondent State to resolve the dispute locally.
34. With the time for the Respondent State to file its written submissions and after repeated reminders to submit its response to the Complainants' written brief on the merit, the Commission has now proceeded to decide the case on the merit in light of Respondent State's default.

Admissibility

The Complainants' Submission on Admissibility

35. According to the Complainants, in cases of serious and massive violations of human rights, the Commission needs to interpret the requirement of exhaustion of domestic remedies in light "of its duty to protect human and peoples' rights as provided for in the African Charter." Further, "the condition that internal remedies must have been exhausted cannot be applied literally to those cases in which it is neither practicable nor desirable for the complainants or the victims to pursue such internal channels of remedy in every case of violation of human rights. Such is the case where there are many victims."¹
36. The Complainants submitted that, in the present case, the Respondent's alleged indiscriminate bombing campaign is estimated to have resulted in "hundreds of thousands" victims, including internally displaced persons. According to the Complainants, non-governmental organisations (NGOs) reported that government authorities and the SAF forces committed mass human rights violations throughout 2012, including indiscriminate daily aerial bombardment by

¹ Communications 54/91-61/91-96/93-98/93-164/96-196/97-210/98 - *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*, para 85; see also Communications 27/89-46/91-49/91-99/93 - *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v Rwanda*, para. 17.



government forces in South Kordofan, the killing and injuring of civilians, and the deliberate destruction of grain and water sources, schools, farms, health clinics and other civilian property.²

37. The Complainants also submitted that significant number of women and girls were reportedly raped by SAF forces while fleeing their homes in South Kordofan's Nuba Mountains and "Sudanese government soldiers" reportedly arrested and detained hundreds of men, women and children, which resulted in the disappearance of some of those detained.³ In Blue Nile State, the SAF also allegedly carried out a bombing campaign starting in September 2011 which continued through 2012, displacing tens of thousands. Government security, police, and military forces were allegedly responsible for the extra-judicial killings, injury, arbitrary arrest, torture and ill-treatment of civilians in Damazin and other locations.⁴
38. The Complainants averred that the UN has estimated that there is a total of 665,000 internally displaced persons or severely affected people in South Kordofan (520,000 civilians) and Blue Nile (145,000 civilians). By the end of July 2012, the UN Refugee Agency – the United Nations High Commission for Refugees (UNHCR) – reported that the total number of persons from South Kordofan and Blue Nile who had fled to neighbouring countries to escape persecution had reached 204,000.⁵
39. The Complainants argue that there is no judicial system or mechanism in place in Sudan that can cope with the large number of victims in the present case. It would be impracticable to expect victims to exhaust any remedies in Sudan as they are "unavailable in fact".
40. The Complainants further argued that the Respondent State had ample notice of the human rights violations committed in South Kordofan. In particular, this include the Commission's request for Provisional Measures on 7 November 2011

² Human Rights Watch, 'Sudan: Crisis conditions in Southern Kordofan', 4 May 2012, at <http://www.hrw.org/news/2012/05/04/sudan-crisis-conditions-southern-kordofan>; Amnesty International, 'We can run away from bombs, but not from hunger- Sudan's refugees in South Sudan', June 2012, pp. 10-14. at http://www.amnestyusa.org/sites/default/files/3919_s_sudan_report_final_2.pdf.

³ Human Rights Watch, 'Sudan: Crisis Conditions in Southern Kordofan', 4 May 2012, at <http://www.hrw.org/news/2012/05/04/sudan-crisis-conditions-southern-kordofan>.

⁴ Human Rights Watch, 'Sudan: Blue Nile Civilians Describe Attacks, Abuses', 23 April 2012, at <http://www.hrw.org/news/2012/04/23/sudan-blue-nile-civilians-describe-attacks-abuses>.

⁵ OCHA, 'Sudan Weekly Humanitarian Bulletin, 23-29 July 2012' at <http://reliefweb.int/sites/reliefweb.int/files/resources/OCHA%20Sudan%20Weekly%20Humanitarian%20Bulletin%2023%20-%2029%20July%202012.pdf>.





urging the Government "to intervene in the matter with a view to preventing irreparable harm being caused to the victims". The Complainants noted that the AU, the UN and other international bodies have called on the Respondent State and the Sudan People's Liberation Army (SPLA) to end the violations in South Kordofan as early as 10 June 2011 and to end the violations in Blue Nile starting September 2011.⁶

41. The Complainants submitted that the Respondent State failed to take any measures to respond to the human rights violations committed in South Kordofan and Blue Nile and there is no indication that the Respondent State had acted upon the information on the alleged human rights violations in South Kordofan and Blue Nile.

42. The Complainants further argued that remedies for human rights violations as committed in South Kordofan and Blue Nile are ineffective and insufficient in the Respondent State. According to the Complainants, they are not required to exhaust any local remedy which is found to be, as a practical matter, unavailable, ineffective or insufficient. They cite the Commission's decision in *Dawda Jawara v The Gambia*, which states 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.*⁷

43. According to the Complainants, there are no effective domestic remedies for serious human rights violations such as those alleged in the Communication due to: (i) shortcomings in Sudan's legal framework, and (ii) a general climate of fear fostered by the Respondent State that prevents Victims from seeking remedies against human rights violations committed by government officials.

44. The Complainants added that broad provisions for immunities for a range of State officials further means that any "remedies" do not offer a prospect of success to victims of human rights violations in Sudan. In the present case, the violations are

⁶ United Nations, 'Sudan: UN calls for immediate end to reported army bombing of civilians', 7 September 2011, <http://www.un.org/apps/news/story.asp?NewsID=39482&Cr=kordofan&Cr1=&Kw1=blue+nile&Kw2=&Kw3=>; United Nations, 'Sudan: Ban urges end to fighting in Southern Kordofan and Blue Nile states', 2 September 2011,

<http://www.un.org/apps/news/story.asp?NewsID=39444&Cr=Kordofan&Cr1=&Kw1=blue+nile&Kw2=&Kw3=>.

⁷ Communication 147/95- 149/96 - *Sir Dawda K. Jawara v The Gambia*, para 32.





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primarily alleged to have been committed by soldiers of the SAF with the support of the Popular Defence Forces (PDF) and security forces.

45. Similarly, in Blue Nile, witnesses testified that SAF, militia and national security forces committed human rights violations. The Complainants made reference to Article 52 of the National Security Forces Act 2010, Article 46 of the Police Act 1999 and Article 34 of the Armed Forces Act 2007 which provide immunities for these officials, including soldiers, for any acts committed in the course of their duties. The immunities shield these officials from criminal prosecution and any civil suits unless the head of the respective forces, or in case of the Armed Forces, the President of the Republic, approves such legal action. Specifically, Article 34 (2) of the Armed Forces Act of 2007 provides that:

No proceedings shall be taken against any officer, or soldier, who commits an act, which constitutes an offence, which occurs in the course, or by reason of his/her discharge of his/her duties, or carrying out of any lawful order, issued thereto in this capacity thereof, and he/she shall not be tried, save upon permission, issued by the President of the Republic, or whoever he may authorize.

46. The Complainants averred that any complaint regarding crimes committed by a member of the security forces or soldier cannot therefore be pursued without impediment, as their immunity would need to be lifted for any investigation to proceed. Furthermore, they state that there is no judicial or administrative procedure in place that would enable victims in the present case to compel the relevant authorities or the President of the Republic, in relation to violations committed by members of the SAF, to waive immunity and undertake a full criminal investigation. The Complainants submitted that waiver of immunity is therefore entirely discretionary and immunity is rarely lifted in practice.
47. According to the Complainants, the most recent government campaign against human rights activists, lawyers, journalists, marginalised communities and individuals believed to be members of the opposition in Sudan extends to South Kordofan and Blue Nile. The Complainants submitted that the Darfur Relief and Documentation Centre reported on 8 March 2012 that an "unknown number of perceived political opponents, especially intellectuals and educated persons, human rights and pro-democracy activists originating from the Nuba Mountains, are held in government custody for prolonged periods and without judicial review." In April 2012, the International Rescue Committee reported that an





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increasing number of Nuba women and girls were raped while fleeing their homes in Nuba Mountains in South Kordofan.⁸

48. Considering that the Complainants raised a preliminary objection that any submissions by the Respondent State on admissibility falling outside the time frames established by the Rules of Procedure should not be entertained, the Commission notes that as a matter of due diligence, a party must be expected to raise issues of a technical nature such as illegibility following receipt of a submission, well within the applicable time period. Accepting such argument after the expiry of the time limit would result in an unmerited substantial extension of the time limit and would allow parties to employ them as delaying tactics.

The Commission's Analysis on Admissibility

49. Having established that the African Commission is competent to entertain the Communication before it, the African Commission will now proceed to analyse Admissibility of the Communication.
50. Article 56 of the African Charter sets out seven requirements that a Communication brought under Article 55 of the African Charter must satisfy in order to be admissible, which apply conjunctively and cumulatively.⁹
51. In the present Communication, the Respondent State has not made any submissions. Under such circumstances, as the jurisprudence of the Commission dictates in the case of the *Institute for Human Rights and Development in Africa v Republic of Angola*,¹⁰ "in the face of the state's failure to address itself to the complaint filed against it, the African Commission has no option but to proceed with its consideration of the Communication in accordance with its Rules of Procedure." In the same decision, the African Commission re-affirmed its position by ruling that "... it would proceed to consider Communications on the basis of the submission of the Complainants and information at its disposal, even if the State fails to submit."¹¹ Consequently, the Commission will rely on the

⁸ International Rescue Committee, 'Surge in refugees from South Kordofan fleeing into South Sudan', 13 April 2012, at <http://www.rescue.org/press-releases/press-release-surge-refugees-south-kordofan-fleeing-south-sudan-13491>.

⁹ See Communication 304/2005: FIDH & Others v Senegal (2006) ACHPR, paragraph 38.

¹⁰ Communication 292/04 - *Institute for Human Rights and Development in Africa v. Republic of Angola*, para. 34

¹¹ Ibid. The cases cited in this case are: Communication 155/96 - *Social and Economic Rights Action Center, Center for Economic and Social Rights v. Federal Republic of Nigeria*, and Communication 159/96 - *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre*



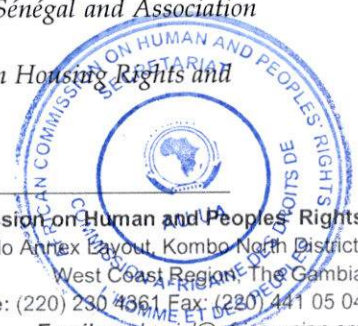


Complainants' submissions to pronounce on the Admissibility of the Communication.

52. In the present Communication, the authors have been indicated, the Communication is compatible with the provisions of the African Charter and the Constitutive act of the AU as it outlines a *prima facie* case of the violation of relevant Articles of the African Charter; it is not written in disparaging or insulting language, and the Communication has not been settled through other international procedures.
53. With regards to Article 56(5), the Complainants contended that they were not able to exhaust local remedies because domestic remedies were not available, effective and sufficient. It is in light of this submission that the Commission will proceed to determine on the availability, effectiveness and sufficiency of Sudanese local remedies to the Complainants.
54. The Complainants argued that there is no judicial system or mechanism in place in the Respondent State that can cope with the large number of victims in the present case and that it would be impracticable to expect victims to exhaust any remedies in Sudan as they are "unavailable in fact".
55. While the exhaustion of domestic remedies must in principle be considered in each individual case, the African Commission's jurisprudence in other cases of serious or massive violations of human rights committed in Sudan attests to the lack of effective remedies available in the Respondent State. In regard to massive human rights violations committed in Darfur, where "tens of thousands of people have allegedly been forcibly evicted and their property destroyed" the African Commission found that "in the present communication, the scale and nature of the alleged abuses, the number of persons involved *ipso facto* make local remedies unavailable, ineffective and insufficient."¹²
56. Similarly, the Commission found in *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of members of the Episcopal Conference of East Africa v Sudan* where hundreds of people were detained without charge and tortured that the "seriousness of the human rights situation in Sudan and the great number of people involved renders such remedies unavailable in

Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v. Republic of Angola.

¹² Communication 279/03- 296/05 - Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v The Sudan, para. 100





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fact, or, in the words of the African Charter, their procedure would probably be unduly prolonged.”¹³

57. In the present Communication, the Complainants contended that the Respondent State's disregard for the rule of law in combination with a general climate of fear fostered by the Respondent State, which includes recent government campaign against human rights activists, lawyers, journalists, marginalised communities and the raids against the populations of South Kordofan and Blue Nile, renders any potential remedy unavailable, as it exposes the Victims who seek to pursue legal avenues to significant risks to their security.
58. The Commission recognised in *Anuak Justice Council v Ethiopia* that a remedy may only be deemed available “if the petitioner can pursue it without impediments or if he can make use of it in the circumstances of his case. The word ‘available’ means readily obtainable; ‘accessible’ or ‘attainable, reachable’”.¹⁴ The Commission also held in *John D. Ouko v Kenya* that domestic remedies need not be exhausted where doing so would put victims at risk of their life.¹⁵
59. The Respondent State's campaign against human rights activists, lawyers, journalists, marginalised communities and individuals in South Kordofan and Blue Nile demonstrate the genuine risk to victims seeking to take judicial steps with a view to holding those responsible for human rights violations to account. The Complainants submitted that human rights violations continue to be committed in South Kordofan and Blue Nile on a daily basis with complete impunity. No specific provisions exist in Sudanese law or practice that would provide victims with protection. Under these circumstances, it would be “reversing the clock of justice to request the complainants to attempt to exhaust local remedies.”¹⁶ Therefore, for the aforementioned reasons and in line with its established jurisprudence, the Commission finds that domestic remedies were not available for the Victims because of fear for their lives and existing risks to their security.
60. The Complainants also submitted that local remedies are not effective as there exists broad provisions for immunities for SAF soldiers and Sudanese security

¹³ Communications 48/90, 50/91, 52/91, 89/93, para. 39

¹⁴ Communication 299/2005 - *Anuak Justice Council v Ethiopia*, para.51; Communication 379/09 - *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*

¹⁵ Communication 232/1999 - *John D. Ouko v Kenya*, para. 19.

¹⁶ *Sir Dawda Jawara v The Gambia*, para 40





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forces for any acts committed in the course of their duties.¹⁷ The immunities shield these officials from criminal prosecution and any civil suits unless the head of the respective forces, or in the case of the Armed Forces, the President of the Republic, approves such legal action. Moreover, they claim that there is no judicial or administrative procedure in place that would enable the Victims to compel the relevant authorities or the President of the Republic, in relation to violations committed by members of the SAF, to waive immunity and undertake a full criminal investigation. The waiver of immunity is therefore entirely discretionary.

61. The Commission has previously held that in light of the immunity provisions under Sudanese law, "it would be a mockery of justice to expect that the Victims would get justice from such a discretionary remedy."¹⁸ The Commission has made its position clear that 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. In *Constitutional Rights Project (in respect of Zamani Lakwot and Six Others) v Nigeria*¹⁹ and *Constitutional Rights Project (in respect of Wahab Akamu, G. Adeg and Others) v Nigeria*,²⁰ the Commission ruled that when the remedy is of a discretionary, extraordinary remedy of a non-judicial nature "it would be improper to insist on the Complainant seeking remedies from a source which does not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective".²¹
62. In line with the above reasoning, the Commission finds that the immunity provisions in Sudanese law render local remedies inadequate and ineffective.
63. Furthermore, it is the Commission's established jurisprudence that, the exhaustion of domestic remedies is not required in cases where it can be shown that a State failed to remedy a situation despite 'ample notice and time' to do so.²² In the present Communication, it is clear from the request for Provisional Measures issued by the Commission, the reports of the AU, UN and international NGOs that the Respondent State had ample notice of the alleged human rights violations in South Kordofan and Blue Nile State, and should have accordingly taken the

¹⁷ Namely Article 52 of the National Security Forces Act 2010, Article 46 of the Police Act 1999 and Article 34 of the Armed Forces Act 2007

¹⁸ Communication 379/09 - *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, para.67.

¹⁹ Communication 87/93 - *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v Nigeria*, para 8.

²⁰ Communication 60/91 - *Constitutional Rights Project v Nigeria*, para 10.

²¹ As above.

²² Communication 275/03 - *Article 19 v Eritrea*, paras 72, 77.





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necessary steps to investigate the matter. According to the Commission, the failure to take any action means that domestic remedies are not available or - even if they are - not effective or sufficient to address the alleged violations.²³

64. The Commission therefore holds that local remedies in the Respondent State were not available, effective and sufficient to the Complainants and hence the Complainants are waived from exhausting local remedies pursuant to Article 56(5) of the African Charter.

Decision of the African Commission on Admissibility

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

Merits

Summary of the parties' submissions

66. The only submissions on the merits that have been made before the African Commission on this matter are those of the Complainants. Despite several *Notes Verbale* to the Respondent State to file submissions on the merits, the latter has neglected, failed or refused to do so.

Complainants' submissions

67. The case of the Complainants before the Commission is summarised in the following paragraphs.

68. The Complainants submitted that the Respondent State committed massive and serious violations of the provisions of Articles 1, 2, 3, 4, 5, 6, 7(1)(a), 9(1), 12, 14, 16, 18, 19, 20, 21 and 23 of the African Charter, in no particular order.

(i) Alleged violation of the right to life (Article 4 of the African Charter)

69. The Complainants submitted that the SAF, PDF and other forces of the Respondent State carried out extrajudicial killings of a large number of persons living in South Kordofan and Blue Nile in violation of Article 4 of the African Charter.

²³ Communication 296/05 - *Centre on Housing Rights and Evictions v Sudan*, para 68





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(ii) Alleged violation of the prohibition of torture (Article 5 of the African Charter)

70. The Complainants submitted that the Respondent State is responsible for torture, ill-treatment, rape and sexual violence committed by various forces of the Respondent State in violation of Article 5 of the African Charter.

71. The Complainants also argued that the forced evictions, the destruction of homes and the poor living conditions endured by thousands of civilians as a result of forced displacement constitute ill-treatment in violation of Article 5 of the African Charter.²⁴

(iii) Alleged violation of the right to liberty and security (Article 6 of the African Charter)

72. The Complainants submitted that the arrests of many civilians, especially members of the Nuba ethnic group and others believed to be SPLM/A-North sympathisers, as well as UN peacekeepers and journalists, were arbitrary and constitute a violation of the right to security of the person guaranteed under Article 6 of the African Charter.

73. The Complainants argued that the SAF and NISS arrested large numbers of members of the Nuba ethnic group, SPLM political and civil society activists, civilians believed to support the SPLM/A-North, UN personnel and journalists.

74. The Complainants further submitted that the SAF and other forces failed to inform individuals of the reason for their arrest, refused to charge those detained, and neglected to grant them access to a lawyer and to their families.

75. The Complainants emphasized that those arrested and detained have not been able to challenge their arrest or detention before a judicial officer or judge.

76. The Complainants submitted that not only have the Respondent State's forces committed, and continue to commit, a wide range of human rights violations against civilians in the context of the conflict in South Kordofan and Blue Nile, but also that the Respondent State failed to take any steps to protect the physical integrity of its citizens, in violation of Article 6.

(iv) Alleged violation of the right to a remedy (Article 7(1)(a) of the African Charter)

77. The Complainants submitted that the Respondent State failed to provide victims of the alleged human rights violations with access to justice in violation of Article

²⁴ Communication 224/98 - *Media Rights Agenda v Nigeria*, para.71; Communication 97/93 - *John Modise v Botswana*, para. 92.



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7(1)(a) of the African Charter and the Commission's Principles and Guidelines on the Right to a Fair Trial and legal Assistance.

78. The Complainants submitted that despite the Respondent State's responsibility for serious and massive human rights violations resulting in a large number of victims in South Kordofan and Blue Nile, the victims have not had any access to a remedy and reparation to date.

79. The Complainants further submitted that the Respondent State has yet to respond to the Commission's two requests for provisional measures and to take the necessary steps to investigate the alleged violations, prosecute and punish those responsible, and provide reparation to victims in South Kordofan and Blue Nile. The Complainants further submitted that no cases are known where soldiers of the SAF or members of the security forces have been held accountable for human rights violations alleged to have been committed in both States, since the outbreak of hostilities on 5 June 2011 and September 2011, respectively.

(v) Alleged violation of the right to information (Article 9(1) of the African Charter)

80. The Complainants submitted that the Respondent State's restriction of the right of individuals to receive information by closing the region of South Kordofan and Blue Nile state to national and international media, and by preventing national media and journalists from reporting on the violations committed by the Respondent State in both states, constituted a violation of Article 9(1) of the African Charter.

81. The Complainants also submitted that the lockdown of South Kordofan and Blue Nile as well as the de-facto blanket ban on national and international media from accessing both States to report on the conduct of hostilities, ostensibly with a view to prevent reporting on human rights violations by SAF, PDF and NCP forces, are unjustifiable under the African Charter.

(vi) Alleged violation of the freedom of movement and residence (Article 12 of the African Charter)

82. The Complainants submitted that the Respondent State, by forcibly displacing civilians and by failing to ensure their safe return, has violated the right to residence and freedom of movement as enshrined in Article 12 of the African Charter.

83. The Complainants further submitted that many of those displaced as a result of the SAF's indiscriminate bombings were not permitted access to IDP camps but





rather forced to return to areas where their lives and safety were considered to be at risk.

(vii) Alleged destruction of civil property (Article 14 of the African Charter)

84. The Complainants submitted that the SAF's indiscriminate air and ground attacks on civilian life caused the destruction of churches, houses and other property, the abandonment of homes and the loss of livestock and other resources, and therefore amount to a violation of Article 14 of the African Charter.

(viii) Alleged violation of the right to health (Article 16 of the African Charter)

85. The Complainants submitted that the indiscriminate bombing campaign by the Respondent State led to the widespread destruction of homes and livestock and caused hundreds of thousands of persons to be cut off from drinking water, electricity and any medical aid, and constituted a violation of Article 16 of the African Charter.

(ix) Alleged violation of the protection of the family (Article 18(1) of the African Charter)

86. The Complainants submitted that the forced displacement of hundreds of thousands of civilians by the Respondent State's indiscriminate bombing campaign and other human rights violations resulted in a violation of the right to protection of the family under Article 18 (1) of the African Charter.

87. The Complainants submitted that the fear of aerial bombardment by the Respondent State has forced civilians to leave behind family members, including children as well as the elderly.

(x) Alleged discrimination against women (Article 18(3) of the African Charter)

88. The Complainants submitted that the Respondent State's forces and authorities have committed widespread acts of sexual violence specifically targeted at women and girls in violation of Article 18(3) of the African Charter.

89. The Complainants submitted that by specifically committing sexual violence against female Sudanese civilians, the violations "are gender-specific in the sense that the victims were subjected to acts of sexual harassment and physical violence that can only be directed to women."

(xi) Alleged discriminatory treatment on other grounds (Article 2 of the African Charter)

90. The Complainants submitted that the Respondent State is responsible for discriminatory treatment of civilians in South Kordofan, Blue Nile as well as other areas in Sudan on the basis of sex, colour, race and ethnicity, and political opinion in violation of Article 2 of the African Charter.





(xii) *Alleged violation of the Nuba's collective rights (Articles 19, 20, 21 and 23 of the African Charter)*

91. The Complainants submitted that the Respondent State's assault on members of the Nuba ethnic group violates their collective rights as a "people" under the African Charter. Specifically, they submitted that the Respondent State is responsible for violations of the Nuba people's right to equality under Article 19; their right to existence and self-determination under Article 20; their right to freely dispose of their wealth and natural resources under Article 21(1) and (2); and their right to peace and security under Article 23(1) of the African Charter.
92. The Complainants submitted that, due to the history of targeted violations committed by the Respondent State against the Nuba people during the conflict in South Kordofan, militias and government forces in South Kordofan killed individuals because they belonged to the Nuba.
93. The Complainants submitted that the Respondent State has denied the Nuba their fundamental rights enshrined in the African Charter, including their right to life, to be free from torture and ill-treatment, and to liberty and security of the person.
94. The Complainants submitted that based on the continued and specially targeted violations against this group, the Nuba cannot enjoy the same respect and the same rights as others in Sudan in violation of Article 19 of the African Charter.
95. The Complainants submitted that the scale of the human rights violations committed by the Respondent State's forces against the Nuba people threatens their existence as a people in violation of Article 20 of the African Charter.
96. The Complainants also submitted that the Respondent State's forces destroyed wealth and natural resources in the Nuba Mountains without providing any compensation to the Nuba People in violation of Article 21(1) and (2) of the African Charter.
97. The Complainants submitted that the destruction of thousands of homes and cultivated land in the Nuba Mountains has effectively denied the inhabitants their right to dispose of their own wealth without compensation.
98. The Complainants submitted that the Respondent State is furthermore responsible for violating the Nuba peoples' right to national peace and security through the unprovoked attacks on villages by state forces.





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(xiii) *Alleged violation of the right to equal protection of the law (Article 3(2) of the Charter)*

99. The Complainants submitted that the Respondent State's failure to guarantee a fair and just treatment of individuals and ensure the equal protection of the law amounts to a violation of Article 3(2) of the African Charter.

(xiv) *Alleged violation of Articles 1 of the African Charter*

100. The Complainants submitted that the Respondent State's failure to take reasonable and necessary steps to prevent and adequately respond to the violations alleged in the complaint and the failure to implement the African Commission's request for provisional measures amount to a violation of Article 1 of the African Charter.

101. On the basis of these submissions, the Complainants urged the Commission to find that the Respondent State has violated the provisions of the African Charter and grant the remedies sought.

B. Respondent State's submissions

102. As indicated above, the Respondent State did not submit its observations on the merits, despite ample reminders by the Secretariat of the African Commission. In the absence of any submissions by the Respondent and the time for the Respondent State to enter its submissions having elapsed, the Commission is entitled to proceed to enter a default decision on the merits in accordance with the relevant provisions of the Commission's 2010 Rules of Procedure.

The Commission's Analysis on the Merits

103. Having considered the submissions of the Complainants on the merits, the Commission will analyse the arguments and evidence furnished by the Complainants.

Alleged violation of Article 4 of the African Charter

104. The Complainants alleged that the Respondent State violated the provisions of Article 4 of the African Charter, through the extrajudicial killings of a large number of persons in South Kordofan and Blue Nile. The killings, the Complainants claimed, were perpetrated by the SAF, the PDF and other forces of the Respondent State.

105. 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 may be arbitrarily deprived of this right.





106. In the jurisprudence of the African Commission, the right to life is foundational to the exercise of all other rights. Under the African Charter, the right to life applies to all persons, at all times, and it cannot be derogated from.²⁵ This is because without life, all other rights cannot be exercised.
107. In the case of *Forum of Conscience v Sierra Leone*,²⁶ the Commission held that “[t]he right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life.”²⁷
108. Similarly, in General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), the Commission notes that:
- The right to life is universally recognised as a foundational human right. It is guaranteed by Article 4 of the African Charter and all of the other main global and regional human rights instruments. The right not to be arbitrarily deprived of one’s life is recognised as part of customary international law and the general principles of law, and is also recognised as a jus cogens norm, universally binding at all times. The right to life is contained in the constitutions and other legal provisions of the vast majority of African and other States. All national legal systems criminalise murder, and arbitrary killings committed or tolerated by the State are a matter of the utmost gravity.*²⁸
109. By the tenor of this interpretation, State Parties have an obligation under the African Charter to refrain from the arbitrary and unlawful deprivation of life. State Parties have an obligation to protect human life against unwarranted or arbitrary actions by security forces and private persons. In the case of *Gabriel Shumba v Zimbabwe*,²⁹ the Commission noted that the right to life enshrined in Article 4 of the African Charter is the supreme right of the human being. As the Commission rightly held in that case, the deprivation of life by the authorities of the state is a matter of utmost gravity which requires that State Parties under the African Charter have a responsibility to strictly control and limit the circumstances under which a person may be deprived of life by State authorities.

²⁵ Communication 74/92 - *Commission Nationale des Droits de l’Homme et des Libertés v Chad*, para 21.

²⁶ (2000) AHRLR 293 (ACHPR 2000) para 19.

²⁷ Communication 288/04 - *Gabriel Shumba v Zimbabwe* (2012) para. 130.

²⁸ ACHPR General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4) para 5.

²⁹ Communication 288/04, para. 130.





110. In General Comment 6 on the Right to Life in Article 6 of the International Covenant on Civil and Political Rights,³⁰ UN Human Rights Committee clarified that the right to life under the Covenant impose an obligation on States Parties not only to refrain from the intentional and unlawful deprivation of life but also to protect human life against unwarranted or arbitrary actions by public authorities and private persons.³¹
111. The Commission, in *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*,³² noted that it is the duty of the State to protect human life from arbitrary and unwarranted actions by both public authorities and private persons. This duty must be broadly interpreted to include prohibitions of arbitrary killings by state security services and to strictly regulate the circumstances in which a person may be deprived of life by state authorities. It also includes the necessity to secure the right to life by making effective provisions in criminal law to deter the commission of offences against the person, to conduct effective official investigations when individuals have been killed as a result of the use of force by State agents, and to establish law enforcement machinery for the prevention, suppression, investigation and penalisation of breaches of criminal law. The Commission further noted that the State is duty bound to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.
112. In *Article 19 v Eritrea (Article 19 case)*,³³ the Commission noted that arbitrariness should not be equated with an act being “against the law” but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process.
113. In the instant case, the facts of multiple killings of civilians in South Kordofan and Blue Nile by Security forces of the Respondent State are well established. Besides the latest pieces of documentary evidence in support of the allegations by the Complainants, there is well documented evidence showing not only the indiscriminate aerial bombardment and shelling of civilians by the security forces

³⁰ UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982 <https://www.refworld.org/docid/45388400a.html> [accessed 8 October 2022] para 3.

³¹ Communication No. 245/02 - *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para. 86 (quoting Communication 223/98 - *Forum of Conscience v Sierra Leone*). Also see Communications 279/03-296/05 - *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan* paras 150-153.

³² *Sudan Human Rights Organisation case* (n 30 above), para 147.

³³ (2007) AHRLR 73 (ACHPR 2007) para 93.





of the Respondent State, but also the bombing and shelling of civilian areas throughout both regions.³⁴

114. In its 5 November 2011 Resolution on the General Human Rights Situation in Africa - ACHPR/Res.207(L)2011, the Commission observed that it was concerned about:

*the indiscriminate aerial bombardment of civilian targets, and causing death among the populations, destruction of houses and the systematic displacement of civilian populations destruction of habitat and purposeful displacement of civilian populations, extrajudicial killings and forced disappearances of members of the indigenous tribes of these regions.*³⁵

115. Similarly, in its Concluding Observations and Recommendations on the 4th and 5th Periodic Reports of the Republic of Sudan, the Commission observed that:

Government forces persistently and indiscriminately bomb civilian areas across the Nuba Mountains, forcing people to seek shelter in caves and in mountains, where they lack food, shelter, and access to basic needs such as water and sanitation.

116. These observations are in addition to public reports by the UN, the Sudan Democracy First Group, Amnesty International, Human Rights Watch, and other civil society organisations showing the arbitrary deprivation of life by security personnel of the Respondent State. In the face of the preponderance of evidence demonstrating the wanton destruction of human lives, the government did not provide any explanation for the actions of its security personnel.

117. In light of the failure of the Respondent State to refute these allegations, the Commission is entitled to find that the various killings of civilians in South Kordofan and Blue Nile demonstrate, jointly and severally, government's

³⁴ Human Rights Watch 'Under siege: Indiscriminate bombing and abuses in Sudan's Southern Kordofan and Blue Nile States' (11 December 2012) pp. 20-21, 34-39; Amnesty International 'We can run away from bombs, but not from hunger- Sudan's refugees in South Sudan' June 2012

<https://www.amnesty.org/en/documents/afr65/001/2012/en/>; UN Human Rights Committee, 'General Comment 6, Article 6, 16th session, UN', Doc. HRI/GEN/1/Rev.1, 1994, para.3; Sudan Democracy First Group 'Ethnic Cleansing Once Again: South Kordofan/ Nuba Mountains' 13 June 2011 http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=38972; The Enough Project, 'Sudan Field Dispatch: Refugees Provide Details of Attacks in Isolated Blue Nile State' http://www.enoughproject.org/files/Blue_Nile_Dispatch_20120723.pdf.

³⁵ African Commission "Resolution on the General Human Rights Situation in Africa - ACHPR/Res.207(L)2011" adopted during the 50th Ordinary Session, Banjul, the Gambia, 24th October - 5th November 2011.





responsibility for the violations of Article 4. As such, the Commission finds that the Respondent State violated the provision of Article 4 of the African Charter.

Alleged violation of Article 5 of the African Charter

118. The Complainants alleged that the Respondent State is responsible for torture and ill-treatment committed by its various forces in violation of Article 5.

119. Article 5 of the African Charter provides that:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

120. A basic interpretation of the text shows that Article 5 of the African Charter not only guarantees respect for the dignity inherent in the human person but also guarantees the recognition of his or her legal status. It further prohibits all forms of exploitation and degradation of man or woman, including slavery, slave trade and torture, cruel, inhuman or degrading punishment and treatment.

121. This implies that Article 5 of the African Charter permits no restrictions or limitations on the right to be free from torture and cruel, inhuman or degrading punishment or treatment. In the *Article 19* case,³⁶ the Commission held that the right to freedom from torture and cruel, inhuman and degrading treatment, cannot be derogated from for any reason, in whatever circumstances.

122. The Commission, in *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (*Mouvement Burkinabé* case),³⁷ noted that any act resulting in the forced disappearance of a person prevents the victim from the protection of the law and causes immense suffering to that person and his or her family.³⁸ In this case, the Complainants submitted that the enforced disappearance of individuals in South Kordofan and Blue Nile constitute a violation of Article 5, both of the right of the person forcibly disappeared and the right of his or her family members to be free from torture or inhuman and degrading treatment.

123. The Commission also notes that the enforced disappearance of identified and unidentified individuals in South Kordofan and Blue Nile constitute a violation of

³⁶ (2007) AHRLR 73 (ACHPR 2007) para 98.

³⁷ Communication No. 204/97 (2001) - *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*, [2001] ACHPR 32; (7 MAY 2001).

³⁸ *Mouvement Burkinabé* (n 36 above) para 44.





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Article 5, both in respect of the right of the person forcibly disappeared and that of their family members. In the *Mouvement Burkinabé* case,³⁹ the Commission not only noted that the enforced disappearances of political opponents constituted a violation of Article 5, but also held that:

Article 5 of the Charter guarantees respect for the dignity inherent in the human person and the recognition of his legal status. This text further prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture cruel, inhuman or degrading punishment and treatment. The guarantee of the physical integrity and security of the person is also enshrined in Article 6 of the African Charter, as well as in the Declaration on the Protection of all Persons against Forced Disappearances, adopted by the General Assembly of the United Nations in Resolution 47/133 of 18th December 1992, which stipulates in article 1(2) that "any act leading to forced disappearance excludes the victim from the protection of the law and causes grave suffering to the victim and his family. It constitutes a violation of the rules of international law, especially those that guarantee to all the right to the recognition of their legal status, the right to freedom and security of their person and the right not be subjected to torture or any other inhuman or degrading punishment or treatment. It also violates the right to life or seriously imperils it.

124. The Complainants have submitted that during the first months of the conflict in South Kordofan, between June 2011 and November 2012, the SAF and other security services of the Respondent State carried out arbitrary arrests, detention, torture and enforced disappearances and in the process subjected members of the Nuba ethnic group in South Kordofan and Blue Nile to beatings and kicking, rape and other forms of sexual violence, destruction of properties, forced evictions and displacement in violation of Article 5 of the African Charter.
125. In particular, the Complainants listed specific violations of Article 5 to include: the detention in June 2011 of four UN Peacekeepers and subjecting them to a mock firing squad; the detention in June 2011 of an Al Jazeera TV team, who were beaten with Rifle butts and threatened to be killed at the Security Authority Headquarters and a police station; the arbitrary arrests in June 2011 of over a hundred civilians in and around Kadugli, some of whom were reportedly tortured before being transferred to Khartoum; the arrest and detention on 20 June 2011 of a young Nubian woman, who was interrogated about her work with an international NGO while being beaten with fists, sticks, rubber hoses, and electric wires; the arrest, detention and torture in December 2011 by the NISS of three young men (Musa

³⁹ Communication No. 204/97 (2001) - *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, para 44.





Bakhit, Al Fadul Altoum and Hamdeen Eisa Al Nour) belonging to the Misseriya tribe, between Hajlij and Muglad in South Kordofan.

126. Other acts of ill-treatment and torture which the Complainants alleged include: the arrest on 17 January 2012 of Mr Fathi Bashir El-Feil, a pro-democracy activist from Al-Abasya Tagali in South Kordofan and the threatening of his family by security forces; the detention, interrogation and torture on 18 May 2012 of a Nuban high school student on the accusation of being a rebel; the arrest of Omaia Abdel Latif Hassan Omaia, a media representative of the SPLM-North on 22 August 2012 and incommunicado detention, since his transfer from Tajmala to Talodi in South Kordofan, on 3 November 2012; the arrest on 24 October 2012, detention and beating of 22-year old mother of two, Sarah L, along with 35 other women by Sudanese security officials, in a national detention facility inside Kadugli town.
127. The Complainants also alleged that, on 10 and 11 November 2012, the security forces of the Respondent State placed 34 women in incommunicado detention without access to their lawyers or families and without access to medical facilities. They claimed that while 14 of these women were released on 14 April 2013, the remaining 20 women remained detained without any charges until they were subsequently released on 10 July 2013.
128. The Complainants claimed that, on 18 November 2012, 60 civilians were reportedly arrested in Dilling, South Kordofan, and taken to the military barracks, before being transferred to Kadugli. They claimed that the 60 detainees, most of whom were from the 'Oncho' tribe, which is part of the Nuba ethnic group, were denied access to their families and legal representation, and were not released until they had bribed the security officials who kept them captive.
129. The Complainants submitted that, in Blue Nile, the security forces of the Respondent State have reportedly arrested young Sudanese men on the accusation of being SPLM/ A-North soldiers, and placed them in a crowded cell for extended periods. They claim that those held in the cells have had their hands tied and beaten with belts on their feet and hands, have been threatened, and witnessed a military officer shooting two men in the head.
130. The Commission notes from the documentary evidence submitted before it that the alleged targeting of ethnic Nuba and perceived or actual sympathizers of the SPLM/ A-North extended beyond the conflict areas to other areas of Sudan. Documented reports by national and international civil society groups show how the Sudanese authorities have arbitrarily arrested, detained, tortured and ill-



treated persons believed to be members of the Nuba ethnic groups, activists acting on their behalf, as well as suspected SPLM/ A sympathisers.

131. As the Commission has held in the *Article 19* case,⁴⁰ “where allegations are not disputed by the state involved, the Commission may take the facts as provided by the complainant as a given.” In the same way, where the Respondent State in this case does not dispute the factual allegations of the Complainants, the Commission has the discretion to take the facts as a given.
132. Therefore, the Commission finds that the deliberate inhuman treatment of members of South Kordofan and Blue Nile, including the rape and other forms of sexual violence, violent assaults and enforced disappearances causing serious physical and psychological suffering that amount to torture and ill-treatment, violates Article 5 of the African Charter. The Commission also finds that, regardless of the accusations leveled against those arrested and detained, the ill-treatment, brutalisation and torment of those in detention by the security personnel of the Respondent State with the intention to cause physical and psychological harm are inhuman and unjustified and amounted to a clear violation of Article 5 of the African Charter.

Alleged violation of Article 6 of the African Charter

133. The Complainants alleged that the arbitrary arrests of a large number of civilians, in particular, members of ethnic groups such as Nuba and others believed to be SPLM/ A-North sympathisers, as well as UN peacekeepers and journalists as well as the enforced disappearances of identified and unidentified individuals constitute a violation of the liberty and security of the person under Article 6 of the African Charter.
134. Article 6 of the African Charter provides that:
- Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.*
135. Deprivation of liberty through arbitrary arrests, detention and enforced disappearances contravenes the very essence of Article 6 of the African Charter. Where violation of Article 6 is widespread, as is evident in this case, and shown to have been perpetrated by the Respondent State, the Commission has no option but to find the Respondent State and its security personnel responsible.

⁴⁰ *Article 19* case (n 32 above) para 102.





136. In the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Commission affirms in relation to the obligation of State Parties under Article 6 of the African Charter 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 authorised for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause.

137. This means that the security personnel in the Respondent State must refrain from arresting, detaining, or imprisoning individuals or groups in flagrant disregard of due process of law or without legal justification. In *Article 19* case, the Commission noted that while arrests and detention may be legal according to domestic law, it will be arbitrary and therefore unlawful if it is inappropriate, unreasonable, unjustified and unpredictable.⁴¹
138. In the present case, the SAF and NISS arrested large numbers of members of the Nuba ethnic group, SPLM political and civil society activists, civilians believed to support the SPLM/A-North, UN personnel and journalists. The arrests and detention were made primarily on the basis of the individuals' perceived opposition to the government rather than on the ground of reasonable and justifiable suspicion against them, in violation of Sudanese laws. In the absence of any due process of law being followed in the arrests and detention of civilians in South Kordofan and Blue Nile and given the lack of any reasonable or justifiable explanation by the Respondent State, the Commission finds that the arrests and detention were arbitrary and in violation of Article 6.
139. It is also pertinent to emphasise that the existence of conflict in the two affected regions of the Respondent State does not justify any arbitrary measures adopted by the military and intelligence authorities in the Respondent State. This is especially so considering that due to the violent acts of the Respondent State's authorities, about 695, 000 people have been displaced internally as of August 2013, while 225, 000 were living in refugee camps in Ethiopia or South Sudan.
140. In the *Article 19* case, the Commission citing with approval the decision of the UN Human Rights Committee in the case of *Albert Mukong v Cameroon*⁴², noted

⁴¹ *Article 19* case (n 32 above) para 93.

⁴² Communication No. 458/1991 10 August 1994.





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that the existence of conflict or war cannot be used as a justification by a State Party for violation of the provisions of the African Charter.⁴³

141. In the present case, the Respondent State did not file any submissions in response to the Complainants' allegations that its national security agencies carried out arrests, detention, and enforced disappearances of persons who are either members of the Nuba ethnic group or perceived to be SPLM/A – North sympathizers. In the absence of any concrete steps on the part of the State to bring the victims of arrests, detention and enforced disappearances to court several days, months or, sometimes, indefinitely after the fact, or to allow them access to their legal representatives, the African Commission is persuaded to conclude that there is no reasonable justification for these violations. Arrests and detentions which are carried out without recourse to due process of law amount to arbitrariness.

142. As such, the Commission finds that the arrests, detention and enforced disappearances of civilians in South Kordofan and Blue Nile were unjustified and amount to a violation of Article 6 of the African Charter.

Alleged violation of Article 7(1)(a) of the African Charter

143. The Complainants alleged that the Respondent State failed to provide the victims of human rights violations with access to justice in violation of Article 7(1)(a) of the African Charter.

144. Article 7(1)(a) provides that:

Every individual shall have the right to have his cause heard. This comprises:

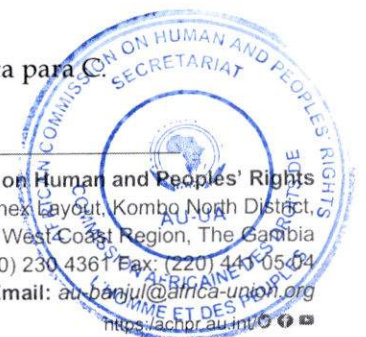
(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulation and customs in force;

145. Article 7(1)(a) of the African Charter guarantees the right of fair trial and effective remedies to everyone. States have an obligation under the African Charter to ensure that anyone whose rights have been violated has an effective remedy by an appropriate judicial body.⁴⁴

146. In amplifying the right to fair trial and effective remedy under the African Charter, the Commission notes, in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, that everyone has the right to an effective

⁴³ Article 19 case (n 32 above) para 87.

⁴⁴ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa para C.





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remedy by competent national tribunals for acts violating the rights guaranteed by the Constitution, the law or the African Charter, regardless of whether the acts were committed by persons acting in an official capacity.⁴⁵ The Commission also notes that the right to an effective remedy includes: access to justice; reparation for the harm suffered; and access to the factual information concerning the violations.

147. In the present case, there is no doubt that the incommunicado detention of hundreds of civilians in South Kordofan and Blue Nile without trial not only runs contrary to the Sudanese Constitution, but also violates the provisions of Article 7(1)(a) of the African Charter.
148. The Commission, therefore, finds that the arbitrary arrests, incommunicado detention and detention without trial of large numbers of civilians in the two affected regions of the Respondent State over the course of two years amounts to massive violations of not only the right to liberty and security of the person but also of access to effective remedies. As with its undertaking under the African Charter, the Respondent State has an obligation to apply due process of law in relation to persons who have been subject of arrests and detention and to guarantee their right to a fair trial before a competent court or tribunal.
149. The right to effective remedies under Article 7(1)(a) of the African Charter entails the obligation on the part of the Respondent State to investigate, try and punish violators of human rights among its security personnel. The failure and neglect on the part of the Respondent to respect this right, in relation to those arbitrarily arrested and detained without trial, within a reasonable time or to hold those members of its security agencies responsible for various human rights violations, amounts to a violation of the right to a remedy under the African Charter.
150. As such, the Commission finds that the Respondent State's arrests, prolonged detention without trial and incommunicado detention of hundreds of civilians were arbitrary and violated Article 7(1)(a) of the African Charter.

Alleged violation of Article 9(1) of the African Charter

151. The Complainants alleged that by effectively closing the region of South Kordofan and Blue Nile states to national and international media, and by preventing national media from reporting on the violations committed by the Respondent State in both states, the Respondent State restricted the right of

⁴⁵ As above, para C.





individuals to receive information in violation of Article 9(1) of the African Charter.

152. Article 9(1) of the African Charter provides that "[e]very individual shall have the right to receive information."
153. By the tenor of this provision, the right to freedom of expression and access to information is guaranteed under the African Charter, and form part of the basic components for the promotion of participation, democracy and accountability on the continent. Under the African Charter, this right comprises the right to receive information and express opinions.⁴⁶
154. In *Constitutional Rights Project and Another v Nigeria*,⁴⁷ the Commission held that "[f]reedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and participation in the conduct of public affairs in his country."
155. In the present case, the government did not provide any response to the allegations pertaining to the restriction of civilians' right of access to information as well as the restriction of media practitioners and journalists from reporting on the conflict in South Kordofan and Blue Nile. The Commission recalls its Concluding Observations on the Respondent State's 4th and 5th Periodic Report that "[m]edia practitioners are often arrested, imprisoned, beaten and tortured for doing their jobs."⁴⁸
156. The Commission has noted severally in its jurisprudence that, the African Charter does not contain a derogation clause.⁴⁹ This implies that the right of individuals to express themselves and disseminate their opinions "within the law" does not give States a carte blanche prerogative to restrict the right to freedom of expression and the press, under the African Charter, in times of war or conflict. For this reason, any limitation of a right contained in the African Charter must be in accordance with the provisions of Charter.⁵⁰

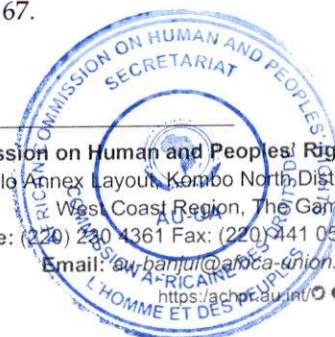
⁴⁶ Also see *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 54.

⁴⁷ (2000) AHRLR 227 (ACHPR 1999) para 36.

⁴⁸ African Commission, 'Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan', adopted at the 12th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights held from 29 July to 4 August 2012, Algiers, Algeria, para. 45.

⁴⁹ *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) paras 38 & 41; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 67.

⁵⁰ *Article 19* case (n 32 above) para 105.





157. The only legitimate reasons for limitations to the rights and freedoms enshrined in the African Charter can be found in Article 27(2), which is that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest". As such, for any restriction of a right recognised in the African Charter to be reasonably justified, it must be in conformity with the obligations of the State Party and must be legitimate, absolutely necessary and strictly proportionate to the intended goal being pursued by the Government.
158. In *Media Rights Agenda and Others v Nigeria* (Media Rights case),⁵¹ the Commission held that where a State Party has sought to restrict the rights enshrined in the African Charter, "[t]he reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained."⁵² The Commission further noted that "[e]ven more important, a limitation may never have as a consequence that the right itself becomes illusory."⁵³
159. In this case, the evidence shows that the people of South Kordofan and Blue Nile, especially those of Nuba ethnic origin, had been deliberately cut-off from having access to national and international media and from effective media coverage of the violations committed by the Respondent State in South Kordofan and Blue Nile. Not only has the restriction of access been done without any legitimate aim, it is disproportionate to and absolutely unnecessary for whatever the intended aim of the Respondent State sought to obtain.
160. In *Civil Liberties Organisation (in respect of Bar Association) v Nigeria*,⁵⁴ the Commission held that, as a general principle, competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards. The Commission also stated that:

Government should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law. No situation

⁵¹ (2000) AHRLR 200 (ACHPR 1998).

⁵² *Media Rights case* (n 50 above) para 69.

⁵³ *Media Rights case* (n 50 above) para 70.

⁵⁴ *Communication 101/93 – Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995), para 15.



justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counterproductive.⁵⁵

161. In the absence of any rebuttal from the Respondent State, the Commission is left with no option than to accept as true that there is no justification for their occurrence.

162. The Commission, therefore, finds that the restriction on the freedom of expression, access to information and on local and international media are unjustified, illegitimate, disproportionate, and absolutely unnecessary and therefore amounts to a violation of Article 9(1) of the African Charter.

Alleged violation of Article 12 of the African Charter

163. The Complainants alleged that, by forcibly displacing civilians and by failing to ensure their safe return, the Respondent State has violated the right to residence and freedom of movement as enshrined in Article 12 of the African Charter.

164. Article 12 of the African Charter provides that:

Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.

165. Free movement is crucial for the protection and promotion of human rights and fundamental freedoms.⁵⁶ This implies that, under the African Charter, the right to protection from displacement arises from the right to freedom of movement and residence within the borders of a State as recognised by the African Charter.

166. As the Commission has earlier noted in its jurisprudence, the right to freedom of movement and enjoyment of residence is a right guaranteed under the African Charter to all individuals within a state. Freedom of movement is a right firmly enshrined in international human rights instruments and the Constitutions of numerous States. It entails that a citizen of a State generally has the right to leave that State and return at any time. It also includes the right to travel to, reside or work in, any part of the State the individual wishes without interference from the State.

167. Moreover, the proviso for individuals to abide by the law as a condition for the enjoyment of the right to freedom of movement and residence does not create a limitation under the Charter. For a restriction on the freedom of movement or

⁵⁵ As above.

⁵⁶ *Sudan Human Rights Organisation case* (n 30 above) para 187.





residence to be reasonably justified, the onus is on the Respondent State to show that the limitation on the right, seeks to achieve a legitimate aim, is absolutely necessary and strictly proportional. This onus has neither been rebutted nor dispensed with by the Respondent State in this case.

168. In the *Sudan Human Rights Organisation* case, the Commission held that:

*Freedom of movement and residence are two sides of the same coin. States therefore have a duty to ensure that the exercise of these rights is not subjected to arbitrary restrictions. Restrictions on the enjoyment of these rights should be proportionate and necessary to respond to a specific public need or pursue a legitimate aim. Under international law, it is the duty of States to take all measures to avoid conditions which might lead to displacement and thus impact the enjoyment of freedom of movement and residence.*⁵⁷

169. In *General Comment No.5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1))*, the Commission clarifies that the right to freedom of movement imposes a duty on the State not to interfere with the enjoyment of the free movement of individuals. This duty includes not imposing or allowing impediments, whether social constructed or politically driven, in the lawful exercise of the freedom to choose residence.⁵⁸ The Commission also noted that, by the very nature of the territorial component of Article 12, State Parties are required to protect the right to freedom of movement of every person primarily within their borders, which includes every political and administrative subdivisions of States.⁵⁹

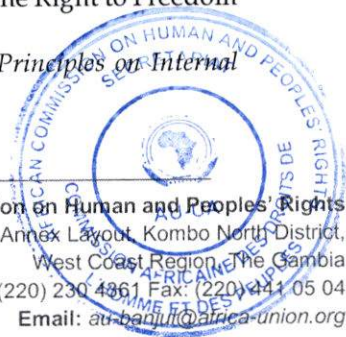
170. Similarly, under *Principle 5 of the UN Guiding Principles on Internal Displacement*, national authorities and international actors are required to adhere to international law in relation to their obligations to respect and ensure respect for human rights and humanitarian law, in order to prevent or avoid situations that can lead to internal displacement.⁶⁰

⁵⁷ *Sudan Human Rights Organisation* case (n 30 above) para 188.

⁵⁸ *General Comment No.5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1))*, paras 9 & 11.

⁵⁹ *General Comment No.5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1))*, para 12.

⁶⁰ United Nations Office for the Coordination of Humanitarian Affairs *Guiding Principles on Internal Displacement* (2004) Principle 5.





171. In the instant case, the Respondent had a clear duty under the African Charter to prevent the displacement of the civilian population, and to protect and assist those impacted by violence and armed conflict from the impact of the conflict.
172. The failure of the Respondent State to prevent or mitigate the involuntary movement or forced displacement of civilian populations in South Kordofan and Blue Nile or to protect those who have been forcibly displaced in the two regions amounts to a violation of the provision of Article 12 of the African Charter.

Alleged violation of Article 14 of the African Charter

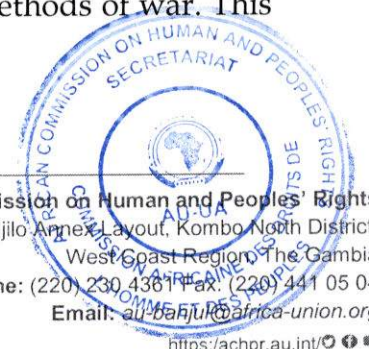
173. The Complainants alleged that the SAF's indiscriminate air and ground attacks on civilian life caused the destruction of churches, houses and other property, the abandonment of homes, and the loss of livestock and other resources in violation of Article 14 of the African Charter.

174. Article 14 provides that:

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

175. This suggests that, under Article 14 of the African Charter, not only is the right to property and the peaceful enjoyment of property guaranteed, but that the arbitrary deprivation of property is also prohibited. State Parties have a responsibility to protect the right to property of citizens from encroachment, including interference with the peaceful and quiet enjoyment of property.
176. The destruction of civilian homes, buildings and other structures as well as cultivated land and property by the armed forces of the Respondent State have led individuals and groups to be displaced or flee their ordinary places of abode. As the African Commission noted in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (SERAC case),⁶¹ "when housing is destroyed, property, health and family life are adversely affected."
177. In the *UN Principles on Housing and Property Restitution for Refugees and Displaced Persons* ('Pinheiro Principles'), everyone is entitled to be protected against arbitrary displacement from his or her home, land or place of habitual residence. The protection of this right entails that States must prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of lands as a punitive measure or a means of methods of war. This

⁶¹ (2001) AHRLR 60 (ACHPR 2001), para 60.





obligation, under the Pinheiro Principles, also entails that States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors.⁶²

178. In the instant case, it is evident in the absence of any rebuttal by the Respondent State that the victims of displacement in South Kordofan and Blue Nile have both been displaced from their residences and denied their right to peaceful enjoyment of property.

179. The Commission finds that the displacement of civilians from the lawful and quiet enjoyment of property amounts to a violation of Article 14 of the African Charter.

Alleged violation of Article 16 of the African Charter

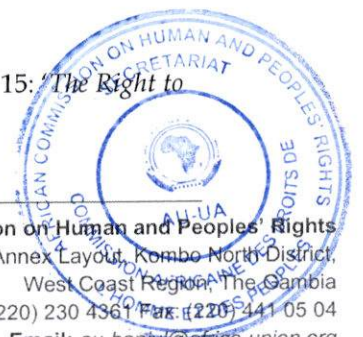
180. The Complainants alleged that the attacks on civilians, subsequent displacement and failure of the Respondent State to provide basic services violated Article 16 of the African Charter. The Complainants claimed that the bombardment of civilians, their homes, farms and dwelling areas, which cut them off from drinking water, food, electricity and medical aid, constitute a violation of Article 16 of the African Charter.

181. Article 16 of the African Charter guarantees that "[e]very individual shall have the right to enjoy the best attainable state of physical and mental health." This right entails the obligation of state parties to take the necessary steps to protect the health of their people and to ensure that they receive appropriate medical attention when they are sick. The right to the best attainable state of physical and mental health also entails both a positive obligation on the part of the State to progressively realise the right of access to the basic necessities for good health such as food, water and healthcare, and a negative obligation to not impede access by the civilian population to these necessities.

182. In this regard, the Commission takes inspiration from the work of the UN Committee on Economic, Social and Cultural Rights. In General Comment No. 15 on The Right to Water, for example, the UN Committee on Economic, Social and Cultural Rights states that the right to water is inextricably linked to the right to the highest attainable standard of health.⁶³ Similarly, in the case of SERAC, the Commission found that the right to food is implicit in the African Charter and inseparably linked to the dignity of human beings. The African Charter and

⁶² Pinheiro Principles 5.1, 5.3.

⁶³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 15: 'The Right to Water' para 3.



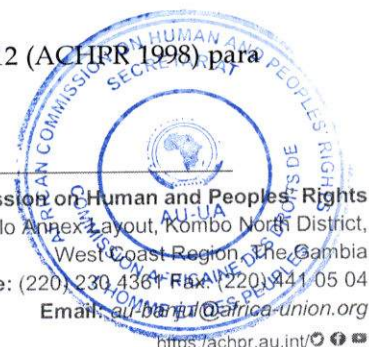


international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens.

183. In the same way, under the African Charter, the right to water and food are essential for securing the highest attainable standard of physical and mental health under Article 16. They are fundamental to an adequate standard of living as they are some of the most basic necessities for survival.
184. In the *SERAC* case, the Commission found that the right to food is implicit in the African Charter and inseparably linked to the dignity of human beings. The Commission noted that the minimum core of the right to food required that the Nigerian government should not destroy or contaminate food sources, but rather protect and improve existing food sources and to ensure access to adequate food for all citizens.⁶⁴ This obligation also requires that the government should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.
185. From the facts of this case, there is no doubt that the bombardment and destruction of areas of civilian habitation, livestock and farms, inexorably expose victims to serious health risks, not least the emotional and psychological trauma of war, forced displacement and armed violence. In the case of victims of prolong detention, the Commission has noted that the responsibility of government is heightened in situations where individuals are in its custody and completely dependent on the actions of the authorities for their wellbeing.⁶⁵
186. While the failure of the government of the Respondent State to provide basic services such as safe drinking water, electricity and medicine by itself contravenes the obligations undertaken under Article 16 of the African Charter, the deliberate prevention of the civilian population in South Kordofan and Blue Nile from having access to water, food, electricity and medical aid is a flagrant violation of their fundamental right to the best attainable standard of physical and mental health, recognised under the African Charter.
187. The Commission finds that the bombardment and destruction of civilian homes and resulting forced displacement negatively affected the ability of victims of the violence to access water, food and medical supplies, which invariably violated their right to health.

⁶⁴ *SERAC* case (n 58 above) paras 64-65.

⁶⁵ *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 112.





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188. As such, the Commissions finds that the Respondent State's actions amounted to a violation of Article 16 of the African Charter.

Alleged violation of Article 18(1) of the African Charter

189. The Complainants alleged that the forced displacement of large numbers of civilians as a result of the Respondent State's indiscriminate bombing campaign and other human rights violations resulted in a violation of Article 18(1) of the African Charter.

190. Article 18(1) provides that "[t]he family shall be the natural unit and basis of society." The Article goes further to place an obligation on the State to protect the family and take care of its physical and moral health.

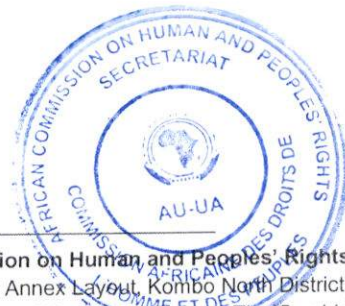
191. The Commission has noted in its jurisprudence that the family is the basic core of society, which should be protected by the State. In *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*,⁶⁶ the Commission noted that the mass transfer of persons from the eastern provinces of the complainant state to camps in Rwanda was inconsistent with the provisions of Article 18(1) of the African Charter.

192. Similarly, in the *SERAC* case,⁶⁷ the Commission held that the right to housing could be implied from the combined effect of Articles 14, 16 and 18(1) of the African Charter. The Commission noted that, at a very minimum, the right to shelter not only "obliges the Nigerian government not to destroy the housing of its citizens," but also required government to not obstruct efforts by individuals or communities to rebuild lost homes. In that case, the Commission stated that:

The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to him or her in a way he or she finds most appropriate to satisfy individual, family, household or community housing needs. Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and landowners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies. The right to shelter even goes further than a roof over one's head. It extends to embody

⁶⁶ (2004) AHRLR 19 (ACHPR 2003) para 81.

⁶⁷ (2001) AHRLR 60 (ACHPR 2001) para 61.





*the individual's right to be left alone and to live in peace – whether under a roof or not.*⁶⁸

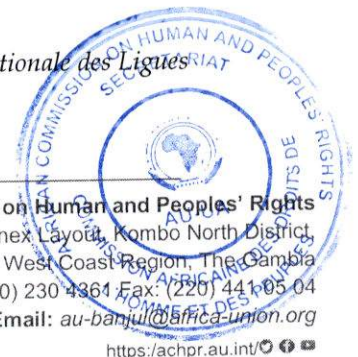
193. In *General Comment No. 19 on the Protection of the Family, the Right to Marriage and Equality of the Spouses* made under Article 23 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee clarified the obligation of the State to adopt legislative, administrative and other measures to protect the family and to avoid any action that will negatively affect the family unit, including the arbitrary separation of family members and involuntary displacement of families.⁶⁹
194. This Commission cites with approval its decision in the *Sudan Human Rights Organisation case*⁷⁰ and in *Union inter Africaine des droits de l'Homme, Fédération Internationale des Ligues des droits de l'Homme and others v Angola*,⁷¹ where the Commission found that massive forced expulsion – whether in peace time or war time – of populations has a negative effect on the enjoyment of the right to family life. In both cases, the Commission noted that the Respondent State had violated Article 18(1) of the African Charter by separating families.
195. In the present case, it is the Commission's opinion that the destruction of civilian residences had the same effect of destroying family life and separating family due to the ensuing displacement and dispersal of families. It is reported by notable humanitarian actors including the UN that a majority of those affected by the forced displacement are women and children, including thousands of children of school age from Abu Kershola and surrounding villages in South Kordofan and Blue Nile.
196. The Commission finds that the natural negative effect of the forced displacement of civilians from civil centres and structures and the continued impact of the conflict in areas habited by civilians is the unwarranted separation of families and the violation of the peaceful and quiet enjoyment of family and civil life. The Commission finds that the forced displacement of civilians in both South Kordofan and Blue Nile constituted a violation of Article 18(1) of the African Charter.

⁶⁸ *SERAC case* (n 58 above) para 61.

⁶⁹ *Sudan Human Rights Organisation case* (n 30 above) para 214.

⁷⁰ *Sudan Human Rights Organisation case* (n 30 above) para 215.

⁷¹ *Communication 159/96 - Union inter Africaine des droits de l'Homme, Fédération Internationale des Ligues des droits de l'Homme and Others v Angola* (11 November 1997) para 17.





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Alleged violation of Article 2 and Article 18(3) of the African Charter

197. The Commission will consider Articles 2 and 18(3) together, given that both provisions are closely linked in the context of this Communication.

198. The Complainants submitted that the Respondent State is responsible for discriminatory treatment of civilians in South Kordofan, Blue Nile as well as other areas in Sudan on the basis of sex, colour, race and ethnicity, and political opinion and that the Respondent State's forces and authorities have specifically targeted women and girls and have committed widespread acts of sexual violence in violation of Articles 2 and 18(3) of the African Charter.

199. Article 2 of the African Charter provides that:

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

200. Article 18(3) of the African Charter provides that:

The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

201. The principle of non-discrimination as recognized in both Articles is a fundamental principle in international human rights law. The principle guarantees that those in the same circumstances are dealt with equally in law and practice. Under Article 2, the principle of non-discrimination entails that an individual or group of persons be accorded equal treatment, irrespective of their particular characteristics and ensures, in relation to Article 18(3), that women in particular are protected by State Parties from discrimination.

202. The Commission, in *Communication 313/05 - Kenneth Good v. Republic of Botswana*, held that the test to establish whether discrimination has occurred is threefold: (a) whether equal cases are treated in a different manner; (b) whether a difference in treatment does not have an objective and reasonable justification; and c) whether there is no proportionality between the aim sought and the means employed.

203. In this case, the widespread acts of sexual violence have specifically been targeted at not the general population but women and girls. The heinous acts lack any objective or legal justification for their occurrence in the first place. This is



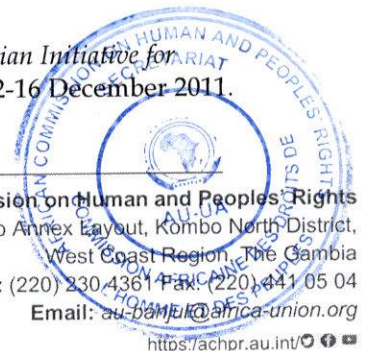


especially considering that sexual violence against women and girls is internationally condemned as a war crime. Lastly, the use of sexual violence against women and girls was greatly disproportionate to what aim that the Respondent State's forces sought to achieve.

204. Similarly, under Article 18(3), the African Charter affirms that mandatory obligation of State Parties to eliminate every form of discrimination against women and the duty to protect the rights of women and the girl child under international human rights law.
205. Although the African Charter does not define "discrimination", the Commission has clarified the relationship between discrimination and gender-based violence, based on the requirement in Article 18(3) that State Parties protect the rights of women and the child "as stipulated in international declarations and conventions" and by receiving inspiration from other relevant regional and international human rights instruments pursuant to Articles 60 and 61 of the African Charter.
206. In *Egyptian Initiative for Personal Rights and Interights v Egypt* (Egyptian Initiative case),⁷² the Commission relied on the definitions proffered in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (African Women's Protocol) and the UN Convention for the Elimination of Discrimination Against Women 1979 (CEDAW) in aid of its analysis on the relationship between discrimination and sexual-based violence. In that case, the Commission considered the definitions of "discrimination against women" and "violence against women" in the African Women's Protocol in relation to the principle of non-discrimination in Articles 2 and 18(3) of the African Charter.
207. With the African Charter not providing any express definition of the term "discrimination" in Article 18(3), the Commission in the *Egyptian Initiative* case proceeded to consider the definitions of "discrimination against women" and "violence against women" provided in the supplementary provisions of the African Women's Protocol as well as UN instruments. In particular, the Commission considered Article 1(f) of the African Women's Protocol to the effect that:

Discrimination against women means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or

⁷² (2011) AHRLR 90 (ACHPR 2011) para 119; also Communication 323/06 - *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* 10th Extra-Ordinary Session ACHPR, 12-16 December 2011.





destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

208. The Commission noted that this definition is quite similar to the CEDAW, which defines “discrimination” as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁷³

209. The Commission also considered the definition of “discrimination” in the UN General Recommendation No. 19, where the CEDAW Committee affirmed the correlation between discrimination against women and gender-based violence. In Paragraph 6 of General Comment 19, the CEDAW Committee clarified that the definition of *discrimination* includes gender-based violence, which is violence directed against a woman because she is a woman or that affects women disproportionately. The Committee noted that gender-based violence “includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”⁷⁴

210. The Commission also considered the definition of “discrimination against women” in Article 1(j) of the African Women’s Protocol and the relevant UN instruments above, as well as the definition of “violence against women” in the same Article, which provides that:

Violence against women means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

211. After a careful analysis of the implications of these definitions on the rights of women in the *Egypt Initiative* case,⁷⁵ the Commission concluded that systematic sexual violence targeted at the women participating or present in the scene of a demonstration amounted to gender-based violence. The Commission held that “violence against women affects, compromises or destroys the enjoyment and

⁷³ African Women’s Protocol art 1.

⁷⁴ CEDAW General Recommendation No. 19: Violence against women, para 6.

⁷⁵ *Egyptian Initiative* case (n 70 above) para 121.





exercise by women of their fundamental and human rights in different spheres of life. In this regard, the African Commission considers violence against women as a form of discrimination against them.”⁷⁶

212. By the tenor of the corollary definitions in the African Women’s Protocol, it is clear that the provisions of Articles 2 and 18(3) of the African Charter are inextricably linked to the supplementarily interpretive provisions of the African Women’s Protocol in relation to issues of gender-based discrimination and gender-based violence in Africa.
213. The interpretations provided by Article 1 of the African Women’s Protocol of “discrimination against women”, an expression first used in Article 18(3) of the African Charter, and the interpretation of “violence against women”, which responds to the need to “ensure the protection of the rights of women” under Article 18(3) of the same Charter, clearly establish the normative relationship between the African Charter and the African Protocol in relation to the protection of the Rights of Women from discrimination and violence.
214. The Commission notes that the African Women’s Protocol has not yet been ratified by the Respondent State. While Sudan has not ratified the African Women’s Protocol, it signed it on 30 June 2008, and its signature attracts with it the obligation not to undermine or defeat the object and purpose of the Protocol. Article 18 of the Vienna Convention on the Law of Treaties states:
- “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: “(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty”*
215. Furthermore, by virtue of Article 60 of the African Charter, the Commission can draw inspiration from international law on human and peoples’ rights, “particularly from the provisions of various African instruments on human and peoples’ rights” on the issue of discrimination against women and violence against women, including sexual violence against women. In particular, the provisions of Articles 2, 3 and 11 of the African Women’s Protocol are relevant to this case.
216. Article 2 of the African Women’s Protocol provides that States parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures by including in their national constitutions and

⁷⁶ Egypt Initiative case (n 73 above) para 165.





other legislative instruments the principle of equality between women and men and ensure its effective application.

217. Article 3 of the same Protocol provides for the right of every woman to dignity inherent in a human being and to the recognition and protection of her human and legal right. The Article also provides that “[e]very woman shall have the right to respect as a person and to the free development of her personality.”

218. Article 11 of the African Women’s Protocol provides that:

1. *States parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women.*
2. *States parties shall, in accordance with the obligations incumbent upon them under international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.*
3. *States parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape Protocol on the Rights of Women 71 and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.*
4. *States parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.*

219. These provisions affirm the obligation of State Parties to the Protocol not only to prevent all forms of discrimination against women but also to ensure the respect for the rights and dignity of women, and protection of women during armed conflict. In the *Egyptian Initiative* case, the Commission recognised the harmful impact of the differential treatment that the victim had received and how that amounted to discrimination on the basis of sex. It also rightly pointed out the link between gender-based violence and discrimination against women. It however arrived at its decision based on whether or not the women received the same treatment as the men in the same circumstances.

220. The Commission’s interpretation of Articles 2 and 18(3) was based on formal equality between the sexes, as opposed to the principle of substantive transformative equality. It is pertinent to note that any act of sexual and gender-based violence, is an act of gender-based discrimination, irrespective of whether men in the same situation were treated the same way as women or not. The African Women’s Protocol by its very nature and tenor guarantees substantive





transformative equality not just formal equality. Under it, states have the responsibility to prevent, regulate, control, investigate, punish and provide effective remedies. Reparations under the Protocol include individual reparations and reparations targeted at systematic failures.

221. Furthermore, the *Guidelines on Combatting Sexual Violence and its Consequences in Africa* (the Niamey Guidelines) calls on States to take actions to prevent sexual violence against women including in conflict or post-conflict situations; and combating impunity for the perpetrators of sexual violence. The Niamey Guidelines also underscore the right to reparation, calling on States to take the necessary legislative and other measures required to guarantee access to appropriate, efficient, accessible, timeous and long-lasting reparation for injury and loss suffered by victims of sexual violence. States are also required to ensure that their national legal framework guarantees that the definitions of all forms of sexual violence set out in criminal legislation are consistent with regional and international standards.⁷⁷

222. Under Principle 4 of the Niamey Guidelines, the Commission clarifies that:

*States must take the necessary measures to ensure that the rights of the victims of sexual violence are guaranteed, irrespective of their race, colour, national origin, citizenship, ethnicity, profession, political opinions, and any other opinions, and health including HIV status, disability, age, religion, culture, marital status, socio-economic status, status as a refugee, migrant or any other status, sexual orientation and identity, gender expression or any other factor that could lead to discrimination against them.*⁷⁸

223. However, it is worth noting that in *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Ethiopia*,⁷⁹ the Commission held that “distinctively exacting violence on someone simply because she is a woman, as opposed to being a man, or exacting more violence on women as compared to men in the same circumstances amounts to discrimination.

224. Similarly, in emphasizing the importance of providing access to justice to women and girls at risk of sexual and gender-based violence, the Commission

⁷⁷ Niamey Guidelines para 39.

⁷⁸ Niamey Guidelines para 4. Also see the AU Solemn Declaration on Gender Equality in Africa Assembly/AU/Decl.12 (III) Rev.1, para 4, that urges Member States of the Union to develop, launch and implement “sustained public campaigns against gender based violence” and “[r]einforce legal mechanisms that will protect women at the national level and end impunity of crimes committed against women” in order to shift and positively transform the attitude and behaviour of society.

⁷⁹ Communication 341- *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Ethiopia*, para 145.



noted in *Safia Ishaq Mohammed Issa (represented by The REDRESS Trust) v. Sudan*,⁸⁰ that guaranteeing access to justice that is free of discriminatory treatment based on sex or any other ground is a prerequisite for ensuring effective access to justice for victims of sexual violence, particularly women.

225. The above decisions and standards not only establish that sexual violence targeted against women is gender-based, but also set standards for gender equality that influence the perception and responds to sexual assault and related issues.
226. In the present case, the Complainants submitted that the mass rape and other forms of sexual violence committed by SAF forces and state authorities against women amounted to gender-based violence. They submitted that the conduct of the Respondent State's authorities was specifically directed against women because they are women and because it affected them disproportionately.
227. Specifically, the Complainants allege that, in November 2011, PDF soldiers stationed at Jau (South Kordofan), a military base near the South Sudan border, assaulted and raped two Nuba girls, ages 14 and 16, who were fleeing to the Yida refugee camp in South Sudan.⁸¹ In Blue Nile, two young girls are reported to have been killed as a result of being raped by around 30 men.⁸² Although the Commission notes the absence of any direct evidence before it on these serious allegations, their widespread nature reported by various organisations and the inability of the Respondent to refute them make sexual violence or the threat of it indeed, significantly plausible.
228. The Complainants also submitted that the Respondent State's authorities committed discrimination based on colour and ethnicity considering that numerous victims, including children and women from the Nuba ethnic group have been killed or threatened to be killed for being "black" and for their political opinion on suspicion of being SPLM/A-North members.⁸³ The Complainants submitted that the Respondent State's forces and authorities singled out

⁸⁰ Communication 443/13 – *Safia Ishaq Mohammed Issa (represented by The REDRESS Trust) v. Republic of Sudan*, para 164.

⁸¹ Human Rights Watch, 'Under Siege', p. 28.

⁸² Enough Project, 'Field Dispatch: Refugees from Blue Nile Recount Atrocities, Government's Targeting of Civilians', 1 November 2011.

⁸³ Enough Project 'Field Dispatch: Refugees from Blue Nile Recount Atrocities, Government's Targeting of Civilians', 1 November 2011, p. 2; Nicholas D. Kristoff, 'In Sudan, seeing echoes of Darfur', *New York Times*, 18 February 2012, <http://www.nytimes.com/2012/02/19/opinion/sunday/kristof-in-sudan-seeing-echoes-of-darfur.html> (accessed 18 August 2022).





individuals in and outside South Kordofan and Blue Nile on the basis of their perceived or actual relationship to the SPLM/ A-North.

229. The Complainants claimed that where the SAF forces and other Respondent State authorities believed an individual to be a member or supporter of the SPLM/ A-North, it subjected the individual to a variety of violations, including arbitrary arrest and detention, torture and ill-treatment. Civilians who were not (perceived to be) members of the SPLM/ A-North were not subjected to the same treatment.
230. The Respondent has not denied these allegations, including the allegations of rape and sexual violence committed by its security personnel against women and girls. And there are numerous indications from the evidentiary documents submitted before the Commission, including the reports of local and international NGOs of sexual and gender-based discriminations, as well as discrimination on account of sex, colour and ethnicity.
231. In the *Egypt Initiative* case, the Commission noted that sexual assault against victims were acts of gender-based violence perpetuated by state and non-state actors under the control of state actors, that went unpunished.⁸⁴ The weaponisation of rape and sexual violence against vulnerable girls and women as tools of oppression and violations during conflict, as referenced in that case, is not any different from the instant one.
232. The Commission affirms that the duty to respect that the Respondent bears entails that state institutions and officials refrain from acts of violations and that the duty to protect and the due diligence obligation of the Respondent State entails that the State takes measures to prevent discrimination of any kind and to, more especially, protect vulnerable groups such as women and girls from sexual and gender-based violence. This includes the obligation to investigate allegations of sexual and gender-based violence, prosecute and punish offenders, and ensure that victims are accorded adequate remedies.
233. There is no indication that the Respondent State has fulfilled its obligations under the African Charter to prevent discrimination on account of gender or sex, colour, origin, ethnicity or political opinion under Article 2 of the African Charter or to protect the affected women and girls in accordance with international human rights law under Article 18(3) of the African Charter.

⁸⁴ *Egypt Initiative* case (n 73 above) para. 166.





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234. The Commission finds that the Respondent State, having failed to prevent the violations from happening and, where they occurred, having failed to adequately address them or accord remedies to the victims, violated the provisions of Articles 2 and 18(3) of the African Charter.

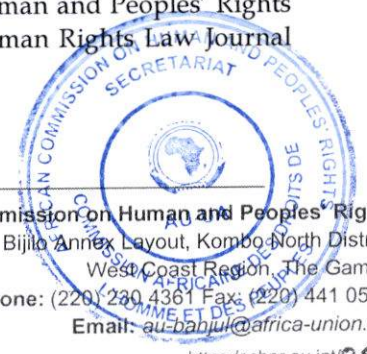
Alleged violation of Articles 19, 20, 21(1)(2) and 23 of the African Charter

235. The Complainants submitted that the Respondent State's assault on members of the Nuba ethnic group violates their collective rights as a "people" under the African Charter. This includes alleged violations of the Nuba people's right to equality in Article 19, their right to existence and self-determination in Article 20; their right to freely dispose their wealth and natural resources in Article 21(1) and (2); and their right to peace in Article 23 (1) of the African Charter.

236. In the light of the foregoing submission, the first issue for consideration is the application of peoples' rights of the African Charter to the Nuba. It is now generally accepted in scholarly works and in the jurisprudence of the Commission that peoples' rights of the African Charter apply to specific category of people. While the term peoples' as used in the Charter is amenable to different interpretation how it is used in particular context and provision of the Charter, one important meaning of the term is a reference to sub-national groups having distinct identity on account of possession of specific identity markers and status.⁸⁵ Viewed from this conceptual perspective, 'the subjects of peoples' rights,' as one analysis of the jurisprudence of the Commission pointed out, 'are the different ethnic groups or inhabitants of a particular territory within the state, who on account of historical, cultural and/or existing patterns of discrimination have come to form a sense of separate identity. This finds textual support in the African Charter, particularly in article 19: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'⁸⁶ The African Commission in its jurisprudence in *Katangese People's Congress v Zaire* and *SERAC and other v. Nigeria* in affirming and recognizing the applicability of peoples' rights of the Charter to 'the people of Katanga' and to 'the Ogoni people', the term 'peoples' may mean a section of the

⁸⁵ See RN Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 97 & Solomon A. Dersso, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights of the African Charter', (2006) 6 *African Human Rights Law Journal* (2006) 358.

⁸⁶ Solomon A. Dersso, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights of the African Charter,' (2006) 6 *African Human Rights Law Journal* (2006) p 362.





population of a state that historically inhabited and is associated to a particular region or territory within the state and such a sub-national group constitutes a subject of the peoples' rights of the Charter.

237. In the present case, the Nuba constitute a section of the population of Sudan. The Complainants argued that the Nuba are "distinct people living in their own historic territory", which is the Nuba Mountains in South Kordofan. It was submitted that they are made up of ethnically and religiously diverse tribes who share "a common identity as 'Nuba' through their shared mountain homeland, common culture and traditions, and a history of shared oppression." The classification of the Nuba as a people, the Complainants submitted, is also supported by the identification of the Nuba by others, and the consequences such identification entails for individual Nuba in relation to non-Nuba.

238. Clearly, while the Nuba people do not constitute a single ethnic or religious group, they possess a shared common identity by virtue of, among others, a common territory that they historically inhabited and a sense of belonging they fostered by living together in their shared historical territory, the Nuba mountains. This sense of common identity has been further reinforced by the shared experience of discrimination and violations that the people of Nuba have been subjected to. Following the recognition, in *Katangese People's Congress v Zaire* and *SERAC and other v. Nigeria*, of the application of peoples' rights of the Charter to people from particular territory of a state, the Commission thus finds that the Nuba are people for purposes of peoples' rights of the African Charter.

Alleged violation of Articles 19 of the African Charter

239. As noted above one of the violations alleged by the complainants concerns Article 19 of the Charter. Article 19 of the African Charter provides that "[a]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."

240. From the Complainants' arguments, it is claimed that the Nuba have historically been regarded as second-class citizens by the dominant classes of Sudan and have historically been vulnerable to marginalization. They have also been victims of group-targeted violence, particularly during civil wars in South Kordofan in the mid-1980s and throughout the 1990s. And that Sudan has a history of discrimination in the provision of education and development to this group.

241. The Complainants also submitted that when the government "declared jihad in 1992", the then UN Special Rapporteur on the situation of human rights in the Sudan noted that "all these practices [referring to mass violations committed



during the war in Nuba Mountains in the early 1990s, and in particular slavery] have a pronounced racial aspect, as the victims are exclusively southerners and persons belonging to the indigenous tribes of the Nuba Mountains."

242. The Complainants submitted that many Nuba were forced into "peace camps in government-controlled areas, and large tracts of emptied land were rapidly incorporated into new commercial agricultural schemes." And that by the time the warring parties agreed to a ceasefire in 2002, "[T]he Nuba Mountains were largely emptied of their population."

243. The Complainants further submitted that eye-witness accounts show that militias and government forces in South Kordofan killed individuals because they belonged to the Nuba and, in the process, denied members of the Nuba their fundamental rights enshrined in the African Charter. For this reason, the Complainants submitted that the Nuba cannot enjoy the same respect and the same rights as others in Sudan in violation of Article 19.

244. The Commission finds that, with regard to the alleged violation of Article 19 of the African Charter, the historical record of the civil wars in Sudan and the specific experience of the Nuba people in particular are such that discrimination and violation of rights were perpetrated targeting specific group of people. Nuba people as historically marginalized people and as one of the communities in Sudan who were subjected to discrimination and violations including through state policies have been deprived of their right under Article 19 to be equal, to enjoy the same respect and to have the same rights. The Respondent State continues to commit violations against the Nuba during the more recent conflict in South Kordofan where serious and massive human rights violations have specifically targeted the Nuba people. The Commission thus finds a violation of Article 19 of the African Charter.

Alleged violation of Articles 20 the African Charter

245. The complainants also submitted that the acts of violence to which they were subjected violated their rights to existence and self-determination under Article 20 of the Charter. Article 20(1) of the African Charter states that:

All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.





246. With regard to the Respondent State's alleged violation of this article, the Complainants submitted that the scale of the human rights violations committed by the Respondent State's forces against the Nuba people threatens their existence as a people in violation of Article 20.
247. In the 2005 Report of the African Commission Working Group of Experts on Indigenous Populations/Communities to the UN Commission on Human Rights Working Group on Minorities, the African Commission noted that dispossession of indigenous peoples of their land, in addition to discriminating against them and denying them their rights denies them their right to existence and self-determination.⁸⁷
248. The Commission agrees with the Complainants that the indiscriminate bombing campaign undertaken by the Respondent State's forces against rebel held areas in the Nuba Mountains invariably forced the Nuba people living in the Nuba Mountains off their land. The Commission finds that the Nuba people have been subjected to extrajudicial killings, enforced disappearances, torture and other violations. The resulting loss of life, destruction of property and forced displacement threatens the existence of the Nuba as a distinct people. The Commission thus finds a violation of the right to existence of the Nuba under Article 20 of the Charter.

Alleged violation of Articles 21(1)(2) the African Charter

249. The other rights allegedly violated are those under Article 21 of the Charter. Article 21(1) of the African Charter stipulates that "[a]ll peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it." Sub-article (2) provides that "[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."
250. With regard to the alleged violation of Article 21(1) of the African Charter, the Commission also finds that the destruction of thousands of homes and cultivated land in the Nuba Mountains has effectively denied the inhabitants their right to freely dispose of their wealth.
251. The Respondent State's bombing campaign has left large expanse of arable land unfit for cultivation and driven survivors to refugee camps and other places to seek refuge. The effect of this unwarranted dispersal has made it impossible for the

⁸⁷ UN Commission on Human Rights, *Report of the African Commission Working Group of Experts on Indigenous Populations/Communities* (2005) UN Doc E/CN.4/Sub.2/AC.5/2005/WP.3 41.



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Nuba people to benefit from their land and its natural resources. The Commission thus finds that the rights of the Nuba to freely dispose of their wealth and natural resources under Article 21(1) have been violated.

252. Under Article 21(2) of the African Charter, the Respondent State has an obligation to compensate the Nuba people for despoilation of their properties. The destruction of their property and the failure to compensate them for the damage amounts to a violation of Article 21(2) of the African Charter.

Alleged violation of Articles 23 of the African Charter

253. The Complainants also allege that their right to peace under Article 23 was violated. Article 23(1) of the African Charter enshrines that:

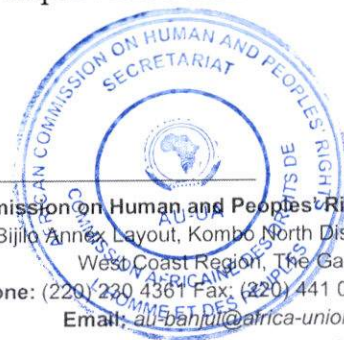
"[a]ll peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between states."

254. The right to national peace and security has two dimensions. The first dimension affords a negative protection. By virtue of this protection, people are entitled to be protected from being targets of or being subjected to conditions of armed violence. The second dimension involves positive protection. This goes beyond the silence of the guns or the absence of armed violence. It additionally involves the provision of institutional and legal measures that ensure positive peace whereby they have a secure social and political environment guaranteed by respect for their rights, the rule of law and the enforcement of law and order in accordance with internationally accepted constitutional processes. At a minimum Article 23(1) requires that the state or its agents refrain from subjecting any category of its population from being a target of armed violence or being subjected to conditions of armed violence.

255. With regard to the Respondent State's alleged violation of Article 23(1), the Commission notes that the attack of civilian villages and populations by State forces amounted to a denial of the right to live in peace and security.

256. In *Malawi African Association and Others v Mauritania*,⁸⁸ the Commission noted that even where the attack by State forces was done against rebel groups, the responsibility for protection of human rights was incumbent on the Mauritanian State, which is a party to the African Charter; and as such, the unprovoked attacks

⁸⁸ (2000) AHRLR 149 (ACHPR 2000) para 140.





on villages constitute a denial of the right to live in peace and security.⁸⁹ The Commission also noted that regardless of whether the destruction of civilian villages in Mauritania was carried out by state-controlled forces or rebel forces, the responsibility to protect the people remained that of the State.⁹⁰

257. In the present case, there is no indication on the part of the Respondent State that it has taken any due diligence measures either to prevent the disruption of the peace or investigate and punish violators of the peace and security of the people. The lack of any preventive or mitigation measures by the Respondent State to stop the violent disruption of the peaceful existence of individuals and communities in the recess of their residences and neighbourhoods in South Kordofan and Blue Nile incurs the responsibility of the Respondent State under the African Charter.

258. Given that the nature and extent of the attacks and bombardment of unarmed civilians by state security forces in breach of the duty of the state to respect denies the victims their right to live in peace and security, the Commission finds the Respondent State violated the obligation to guarantee peace and security to the people of South Kordofan and Blue Nile under Article 23 of the African Charter.

Alleged violation of Article 3(2) of the African Charter

259. Article 3(2) provides that every individual shall be entitled to equal protection of the law.

260. The Complainants submitted that, for the reasons stated above in this case, the failure of the Respondent State to provide the victims in South Kordofan and Blue Nile with adequate and equal protection of the law amounted to a violation of Article 3(2) of the African Charter.

261. From the facts of this case, it is clear that the Respondent State did not protect the members of the Nuba as it did the dominant sectors of the Sudanese population. The Respondent State did not also protect particularly vulnerable groups such as women, children and ethnic minorities from the horrors of war and armed violence as well as from sexual and gender-based violence.

262. Based on the neglect by the Respondent State of its obligation under the African Charter to prevent violations and protect the victims from infringement by state forces and other violent non-state actors through the provision of adequate security and legal guarantees as well as the availability and accessibility of

⁸⁹ As above, para. 140.

⁹⁰ As above, para. 140.





effective remedies, the Commission finds that the Respondent State violated the provision of Article 3(2).

Alleged violation of Article 1 of the African Charter

263. Based on the foregoing, it is clear that the failure of the Respondent State to comply with its obligations under the various rights and freedoms enshrined in the Charter impinges on its obligation under Article 1 of the African Charter.

264. Article 1 of the African Charter provides that:

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

265. In *Commission Nationale des Droits de l'Homme et des Libertés v Chad*,⁹¹ the Commission noted that, under Article 1 of the African Charter, state parties undertake not only to recognise the rights, duties and freedoms adopted by the African Charter, but also to adopt measures to give effect to them. This suggests that should a state neglect to ensure the rights in the African Charter, it will constitute a violation, even if the state or its agents are not the immediate cause of the violation.

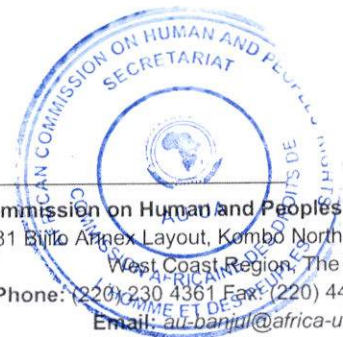
266. In the same way, since the African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency or conflict situations, the Commission finds that the non-compliance by the Respondent State with its obligations under the African Charter is a direct violation of Article 1. Notwithstanding the existence of armed conflict in South Kordofan and Blue Nile, the human rights obligations of the Respondent State under Article 1 of the African Charter are not diminished.

The Complainants' request for remedies and reparations

267. The Complainants have requested the Commission to treat the situation in South Kordofan and Blue Nile as a situation of emergency according to Rule 80 of the Commission's Rules of Procedure and to draw the attention of the Assembly of Heads of State and Government to the situation.

268. The conditions for treating a serious or massive human rights violations situation as a matter of emergency are stipulated in Article 58 of the African Charter.

⁹¹ (2000) AHRLR 66 (ACHPR 1995) paras 20-21.





269. Article 58 of the African Charter provides that:

1. *When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.*
2. *The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.*
3. *A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.*

270. Article 58 of the African Charter is supported by Rules 79-80 of the 2010 Rules of Procedure of the Commission. Rule 79(1)(a) provides that:

(1) The Commission shall treat a situation as a matter of emergency under Article 58(3) of the African Charter, when:

(a) it is one of serious or massive human rights violations;

271. Rule 80(1)(a) provides that:

(1) When the Commission has decided to treat a situation as one of emergency, it shall:

a. Draw the attention of the Chairperson of the Assembly of Heads of State and Government of the African Union to the matter in accordance with Article 58(3) of the Charter;

b. Draw the attention of the Peace and Security Council to the matter in accordance with Article 19 of the Protocol on Peace and Security;

c. Inform the Executive Council;

d. Inform the Chairperson of the African Union Commission of the matter.

2. The Commission as well as its subsidiary mechanisms under the Charter and present Rules, shall also take any appropriate action, including Urgent Appeals.

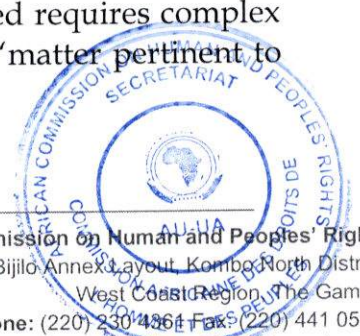
272. From both Article 58(1)(a) and Rule 80 of the 2010 Rules of Procedure, it is clear that the Commission has a discretion to determine whether or not to treat the situation in South Kordofan and Blue Nile of Sudan as a situation of emergency





that should be drawn to the attention of the AU Assembly. To exercise such a discretion, the Commission must act judiciously based on the current situation.

273. By the very nature of the wording of Article 58(1), the Commission is required to act in a certain way upon the occurrence of a specified set of circumstances. Specifically, Article 58(1) directs the Commission to draw the attention of the AU Assembly to 'special cases' which reveal a 'series' of 'serious and massive violations' of human and peoples' rights.
274. Indeed, the allegations of massive or serious violations of several provisions of the African Charter contained in this Communication are quite concerning. The neglect, failure or refusal of the Respondent State to respond to the seriousness of the accusations warrant that the nature of the human rights violations found in this case be better understood.
275. However, after careful deliberations, the Commission is of the opinion that the issues for which the Complainants had sought a referral to the AU Assembly under Article 58 of the African Charter have been overtaken by events and that it is no longer necessary to do so. In the light of this, the Commission declines the Complainants' request to draw the attention of the AU Assembly to the issue of massive and serious violations in South Kordofan and Blue Nile under Article 58 of the African Charter.
276. The Complainants also prayed the Commission to re-iterate its request to the Respondent State for provisional measures to prevent irreparable harm to civilians in accordance with Rule 98. However, the Complainants have not provided any information update to suggest that the harms alleged in 2011 are currently ongoing. The essence of "provisional" measures is to prevent the occurrence of irreparable harm pending when a decision is made.
277. Considering the length of time that has passed since the alleged violations occurred and now, it is the Commission's reasoned consideration it is not relevant to reiterate the Provisional Measures issued to the Respondent State.
278. The Complainants have also requested the Commission to accept a separate submission on remedies and reparation and to allow for a hearing on reparation if it has found the Respondent State to be in violation of the African Charter. In support of this request, the Complainants submitted that the magnitude of the violations committed and the large number of victims affected requires complex individual and collective measures of reparation, and are a "matter pertinent to





the Communication" in line with Rule 99 (3) (d) of the Commission's Rules of Procedure.

279. Based on this, the Complainants submitted that such a hearing is merited in accordance with Rule 99(3)(d) of the Commission's Rules of Procedure, which allows the Commission to address the following in detail:

- i. appropriate forms of reparation as provided for by the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for the victims of these violations, including for the next of kin of those who were unlawfully killed by SAF, PDF, or other state forces and authorities, or who suffered harm as a result of the failure of the state to provide adequate protection against violations and to request the Government of Sudan to give effect to such findings;
- ii. appropriate collective measures of reparation to repair collective or group harm caused by the Respondent State's campaign of massive and serious human rights violations;

280. Rule 99(3) of the 2010 Rules of Procedure of the Commission provides as follows:

During a hearing on a Communication or at any stage prior to the conclusion of the matter, the following may be considered:

- (a) *The verification of the facts;*
- (b) *Initiation of a friendly settlement;*
- (c) *Consideration on the merits; or*
- (d) *Any other matter pertinent to the Communication*

281. By the tenor of Rule 99(3)(d), there is nothing preventing the Commission from going further to consider a request by a party for an opportunity to make submissions for remedies and reparations where the Commission has found evidence of serious or massive violations of the provisions of the African Charter and where the justice of case requires it to so do.

Decision of the Commission on the Merits

282. For these reasons, the African Commission:



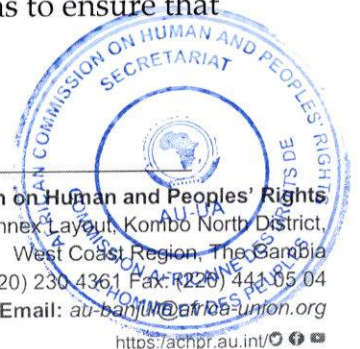


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1. Finds a violation of Articles 1, 2, 3(2), 4, 6, 7(1)(a), 12(1), 14, 16, 18, 19, 20, 21 and 23 of the African Charter.
2. Urges the Respondent State to guarantee all the rights found to have been violated in this communication in accordance with its obligation under Article 1 of the African Charter.
3. Grants the Complainants' request for the Commission to hear submissions from both parties on remedies and reparations and, therefore, requests the Complainants to forward their written submissions on remedies and reparations to the Commission within sixty (60) days of its receipt of notification of this decision, and the Respondent State shall have sixty (60) days within which to submit its observations in response thereof.
4. Urges the Respondent State to set up an independent inquiry to carry out prompt, effective and impartial investigations into the circumstances of the abovementioned violations, and ensure that where sufficient evidence exists, the perpetrators are brought to justice and held accountable for any violations.
5. Recommends to the Respondent State to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, in order to safeguard and ensure the protection of women from gender-based discrimination, violence against women and sexual violence in times of war and armed conflict, in line with its existing obligations under Articles 2 and 18(3) of the African Charter.
6. Recommends to the Respondent State to ratify the AU Convention for the Protection and Assistance of Internally Displaced Persons 2009 (Kampala Convention), in order to prevent internal displacement and protect as well as assist internally displaced persons in Sudan.
7. Recommends to the Respondent State to adopt legislative, administrative, judicial and all other necessary measures to implement the Niamey *Guidelines* and to ensure that the rights and obligations therein are guaranteed in fact and in law, including during armed conflicts, crisis situations and states of emergency. This will include examining legislative and regulatory provisions and all other relevant provisions to ensure that they are compliant with the provisions of the *Guidelines*.





8. Calls on the Respondent State to:
- a. immediately release all arbitrarily detained civilians and ensure that those detained on a lawful basis enjoy full due process rights;
 - b. urgently facilitate unimpeded access by humanitarian aid groups to deliver assistance to civilians in all parts of Southern Kordofan and Blue Nile;
 - c. allow full and effective access for international monitors, including human rights officers, to Southern Kordofan and Blue Nile states;
 - d. provide appropriate housing and basic needs to the displaced persons in accordance with the UN Guiding Principles on Internal Displacement and the AU Convention for the protection and assistance of internally displaced persons in Africa;
 - e. ensure the safe return of the displaced persons to their communities after the unrest has ceased;
 - f. reform its national legislation so that:
 - (i) the Respondent State provides for adequate and effective safeguards against abusive use of force as well as abuse of powers in the course of arrest and detention by government forces, law enforcement and security officials;
 - (ii) Recognize the right of the Nuba people to equality and non-discrimination pursuant to Article 19 of the African Charter and their right to existence as distinct category of minority people by virtue of Article 20 of the Charter, with full rights on their land and the use of the resources on their land in accordance with Article 21 of the Charter;
 - (iii) arbitrary or abusive use of force as well as violations committed in the course of arrest and detention procedures by government forces and law enforcement officials, including torture and ill-treatment, enforced disappearances and rape, are effectively recognised as a criminal offence under the penal codes in Sudan;
 - (iv) the Respondent State provides for the criminal accountability of officials responsible for violations, including by removing the immunity that officials enjoy for such crimes under Sudanese legislation; and





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- (v) the Respondent State ensures training in international human rights and international humanitarian law to law enforcement and military personnel and NISS agents.
9. Urges the Respondent State to report on the steps it has taken to implement these decisions in accordance with Rule 112 (2) of its Rules of Procedure, within one-hundred and eighty (180) days.

Done during the 74th Ordinary Session held virtually from 21 February to 7 March 2023.

