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African Commission on Human and Peoples' Rights

Communication 402/2011:

**Interights, Human Rights Watch, Sudan Democracy First Group and
REDRESS**

v

Sudan

SUBMISSION ON ADMISSIBILITY

15 August 2012

I Introduction

1. Interights, Human Rights Watch, Sudan Democracy First Group and REDRESS ('the Applicants') submitted *Communication 402/2011: Interights, Human Rights Watch, Sudan Democracy First Group and REDRESS v Sudan* ('the Communication') to the African Commission on Human and Peoples' Rights ('African Commission' or 'the Commission') on 13 July 2011, after having previously submitted a request for provisional measures on 2 July 2011. The Applicants sent additional information on reported human rights violations in South Kordofan to the Commission on 21 July 2011¹ and 12 September 2011² respectively. The Commission was seized of the Communication at its 50th Ordinary Session, communicated it to the Government of Sudan ('the Respondent State') and requested provisional measures on 7 November 2011, calling on the Respondent State to "*intervene in the matter with a view to preventing irreparable harm being caused to the victims.*"³ On 15 June 2012, the Commission requested the Applicants to make a submission on admissibility by 14 August 2012.
2. The Applicants herewith make their submission on admissibility in accordance with Rule 105 (1) of the Rules of Procedure of the African Commission.

II Submission on Admissibility

3. The Communication satisfies the admissibility criteria stipulated in Article 56 of the African Charter. The Communication identifies the authors of the Communication and individuals representing the organisations. As previously confirmed by the Commission, in a "*situation of grave and massive violations it may be impossible to give a complete list of names of all the victims...*" and "*Article 56 (1) demands simply that communications should indicate the names of those submitting and not those of all the victims of the alleged violations.*"⁴
4. The Communication is furthermore compatible with the African Charter as it alleges serious violations of rights enshrined in the Charter⁵ and it is submitted against Sudan, which ratified the Charter on 18 February 1986. It is written in a respectful language. Further, it is not based exclusively on mass media reports, but on eyewitness testimony, reports by the African Union (AU), the United Nations (UN), national and international non-governmental organisations and other documents. The Applicants have not submitted

¹Letter sent by the Authors, 'Submission of additional material in regards to Request for Provisional Measures of 2 July 2011', 21 July 2011.

² Letter sent by the Authors, 'Follow up to Request for provisional measures in regards to the human rights situation in Southern Kordofan, Sudan', 12 September 2011.

³ African Commission on Human and Peoples' Rights, 'Request for provisional measures under rule 98 of the rules of procedure of the African Commission on Human and Peoples' Rights', 7 November 2011.

⁴ *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*, Communications 54/91-61/91-96/93-98/93-164/976-196/97-210/98, para.79.

⁵ The Applicants submit in the Communication that the Respondent State engaged in conduct violating articles 1,4,5,6,9 (1), 12 and 14 of the Charter.

the Communication to any other procedure of investigation or settlement. The Communication was also submitted within a reasonable time, namely five weeks after the outbreak of hostilities in South Kordofan on 5 June 2011.

II.1. Exhaustion of domestic remedies

5. This submission on admissibility supplements the arguments on the exhaustion of domestic remedies initially set out in the Communication,⁶ namely that the exhaustion of domestic remedies would be neither practicable nor desirable in light of the large number of victims concerned. Furthermore, the Applicants submit that local remedies are not available, effective or sufficient.

II.1.1. Exhaustion of domestic remedies would be neither practicable nor desirable

6. The condition of exhaustion cannot be applied literally in the present case due to the large number of victims involved.
7. According to the well established jurisprudence of the Commission, in cases of serious and massive violations of human rights it needs to interpret the requirement of exhaustion in light *“of its duty to protect human and peoples’ rights as provided for in the Charter”*. Further, *“the condition that internal remedies must have been exhausted can[not] 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.”*⁷
8. In the present case, the Respondent’s alleged indiscriminate bombing campaign in the first month of the conflict is estimated to have resulted in up to ‘hundreds of thousands’ victims, including internally displaced persons.⁸ Non-governmental organisations reported that government authorities and the Sudan Armed Forces (SAF) forces committed mass human rights violations throughout 2012, including indiscriminate daily aerial bombardment by 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.⁹ Significant numbers of women and girls were reportedly raped by SAF forces while fleeing their homes in South Kordofan’s Nuba Mountains¹⁰ and ‘Sudanese government soldiers’ reportedly arrested and detained

⁶ Communication, pp. 8-9.

⁷ *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*, Communications 54/91-61/91-96/93-98/93-164/976-196/97-210/98, para.85; see also *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l’Homme v Rwanda*, Communications 27/89-46/91-49/91-99/93, para.17.

⁸ Communication, pp. 3-8.

⁹ 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.

¹⁰ International Rescue Committee, ‘Women raped while fleeing South Kordofan conflict’, 2 March 2012, at <http://www.rescue-uk.org/international-news/women-raped-while-fleeing-south-kordofan-conflict>.

hundreds of men, women and children, which resulted in the disappearance of some of those detained.¹¹ In Blue Nile state, the SAF also carried out a bombing campaign starting in September 2011 which continued in 2012, displacing tens of thousands. Government security, police, and military forces were allegedly responsible for the extra-judicial killing, injury, arbitrary arrest, torture and ill-treatment of civilians in Damazin and other locations.¹²

9. Furthermore, since the Commission became seized of the Communication in November 2011 and the spreading of the conflict to the state of Blue Nile in September 2011, 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).¹³ By the end of July 2012, the UN Refugee Agency (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 204,000.¹⁴
10. There is no judicial system or mechanism in place in Sudan that can cope with the large number of victims in the present case. While the exhaustion of domestic remedies must in principle be considered in each individual case, the 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 regards to massive human rights violations committed in Darfur, where "*tens of thousands of people have allegedly been forcibly evicted and their property destroyed*" the Commission found that "[i]n 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."¹⁵ Similarly, the Commission found in another case 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 fact, or, in the words of the Charter, their procedure would probably be unduly prolonged.*"¹⁶
11. As these considerations apply equally in the present case, it would be impracticable to expect victims to exhaust any remedies in Sudan as they are 'unavailable in fact'.

¹¹ 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>.

¹² 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>.

¹³ UN Office for the Coordination of Humanitarian Affairs (OCHA), 'Sudan Humanitarian Update', 2nd Quarter 2012, 15 July 2012, at http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_4230.pdf.

¹⁴ 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>.

¹⁵ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v The Sudan*, Communication 279/03- 296/05, para.100.

¹⁶ *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of members of the Episcopal Conference of East Africa v Sudan*, Communications 48/90, 50/91, 52/91, 89/93, para.39.

II.1.2. The Respondent State fails to remedy the situation despite ample notice

12. 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.¹⁷ 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.¹⁸
13. The Respondent State had ample notice of the human rights violations committed in South Kordofan, in particular following the Commission's request for provisional measures on 7 November 2011.
14. The AU, UN and others 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, five days after the outbreak of hostilities.¹⁹ International organizations also called on the Respondent to end violations in Blue Nile starting September 2011.²⁰ When the UN issued a statement alleging that war crimes and crimes against humanity may have been carried out in South Kordofan by both parties, the Respondent State on 18 August 2011 called allegations 'biased and predicated on no evidence', yet failed to carry out an investigation into the allegations.²¹ As violations continued being committed by both parties, the Commission on 7 November 2011 provided the Respondent State with a copy of the Communication and requested provisional measures, urging the Government "*to intervene in the matter with a view to preventing irreparable harm being caused to the victims*"²², thereby again bringing the violations to the attention of the Respondent State.
15. The Respondent State failed to take any measures to respond to the human rights violations committed in South Kordofan and Blue Nile.
16. There is no indication that the Respondent State has acted upon the information on the alleged human rights violations in South Kordofan and Blue Nile. Indeed, it has yet to respond to the Commission's request for provisional measures issued almost nine months ago and has yet to show what steps it will take to hold the alleged perpetrators accountable and remedy past and ongoing violations in South Kordofan and Blue Nile. Instead, the Respondent State appears to encourage further human rights violations by its armed

¹⁷ *Article 19 v Eritrea*, Communication 275/03, paras. 72 ; 77.

¹⁸ *Centre on Housing Rights and Evictions v The Sudan*, Communication 296/05, para.68; *Article 19 v Eritrea*, Communication 275/03, para.77;

¹⁹ Communication. pp. 2-4.

²⁰ United Nations, 'Sudan: UN calls for immediate end to reported army bombing of civilians', 7 September 2011, at <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 Nil states', 2 September 2011, at <http://www.un.org/apps/news/story.asp?NewsID=39444&Cr=Kordofan&Cr1=&Kw1=blue+nile&Kw2=&Kw3=>.

²¹ Sudan Tribune, 'Sudan submits rebuttal to UN Security Council over S. Kordofan abuses', 19 August 2011, at <http://www.sudantribune.com/Sudan-submits-rebuttal-to-UN,39879>.

²² African Commission on Human and Peoples' Rights, 'Request for provisional measures under rule 98 of the rules of procedure of the African Commission on Human and Peoples' Rights', 7 November 2011.

forces. In April 2012, the Governor of South Kordofan, Ahmed Haroun, was filmed calling on Sudanese soldiers to “hand over the place [South Kordofan] clean, swept, rubbed and crushed. Do not bring them [i.e. rebels] back alive, they will be an administrative burden.”²³ The UN High Commissioner for Human Rights in April 2012 expressed her serious concern about the “possible violations of human rights and international humanitarian law in South Kordofan and Blue Nile States” and warned that the comments by Ahmed Haroun could amount to a serious crime and lead to an escalation of violence.²⁴ Similarly, reports from the UN, national and international human rights organisations strongly suggest that instead of taking active steps to remedy the situation, the situation in South Kordofan and Blue Nile is deteriorating and the Respondent State is continuing to commit serious human rights violations.²⁵ In addition, the Respondent State had refused to permit humanitarian access to populations affected by the fighting in South Kordofan and Blue Nile. The Respondent State rejected a tri-partite agreement proposed by the AU, UN and the League of Arab States in February 2012 to address the humanitarian crisis and to permit such access. It only conditionally accepted the proposal on 27 June 2012 and only on 4 August 2012 agreed to permit humanitarian access to SPLM-North controlled areas of South Kordofan and Blue Nile.²⁶ On 5 August 2012, a driver of the World Food Programme was killed in an armed attack in South Kordofan.²⁷

II.1.3. Domestic remedies for serious human rights abuses are ineffective and insufficient in Sudan

17. Remedies for human rights violations as committed in South Kordofan and Blue Nile are ineffective and insufficient in Sudan.
18. Complainants are not required to exhaust any local remedy which is found to be, as a practical matter, unavailable, ineffective or insufficient. The Commission held in *Dawda Jawara v The Gambia* 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.”*²⁸

²³ UN Human Rights Office of the High Commissioner, ‘Sudan: Pillay condemns inflammatory statements by official, warns against dangerous escalation of Southern Kordofan conflict’, 5 April 2012, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12047&LangID=E>.

²⁴ Ibid.

²⁵ Supra, paras.8-9.

²⁶ Sudan Tribune, ‘Sudan, rebels sign humanitarian deal for South Kordofan and Blue Nile’, 4 August 2012, at <http://www.sudantribune.com/Sudan-rebels-sign-humanitarian.43462>.

²⁷ World Food Programme, ‘WFP Deplores Fatal Shooting Of Staff Member In South Kordofan, Sudan, 5 August 2012, at <http://www.wfp.org/news/news-release/wfp-deplores-fatal-shooting-staff-member-south-kordofan-sudan>.

²⁸ *Sir Dawda K. Jawara v The Gambia*, Communication 147/95- 149/96, para.32.

19. The Commission held further that the law on exhaustion of domestic remedies presupposes “(i) the existence of domestic procedures for dealing with the claim; (ii) the justiciability or otherwise, domestically, of the subject-matter of the complaint; (iii) the existence under the municipal legal order of provisions for redress of the type of wrong being complained of; and (iv) available effective local remedies, that is remedies sufficient or capable of redressing the wrong complained of.”²⁹
20. 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 framework³⁰ 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.
21. Sudan has not enacted (or repealed) the requisite laws to bring its legislation in conformity with the Charter, and its legal framework is not capable of giving effect to rights as enshrined in the Charter. Specifically in regards to violations alleged in the Communication – including violation of Articles 4 (right to life), 5 (prohibition of torture) and 6 (right to liberty and security) of the Charter – Sudanese law provides for definitions of these rights that significantly diverge from the Charter as interpreted in the Commission’s jurisprudence. The right to liberty does not extend the full guarantees as provided for in Article 6 of the Charter, in particular the right not to be subject to arbitrary arrest or detention and the right to be promptly brought before a judge.³¹ Further, the Respondent State has resisted repeated calls from the African Commission and others to criminalise torture in line with the Robben Island Guidelines / Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³² Definitions of crimes such as war crimes and crimes against humanity, particularly relevant in this case, are also not in conformity with internationally recognised standards. Inconsistencies between different pieces of Sudanese legislation, the near complete absence of ‘command responsibility’ as a mode of criminal liability,³³ as well as

²⁹ *Article 19 v The State of Eritrea* Communication 275/2003.

³⁰ For the incompatibility of Sudan’s legal framework with its obligations under the Charter, see REDRESS, Sudanese Human Rights Monitor and CLRS, Alternative Report, ‘Comments to Sudan’s 4th and 5th Periodic Report to the African Commission on Human and Peoples’ Rights: The need for substantial legislative reforms to give effect to the rights, duties and freedoms enshrined in the Charter’, April 2012, (‘First Alternative Report’) at <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%20Report%20-%20Legislative%20Reforms.pdf>

³¹ *Ibid*, p.2.

³² See for instance African Commission, ‘Consideration of Reports Submitted by States Parties under the Terms of Article 62 of the African Charter on Human and Peoples’ Rights- Concluding Observations and Recommendations on the Third Periodic Report of the Republic of Sudan (2003-2008), 13-27 May 2009, para.53; Article 115 of the Criminal Act 1991 stipulates that 1. *Whoever intentionally does any act which tends to influence the fairness of judicial proceedings relating thereto, shall be punished with imprisonment for a term not exceeding three years or with a fine or with both.* 2. *Every person who having public authority entice or threaten or torture any witness or accused or opponent shall be punished with imprisonment for a term not exceeding three months or with fine or with both.*” See further on the incompatibility of Sudan’s legal framework with Article 5 of the Charter; REDRESS, Sudan Democracy First Group, African Centre for Justice and Peace Studies, ‘Comments to Sudan’s 4th and 5th Periodic Report to the African Commission on Human and Peoples’ Rights: Article 5 of the African Charter: Prohibition of torture, cruel, degrading or inhuman punishment and treatment’, April 2012, (‘Second Alternative Report’) at <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%204th%20and%205th%20Periodic%20Report.pdf>.

³³ Command Responsibility is recognised in the Sudan Armed Forces Act, though in practice, no cases are known in which any higher-ranking official had to stand trial for human rights violations that constitute international crimes, see REDRESS and Khartoum Centre for Human Rights

the impact of amnesties and immunities (see below) prevent accountability for serious crimes in violation of Article 4, 5, 6, 12 (forced displacement), 14 (right to property) as allegedly committed in South Kordofan.³⁴

22. 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 primarily alleged to have been committed by soldiers of the Sudanese Armed Forces (SAF) with the support of the Popular Defence Forces (PDF) and security forces. Similarly, in Blue Nile, witnesses testified that SAF, militia and national security forces committed human rights violations.³⁵ 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 provide immunities for these officials, including soldiers, for any acts committed in the course of their duties.
23. 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.*³⁶

24. Any complaint regarding crimes committed by a member of the security forces or soldier can therefore not be pursued without impediment as their immunity would need to be lifted for any investigation to proceed. Furthermore, there is no judicial or administrative procedure in place that would enable victims in the present case to compel the relevant authorities- or, in relation to violations committed by members of the SAF, the President of the Republic- to waive immunity and undertake a full criminal investigation.
25. The waiver of immunity is therefore entirely discretionary and immunity is rarely lifted in practice.³⁷ The African Commission has previously called on the Respondent State to

and Environmental Development, ‘Criminal Law and Human Rights in Sudan- A Baseline Study’, March 2008, p.8, at http://www.redress.org/downloads/publications/BASELINE_STUDY_FINALMar08.pdf

³⁴ First Alternative Report, p.3; see also REDRESS and Khartoum Centre for Human Rights and Environmental Development, ‘Criminal Law and Human Rights in Sudan- A Baseline Study’, March 2008, at http://www.redress.org/downloads/publications/BASELINE_STUDY_FINALMar08.pdf.

³⁵ Communication, p.3.; see also submission by the Darfur Relief and Documentation Centre to the UN Human Rights Council, ‘Evidence of Human Rights Violations in the Nuba Mountains’, 8 March 2012, http://www.darfurcentre.ch/images/00_DRDC_documents/SARAH/Nuba_Mountains_8_March_2012; 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>.

³⁶ The Armed Forces Act of 2007, article 34.

³⁷ UN Human Rights Committee, ‘Concluding Observations: the Sudan’, 29 August 2007, CCPR/C/SDN/CO/3, paras.9 and 16 at <http://www.unhcr.org/refworld/country..HRC..SDN..46e516f52.0.html>.

repeal relevant immunity provisions.³⁸ Indeed, the Commission 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.”³⁹ Similarly, in considering the immunity of security and uniformed personnel in Darfur, the UN Panel of Experts on Sudan held in October 2010 that their immunity

*has turned into a tool that encourages impunity, preventing the prosecution of security personnel, police and soldiers who allegedly perpetrated crimes in Darfur. The Panel is unaware of any case where victims of arbitrary arrest and detention or victims of torture and ill-treatment were accorded the right to an effective remedy. The Panel is also unaware of any case where the Government of the Sudan brought to justice an NISS [National Intelligence and Security Service] perpetrator of human rights violations, or where the Government of Sudan compensated victims of human rights violations committed by the NISS.*⁴⁰

26. Similarly, 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 South Kordofan and Blue Nile since the outbreak of hostilities on 5 June 2011 and September 2011 respectively.
27. Broad immunity provisions also prevent victims of human rights violations from claiming compensation or other forms of reparation for the harm suffered as a result of the violations.⁴¹ Where the permission to sue an official is refused or not granted, the person alleging a violation cannot take separate legal action against the state because the liability is vicarious on the grounds of employers’ liability.⁴² Consequently, where requests for the lifting of immunity and subsequent legal petitions to this effect have been unsuccessful, no claim for compensation or other forms of reparation can be brought with a reasonable prospect of success against the individual suspects or the State authorities.
28. A civil claim would, in any case, not be a sufficient remedy in the present case in light of the serious human rights violations alleged in the Communication.⁴³ A civil claim does not deal with establishing facts by means of an effective and impartial investigation, and

³⁸ African Commission, ‘Consideration of Reports Submitted by States Parties under the Terms of Article 62 of the African Charter on Human and Peoples’ Rights- Concluding Observations and Recommendations on the Third Periodic Report of the Republic of Sudan (2003-2008), 13-27 May 2009, para.57.

³⁹ *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, Admissibility Decision, August 2012, para.67.

⁴⁰ UN Security Council, Report of the Panel of Experts on Sudan, UN Doc. S/2011/11, 20 September 2010, circulated 8 March 2011, para.159, at http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/11.

⁴¹ Section 46 of the Police Forces Act of 1999 and Section 45 (1) of the Police Act of 2008.

⁴² Article 146 (1) Civil Transaction Act of 1984.

⁴³ African Commission on Human and Peoples’ Rights, *Mouvement ivoirien des droits humains (MIDH) v Cote d’Ivoire*, Communication 246/02, para. 98; European Court of Human Rights, *Assenov and Others v Bulgaria*, (1999) 28 EHRR 652, para.86; UN Human Rights Committee, Communication No. 1880/2009, *N.S. Nenova et al. v Libya*, 20 March 2012, para. 9.

cannot result in a determination of whether there is sufficient evidence against individual officials concerned to prosecute and to punish where so warranted.

II.1.4. Climate of fear prevents exhaustion of domestic remedies in Sudan

29. 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’”.⁴⁴ The Commission consistently held that domestic remedies need not be exhausted where doing so would put victims at risk of their life.⁴⁵
30. The Applicants submit that the Respondent’s disregard for the rule of law in combination with a general climate of fear fostered by Respondent State renders any potential remedy unavailable as it exposes victims who seek to pursue legal avenues to significant risk to their security.
31. 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.⁴⁶ 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.”⁴⁷ In April 2012, the *International Rescue Committee* reported that an increasing number of Nuba women and girls were raped while fleeing their homes in Nuba Mountains in South Kordofan.⁴⁸
32. The case of Dr Bushra Gamar Hussein, director of the Human Rights and Development Organisation (HUDO) in South Kordofan is emblematic of the Government’s response to those seeking to assist victims in the region. Dr Bushra was arrested by agents of the NISS on 25 June 2011 and released on 14 August 2011, only to be immediately re-arrested by NISS officials. He was detained without trial until his release on 27 June 2012. NISS officials are reported to have accused Dr Bushra of sending information about the human rights violations currently committed in South Kordofan to international non-

⁴⁴ *Anuak Justice Council v Ethiopia*, Communication 299/2005, para.51; *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, Admissibility Decision, August 2012.

⁴⁵ *John D. Ouko v Kenya* Communication 232/1999, para.19.

⁴⁶ See second Alternative Report, pp.4-9, for a detailed overview of incidents of torture and ill treatment of human rights activists and others over the past 18 months, including in South Kordofan and Blue Nile; see Human Rights Watch, ‘Sudan: Political Repression Intensifies’, September 2011, at <http://www.hrw.org/news/2011/09/21/sudan-political-repression-intensifies>; Human Rights Watch, ‘Sudan: Repression Intensifies after Border Violence’, 17 May 2012, at <http://www.hrw.org/news/2012/05/17/sudan-repression-intensifies-after-border-violence>.

⁴⁷ Darfur Relief and Documentation Centre to the UN Human Rights Council, ‘Evidence of Human Rights Violations in the Nuba Mountains’, 8 March 2012, http://www.darfurcentre.ch/images/00_DRDC_documents/SARAH/Nuba_Mountains_8_March_2012.

⁴⁸ 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-refugees-south-kordofan-fleeing-south-sudan-13491>.

governmental organisations.⁴⁹ Following his release, he held a press conference during which five lawyers, including the Chairperson of the Darfur Bar Association were arrested.⁵⁰ Similarly, Mr. Fathi Bashir El-Feil, a pro-democracy activist from Al-Abasya Tagali in South Kordofan has been reportedly arrested by the SAF Military Intelligence Service on 17 January 2012, following accusations that he leaked information about the crimes committed in South Kordofan.⁵¹ For the same reason, Mr. Fathi's family was also threatened and targeted by security forces.⁵² On 14 March 2012, members of the NISS reportedly arrested Jalila Khamis Koko, a teacher and activist from Nuba Mountains. She remained in detention at the time of writing, and does not have access to a lawyer and charges against her are unclear, yet reportedly include offences against the State for communicating with the international community about crimes committed in South Kordofan.⁵³ Those arrested or threatened often do not have access to a lawyer and it is difficult for their families to ascertain their whereabouts. Amnesty International reported in June 2012 that lawyers trying to follow the arrests of over 200 suspected SPLM-N members are "either detained or missing".⁵⁴

33. Lawyers and human rights advocates seeking to assist victims in South Kordofan are at risk of serious human rights violations, including arbitrary arrest and detention, ill-treatment, torture or death. Victims coming forward to provide information, or to file a complaint against perpetrators, are exposed to the same risks.⁵⁵ This is aggravated by the lack of victim and witness protection in Sudan's legislation and the complete absence of such protection in the practice of judicial and law enforcement authorities.⁵⁶
34. The Commission's established jurisprudence that a victim does not need to pursue local remedies if he or she fears for his or her life, is also reflected in the jurisprudence of other human rights treaty bodies and courts. The European Court of Human Rights,⁵⁷ the Inter-American Commission on Human Rights⁵⁸ and the Inter-American Court of Human Rights⁵⁹ all provide for such an exception to the requirement of exhaustion of domestic remedies.

⁴⁹ Amnesty International, Sudanese Activist Released Without Charge, 16 July 2012, at <http://www.amnesty.org/fr/library/asset/AFR54/031/2012/fr/146eb525-d933-4179-9b5d-13f1da8a8577/af540312012en.html>.

⁵⁰ SUDO, UK, 'Lawyers Arrested after Press Conference', 2 July 2012; the lawyers were released the next day and asked to report to NISS offices.

⁵¹ Darfur Relief and Documentation Centre, 'Incommunicado Detention of Mr. Fathi Bashir El-Feil', Submission to UN Human Rights Council, 20 March 2012.

⁵² Ibid; no update or further information could be obtained on Mr Fathi's situation at the time of submission.

⁵³ Sudan Human Rights Network, 'Urgent Action', 15 April 2012, <http://www.sudanhumanrights.org/wp-content/uploads/2012/04/JalilaEn.pdf>.

⁵⁴ Amnesty International, 'We can run away from bombs, but not from hunger- Sudan's refugees in South Sudan', June 2012, p. 13, at http://www.amnestyusa.org/sites/default/files/3919_s_sudan_report_final_2.pdf.

⁵⁵ See for instance submission on admissibility by the applicants in Communication 379/09, *Monim Elgak, Osman Hummeida and Amir Suliman v Sudan*, 3 August 2010, p.6.

⁵⁶ See REDRESS, 'First Alternative Report', p.10, at <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%20Report%20-%20Legislative%20Reforms.pdf>.

⁵⁷ European Court of Human Rights, *Akdivar v Turkey*, Application No. 21893/93, 16 September 1996, paras.74, 75.

⁵⁸ Inter-American Commission on Human Rights, *Plan de Sanchez Massacre Guatemala*, Case 11.763, 11 March 1999, para.27.

⁵⁹ Inter-American Court of Human Rights, *Velasquez Rodriquez Case*, Judgment of 29 July 1988, para.66.

35. In the present case, the above cases demonstrate the genuine risk to their lives facing victims who seek to take judicial steps with a view to holding those responsible for human rights violations to account. 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 complainant to attempt [to exhaust] local remedies.”⁶⁰

III Conclusion

36. In light of the foregoing, the Applicants request the Commission to find this Communication admissible.

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⁶⁰ *Sir Dawda K Jawara v The Gambia*, para.40