



ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

Ref: ACHPR/COMM/511/15/SUD.....⁷⁹²...../23

Date: 24 July 2023

Ms. Julie Bardeche

REDRESS

Julie@redress.org

cc: Emma DiNapoli emma@redress.org

Dear Ms. Bardeche,

**Re: Communication 511/15 – Dr. Amin Mekki Medani and Mr. Farouq Abu Eissa
(Represented by FIDH, ACJPS, OMCT & REDRESS) v. The Sudan**


I write to inform you that at its 73rd Ordinary Session held in Banjul, The Gambia from **20 October to 9 November 2022**, the African Commission on Human and Peoples' Rights (the Commission) considered the above-mentioned Communication and adopted a decision on the Merits.

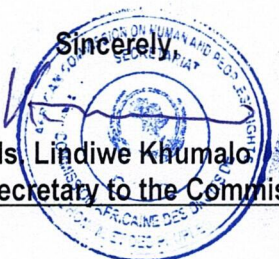
The Secretariat hereby transmits the text of the decision, which will be published on the Commission's website, in accordance with Rule 110(4) of the Rules of Procedure of the Commission (2010) under which this Communication was instituted.

The decision was approved for publication in the Commission's combined 52nd and 53rd Activity Report, through Executive Council Decision **EX.CL/Dec.1189-1216(XLII)** adopted during the 42nd Ordinary Session of the Executive Council, held from **15 to 16 February 2023** in Addis Ababa, Ethiopia.

I thank you.

Sincerely,


Ms. Lindiwe Khumalo
Acting Secretary to the Commission

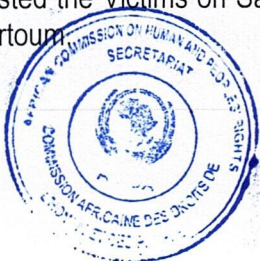


Draft Decision on Merits

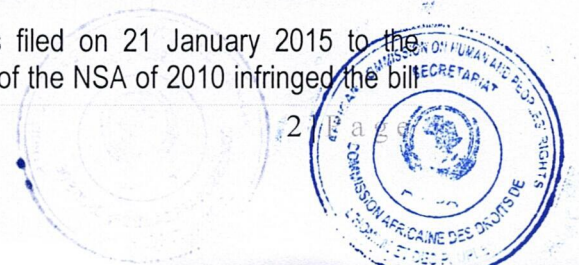
Communication 511/15 - Dr. Amin Mekki Medani and Mr. Farouq Abu Eissa v. The Republic of The Sudan

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on **21 February 2015** from **the African Centre for Justice and Peace Studies (ACJPS), The Redress Trust (REDRESS), and International Federation for Human Rights (FIDH)**, hereinafter referred to as the Complainants) on behalf of **Dr. Amin Mekki Medani** (the First Victim) and **Mr. Farouq Abu Eissa** (the Second Victim).
2. The Complaint is submitted against the Republic of The Sudan (the Respondent State) which is a State Party to the African Charter on Human and Peoples' Rights (the African Charter), having ratified the same on 11 March 1986.
3. The Complainants submit that the First Victim was 75 years of age and suffering from diabetes and high blood pressure. He was a prominent Sudanese human rights defender and lawyer. Amongst other accolades, the First Victim was previously the Chairperson of the Sudanese Human Rights Monitor, an NGO that is also a Member of the FIDH in Sudan, and was the President of Sudan's Confederation of Civil Society Organizations (CSOs).
4. The Complainants submit that the Second Victim was 81 years of age, diabetic and suffering from a heart condition and cyanosis. He was a well-known political activist and Chairperson of the National Consensus Forces, an umbrella of political opposition groups in Sudan. He was also the former Secretary General of the Arab Lawyers' Union and the Co-President of the National Democratic Alliance.
5. The Complainants aver that a few days before their arrest, both Victims participated in political negotiations held in Addis Ababa, Ethiopia, between Sudanese political and armed opposition groups and civil society that led to the adoption, on 3 December 2014, of the "*Sudan Call: A Political Declaration on the Establishment of a State of Citizenship and Democracy*" (hereafter referred to as "*The Sudan Call*").
6. The "*Sudan Call*," according to the Complainants, represented the first agreement between political opposition parties, rebel movements and civil society. It committed signatories to work towards the cessation of conflicts raging in different regions of Sudan and pledged to work towards legal, institutional and economic reforms in the country. The Complainants submit that the First Victim signed the "*Sudan Call*" on behalf of a group of civil society actors and the Second Victim signed on behalf of the Sudanese National Consensus Forces – an umbrella of political opposition parties – in his capacity as Chairperson of that group at the time.
7. The Complainants allege that following the Victims' return from negotiations in Addis Ababa, personnel from the Respondent State's National Intelligence and Security Services (NISS) arrested the Victims on Saturday, 6 December 2014, just before midnight, from their homes in Khartoum.



8. They further allege that the NISS took the Victims and another man, Dr. Farah Ibrahim Mohamed Alagar (Dr. Alagar), to NISS offices in Khartoum Bahri, without providing any reasons for their arrests. Family members present during the First Victim's arrest, allegedly reported that the NISS refused requests to take any medicine required to treat his diabetes. The Complainants allege that the NISS did not charge the three men upon arrest and held the Victims *incommunicado* for sixteen (16) days, until 21 December 2014, when they were transferred from NISS custody to Kober Prison in Khartoum.
9. The Complainants submit that whilst the Victims were detained, the NISS raided the offices of the Sudanese Human Rights Monitor on 21 December 2014. Seven NISS Officers entered the premises of the Sudanese Human Rights Monitor and put an end to a workshop on the Universal Periodic Review of Sudan by ordering participants to leave. They aver that the NISS officers temporarily detained one of the participants, and confiscated a number of laptops and documents.
10. The Complainants submit that both Victims were detained in Kober Prison, Khartoum, Sudan, and at high risk of irreparable harm as a result of further detention, with an adverse impact on their health. This concern, according to the Complainants, was aggravated by the prospects of an unfair trial for offences that carried the death penalty, and which was scheduled to start on 23 February 2015.
11. While the Victims were held *incommunicado*, the Complainants aver that on 19 December 2014, the Complainants, together with 10 Non-Governmental Organizations (NGOs) sent an 'Open Letter' to several Special Procedure Mandate Holders and Working Groups of the African Commission on Human and Peoples' Rights (the Commission), and the United Nations (UN), urging the mandate holders to call upon the Respondent State to release the Victims from custody in the absence of valid charges against them.
12. The Complainants aver that the First Victim was allegedly not allowed to meet his Lawyers before 23 December 2014, and was only granted his first family visit on 24 December 2014. His family was also permitted for the first time since his arrest, to bring food that is compatible with his health needs as a diabetic patient to Kober Prison.
13. The Complainants also allege that on 22 December 2014, the Second Victim met with his Lawyers for the first time since his arrest, and on the same day, was briefly taken to Alamal Hospital, a hospital owned by the NISS, due to high blood pressure. According to the Complainants, his family was able to visit him while he was in the hospital.
14. The Complainants allege that following their arrest and detention, the Victims filed a Complaint to the Supreme Court through the law office of Kamal Algizouli on 12 December 2014, challenging the validity of the Treatment and Rights Detainees Regulations made under the National Security Act (NSA) of 2010.
15. The Complainants submit that on 19 December 2014, prominent human rights lawyers who subsequently became the Complainants, filed a *habeas corpus* petition before the Constitutional Court of Sudan (the Constitutional Court) based on the arbitrary arrest and detention of the Victims, their lack of access to lawyers and family and their *incommunicado* detention. The Complainants submit that they have not yet receive a response from the Constitutional Court.
16. The Complainants also submit that another petition was filed on 21 January 2015 to the Constitutional Court, arguing that Articles 50 (1) and 51(2) of the NSA of 2010 infringed the bill



of rights and rights enshrined in international instruments,¹ the rights to life and human dignity,² and the right to liberty and security of the person.³

17. The Complainants disclose that on 10 February 2015, the Prosecutor General passed a referral order, and the Chief Justice of Khartoum State referred the case to the competent court for the trial of the Anti-terrorist charges to start on 13 February 2015. The Court subsequently fixed the 23 February 2015 as the start date of the trial.
18. The Complainants aver that on 12 February 2015, the Victims were both charged under Articles 5 and 6 of the Respondent State's Anti-Terrorism Act of 2001 concerning incitement to terrorism. The Complainants aver that the crimes under the Anti-Terrorism Act are punishable by life imprisonment or the death penalty.
19. The Complainants allege that the Victims were tried on 23 February 2015, before a Special Court set up by the Chief Justice under the Anti-Terrorism Act of 2001 on the grounds that charges filed against the Victims included offences relating to terrorism. They submit that on 9 April 2015, the Respondent State's Minister of Justice announced the decision to stay the criminal proceedings against the Victims, and on the same day, the Victims were released from Kober Prison in Khartoum.

Articles alleged to have been violated

20. The Complainants allege violations of Articles 1, 5, 6, 7(1) (c) and (d), 9(2), and 10 of the African Charter by the Respondent State.

Prayers

21. The Complainants seek on behalf of the First and Second Victims, the following Provisional Measures:
 - i. Immediate and unconditional release of the First and Second Victims; or in the alternative, their immediate release on bail;
 - ii. Pending release of the Victims:
 - Guarantee that they have regular and unhindered access to adequate medical care, including care provided through their families;
 - Ensure that their lawyers have regular and unhindered access to them;
 - Guarantee that if the Victims are put on trial, they will be tried before the Criminal Court and in line with the Respondent State's obligations under Articles 7 and 26 of the African Charter, as well as, be transparent and open for monitoring by international organizations, institutions and others.

22. The Complainants requests on behalf of the First and Second Victims, the following remedies:

¹ Article 26 Interim National Constitution.

² Article 27 Interim National Constitution.

³ Article 28 Interim National Constitution.



- i. Compensation for material harm including, *inter alia*, (a) costs for medical treatment; and (b) loss of earnings;
- ii. Compensation for non-material harm arising from, *inter alia*, physical and psychological suffering;
- iii. A prompt and impartial investigation into the Victims' arbitrary arrest and detention, as well as subsequent ill-treatment;
- iv. A public acknowledgement of the facts and a public apology for being responsible for violations of the African Charter suffered by the Victims;
- v. Changes to domestic legislation, including: (a) alignment of the domestic definition of 'inhuman and degrading treatment' with the African Charter and the jurisprudence of the Commission; (b) the introduction of safeguards against torture and *incommunicado* detention; (c) undertaking the reform of the NSA 2010 and the role of the NISS to comply with human rights standards, (iv) ensuring accountability and removing immunity of state officials; and (iv) the provision of legal guarantees of access to remedies; and
- vi. Institutional and practical reforms including: (a) abolishing NISS detention centres and political sections attached to prisons across Sudan; (b) training and vetting of NISS officials; (c) improvements in conditions of detention; (d) provision of independent and effective complaint mechanisms, including a national preventive mechanism; (e) adopting measures to protect the rights to freedom of association and freedom of expression of human rights defenders, political activists, journalists and others; and (f) taking measures to ensure rehabilitation for survivors of torture and ill-treatment.

Procedure

23. The Secretariat received the Complaint on 21 February 2015 and acknowledged receipt of same on 6 March 2015.
24. The Communication was seized during the Commission's 17th Extra-Ordinary Session held from 19 to 28 February 2015 in Banjul, The Gambia.
25. The Commission granted Provisional Measures requesting the Respondent State to guarantee that the Victims have regular and unhindered access to adequate medical attention, including care provided through their families; and to ensure that lawyers have regular and unhindered access to the Victims.
26. On 6 March 2015, the Secretariat informed both Parties about Seizure of the Communication and grant of Provisional Measures. The Secretariat also invited the Complainants to make their submissions on Admissibility within two (2) months in line with the Commission's Rules of Procedure 2010.
27. On 5 May 2015, the Complainants made their submissions on Admissibility which were subsequently forwarded to the Respondent State on 20 May 2015, requesting the latter to submit its written submissions on Admissibility within two (2) months.
28. Consideration of the Communications was deferred pending submissions from the Respondent State, and on 14 December 2015, the Commission granted an extension of thirty (30) days to the Respondent State within which to submit their overdue submissions on Admissibility, failing which it would proceed to adopt a default decision.



29. The Respondent State's submissions were received on 3 February 2016 and on 4 February 2016, the Respondent State's submissions were forwarded to the Complainants, requesting the latter to submit their comments/observations on the submissions within a one (1) month timeline.
30. The Complainants made additional submissions on Admissibility in March 2016 in response to the Respondent State's submissions which were forwarded to the Respondent State for information on 23 March 2016.
31. The Commission decided on Admissibility during its 24th Extra-Ordinary Session which held from 30 July to 8 August 2018, and Parties were notified of the decision on 24 September 2018. The Complainants were requested to submit on the Merits within 60 days of the notification.
32. On 5 April 2019, the Complainants requested one-month extension of time to make submissions on the Merits which was granted by the Commission by letter dated 10 April 2019.
33. On 10 May 2019, the Complainants submitted on the Merits of the Communication and the Respondent State was informed on 17 May 2019 with a timeline of 60 days to make submissions.
34. The decision on the Merits of the Communication was deferred from the 65th to 72nd Ordinary Sessions due to lack of submissions from the Respondent State.
35. On 13 September 2022, the Respondent State was given 30 additional days to make submissions on the Merits, with an indication that the Commission would proceed with a decision on the Merits based on submissions from the Complainants if the Respondent State failed to submit.

ADMISIBILITY

Complainants' Submissions on Admissibility

36. The Complainants' submissions on Admissibility were accompanied by Affidavits from two witnesses, including the daughter of the First Victim.
37. The Complainants submit that this Communication satisfies the admissibility criteria articulated in Article 56(1) - (4) of the African Charter in that:
 - i. It identifies the organisations representing the Victims as the authors of the Communication in accordance with Article 56(1);
 - ii. It is filed against a State party (The Sudan) to the African Charter and provides *prima facie* evidence of violations of the African Charter committed after ratification of the African Charter. The Communication also alleges violations of the rights enshrined in the African Charter (Articles 1, 5, 6, 7(1) (c) and (d), 9 (2), and 10, in accordance with Article 56(2) of the African Charter;
 - iii. Furthermore, that there is no disparaging language in line with Article 56(3) of the African Charter; and
 - iv. The facts are based on correspondence with the Complainants' defence team, the defence petition to the Constitutional Court, families, human rights defenders following their case and reports of national and international organisations and institutions, in line with Article 56 (4) of the African Charter.

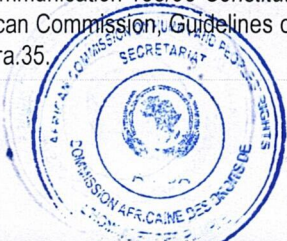


38. Regarding Article 56(5) of the African Charter, it is the Complainants' submission that in the present case there are no effective and sufficient remedies available to the Victims. They note that as specified by the Commission in its jurisprudence, it is not necessary for Complainants to exhaust domestic remedies where domestic legislation and practice foster violations of the African Charter. In such instances, domestic proceedings are unavailable, futile or ineffective.⁴
39. Their arguments are hinged on three issues: (1) Failure of the Constitutional Court to provide the Victims with an effective remedy for arbitrary arrest and detention; (2) Immunity of NISS Officials and (3) Respondent State's failure to remedy the violations despite ample notice.
40. The Complainants submit that the Respondent State failed to provide the Victims with an effective remedy. They submit that, on 12 December 2014, the Victims filed a Complaint to the Supreme Court through the law office of Kamal Algizouli challenging the validity of the Treatment and Rights Detainees Regulations made under the NSA. The Complainants submit that the Regulations have not yet been deposited before the National Assembly as prescribed by the law.
41. Citing **Constitutional Rights Project v Nigeria**, the Complainants argue that in cases of arbitrary arrest and detention, such as in the present case, the Commission has held that the appropriate remedy is a writ of *habeas corpus* so that a "court may order the police to produce an individual and justify his imprisonment."⁵ The Complainants submit that they filed a *habeas corpus* petition before the Constitutional Court on 19 December 2014, based on arbitrary arrest, denying access to lawyers and family and detaining the Victims in unknown places without the right to appear before a judge or another legal officer. According to the Complainants, the Constitutional Court did not respond to the petition, nearly five (5) months after the arrest of the Victims.
42. The Complainants argue that this has been the attitude of the Constitutional Court in several previous cases. Based on this, the Complainants argue that since *habeas corpus* cases need to be dealt with promptly, the attitude of the Constitutional Court fails to qualify it as an effective remedy in the present case.
43. The Complainants also refer to the Commission's **Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa** (the Guidelines) which state that "[a]ll persons in police custody and pre-trial detention shall have the right, either personally or through their representative, to take proceedings before a judicial authority, without delay, in order to have the legality of their detention reviewed."⁶
44. The Complainants further submit that, the Commission's **Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa** (Right to Fair Trial Guidelines) provide that "[a]nyone concerned or interested in the well-being, safety or security of a person deprived of his or her liberty has the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of such a person and/or identifying the authority

⁴ See for example Communication 368/09 -*Abdel Hadi, Ali Radi & Others v Republic of Sudan*, paras. 46-49; Communication 71/92-*Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*, para.11. See also European Court of Human Rights, *Aksoy v Turkey*, Application no 21987/93, Judgment (Merits and Just Satisfaction), 18 December 1996, para.52.

⁵ Communication 153/96-*Constitutional Rights Project v Nigeria*, para.8.

⁶ African Commission, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*, March 2015, para.35.



ordering or carrying out the deprivation of liberty.”⁷ According to the Guidelines, “[j]udicial bodies shall at all times hear and act upon petitions for *habeas corpus*, *amparo* or similar procedures.”⁸

45. The Complainants submit that the Commission considers that remedies are only deemed effective if they offer a prospect of success, which means that they must be available in practice and not be a purely theoretical construct.⁹ Further that the seeking of internal remedies must be applied concurrently with Article 7 of the African Charter, which establishes and protects the right to a fair trial.¹⁰ Therefore, they submit that where domestic remedies do not guarantee rights protected under Article 7 of the African Charter, such remedies are not effective for the purposes of Article 56 (5) of the African Charter.
46. The Complainants argue that in the present case, the two Victims were held *incommunicado* for sixteen and seventeen days respectively without access to their family or a lawyer. Further, that they were not brought before a judge to decide on the legality of their respective detention.
47. The Complainants argue that Article 50 of the NSA of 2010 permits the NISS to detain an individual for up to four and a half months without judicial review. According to them, this deprives the detained individual of any judicial protection under Article 7 of the African Charter and violates the right to a fair trial. It is the Complainants' submission that the same Act in Article 51 (2) thereof, fails to adequately guarantee the right to inform one's family and the right of access to a lawyer in conformity with Article 7 of the African Charter and the Commission's aforementioned Guidelines.¹¹ They also submit that the Act provides for the right to inform one's family and access to a lawyer “if it does not prejudice the progress of interrogation, enquiry and investigation,” and that this decision is a prerogative of the NISS without any judicial oversight or review.
48. The Complainants submit that in any event there are no effective and sufficient remedies available in the Respondent State to Victims of NISS abuse. They submit that in the present case, the alleged violations were committed by NISS officials who have immunity from prosecution under the NSA, and that the Respondent State's legal framework provides NISS officials with extremely broad powers of arrest and detention under Articles 50, 51 and 52 of the NSA that are not subject to judicial review.¹²
49. The Complainants submit that on 21 January 2015, they filed Petition No 258/2014,¹³ in the Constitutional Court, arguing that Articles 50 (1) and 51(2) of the NSA of 2010 infringed the bill of rights and rights enshrined in international instruments¹⁴, the rights to life and human dignity¹⁵ and the right to liberty and security of the person.¹⁶ The Complainants submit that their petition

⁷ African Commission, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, Principle M (5) (b).

⁸ Ibid, principle M (5) (e).

⁹ Communications 147/95 & 149/96-*Sir Dawda K. Jawara v The Gambia*, paras.31-32, 35, 38.

¹⁰ Communication 48/90-50-91-89/93-*Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, para.31.

¹¹ African Commission, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, March 2015, para.4 (f); the Commission's Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa similarly provide for the right of arrested persons to contact their family, principle M (1) (c).

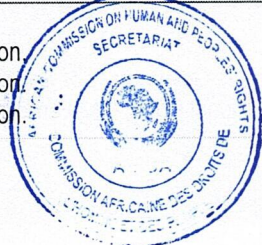
¹² See Article 50, 51 and 52 of the 2010 National Security Act; for an English translation: <http://www.pclrs.com/downloads/bills/Institutional%20Law/National%20Security%20Act%202010%20UNMIS%20unofficial%20English%20%20Transaltion%20final%20version%202010-02-03%20single%20space.pdf>.

¹³ Annex B of additional submissions.

¹⁴ Article 26 Interim National Constitution

¹⁵ Article 27 Interim National Constitution

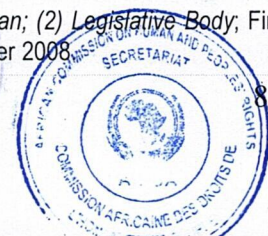
¹⁶ Article 28 Interim National Constitution



also requested the Constitutional Court to rule against actions of the Respondent State's agents on the grounds that their actions were contrary to Articles 6 and 9 of the International Covenant on Civil and Political Rights (ICCPR), both of which guarantee liberty and security of the person.

50. The Complainants submit that they were yet to hear from the Constitutional Court, and that even if the Constitutional Court acknowledged the Victims' petition, it has previously upheld the immunity for NISS personnel as enshrined in Article 52 of the NSA.¹⁷ The Complainants then submit that the immunity of NISS personnel would constitute an additional impediment to the resolution of the Complainants' petition.
51. The Complainants submit that on 23 February 2015, the trial of the Victims commenced before a Special Court set up by the Chief Justice of Khartoum State under the Anti-Terrorism Act of 2001, at the request of the Prosecutor, on the grounds that charges filed against the Victims included offences relating to terrorism. They submit that under the applicable procedure, the prosecution does not require the court's permission to present witnesses and can present an unlimited number of prosecution witnesses. The defence on the other hand is required to submit a list of its witnesses with a summary of each witness's testimony. The court may then exclude defence witnesses if it considers their testimony irrelevant for the case.
52. The Complainants submit that during the trial, the prosecution presented officers of the NISS as witnesses who testified, *inter alia*, that the First Victim employed political activists and journalists. They submit that the Sudanese Human Rights Monitor was collaborating with international human rights organisations, and NISS Officers reportedly beat lawyers who were holding a sit-in protest in front of the court against the continued trial of the Victims.
53. The Complainants submit that on 9 April 2015, the Respondent State's Minister of Justice announced the decision to stay the criminal proceedings against the Victims in accordance with the Criminal Procedure Act (CPA) 1991. They submit that under Article 58(1) of the CPA "*the Minister of Justice, at any time, after completion of inquiry, and before passing the preliminary judgement, in the criminal suit, may take a grounded decision, to stay the criminal suit, against any accused; and his decision shall be final.*" They further submit that the decision was read out to the Victims by the prosecution. However, neither the Victims nor their lawyers were handed copies of this decision, and on 9 April 2015, both Victims were released from Kober Prison in Khartoum.
54. In light of the foregoing, the Complainants submit that the Respondent State's legal framework, the practice of its Constitutional Court and of the NISS and other authorities responsible for the investigation and prosecution of violations, render remedies in the Respondent State unavailable, ineffective and insufficient for the Victims.

¹⁷Constitutional Court, *Farouq Mohamed Ibrahim Al Nour v (1) Government of Sudan; (2) Legislative Body*, Final order by Justice Abdallah Aalmin Albashir, President of the Constitutional Court, 6 November 2008.



55. The Complainants also submit that the requirement to exhaust domestic remedies prior to filing a complaint with the Commission reflects the primary duty of a State to remedy an alleged violation and provides the State with an opportunity to do so. Therefore, where the authorities are aware of an alleged violation, yet do not initiate steps to remedy the violation, they fail to comply with their duty. Under these circumstances, they submit that victims of alleged violations have no alternative but to seek justice outside the State. The Complainants therefore argue that the fact that a State has not taken any action is an indication that domestic remedies are not available or if they are, are not effective or sufficient to redress the alleged violations.
56. The Complainants submit that the Respondent State failed in its duty to investigate alleged violations of the African Charter in accordance with the **Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa** (*Robben Island Guidelines*) which provide that investigations into all allegations of torture or ill-treatment shall be conducted promptly, impartially and effectively.¹⁸
57. The Complainants submit that in the present case, the Respondent State's authorities were undoubtedly aware of the alleged human rights violations. As evidence, the Complainants submit that the lawyers of the Victims filed a petition with the Constitutional Court on 19 December 2014. While this petition did not specifically request an investigation, it provided the Respondent State with sufficient information to engage their responsibility to investigate the alleged criminal acts. Further, that the arrest of the Victims, *incommunicado* detention and subsequent trial were widely reported in national and international media¹⁹ and raised by various bodies directly with the Government of the Respondent State, including the UN High Commissioner for Human Rights,²⁰ the delegation of the European Union to the Respondent State²¹ and the European Parliament.²²
58. In addition, they state that senior Government officials reportedly commented on the arrest and detention of the Complainants²³ and the US Deputy Assistant Secretary of State pressed for their release during a visit to the Respondent State from 22-26 February 2015.²⁴ The Complainants submit that the Commission itself brought the alleged violations to the Respondent State and requested the Respondent State to take specific Provisional Measures and to "report back on the implementation of the Provisional Measures" within fifteen days of receipt of the decision on

¹⁸ African Commission, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, para. 19. They also refer to principle XI (2), of the Declaration of Principles on Freedom of Expression in Africa.

¹⁹ See for instance The Guardian, "We are the victims of our own corrupt government'- life as an activist in Sudan," 22 January 2015, at <http://www.theguardian.com/world/2015/jan/22/we-are-the-victims-of-our-own-corrupt-government-life-as-an-activist-in-sudan>; Radio Dabanga, "Sudan: New Witnesses Heard in Case Against Sudan's Opposition Figures," 27 March 2015, at <http://allafrica.com/stories/201503300255.html>; Radio Dabanaga, "Sudan detainee El Algar needs eye surgery," 18 March 2015, at <https://www.dabangasudan.org/en/all-news/article/sudan-security-forces-prisoner-el-agar-to-undergo-eye-surgery>.

²⁰ UN Office of the High Commissioner for Human Rights, "Press briefing notes on Sudan detentions," 12 December 2014, at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15413&LangID=E>.

²¹ European Union delegation to the Republic of Sudan, "European Union calls for immediate release of all political detainees," 7 February 2015, at http://eeas.europa.eu/delegations/sudan/documents/press_corner/20150207_immediate-release-of-all-political-detainees_en.pdf.

²² European Parliament resolution of 18 December 2014 on Sudan: the case of Dr Amin Mekki Medani, 2014/3000 (RSP), at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2014-0108>.

²³ Sudan Tribune, "Govt Changes Version of Events Behind Arrest of Opposition Figures," 8 February 2015, at <http://allafrica.com/stories/201502100352.html>

²⁴ United States Department of State, "Sudan: Readout of DRL Deputy Assistant Secretary Feldstein Trip to Sudan," 28 February 2015, at <http://allafrica.com/stories/201503021721.html>



seizure.²⁵ The Complainants allege that the Respondent State's failure to respond to the Commission's request is indicative of its failure to provide the Victims with a remedy.

59. It is the submission of the Complainants that while the Respondent State was aware of the human rights violations, no measures were taken to provide the Victims with a remedy and there is no indication that the Respondent State has investigated the allegations or plans to do so.
60. Regarding Article 56(6) of the African Charter, the Complainants submit that the Complaint was filed within reasonable time as it was filed on 20 February 2015, two months after the arrest of the Victims.
61. On Article 56(7) of the African Charter, the Complainants submit that this matter has not been submitted before any international body and that it has not been settled in accordance with the principles of the Charter of the United Nations or the Charter of the Organisation of African Unity or the provisions of the African Charter.
62. To substantiate the submission in the above paragraph, the Complainants submit that, they wrote an Open Letter to UN Special Mechanisms, including the Working Group on Arbitrary Detention (the Working Group), and in a response received on 23 February 2015, from the Secretariat of the Working Group, it was stated that the Working Group was considering the Complainants' case in line with the Working Group's regular procedure.²⁶ According to the Secretariat of the Working Group, the latter had taken account of the information in the Open Letter as well as other information received and decided on its own accord to consider the matter as an individual complaint pursuant to its procedure as set out in its revised working methods.²⁷ The Complainants submit that the Working Group's decision to examine the information contained in the Open Letter does not fall within the ambit of Article 56 (7) of the African Charter because of the nature of the Open Letter; the limited scope of the Working Group's mandate and that the Working Group has not settled the matter.
63. With regard to the nature of the letter, the Complainants submit that the Open Letter did not and was never intended to constitute a Complaint submitted for the purpose of consideration by any mechanism. It was clearly designated as an 'Open Letter' sent to the Commission and UN Special Mechanisms in relation to their capacities as Special Procedure mandate holders. The Complainants also state that they did not request the Working Group (nor the Commission) to consider the Open Letter as an individual complaint but were only urging the different mandate holders to undertake a range of "urgent actions", including to: (i) "publicly call" on the Government [of] Sudan to immediately address the allegations set out in the Open Letter; and (ii) "declare" that the action taken against the Complainants and Dr. Alagar constituted a violation of their right to freedom of expression.
64. The Complainants also submit that the Open Letter was not signed by legal representatives of the organisations; not comprehensive enough to constitute a Complaint before an adjudicating body as the substantive part of the letter is only 2.5 pages long and does not include any evidence or reference to further information; and devoid of any legal analysis of potential violations or any reference to the exhaustion of domestic remedies. This is as opposed to the 21 pages long

²⁵ African Commission, Communication 511/15, Decision of the African Commission on Human and Peoples' Rights on Seizure, February 2015.

²⁶ E-mail sent by Mrs Sulini Sarugaser-Hug of the Working Group on Arbitrary Detention's Secretariat to Mrs Katherine Perks, Programme Director, ACJPS, on 23 February 2015, Annex II.

²⁷ UN Working Group, "Report of the Working Group on Arbitrary Detention," 19 January 2011, A/HRC/16/47 at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-57_en.pdf.



Complaint submitted to the Commission on 20 February 2015, with details on a range of specific alleged violations of the African Charter, supported by *prima facie* evidence and includes a legal analysis on the admissibility as well as the merits of the case. They submit that the Complaint was also signed by legal representatives of the Organisations.

65. According to the Complainants, the present Communication differs from the Open Letter as it was submitted by different parties, includes further facts, alleges a broader range of violations of the African Charter, and adduces *prima facie* evidence in support of specific violations of their rights under the African Charter, going beyond the general allegations in the Open Letter. The Complainants therefore submit that the Open Letter and the Complaint differ in respect of the parties, facts and types of violations alleged as well as the types of measures requested.
66. Regarding limited scope of the Working Group's mandate, the Complainants submit that the Working Group's mandate is limited to "investigate cases of deprivation of liberty imposed arbitrarily."²⁸ It is the Complainants' view that consideration of the Victims in this case and Dr. Alagar's case by the Working Group will therefore be limited by the Working Group's mandate and be confined to the arbitrariness of their arrest and detention.
67. Regarding settling the matter, the Complainants submit that at the time of submitting the Complaint to the Commission, the Working Group had not, to the knowledge of the Complainants, rendered an opinion on the matter.

Preliminary Objections of the Respondent State

68. The Respondent State argues that it did not receive the Commission's Seizure decision and a copy of the Provisional Measures of the present Communication. The Respondent State also claims that the Complainants' submissions on admissibility were "*blackened*" and difficult to read.
69. The Respondent State submits that regardless, it would still proceed to make its submissions on Admissibility.

Admissibility Submissions by the Respondent State

70. It is the Respondent State's submission that this Communication does not fulfil the admissibility requirements as articulated in Article 56 of the African Charter.
71. The Respondent State argues that the Communication is incompatible with the African Charter contrary to Article 56 (2) thereof. It states that the Victims were charged in accordance with law and due process guarantees for "*conspiring with armed groups abroad with the intent to wage war against the State and topple the constitutional government via means of force.*" The Respondent State submits that prosecution of the Victims did not amount to human rights violations; and the arrests of the Victims were in accordance with the NSA 2010.
72. The Respondent State submits that, during detention, the Victims were treated with dignity considering their positions as national figures and were given access to their lawyers. The Respondent State refers to the case filed by the Victims before the Supreme Court on 12 December 2014 through a Law Firm, and adds that on 10 December 2014 the Victims also submitted a Complaint to the National Human Rights Commission (NHRC).

²⁸ See para.7 of the Working Group's revised methods of work.



73. The Respondent State submits that following an enquiry by the law enforcement agency under the NSA 2010, *prima facie* evidence emerged to establish charges under the Criminal Act and criminal proceedings were assumed by the competent prosecution against the Victims and subsequently referred for trial by the competent court of law in accordance with the CPA.
74. The Respondent State submits that the Victims were tried in an open court where all the requirements of the trial were satisfied, and represented by prominent lawyers, adding that the court sessions were also attended by regional and international bodies.
75. The Respondent State submits that the Victims were later released by a decree of *nolle prosequi* made by the Minister of Justice on 9 April 2015 pursuant to the power vested upon him under Section 38 of the CPA in a move to boost the Government's efforts for a continued conducive atmosphere for the national inclusive dialogue which was then underway.
76. It is therefore the Respondent State's submission that the mere initiation of legal proceedings in accordance with the law and in the due process of law does not amount to any human rights violations thus making this Communication incompatible with the African Charter.
77. Regarding Article 56(5) of the Charter, the Respondent State submits that the Complainants neither exhausted local remedies as is the requirement under article 56 (5) of the African Charter nor attempted to do so. The Respondent State made reference to the Commission's jurisprudence regarding the exhaustion of local remedies in ***Bakweri Land Claims Committee v Cameroon***.
78. The Respondent State submits that assertions that the Victims were kept *incommunicado* without access to visits either by lawyers or family and that writ of *habeas corpus* is unattainable in the local judicial system is a mere casting of aspersions and refutable by the fact of the applications made by the Victims' lawyers to the Supreme Court and NHRC as previously stated.
79. It is therefore the Respondent State 's submission that the same motion could have been taken by the Complainants to approach domestic law mechanisms such as the Constitutional Court for any alleged human rights violations before resorting to the Commission, but they chose not to do so.
80. On Article 56(7) of the African Charter, the Respondent State submits that this case has already been referred to and settled by the Working Group on Arbitrary Detention, which rendered its decision on 24 April 2015, 16 days after the Victims had been released by virtue of the Ministry of Justice's decree of *nolle porsequi*. The Respondent State therefore submits that the facts alleged in this Communication were the same as those which gave rise for the cause of referral to the Working Group, and so, consideration of it by the Commission may amount to *res judicata*.
81. The Respondent State also alleges that, earlier, the Government of The Sudan had received a joint urgent appeal signed by five special procedure mandate holders dated 9 December 2014 on the same issue. The Respondent State submits that the Government responded and made clarifications and there has not been any further comment from the mandate holders.
82. The Respondent State's prays that this Communication be declared inadmissible under Article 56(2), (5) and (7) of the African Charter.



Complainants' supplementary arguments on Admissibility

83. The Complainants submitted additional arguments in response to the Respondent State's submissions on admissibility. These submissions focus on the incompatibility of the Complaint with the African Charter contrary to Article 56 (2) thereof; the Complainants' failure to exhaust local remedies contrary to Article 56 (5) thereof; and the settlement of the Complaint through the consideration of the Complaint by the Working Group contrary to Article 56 (7) thereof.
84. On Article 56(2) of the African Charter, the Complainants submit that, contrary to the Respondent State's admissibility submissions, the charging in accordance with law and the prosecution of individuals does not determine whether a matter raises human rights issues, and therefore has no bearing on its compatibility with the African Charter. The Complainants argue that, as outlined in detail in their Complaint, it is the arrest and arbitrary detention of the Victims, for participating in discussions on the future of Sudan, and their subsequent *incommunicado* detention in breach of Articles 1, 5, 6, 7 (1) (c) and (d), 9 (2), 10 and 16 of the African Charter that this Complaint seeks to address.
85. In response to the Respondent State's submission that the Complainants neither exhausted local remedies nor attempted to do so, the Complainants refer to their initial submission on admissibility outlining that the Respondent State failed to remedy the situation despite ample notice. They submit that at no point during their detention were they arraigned before a judge to determine the legality of their detention. The Complainants submit that the Victims made attempts to seek remedies before the Constitutional Court and the Supreme Court even though they were held in *incommunicado* detention by virtue of provisions of the NSA.
86. The Complainants reiterate their arguments in **paragraphs 33 to 54** above.
87. In respect of Article 56(7) of the African Charter, the Respondent State argued that the Working Group considered the matter and rendered its decision on 24 April 2015. In that regard the Respondent State, concluded that the Complaint is therefore settled and should be declared inadmissible in accordance with Article 56(7) of the African Charter. In response, the Complainants reiterate their initial arguments on the subject, with the conclusion that there has been no determination by another international adjudicative body of all their grievances, nor has there been consideration of appropriate forms of redress.
88. In light of the submissions made by the Complainants in its initial and additional submissions, the Complainants request the Commission to declare this Communication admissible and that it considers its merits, at the earliest opportunity.

The Commission's Analysis of the Respondent State's Preliminary Observations

89. Before considering each of the above arguments on Admissibility, the Commission will first address the preliminary objections raised by the Respondent State in the instant case.
90. The preliminary objections are based on the Respondent State's submission that it was yet to receive the Commission's Seizure decision and a copy of the Provisional Measures of the present Communication. The Respondent State also claims that the Complainants' submissions on Admissibility were "blackened" and difficult to read.



91. The Commission will verify/determine whether the procedures followed in the instant case contain flaws that would undermine the Respondent State's ability to argue the admissibility of the case.
92. The Commission notes that despite the State's observations that the Complainants' submissions on Admissibility were blackened and difficult to read, it still proceeded to make submissions on Admissibility. In the view of the Commission, this translates to the fact that the purportedly poor nature of the submissions did not impede the Respondent State from making submissions.
93. Regarding the argument that the Respondent State did not receive the Commission's Seizure decision and a copy of the Provisional Measures, the Commission notes that after perusing the records from its Registry, there is proof of the fact that both the Seizure decision and Provisional Measures were indeed received by the Respondent State. This is evidenced by DHL receipts dated 16/03/2015 and waybill dated 17/03/2015 signed by a Kone Soudan.
94. Based on the above analysis, the Commission rejects the preliminary objections interposed by the Respondent State and decides to proceed with consideration on the admissibility of the instant case.

The Commission's Analysis on Admissibility

95. Communications submitted under Article 55 of the African Charter must satisfy all the seven admissibility conditions stipulated under Article 56 of the African Charter for the Communication to be admissible. Where the Parties do not address all the admissibility requirements, the Commission examines the admissibility of a Communication in respect of each condition based on the available information.²⁹
96. In the present Communication, the Complainants aver that, apart from Article 56(5) of the African Charter, the Communication meets the requirements under Articles 56(1), 56(2), 56(3), 56(4), 56(6) and 56(7) of the African Charter. They indicate that Article 56(5) of the African Charter was not complied with because there are no effective and sufficient remedies available to the Victims in the Respondent State. The Respondent State on the other hand argues that the Complainants have not complied with the provisions of Article 56 (2), (5) and (7) of the African Charter, and urges the Commission to declare the Communication inadmissible based on the non-fulfillment of these requirements.
97. In examining the facts before it, the Commission notes that the Complainants have indicated the Authors of the Communication, in compliance with Article 56(1) of the African Charter; the Commission has not noted any disparaging or insulting language in terms of Article 56(3) of the African Charter; the Communication is not exclusively based on news disseminated through the mass media in compliance with Article 56(4) of the African Charter; and with no specific objection from the Respondent State, including its analysis of the facts, the Commission finds that the Communication was submitted within reasonable time in line with Article 56(6) of the African Charter. The Commission will therefore focus its analysis on the contentious Articles under Article 56, namely, sub (2), (5) and (7) of the African Charter.

²⁹ Communication 304/05 – *FIDH and others v Senegal* para 38; Communication 338/07 - *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria* para 43; and Communication 284/03 - *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* para 81; Communication 299/05 - *Anuak Justice Council v Ethiopia* para. 44; and Communication 328/06 - *Front for the Liberation of the State of Cabinda v Republic of Angola* para 38.



98. The Complainants argue that, the Communication seeks to address the arrest and arbitrary detention of the Victims for participating in discussions on the future of Sudan, and their subsequent *incommunicado* detention in breach of Articles 1, 5, 6, 7 (1) (c) and (d), 9 (2), 10 and 16 of the African Charter. They submit that the Communication is compatible with the African Charter as it raises concrete violations of the same.
99. The Respondent State contends that the Communication is incompatible with the African Charter contrary to Article 56 (2) thereof on the basis that the arrest, treatment, charge and prosecution of the Victims were in accordance with the law, and further that the Victims were later released by a decree of *nolle prosequi* made by the Minister of Justice. According to the Respondent State, the mere initiation of legal proceedings in accordance with the law and in the due process of law does not amount to any human rights violations, thus making the Communication incompatible with the African Charter.
100. The Commission notes that compatibility under Article 56(2) of the African Charter requires that the facts of a Communication to reveal *prima facie* violation of the rights of the victims, relate to human and peoples' rights under the African Charter, and be filed against a State party to the African Charter. This position was echoed by the Commission in **Michael Majuru v Zimbabwe**,³⁰ **Sir Dawda K. Jawara v The Gambia**³¹ and **Darfur Relief and Documentation Centre v Sudan**.³²
101. In light of the above, the Commission notes that the present Communication alleges violations of Articles 1, 5, 6, 7 (1) (c) and (d), 9 (2), and 10 of the African Charter and the Complainants support facts by evidential materials. The Communication is also filed against a State Party to the African Charter. In this regard, the Commission holds that the Respondent State's assertions are immaterial at this stage and the Commission finds the Communication in compliance with Article 56(2) of the African Charter.
102. Article 56(5) of the African Charter provides that "*Communications ... received by the Commission shall be considered: if they are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged.*" In the case of **Sir Dawda K. Jawara vs. The Gambia**,³³ the Commission held that Complainants are required to exhaust local remedies only if the local remedies are available, effective and sufficient. A local 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*".³⁴
103. In the present Communication, the Complainants surmise that the Respondent State's legal framework; delays in the Constitutional Court; the practice of the NISS and other authorities responsible for the investigation and prosecution of violations, render remedies in the Respondent State unavailable, ineffective and insufficient for the Victims.³⁵ The Complainants contend that the immunity of NISS personnel also constitutes an additional impediment to the resolution of the Victims' petition.

³⁰ Communication 308/2005- *Michael Majuru v Zimbabwe*- para 44.

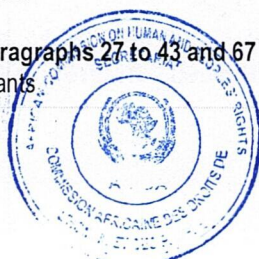
³¹ n 9 above, para 41.

³² Communication 310/05- *Darfur Relief and Documentation Centre v Sudan*, para 64.

³³ n 9 above, para 32.

³⁴ *Ibid*

³⁵ See details in paragraphs 27 to 43 and 67 to 69 in the Initial and supplementary Admissibility submissions on Admissibility of the Complainants.



104. On its part, citing the Commission's jurisprudence in ***Bakweri Land Claims Committee v Cameroon*** to support its arguments, the Respondent State challenges the admissibility of the Communication on the grounds that local remedies have not been exhausted by the Complainants, nor attempted.
105. In the present case, as opposed to the Respondent State's argument that the Complainants did not attempt to exhaust local remedies, in perusing the facts before it, the Commission notes that:
- i. Following arrest and detention of the Victims, they filed a Complaint to the Supreme Court through the law office of Kamal Algizouli on 12 December 2014, challenging the validity of the Treatment and Rights Detainees Regulations made under the NSA of 2010;
 - ii. A *habeas corpus* petition was also filed before the Constitutional Court on 19 December 2014 by the Complainants in this Communication which the Constitutional Court failed to respond to, nearly five months after the arrest of the Victims (according to the Complainants, from **19 December 2014** when the matter was filed to the Constitutional Court and **5 May 2015** when the Complainants made their submissions on Admissibility);
 - iii. Another petition was filed to the Constitutional Court by the Complainants on 21 January 2015 for the unconstitutionality of Article 50 (1) and (2) of the NSA Act of 2010 amongst others; and
 - iv. Trial of the Victims before a Special Court on 23 February 2015 and the subsequent announcement to stay the criminal proceedings on 9 April 2015.
106. Additionally, while the Respondent State is refuting the fact that attempts were made by the Complainants to exhaust local remedies, stating that they should have taken the matter to the Constitutional Court, in the same breath, the Respondent State acknowledges that the Victims took the matter to the Supreme Court and the NHRC.
107. Evidently, the Commission is of the view that attempts to exhaust local remedies were undeniably made by the Victims and the Complainants, and therefore dismisses the Respondent State's contention that the Complainants did not attempt to exhaust local remedies.
108. However, the other leg of the Respondent State's contention remains unanswered. That is, whether the Complainants exhausted local remedies or not, as the rule under Article 56(5) of the African Charter allows the Respondent State to have an opportunity to redress the wrong that has occurred within the framework of its own domestic legal order, before being dealt with at the international level. To ascertain this, the Commission will first analyse the application for the writ of *habeas corpus* to the Constitutional Court mentioned by the Complainants and the extent to which it was effective or not, as a remedy; and the subsequent filing of a petition to the Constitutional Court on 21 January 2015.
109. The Commission will also ascertain whether there was any delay in the judicial process in the Respondent State which justified bringing the Communication before the Commission without waiting for finalisation/adjudication of the matter at the local level. Additionally, the Commission will analyse the other arguments raised by the Complainants as they relate to exhaustion of local remedies.
110. The Black's Law Dictionary defines *habeas corpus* as the process whereby a detained person's Attorney may compel or force police to bring the detained person to court and challenge



the legality of the detention. In **Article 19 v. Eritrea**,³⁶ the Commission stated that a writ of *habeas corpus* is a judicial mandate to an arresting officer ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody.

111. A *habeas corpus* petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment, and it serves as an important check on the manner in which the courts pay respect to constitutional rights. Pursuant to Article 29 of the 2005 Constitution of The Sudan (the Constitution), "*every person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his liberty except for reasons and in accordance with procedures prescribed by law.*" The writ of *habeas corpus* therefore provides a judicial remedy for enforcing a fundamental individual right, the right to personal liberty, which may be defined as the "*right to be free of physical restraint that is not justified by law.*"
112. In addition, **Article 16(1) (c) of the Constitutional Court Act of 2005**, gives the Court powers "*to pass any writ of habeas corpus to anybody or person to bring the detained, or confined person, ad subjiciendum, for the purpose of considering the constitutionality of the confinement or detention.*"
113. In the present Communication, following the victims' *incommunicado* detention without access to lawyers or family, the lawyer of the Victims filed a *habeas corpus* petition before the Constitutional Court on 19 December 2014. The facts indicate that, the Constitutional Court did not respond to the petition nearly five (5) months after the arrest. The Respondent State limits its argument to the fact the Complainants are merely casting aspersions and that they could also have approached domestic law mechanisms such as the Constitutional Court for any alleged human rights violations before resorting to the Commission.
114. In addition, it is reported that the Complainants filed a petition to the Constitutional Court on 21 January 2015, which argued that Articles 50 (1) and 51(2) of the NSA of 2010 infringed the bill of rights and rights enshrined in international instruments,³⁷ the rights to life and human dignity,³⁸ and the right to liberty and security of the person.³⁹ The same petition also requested the Constitutional Court to rule against actions of the Respondent State's agents on the grounds that their actions were contrary to Articles 6 and 9 of the ICCPR, both of which guarantee liberty and security of the person. According to the Complainants, the Constitutional Court did not equally respond.
115. In **Constitutional Rights Project v. Nigeria**⁴⁰, the Commission posited that, a normal remedy for victims of arbitrary detention is for the victims to bring an application for a writ of *habeas corpus*, in which the Court may order the police to produce an individual and justify imprisonment. The Commission notes that, in the instant Communication, the writ of *habeas corpus* was filed to the Constitutional Court, which is mandated under Section 122(1) (d) to protect human rights and fundamental freedoms, and under Article 15(1) (d) of the Constitutional Court Act of 2005, the Court has the jurisdiction to compel the authorities to take action to protect fundamental rights.

³⁶ Communication 275/03-*Article 19 v. Eritrea*, para 69

³⁷ Article 26 Interim National Constitution.

³⁸ Article 27 Interim National Constitution.

³⁹ Article 28 Interim National Constitution.

⁴⁰ N 5 above, para. 8; see also the African Commission's Guidelines on Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa and Combating Torture, Guideline 4 (j)

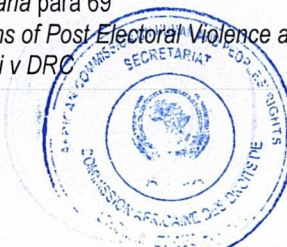


116. The Commission would like to underline the fact that a remedy is effective only if it is available and sufficient. Furthermore, having regard to the circumstances of the case, the effectiveness of the remedy should be in practice, and not only seen to be existent.
117. While the actual determination of the alleged violations will be dealt with at the Merits stage, the Commission notes that procedurally, cases of arbitrary arrests and detention should be addressed promptly, and within a reasonable time or measures should be taken to ensure release of the victims pending trial. In the Communication before this Commission, not only did the Constitutional Court fail to respond to the application on *habeas corpus*, which usually should be dealt with promptly following the circumstances of the Victims who were arbitrarily arrested and detained, but the Constitutional Court did not also respond to the petition filed on 21 January 2015.
118. However, in order for the Commission to make a ruling on the effectiveness of the remedies, the Commission would have to assess the second leg of Article 56(5) of the African Charter which deals with unduly prolonged remedies, or delay in judicial process. The question posed is whether the Constitutional Court's lack of response to both the application for *habeas corpus* and the petition filed on 21 January 2015 constitute undue delay in judicial process.
119. Regarding the question of delay in judicial process, the second part of Article 56 (5) of the African Charter provides that a Communication shall be considered if they are sent after the exhaustion of local remedies "...if any, unless it is obvious that this procedure is unduly prolonged".
120. In the Communication at hand, the Complainants argue that at the time of submitting the Communication to the Commission, the Constitutional Court had not made a ruling on the case filed before it five (5) months (***that is, according to the Complainant, 19 December 2014-date of filing the habeas corpus with the Constitutional Court to 5 May 2015-date of submission on Admissibility***). They state that the Constitutional Court's lack of response demonstrates that there were no effective remedies available to the Victims in the Respondent State.
121. The Commission deals with unduly prolonged remedies on a case by case basis, mostly depending on the circumstances and merits of each case. For instance, in ***Modise v. Botswana***,⁴¹ the Commission considered that local remedies were unduly prolonged for ten (10) years; five (5) years in ***Association of Victims of Post Electoral Violence and Interights v. Cameroon***,⁴² and one (1) year, eight (8) months in ***José Alidor Kabambi et al. v. DRC***.⁴³
122. For purposes of determining whether remedies were unduly prolonged, the Commission will not rely on the Complainants' computation of time which amounts to five (5) months. Rather, the Commission will make its own computation covering the period between the dates when proceedings were initiated at the local level in December 2014, to the date when the Communication was filed before the Commission in February 2015. According to the Commission, this amounts to two (2) months.

⁴¹ See Communication 97/93 *Modise v. Botswana* para 69

⁴² Communication 272/03 *Association of Victims of Post Electoral Violence and Interights v. Cameroon*

⁴³ Communication 408/11 *Jose Alidor Kabambi v DRC*



123. The question to be posed then is whether two (2) months is unduly prolonged, and in this regard, it is the Commission's view that the passage of two (2) months cannot constitute undue delay. Consequently, in the same vein, lack of response from the Constitutional Court within that period can also not translate to an ineffective remedy.
124. In view of the foregoing, the Commission concludes that there was no undue delay in the judicial process in this Communication.
125. The Complainants further argue that no local remedies were available for the Victims due to Article 50 of the NSA Act of 2010 which permits the NISS to detain an individual for up to four and a half months without judicial review. They aver that the alleged violations were committed by NISS officials who have immunity from prosecution, and that the Respondent State's legal framework provides NISS officials with extremely broad powers of arrest and detention under Articles 50, 51 and 52 of the NSA that are not subject to judicial review.⁴⁴
126. The Commission has ruled in several Communications against the Respondent State which raise the same concern regarding NISS officials. The Commission specifically ruled that since the NISS officials have immunity from prosecution, in addition to the fact that their decisions cannot be reviewed, *"it would be making a mockery of justice to expect that the victims would get justice from such a discretionary remedy."*⁴⁵ This renders the remedies available in the Respondent State for victims of NISS crimes "inadequate and ineffective." Additionally, the Commission has noted that the concept of immunity limits the opportunity to deal with violations in courts and consequently lack of redress to victims.⁴⁶ In line with its jurisprudence, the Commission therefore finds that the remedies are inadequate and ineffective.
127. Furthermore, the Complainants submit that the Respondent State was aware of the alleged violations, and did not take steps to remedy them, and under these circumstances, they state that victims of alleged violations have no alternative but to seek justice outside the State. The Complainants aver that the State's failure to act is an indication that domestic remedies are not available, effective or sufficient to redress the alleged violations.⁴⁷ The Respondent State does not make any counter submissions under this head, so the Commission will proceed to analyse the arguments of the Complainants to ascertain whether the Respondent State was indeed aware of the allegations and whether it took steps to investigate them.
128. The principle of exhaustion of local remedies allows a State the opportunity to remedy the situation at the domestic level before international adjudication.⁴⁸ In **Article 19 v Eritrea**,⁴⁹ the Commission ruled that:

⁴⁴ See Article 50, 51 and 52 of the 2010 National Security Act; for an English translation: <http://www.pclrs.com/downloads/bills/Institutional%20Law/National%20Security%20Act%202010%20UNMIS%20unofficial%20English%20%20Transaltion%20final%20version%202010-02-03%20single%20space.pdf>.

⁴⁵ Communication 379/09-*Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, para.57; Communication 386/10 - *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*, para 58; see also Communication 87/93 – *Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v Nigeria*, (1994) ACHPR, para 8; Communication 60/91 - *Constitutional Rights Project (in respect of Wahab Akamu, G. Adegea and Others) v Nigeria*, (1994) ACHPR, para 10.

⁴⁶ Communication 386/10 - *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*, para 58

⁴⁷ n 36 above, para 77.

⁴⁸ See Communication 25/89, 47/90, 56/91, 100/93 *World Organization Against Torture v Zaire* para 36; Communication 25/89, 47/90, 56/91, 100/93- *Free Legal Assistance Group and Others v Zaire* para 36; Communication 71/92 – *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia* para 10.

⁴⁹ Communication 275/03 – *Article 19 v Eritrea* (ACHPR 2007) para 72.



Whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion. In such cases, one cannot demand that the Complainants, or the Victims or their family members assume the task of exhausting domestic remedies when it is up to the State to investigate the facts and bring the accused persons to court in accordance with both domestic and international fair trial standards."

129. In the present Communication, the facts reveal that the Respondent State was aware of the violations through:

- i. The Provisional Measures granted by the Commission on the Communication which were transmitted to the Respondent State;
- ii. The Application for a writ of *habeas corpus* with the Constitutional Court, and as stated by the Complainants, while this petition did not specifically request an investigation it provided the Respondent State with sufficient information to engage their responsibility to investigate the alleged criminal acts;
- iii. Arrest of the Victims, *incommunicado* detention and subsequent trial were widely reported in national and international media and raised by various bodies directly with the government of the Respondent State;
- iv. The Open Letter to the Working Group; and
- v. The Respondent State itself corroborates the fact that it was aware of the violations by acknowledging in its submissions that the Government of The Sudan had received a joint urgent appeal signed by five special procedure mandate holders dated 9 December 2014 on the subject, of which the Government responded and made clarifications.

130. In light of the above, the Commission opines that the Respondent State is deemed to be aware of the violations and had ample notice and time to investigate, prosecute and punish the perpetrators.⁵⁰ This was also the Commission's position in **Article 19 v Eritrea**, where the Commission reasoned that "...the State had ample notice and time within which to remedy the situation, even if not within the context of the domestic remedies of the State... the State may still be said to have been properly informed and is expected to have taken appropriate steps to remedy the violation alleged".⁵¹

131. The Commission therefore echoes its decision in **Article 19 v Eritrea** that domestic remedies are either not available or if they are, not effective or sufficient to redress the violations alleged in the Communication on account of the fact that the Respondent State took no actions to remedy the violations even though it was aware.

132. Based on the above reasoning, the Commission holds that local remedies could not be exhausted in the present Communication because even though they were available, they were not sufficient and effective. Hence, Article 56(5) of the African Charter has been complied with.

133. Article 56(7) of the African Charter, provides that "*Communications ... received by the*

⁵⁰ n 36 above, para.77, Communications.54/91, 61/91, 98/93, 164/97-196/97, 210/98, *Malawi African Association and Others v. Mauritania*, para.142; in this case, the African Commission instructed Mauritania to launch an independent inquiry in order to clarify the fates of disappeared and to "identify and bring to book the authors of the violations perpetrated;" see also Communications 48/90-50/91, 52/91, 89/93-*Amnesty International and Others v. Sudan*, para.51; Communications 245/02-*Zimbabwe Human Rights NGO Forum v. Zimbabwe* paras 68-70

⁵¹ n 36 above, para.77



African Commission shall be considered if they: (7) do not deal with cases which have been settled by the states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter."

134. As a general rule, a Communication must be declared inadmissible if it has been submitted to another procedure for adjudication or settlement. The rule, *non bis in idem*, is meant to ensure that a State is not condemned twice for the same violation.⁵² It is also referred to as the Principle of Prohibition of Double Jeopardy, originating from criminal law. The Commission has also held that *Res judicata* is the principle that a final judgement of a competent court/tribunal is conclusive upon the parties in any subsequent litigation involving the same cause of action.⁵³
135. In the present Communication, the Complainants aver that, together with nine other NGOs, they submitted an Open Letter to the Commission and the UN Special Procedure mandate holders and the Working Group. They state that the Open Letter was not signed by legal representatives of the Organisations; was not comprehensive enough; and devoid of any legal analysis of potential violations to constitute a Complaint before an adjudicating body.
136. According to the Complainants, they did not request the Working Group to consider the Open Letter as an individual Complaint but were only urging the different mandate holders to undertake a range of "urgent actions," including to: (i) "publicly call" on the Government of Sudan to immediately address the allegations set out in the Open Letter; and (ii) "declare" that the action taken against the Complainants and Dr. Alagar constituted a violation of their right to freedom of expression. The Working Group however took account of the information in the Open Letter as well as other information received and decided on its own accord to consider the matter as an individual Complaint pursuant to its procedure as set out in its revised working methods, finalised the matter, and issued its opinion.⁵⁴
137. It is against this background that the Complainants, in their submissions, note that they did not submit this matter for adjudication before any international body and that it has not been settled within the context of Article 56(7) of the African Charter.
138. The Respondent State on the other hand, maintains that the matter has been 'settled' by the Working Group and should be declared inadmissible because the Working Group considered the matter and rendered its decision on 24 April 2015.
139. In this regard, is the Working Group a body envisaged under Article 56(7) of the African Charter with the capacity to offer the envisioned remedy?
140. In determining the admissibility of Communications under Article 56(7) of the African Charter, the Commission has scrutinised the nature of the mechanism, tribunal or organ examining the case. Bodies that are envisaged in Article 56(7) of the African Charter are those that are "*capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations*".⁵⁵

⁵² Communication 260/02 -*Bakweri Land Claims Committee v Cameroon*, para 52

⁵³ Communication 260/02 *Bakweri Land Claims Committee v Cameroon*, para 52

⁵⁴ Opinion of the Working Group available on <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/174/68/PDF/G1517468.pdf?OpenElement>

⁵⁵ Communication 279/03-296/05 -*Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*



141. In *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials v Ethiopia)*, the Commission examined Article 56(7) and unambiguously stated that “a matter is settled within the context of Article 56 (7) if it has been dealt with by any of the human rights treaty bodies or the Charter bodies of the United Nations system”.⁵⁶ The Commission went on to cite the bodies envisaged under Article 56(7) of the African Charter created under international human rights treaties including the UN Human Rights Council (UNHRC); the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination Against Women; the Committee Against Torture; the Committee on the Rights of the Child; and the Committee on Migrant Workers. The Commission also cited Charter bodies created under the UN Charter and Special procedures of the UNHRC, in particular, the 1503 procedure and the Sub-Commission for the Promotion and Protection of Human Rights.⁵⁷
142. In the present Communication, the Commission notes that the matter was brought to the attention of the Working Group, a non-treaty-based mechanism, composed of a group of Experts established by the UN Commission on Human Rights, now replaced by the UNHRC. The Working Group has “adopted methods of work similar to treaty-bodies dealing with individual complaints, complete with conclusions concerning the existence of a violation by the State concerned.”⁵⁸ Its mandate of considering individual Complaints on arbitrary detention is based on a criterion explained in its working methods.⁵⁹
143. In view of the jurisprudence of the Commission, the Commission concludes that the Working Group is not a treaty-based body or mechanism under the terms of Article 56 (7) of the African Charter. In this regard, the Commission agrees with the Complainants that the Working Group has limited scope to sufficiently deal with the matter at hand. The requirement under Article 56(7) of the African Charter is accordingly met.
144. **For these reasons, the Commission declares this Communication Admissible.**

Merits

The Complainants’ submissions on the Merits

Alleged violation of the right to freedom from torture and ill-treatment (Article 5 of the African Charter)

145. The Complainants submit that holding an individual without permitting any contact with his or her family, and refusing to inform the family of the individual’s whereabouts constitute inhuman treatment of both the detainee and the family concerned. They refer to the *Robben Island Guidelines* which expressly prohibits the use of *incommunicado* detention, and provides that detainees have the “right that a relative or other appropriate third person is notified of the detention”.⁶⁰

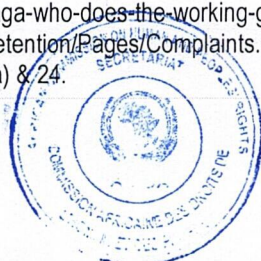
⁵⁶ Communication 301/05- *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials v Ethiopia Para 114*

⁵⁷ *Ibid* Paras 115 and 116

⁵⁸ <https://ilg2.org/2016/02/14/the-assange-saga-who-does-the-working-group-on-arbitrary-detention-represent/>

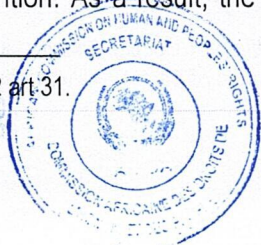
⁵⁹ <http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>

⁶⁰ *Robben Island Guidelines 2002 para 20 (a) & 24.*



146. The Complainants submit that the facts establish that the Victims were unlawfully and arbitrarily arrested, and were not allowed contact with their families from 6 December 2014 to 22 December 2014, neither were their relatives aware of the whereabouts of the Victims. They submit that the *incommunicado* detention was aggravated by the NISS's refusal to allow the family of the First Victim provide him with the necessary medicine and food required for his diabetes.
147. The Complainants further submit that States are required to take steps to ensure that the treatment of all persons deprived of their liberty are in conformity with international standards guided by the ***UN Standard Minimum Rules for the Treatment of Prisoners***. These standards they submit require that: sleeping accommodation meets all requirements of health, due regard being paid to climatic conditions, minimum floor space, lighting, heating and ventilation.
148. The Complainants submit that during the period of *incommunicado* detention, the Victims were held under inhumane conditions. The First Victim was detained in a small cell, approximately between 3m² and 4.5m², with the toilet in the same room. They submit that there was a strong light which was left on in the room at all times so that the First Victim never knew whether it was day or night. There was air conditioning on cold setting at all times and the First Victim slept on the floor with only a small sheet to cover himself. The Complainants submit that during this time, the First Victim was not given his medication regularly and his blood sugar levels were never measured, which was required to ensure that he was being given the correct levels of insulin.
149. The Complainants submit that the Second Victim was also held under similar conditions, in a room with no bed but there was a couch. Due to his old age, the Second Victim was not able to climb onto the couch, and was therefore forced to sleep on the floor. The room was connected to a wash room, but as there was no light for the Second Victim to enter the washroom, he could not use it.
150. The Complainants refer to the ***Right to Fair Trial Principles*** which provides that all detainees must be treated in a humane manner and with respect for the inherent dignity of the person. They also refer to the *Robben Island Guidelines* which set out the right to an independent medical examination as a basic procedural safeguard for the prevention of torture and requires States to "[e]nsure that all persons deprived of their liberty have access to... medical services and assistance".⁶¹
151. The Complainants submit that both Victims had specific medical needs. They aver that the age and circumstances of their arrest, including the continued denial of relevant care, particularly during the period of *incommunicado* detention further aggravated the health concerns of the Victims. They submit that the food provided at the NISS facilities was inedible, and the First Victim was fed beans twice a day which was not suitable for his dietary needs as a diabetic, in addition to which he was denied access to meals brought by his family. The Complainants submit that the First Victim was only allowed access to his medication from time to time and was not provided medical assistance. As a result, the First Victim had to administer insulin on himself without measuring his sugar levels, which resulted in health complications following his release.
152. The Complainants submit that the Victims experienced deteriorations in their health following their detention. As a result, the First Victim developed symptoms of artery damage,

⁶¹ Robben Island Guidelines 2002 art.31.



kidney failure and memory loss. He died on 31 August 2018, after the commencement of the proceeding before the Commission. The Complainants submit that during the First Victim's consultation following his release, his family was informed that his medical complications may have resulted from incorrect insulin doses or storage during his detention.

153. Further, the Complainants submit that the Victims faced a trial before a specially constituted court for crimes which carry the death penalty. They submit that being subjected to an unfair trial before a tribunal that does not conform to minimum standards of impartiality and procedural fairness amounts to inhuman treatment, which subjected the Victims to uncertainty and anxiety about their future existence, liberty and well-being. In support of this argument, they refer to the decision of the European Court of Human Rights in **Ocalan v Turkey** that: "*the imposition of the death sentence on the Complainant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3 of the Convention*".

154. The Complainants submit that the treatment inflicted on the Victims by the NISS in violation of Article 5 of the African Charter, is consistent with the patterns and methods of torture and ill-treatment used by the security agents against activists and political opponents in the Respondent State, in contravention of the African Charter.

Alleged violation of the right to personal liberty (Article 6 of the African Charter)

155. The Complainants submit that the Commission has held that only restrictions on rights which are consistent with the African Charter and State Parties' international obligations should be enacted by the relevant national authorities.⁶² They refer to the Commission's jurisprudence in **Amnesty International and Others v Sudan** where it held that Article 6 of the African Charter must be interpreted in such a way as to permit arrests and detention only in the exercise of powers normally granted to the security forces in a democratic society.⁶³

156. The Complainants submit that the arrest and detention of the Victims were unlawful, as it was based on Article 50 of the NSA 2010, which fails to adequately set out the grounds for arrest and detention or provide for procedural safeguards. They submit that Article 50 (e)-(h) of the NSA 2010 gives NISS officers wide powers to arrest and detain a person on vague grounds for an initial period of up to thirty days (30 days upon renewal) and a possible total of four and a half months without the possibility of judicial review. In addition, they aver that Article 50 (i) of the NSA suggests that the NSA may arrest a person even if there is no evidence of any crime available against that person. The Complainants submit that this runs contrary to recognised standards, as highlighted in the **Right to Fair Trial Guidelines**.

157. The Complainants submit that in the present case, the NISS failed to show an arrest warrant at the time of arrest and subsequently detained the Victims without charge from 6 December 2014 to 21 February 2015. They submit that the Victims were held *incommunicado* and denied access to their lawyers and family for a period of sixteen (16) days, from their arrest on 6 December 2014 to 22 December 2014. The Complainants submit that the right of access to

⁶² Communication 339/2007 – *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v Uganda*, para 118.

⁶³ Communications 48/90-50/91-52/91-89/93 – *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, para 59.



family members is recognised in Article 51 (2) of the NSA 2010, in a qualified form, which makes its availability subject to the discretion of the NISS without any judicial control.

158. They submit that the arbitrariness of the Victims' detention was further demonstrated by the lack of evidence provided in the subsequent criminal proceedings and the eventual collapse of those proceedings. The Complainants submit that the charges brought against the Victims bore no relation to their actions, as the Respondent State failed to produce evidence to support the charges at trial, as a result, the criminal proceedings were subsequently discontinued by the prosecutor.

159. The Complainants submit that an arrest and detention is arbitrary if used as punishment for the legitimate exercise of the rights as guaranteed in the ICCPR and the African Charter. They submit that the arrest and detention of the Victims were in direct response to their participation in human rights activities, political negotiations and the signing of the "Sudan Call", which constitutes an unjustified punishment that rendered their deprivation of liberty in violation of Article 6 of the African Charter.

Alleged Violation of the right to fair trial (Article 7 of the African Charter)

160. The Complainants submit that the Victims' right to fair trial was violated, as they were denied access to prompt and effective judicial review on the lawfulness of their detention; denied access to a lawyer during the first two weeks of their detention; and the lack of impartiality of the anti-terrorism court and fair trial guarantees.

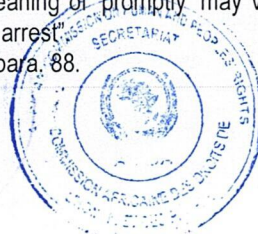
161. The Complainants submit that Article 7 (1) (d) of the African Charter provides for the right to be tried within a reasonable time by an impartial court or tribunal. They cite the Commission's **Resolution on the Right to Recourse and Fair Trial**, its **Right to a Fair Trial Principles** as well as the UN Committee's General Comment No.35 to explain the promptness of a trial according to international standards.⁶⁴

162. The Complainants submit that the applicable domestic legislation, namely the NSA 2010 does not conform to these international standards or the Respondent's obligations under the African Charter, as it permits NISS officers to detain individuals for up to four and a half months without judicial review, and does not provide for an unconditional right to meet and consult a lawyer, effectively depriving the Victims of any judicial protection. They cite the case of **Abdel Hadi, Ali Radi and Others v. Sudan** as an indication that the Commission has found a violation of Article 7 (1) of the African Charter where the Complainants were denied the opportunity to raise the lawfulness of their detention, denied access to lawyers and not informed of the charges against them.⁶⁵

163. The Complainants submit that in the present case, the Victims were arrested and detained *incommunicado* for a period of sixteen (16) days, with no information on the charges against them and no access to lawyers, family or an opportunity to challenge the legality of their detention. They submit that thirteen (13) days after their arrest, a group of lawyers filed a case on behalf of the Victims before the Constitutional Court, yet the Constitutional Court failed to act

⁶⁴ the UN Human Rights Committee has provided guidance in relation to the term in its General Comment No 35 on the right to liberty and security of persons, stating that "[W]hile the exact meaning of 'promptly' may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest"

⁶⁵ Communication 368/09: *Abdel Hadi, Ali Radi and Others v. Sudan* para. 88.



on the case. They submit that the Complainants were detained for over two months without charge and were only brought before a judge on 23 February 2015. They submit that the Court did not address the legality of the arrest and detention of the Victims until more than a year and a half after the Complainants were released.

164. The Complainants also contest the legality of Article 51 (2) of the NSA 2010 which according to the Complainants is contrary to international standards governing prompt access to legal counsel, and not having a lawyer for two weeks is a violation of Article 7(1) (c) of the African Charter.

165. The Complainants further submit that under the Anti-Terrorism Act of 2001, Special Courts are established by the Chief Justice. The rules of procedure for these courts are established by the Chief Justice in consultation with the Minister of Justice. They submit that the rules of procedure of trial courts formulated by the Chief Justice restrict a series of rights guaranteed under the CPA of 1991, including allowing trials in *absentia*, restricting the period for appeals, restricting the appeal procedure for the confirmation of sentences and allowing the courts enter convictions on the basis of confessions made during investigations. Hence, the Complainants submit that Special Courts/Tribunals like those constituted under the Anti-Terrorism Act are incompatible with Article 7 (1) (d) of the African Charter.

Alleged violation of the Right to freedom of expression (Article 9 of the African Charter)

166. The Complainants submit that the right to freedom of expression as enshrined in Article 9 of the African Charter comprises the right to receive information and to express one's opinion. They submit that the importance of this right is reflected in Article 6 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms. The Complainants also refer to the jurisprudence of the Commission in *Huri Law v Nigeria*, where it held that measures that undermine the ability of human rights defenders and organisations to function amounts to an infringement of Article 9 of the African Charter.⁶⁶

167. The Complainants submit that in the present Communication, the Victims were arrested, detained and subsequently charged with various crimes under the CPA 1991 and the Anti-Terrorism Act of 2001 for participating in the negotiation and signing of the Sudan Call. They submit that this can be deduced from the circumstances of the Victims' arrest, as both the First and Second Victims were arrested and detained shortly after their return from the Addis Ababa negotiations which resulted in the adoption of the Sudan Call. They submit that the NISS also arrested and detained other participants of the Addis Ababa negotiations, and that the President of the Respondent State had reportedly accused the signatories of the Sudan Call of being "agents to foreign powers", and warned them against returning to the country.

168. The Complainants submit that the arrest, detention and punishment of individuals for the legitimate exercise of freedom of expression constitutes a violation of Article 9 of the African Charter. They submit that the Victims were arrested and detained on the basis of the NSA 2010. They argue that this law lacks the fundamental safeguards, and the offences for which the Victims were charged are overly broad. Additionally, they refer to report of the UN Special Rapporteur on the situation of human rights in the Sudan, which raised concerns over the abuse

⁶⁶ Communication 225/98 – *Huri Laws v Nigeria* para 48.



of “offences against the State” and “anti-terrorism laws”, to stifle freedom of expression and political opposition in Sudan.

169. The Complainants submit that in the present Communication, there exists no grounds for the restriction of the right to freedom of expression on the basis of national security, as the Sudan Call does not propagate violence, but instead calls for an end to war and the establishment of peace. In support of this argument, they refer to the jurisprudence of the Commission in **Article 19 v Eritrea**, where it held that “No political situation justifies the wholesale violation of human rights; indeed, general restrictions on rights such as the right to free expression and to freedom from arbitrary arrest and detention serve only to undermine public confidence in the rule of law and will often increase, rather than prevent, agitation within a State...”.⁶⁷ The Complainants therefore submit that the arrest and detention of the Victims for their participation in the negotiation and signing of the Sudan Call violates Article 9 (2) of the African Charter.

Alleged violation of the right to freedom of association (Article 10 of the African Charter)

170. The Complainants submit that the right to freedom of association is the individual’s right to convene with others and collectively express, promote, pursue and defend common interests. They submit that in giving effect to this right, States are expected not only to enact laws that facilitate the enjoyment of the right, but to also abstain from any action capable of interfering with the exercise of the right. They refer to the decision of the Commission in **Lawyers for Human Rights v Swaziland**, where it stated that any action or regulation on the exercise of freedom of association should be consistent with States’ obligations under the African Charter.⁶⁸

171. The Complainants submit that the Respondent State deliberately undermined the rights of the Victims to peacefully engage with others in political forums concerning the political environment in Sudan. They submit that the arbitrary arrests and detentions of the Victims were designed to intimidate them and others, and dissuade them from further participating in human rights activism and political processes in opposition to the current government of the Respondent State. They submit that this intent is glaring from the raid of the offices of the Sudanese Human Rights Monitor by NISS on 21 December 2014.

172. The Complainants submit that the Respondent State in the present Communication did not only arrest the Victims, but also targeted the Sudanese Human Rights Monitor, undermining its existence and ability to carry out its activities, in an organised campaign against individuals and organizations believed to be associated with or linked to the Sudan Call. For these reasons, the Complainants submit that the Respondent State violated Article 10 of the African Charter.

Alleged violation of the Respondent State’s positive obligation to recognize the rights, duties and freedoms enshrined in the African Charter (Article 1)

173. The Complainants submit that the Respondent State has a duty to respect, protect, promote and fulfil the rights contained in the African Charter. They submit that this entails the exercise of due diligence in adopting legislation, conducting investigations and providing effective remedies to victims of human rights violations. They submit that from the above analysis of the violations of Articles 6, 5, 7, 9 and 10 of the African Charter, it is evident that the Respondent State failed to put in place a legal framework to protect the rights of the Victims or provide them

⁶⁷ n 36 above, para 108.

⁶⁸ Communication 251/2002: *Lawyers for Human Rights v Swaziland* para 34



with access to adequate redress. They therefore submit that a violation of any provision of the African Charter by a State Party automatically engages its responsibility under Article 1 thereof.

174. The Complainants submit that the said Article 1 imposes an obligation on States to thoroughly investigate violations, and a failure to do so is a contravention of Article 1 thereof. They submit that the Robben Island Guidelines stipulate an obligation on States to ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment. They refer to the jurisprudence of the Commission in ***Amnesty International and others v Sudan***, where the Commission held that there should be “ongoing investigations into allegations of torture and the State Party must provide effective remedies under a transparent, independent and effective legal system”.⁶⁹
175. The Complainants submit that the Respondent State is obligated to conduct these investigations promptly and as soon as an official complaint has been lodged. They submit that there are no compelling reasons as to why the State authorities have not commenced any investigation, four years since the alleged violations occurred, notwithstanding the fact that they have been officially notified of the allegations raised, including by the UN Working Group on Enforced and Involuntary Disappearances on 9 December 2014.
176. The Complainants further submit that the Respondent State has failed in its positive obligation to provide effective remedies, as required by Article 1 read in conjunction with Articles 5, 6, 7 of the African Charter. They submit that the Victims have been unable to access judicial remedies, as there is no effective procedure to claim reparation for the violation of the rights suffered by the Victims. The Complainants aver that where a complaint is raised, NISS officials enjoy immunity under the NSA 2010. They submit that although immunities under the NSA 2010 can be waived by the NISS Director, there are no clear judicial remedies or any practice of lifting immunity.
177. The Complainants contend that the combined effect of: the lack of impartial investigative bodies, non-existent victim and witness protection mechanisms, the absence of timely and effective judicial oversight and the pervasive deference to the NISS on the part of other official bodies, effectively grants the violating body, i.e., the NISS, the sole prerogative of deciding whether to take any action in response to allegations of violations. As such, they submit that there are no effective remedies to challenge the failure to lift immunities.
178. They refer to the Commission’s Right to a Fair Trial Principles, which provides 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.⁷⁰ On this premise, The Complainants submit that the Respondent State has failed in its positive obligation as required by Article 1 of the African Charter.
179. In support of these allegations, the Complainants have submitted four documents as exhibits. They include: a petition submitted to the Constitutional Court and three witness statement/Affidavits of the facts alleged.

⁶⁹ Communication 48/90, 50/91 and 89/93: *Amnesty International and others v Sudan* para 56.

⁷⁰ Principles and Guidelines on the Right to a Fair Trial in Africa Guidelines 2003, C



Commission's Analysis on the Merits

180. The Respondent State has failed to respond to the Secretariat's requests for submissions on the Merits. In this circumstance, the Commission will decide based on the information proffered by the Complainants.⁷¹ To do so entails reviewing the evidence and/or submissions put forward by the Complainants and ascertaining the veracity of the evidence/or submissions.

Alleged Violation of Article 5 of the African Charter

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

"...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."

182. In alleging violation of Article 5 of the African Charter, the Complainants submit that the Victims were unlawfully and arbitrarily arrested; were subject to *incommunicado* detention; not allowed contact with their families from 6 December 2014 to 22 December 2014, neither were their relatives aware of their whereabouts; and the First Victim not allowed provision of necessary medication and food for diabetic patients by his family while in detention. The Complainants also decry the conditions of detention, including accommodation with cold room, small cell, poor ventilation, poor lighting, no medical attention and poor feeding, which according to them, amounts to torture, inhuman treatment of the Victims.⁷²

183. Before the Commission proceeds to establish the veracity of these allegations, it is important to unpack key principles relating to torture, ill-treatment/inhuman and degrading treatment. Treatment that amounts to cruel or inhuman treatment can be re-qualified as torture and vice-versa; and in some cases, could be qualified as both torture and ill treatment.

184. The African Charter has no precise definition for inhuman treatment but describes acts that fall under that category and can therefore be likened to inhuman treatment, including slavery and torture. In ***Mohammed Abderrahim El Sharkawi (represented by EIPR and OSJI) v. Egypt***⁷³, the Commission posited that whereas the definitional margin between torture and ill-treatment is razor-thin and often unclear, it was inclined to consider the division between both notions/terminologies majorly on the degree of suffering involved, the intention of the perpetrator, the victim's position and vulnerability.

185. Under Paragraph 4 of the *Robben Island Guidelines*, the Commission's understanding of torture is founded on the definition of torture established in Article 1 of UNCAT which provides that:

⁷¹ Communication 105/93, 128/94, 130/94, 152/96 – *Media Rights Agenda & Others v Nigeria* para 86; Communication 232/99 – *John Ouko v Kenya* para 21.

⁷² See generally paras 144, 145 and 147 of the Communication

⁷³ Communication 396/11 – *Mohammed Abderrahim El Sharkawi (represented by EIPR and OSJI) v. The Republic of Egypt*, para 220.



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

186. The *Robben Island Guidelines* also evinces the prohibition of applying *incommunicado* detention and makes it a punishable act to detain a person “*in a secret and/or unofficial place of detention.*” Similarly, the Guidelines set out that certain safety measures be adhered to, in relation to those detained, upon commencement of the detention, including the right to have a family member or third party known to the detainee notified of the detention. The Guidelines also posits that States should “*ensure that all persons deprived of their liberty have access to legal and medical service and assistance and have the right to be visited by and correspond with family members.*”
187. Furthermore, the Council of Europe affirmed that inhuman treatment only needs to attain a minimum level of severity and must result in “*either actual bodily harm or intense mental suffering.*” In comparison to torture, inhuman treatment must not be executed deliberately or for a purpose,⁷⁴ and secret/*incommunicado* detention for two weeks constitutes a violation of a detainee’s right to be treated with humanity and respect for the inherent dignity of the human person.⁷⁵ Thus, whereas certain actions may not fall under torture, they are formulative of the ingredients required for inhuman treatment as the margin between both is very thin and the severity to be attained is minimal.
188. In the Commission’s jurisprudence, the Commission stated in *Law Ghazi Suleiman v. Sudan*⁷⁶ that “*detaining individuals without allowing them contact with their families and refusing to inform their families of the fact and place of the detention of these individuals amounts to inhuman treatment both for the detainees and their families.*” This was further reiterated in *Article 19 v. Eritrea* where the Commission described the refusal on the part of parties holding the detainee to grant access to communicate with family and sharing information on the detainee’s location as inhuman treatment.
189. Likewise, the case of *Amnesty International, Comité Loosli Bachelard, Lawyers’ Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. The Republic of Sudan*⁷⁷ further buttresses the Commission’s stance as it substantiates the inhuman treatment embedded in depriving a detainee contact with family and keeping his whereabouts unknown.⁷⁸

⁷⁴ The Council of Europe, *Prohibition of torture*, <https://www.coe.int/en/web/echr-toolkit/interdiction-de-la-torture>, (accessed 3 September 2022).

⁷⁵ Communication 917/2000 - *Karina Arutyunyan v Uzbekistan* UNHRC para 6.1.

⁷⁶ Communications 222/98 and 229/99- *Law Office of Ghazi Suleiman v Sudan*

⁷⁷ Communication 48/90-50/91-52/91-89/93- *Amnesty International, Comité Loosli Bachelard, Lawyers’ Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. The Republic of Sudan*, para 54.

⁷⁸ See also Article 10 of the United Nations Declaration on the Protection of all Persons from Enforced Disappearance which provides: “*Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned;*” and Article 17(2)(d) of the International Convention for the Protection of All Persons from Enforced Disappearances which provides that: “*Without prejudice to other international obligations of the State Party with regard to the deprivation*



190. The Commission notes that allegations made by the Complainants regarding the *incommunicado* detention of the Victims and conditions of detention have not been refuted by the Respondent State. The Commission in *Hassan Ishag Ahmed (Represented by African Centre for Justice and Peace Studies & Ors.) v. Republic of The Sudan* reiterated its assertion that where allegations go unrefuted, it will proceed to decide on the facts presented.⁷⁹ In this regard, the Commission will test the veracity of the allegations based on the submissions of the Complainants, Affidavits of the witnesses, as well as medical records presented by the Complainants.⁸⁰

191. In the present Communication, the Complainants allege that during the period of *incommunicado* detention, the Victims were held under inhumane conditions outlined in **Paragraphs 144, 145 and 147** of this Communication.

192. In addition, according to the facts and Affidavits presented to the Commission, the First Victim died as a result of his traumatic experience during his time in detention and prison, which exacerbated his health condition. According to the Complainants, the First Victim was both diabetic and hypertensive and did not have access to essential medical care.

193. An excerpt from one testimonial indicates that the physical and mental health of the First Victim deteriorated rapidly and seriously after his release from prison. He experienced terrible chest pains and had to have a pacemaker fitted; his kidney failed and he needed dialysis; he began to have vivid hallucinations, which lasted for two and a half years after his release; due to blood loss and major drops in his haemoglobin levels, he required a blood transfusion every two to three weeks, and his weight plummeted from 110kg to 46kg.⁸¹ The Medical Reports also portray various treatments the First Victim underwent, at Bupa Cromwell, Dar Al Found and Fedail hospitals.⁸²

194. The Commission elucidates that cruel, inhuman or degrading treatment is not solely restricted to actions leading to physical or psychological suffering but must be understood to cover and cater to protection from all forms of abuse.⁸³ Thus, based on the definition of torture and inhuman treatment in **paragraph 181**, as well as the principles outlined in the Commission's jurisprudence in **paragraphs 184 and 185** of this Communication, it is apparent to the Commission that the actions of the Respondent State in respect of the Victims are characteristics of torture and inhuman treatment.

195. The Commission acknowledges after the ouster of then-president Omar al-Bashir from office, the Respondent State has addressed some legislative shortcomings regarding

of liberty, each State Party shall, in its legislation... Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law...

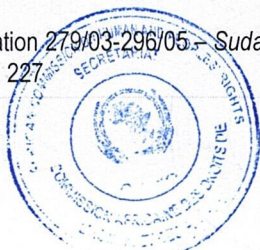
⁷⁹ Communication 577/15- *Hassan Ishag Ahmed (Represented by African Centre for Justice and Peace Studies & Ors.) v. Republic of The Sudan*, para 142. Also citing Communication 137/94, 139/94, 154/96, 161/97 – *International PEN & Others v Nigeria* para 81.

⁸⁰ Communication 379/09, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, para 100.

⁸¹ Witness Statement of Sara Mekki Medani (Daughter of the First Victim), Annex 2 of Complainants' Merits submissions, paras 22 and 23

⁸² *Ibid*

⁸³ Communication 279/03-296/05 – *Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) v Sudan*, para 227



torture and other forms of ill-treatment in its domestic laws. In particular, Article 4(b) of the CPA 1991 was amended in 2020 to explicitly prohibit torture of an “accused person.” Article 115(2) of the Criminal Act 1991 was also amended to recognise that torture can be inflicted both physically and psychologically, and the penalty for torture was increased from three months to three years. However, having regard to the fact that the violations in this Communication occurred before the amendments were made, the Commission will rule based on application of the old Laws. Furthermore, while three years is an improvement from three months, an increased penalty of three years does not adequately reflect the gravity of torture as a crime.

196. Therefore, stemming from the submissions of the Complainants and its analysis of the facts, the Commission concludes that the *incommunicado* detention; poor conditions of detention, including food, accommodation and lack of medical services in the present Communication constitute torture and inhuman treatment. This is also in line with the Commission’s jurisprudence in ***Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi***⁸⁴, where it decided that poor sanitary condition and meagre quality of food is in direct violation of Article 5 of the African Charter.

197. The Commission therefore finds that the Respondent State has indeed violated Article 5 of the African Charter.

Alleged violation of the right to personal liberty (Article 6 of the African Charter)

198. Article 6 of the African Charter provides that:

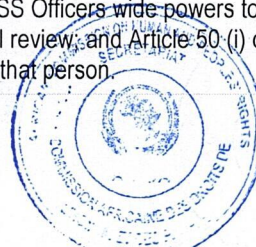
“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions laid down by law. In particular, no one may be arbitrarily arrested or detained”.

199. In alleging a violation of Article 6 of the African Charter, the Complainants submit that: (1) the Victims were unlawfully and arbitrarily arrested without providing reasons for their arrests or arrest warrant shown at the time of arrest; (2) Victims were detained without charge; (3) held *incommunicado* and denied access to their lawyers and family for a period of sixteen (16) days; and (4) arrest and detention were unlawful, as they were based on Article 50 of the NSA 2010, which fails to adequately set out the grounds for arrest and detention or provide for procedural safeguards.⁸⁵

200. The Commission is therefore called upon to determine whether the arrest and detention of the Victims was unlawful and arbitrary as alleged by the Complainants and this notwithstanding the fact that the Respondent State did not make any submissions to rebut the Complainants’ allegations.

⁸⁴ Communication 64/92, 68/92, 78/92_8AR - *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, para 7.

⁸⁵ They specifically aver that Article 50 (e)-(h) of the NSA gives NISS Officers wide powers to arrest and detain a person on vague grounds for a certain period without the possibility of judicial review; and Article 50-(i) of the NSA allows the arrest of a person even if there is no evidence of any crime available against that person.



201. The Commission notes that one significant dimension of the right to liberty and security of the person is freedom from arbitrary arrest and detention, and the central issue is the interpretation of the word 'arbitrary.' The legality of arrests and detention has been established through regional and international norms,⁸⁶ as well as in the jurisprudence of the Commission, wherein the broader interpretation of 'arbitrary' imposes a higher international standard on the content of domestic law. International standards also impose an obligation on States to conform with certain procedures when dealing with arrests and detention which do not qualify as 'arbitrary.'
202. At the regional level, the Commission in the case of **Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda**, held that the right to liberty serves as a substantive guarantee that 'any arrest or detention will not be unlawful or arbitrary'.⁸⁷ In defining arbitrariness in the context of arrest and detention, the Commission referred to the decision of the United Nations Human Rights Committee in **Rafael Marques de Morais (represented by the Open Society Institute and Interights) v Angola**, where it noted that arbitrariness also includes "elements of inappropriateness, injustice, lack of predictability and due process of law."⁸⁸
203. The Commission in **Monim Elgak and Others v Sudan** also considered that a detention is arbitrary when basic procedural safeguards are not respected, such as when detainees are not informed of the charges against them; are not informed or granted access to a lawyer; and are not allowed to seek judicial review of the detention by an independent and impartial court.⁸⁹ This was also echoed by the Commission in its **Right to a Fair Trial Principles**,⁹⁰ where the Commission established 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.⁹¹
204. Most importantly, regarding procedural standards for arrests, police custody and pre-trial detention, Principle 4 of the Commission's **Luanda Guidelines** provides *inter alia*: the right to be informed of the reasons for their arrest and any charges against them; the right of access without delay to a lawyer of his or her choice; the right to apply for release on bail or bond pending investigation or questioning by an investigating authority and/or appearance in court; the right to challenge promptly the lawfulness of their arrest before a competent judicial authority; and the right to freely access complaints and oversight mechanisms. Further, Principle 35 of the same Guidelines provides that "All persons in police custody and pre-trial detention shall have the right, either personally or through their representative, to take proceedings before a judicial authority, without delay, in order to have the legality of their detention reviewed. If the judicial authority decides that the detention is unlawful, individuals have the right to release without delay."
205. In addition, Section 2 (b) of the *Luanda Guidelines* also provides that:

⁸⁶ The right of a person not to be arbitrarily arrested or detained is also found in Article 9 of the UDHR and Article 9(1) of the ICCPR.

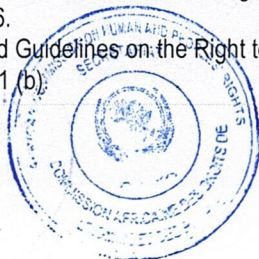
⁸⁷ Communication 339/2007 – *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda* para 107.

⁸⁸ Communication 1128/2002 -*Rafael Marques de Morais (represented by the Open Society Institute and Interights) v Angola* (2005) Human Rights Council, para 6.1.

⁸⁹ Communication 379/2009 – *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* para 106.

⁹⁰ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa Adopted by the Commission in 2003

⁹¹ *Ibid*, Section 1 (b).



“Persons shall only be deprived of their liberty on grounds and procedures established by law. Such laws and their implementation must be clear, accessible and precise, consistent with international standards and respect the rights of the individual.”

206. At the international level, the ICCPR also offers guidelines as to the scope of protection from arbitrary arrest and detention which are designed to protect the personal liberty of the individual. These principles include:

- (i) Everyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest;
- (ii) Everyone who is arrested shall be promptly informed of any charges against him;
- (iii) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or judicial officer;
- (iv) Anyone who is deprived of his liberty shall be entitled to take proceedings before a court to have the lawfulness of his detention determined.

207. Stemming from the above, it follows that, an arrest or detention is arbitrary if the necessary safeguards prescribed by international standards are not adhered to. Furthermore, the more a law allows, or provides for the deprivation of the right to personal liberty, the more arbitrary that law becomes. In other words, the law derogates from the fundamental right to personal liberty, and the Respondent State has the burden to justify such derogation, and to demonstrate its non-arbitrariness.

208. At this juncture, the question that comes to mind is whether the arrest and detention in the present Communication was carried out in accordance with the provisions of the law in the Respondent State and whether the law was arbitrary, and by extension, whether the arrest and detention of the Victims was arbitrary.

209. In responding to this question, it is relevant for the Commission to examine the domestic law(s) in the Respondent State that govern arrests and detentions, namely: The 2005 Constitution of Sudan; the CPA 1991, and the NSA 2010.

The 2005 Constitution of Sudan

210. Pursuant to Article 29 of the 2005 Constitution of Sudan, *“every person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his liberty except for reasons and in accordance with procedures prescribed by law.”*

211. In addition, Article 34 (2) of the same Constitution provides that *“Every person who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”*

CPA (1991)

212. Section 79(1-3) of the CPA provides that, a person arrested by the police may remain in detention for a period not exceeding twenty-four (24) hours. This may be renewed by the Prosecution Attorney for a period not exceeding three (3) days, and upon the report of the Prosecution Attorney, a Magistrate may order the continued detention of the arrested person, for the purpose of inquiry, every week for a period not exceeding in total two weeks



213. Furthermore, according to Section 83(1) of the CPA, an arrested person shall not be hurt physically, or mentally, and appropriate medical care is accorded to the detainee; Section 83 (3) requires that an arrested person contacts his advocate, meet the Prosecution Attorney, or the Magistrate; while Section 83(5) requires an arrested person to inform his family; and Section 83(6) allows the arrested person to obtain food stuffs, clothing and other material things at his own cost.

The NSA 2010

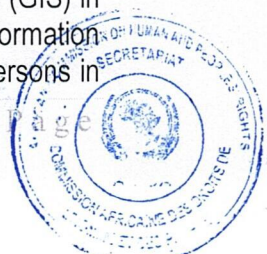
214. With respect to Articles 50 (1) (e-h) and Article 50(1)(i) of the NSA 2010 cited by the Complainants, the Commission notes:

Pursuant to the provisions of Articles 29 and 37 of the Interim National Constitution, 2005, each and every member shall, by virtue of an order issued by the Director, and for the purpose of executing the competences set forth in this Act, have the following powers:

- (e) Arrest or detain any suspected person for a period not exceeding thirty days provided that his/her relatives are immediately informed.*
- (f) After elapse of the thirty days mentioned in Para (e) above, and if there are reasons that require more investigation, enquiry and maintaining the detained person in custody, NSS member shall refer the issue to the Director and make the recommendations he deems appropriate.*
- (g) The Director may renew the detention period for not more than fifteen days with the purpose of completing investigation and enquiry.*
- (h) If it comes to the knowledge of the Director that maintaining any person in custody is necessary for completion of investigation and enquiry in case of an accusation related to a factor threatening the security and safety of the people; intimidating society by way of armed robbery, racial, religious sedition or terrorism; disrupting peace; exercising political violence; or plotting against the country, he shall refer the issue to the Council which may extend the detention period for not more than three months.*
- (i) Without prejudice to paragraphs (f), (g) and (h), NSS authorities shall inform the competent prosecutor and hand over suspect and all documents and appendices thereof in order to complete the procedures. In case of absence of initial evidence, NSS shall release the suspect.*

215. From the forgoing, the Commission notes that while the Constitution of Sudan provides general guarantees on the right to personal liberty, the CPA 1991 provides procedural guidelines of arrests and detention which are synonymous to the Luanda Guidelines of the Commission and other international standards. However, the NSA 2010, which according to the Complainants in this Communication was the basis for arrests and detention of the Victims, allows detention for thirty (30) days and more, depending on the investigation period, which is contrary to the Constitution, the relevant provisions of the CPA, and other international standards governing arrests and detention, which underline immediate action.

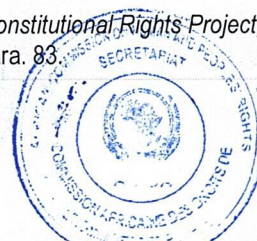
216. It is worth noting at this juncture that law No. 12/2020 amended the NSA of 2010, and legislative amendments made in 2020 to Articles 25 and 50 of the NSA 2010 removed arrest and detention powers from the NISS, which was renamed the General Intelligence Service (GIS) in July 2019. These reforms limited GIS' powers to gathering, analysing, and submitting information to other security services. Articles 51 (providing the rights of arrested and detained persons in



custody) and 52 (providing immunities of members and associates) were also repealed. Nonetheless, the Commission notes from reports that under the transitional government in place from August 2019 – October 2021, GIS allegedly continued to arrest and detain civilians.

217. The Commission opines that modifying the law in the light of later developments in the Respondent State is an important factor as it relates to the general human rights situation in the country. However, for practical purposes, the Commission cannot at this stage delve into analyzing the extent to which the amended laws have redressed the violations alleged by the Complainants or rely on the amended laws for its judgment. Rather, the Commission would base its ruling on the laws under which the allegations were proffered.
218. Consequently, the Commission underscores that the concept of arbitrariness applies to both the law under which the person is arrested and the application of the law. So, if the law is arbitrary, it goes without saying that the arrest or detention would also be arbitrary. This was the Commission's position in ***International PEN and Other (on behalf of Ken-Saro Wiwa Jnr.) v Nigeria***, where it held that a decree which permitted the authorities to detain people without charge for as long as three months without the opportunity for the detainees to challenge their arrest and detention before a court of law, presented a *prima facie* violation of the right to freedom from arbitrary arrest and detention under Article 6 of the African Charter.⁹²
219. Furthermore, in order to assess the lawfulness of arrest or detention, the latter must be in conformity with the substantive and procedural rules of domestic law. The Commission therefore asserts that restrictions to liberty should only be allowed in accordance with the law and compatible with the African Charter. Hence, in the process of arrests, authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution, as well as the African Charter.
220. In the present Communication, the Commission agrees with the Complainants that the arrest and detention of the Victims were unlawful as the NISS Officials arrested the Victims without following the procedure outlined in the Luanda Guidelines, including substantiating the reasons for their arrest. The Commission also opines that the arrest and detention of the Victims is not consistent with due processes of the laws in place in the Respondent State, as well as established international human rights norms.
221. Accordingly, relying on relevant jurisprudence and international standards, the Commission can safely hold that the NSA 2010 is arbitrary in nature, impinges on the fundamental right to personal liberty and no justification was provided that necessitated the actions of the NISS officials who according to the Commission, were acting *intra vires* of the NSA.
222. The Commission, therefore, finds a violation of Article 6 of the African Charter by the Respondent State.

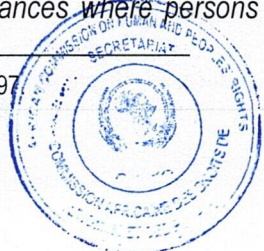
⁹² Communication No. 137/94-139/94-154/96-161/97: *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria* para. 83



Alleged Violation of Article 7(1) of the African Charter

223. This Article provides that: *Every individual shall have the right to have his cause heard. This comprises: (a) the right to appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.*
224. The Complainants specifically allege violation of Articles 7(1)(c) and 7(1)(d) of the African Charter.
225. The Complainants submit that (1) the Victims' right to fair trial was violated, as they were denied access to prompt and effective judicial review on the lawfulness of their detention. In particular, they submit that the NSA 2010 does not conform to international standards or the Respondent's obligations under the African Charter as Article 50 permits NISS Officers to detain individuals for up to four and a half months without judicial review; (2) the Victims were denied access to a lawyer during the first two weeks of their detention; and (3) the lack of impartiality of the anti-terrorism court and fair trial guarantees.
226. Discussing the scope of the right to a 'prompt' hearing amounts to discussing the scope of Article 7 of the African Charter as such. Consequently, in order to address the matter, the Commission shall deal with the submissions from the Complainants and in the process, elaborate on the relevant principles of interpretation of Article 7 of the African Charter, particularly as far as 'promptness' in proceedings is concerned.
227. On the issue of whether the Respondent State barred the Victims from prompt and effective judicial review on the lawfulness of their detention and whether they were denied access to a lawyer: The Commission interpreted Article 7 of the African Charter in Resolution **ACHPR/Res.4(XI)92** on the **Right to Recourse and Fair Trial**, and its **Right to Fair Trial Principles** where it underpinned that the right to a fair trial is essential for the protection of fundamental human rights and freedoms. Therefore, bringing detainees 'promptly' before a judicial body is an important component of Article 7 of the African Charter. In **Article 19 v Eritrea**, the Commission held the term "promptly" to mean immediately or without delay.⁹³ This incorporates the right of every and any individual to question the reasons for their detention and/or arrest and the basis of such a detention. Barring or derogating from such a right is grounds for a violation irrespective of the nature of the crime that the detainee is accused of.
228. In addition, the *Right to Fair Trial Principles* demonstrates that the right to counsel is and should be available to the accused/detainee at every stage of any criminal prosecution, including periods of administrative detention, which is synonymous with the present case. This is echoed by the ICCPR which upholds the right to a fair trial in Article 9(4) thereof stating that: "*Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*"
229. The Commission in **Purohit and Moore v. The Gambia** also declared that "*in circumstances where persons are to be detained, such persons should at the very least be*

⁹³ n 36 above, para 97



*presented with the opportunity to challenge the matter of their detention before the competent jurisdictions that should have ruled on their detention.*⁹⁴

230. It is apparent that the jurisprudence of the Commission and indeed its soft laws relating to arrests, detention and fair trial expound on the obligations of States Parties, to ensure availability at all times, of access to competent, independent and impartial courts of law to promptly administer justice. This is linked to the right to be presumed innocent until proven guilty by a competent court or tribunal governed by Article 7(1)(b) of the African Charter which conditions the treatment given to an accused person throughout the period of criminal investigations and trial proceedings.
231. In the present Communication, the Victims were allegedly arrested and detained *incommunicado* for a period of sixteen (16) days, without information regarding the charges against them, nor access to lawyers, family or opportunity to challenge the legality of their detention. Subsequently, when a Group of lawyers filed a case on their behalf before the Constitutional Court which allegedly failed to act on it, the Victims were detained for over two months without charge.
232. In ***Media Rights Agenda (on behalf of Niran Maloulu) (The Media Rights Agenda Case) v. Nigeria***, the Commission held that persons arrested “shall be informed promptly of any charges against them⁹⁵” and the term “‘promptly’ requires that information is given in the manner described as soon as the charge is first made by a competent authority. In addition, the *Robben Island Guidelines* promotes the right to demand the authenticity of a detention by placing an obligation on the State to implement safeguards to prevent abuse of any kind. It specifically demands that States guarantee that “*all persons deprived of their liberty can challenge the lawfulness of their detention.*”⁹⁶
233. Furthermore, the Commission in its *Right to Fair Trial Principles*, also sets out reasons for judicial review including assessing whether sufficient legal reason exists for the arrest; safeguarding the well-being of the detainee; and preventing violations of the detainee’s fundamental rights⁹⁷. The Commission in this respect, specifies that while the State had a right to detain the Victims when charges against them were being investigated and determined, that right does not deprive the Victims from questioning the validity of the detention before a proper court of law within a reasonable period of time and that any delays amounted to an infringement on their right to fair trial within the context of Article 7 of the African Charter.
234. On the question of whether legal counsel was denied within the first two weeks of the Victims’ detention, Article 7(1) (c) of the African Charter provides that all persons possess the right to have their cause heard which includes the right to defense and the right to be defended by counsel of his choosing. The Commission has underscored the importance of immediate access to a lawyer both in its jurisprudence and soft laws as a fundamental right to fair trial proceedings. The Commission has also emphasised that the right of access to legal counsel must be effectively available, and, where this has not been the case, the Commission has concluded that Article 7(1)(c) of the African Charter was violated.

⁹⁴ Communication 241/01- *Purohit v The Gambia*, para 72.

⁹⁵ Communication 244/98-*Media Rights Agenda (on behalf of Niran Maloulu) v. Nigeria*, para. 43

⁹⁶ As mentioned above in no. 11, para. 32.

⁹⁷ Principles and Guideline on the Right To A Fair Trial and Legal Assistance in Africa, no. 16, principle M(3)(b)(i)(iv)(v)



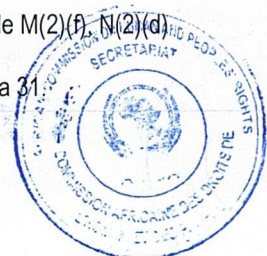
235. Promptness to such access has been encapsulated in the *Luanda Guidelines* which stipulates in Section 4(d) that every person under arrest is afforded the “*right of access, without delay, to a lawyer of his or her choice...*” The same Guidelines provide that “*Access to lawyers or other legal service providers should not be unlawfully or unreasonably restricted. If access to legal services is delayed or denied... then States shall ensure that a range of remedies are available...*”⁹⁸ Likewise, in the *Right to Fair Trial Principles*, the Commission stated that “*any person arrested or detained shall have prompt access to a lawyer*” and that “*this right begins when the accused is first detained or charged.*”⁹⁹
236. Similarly, in its *Resolution on the Right to Recourse and Fair Trial*, the Commission reinforced the right to defence contained in Article 7(1) (c) of the African Charter by holding that in the determination of charges against them, individuals shall in particular be entitled to “*communicate in confidence with counsel of their choice*”.
237. As far as jurisprudence is concerned, in the ***Media Rights Agenda case***, where Media Rights Agenda was acting on behalf of Mr. Niran Malaolu, who was neither allowed access to a lawyer, nor represented by a lawyer of his own choice, the Commission ruled that Article 7(1) (c) of the African Charter had been violated.¹⁰⁰
238. It follows from the forgoing that, an accused’s right to communicate with his lawyer is part of the basic requirements of a fair trial within the context of Article 7(1) (c) of the African Charter, and is applicable to the pre-trial stages of criminal investigation, to the extent necessary to ensure a subsequent fair hearing before an independent and impartial court of law. The onus is therefore on the State to ensure that access to a lawyer is granted, and also to ensure that there are no obstacles or limitations to this right, to which there should be no derogation.¹⁰¹
239. However, while Section 83 of the CPA provides safeguards to protect the rights of arrested persons, Section 58(1) of the CPA derogates from these rights as it gives the Minister of Justice broad powers to order stay of proceedings against the accused after completion of inquiry, and before passing preliminary judgement. The decision of the Minister of Justice cannot be contested which prejudices the accused especially in matters where the investigations are yet to establish the innocence or otherwise of the accused person.
240. Regarding the NSA of 2010, the Commission had already established its irregularity under Article 6 of the African Charter above, as it does not conform to international standards or the Respondent State’s obligations under the African Charter. To put it in context, as already stated, Article 7 (1) (c) of the African Charter provides for the right to defence, including the right to be defended by a counsel of a defendant’s choice. Contrary to this standard, Article 51 (2) of the NSA 2010 provides that: “*The arrested, detainee or person in custody shall have the right to inform his/her family or mother, employer, of his/her detention and shall be allowed to communicate with his/her family or advocate if this does not prejudice the progress of interrogation, enquiry and investigation*”.
241. Based on the above provision, the right to communicate with a lawyer is conditional upon the NISS determining that it does not prejudice the investigation. This determination is not subjected to judicial review and the NISS officials have unfettered discretion in assessing

⁹⁸ Luanda Guidelines, para 8(d)(v)

⁹⁹ Right to Fair Trial Principles, principle M(2)(b), N(2)(d)

¹⁰⁰ n 95 above, paras. 55-56.

¹⁰¹ The Robben Island Guidelines, para 31.



whether to allow detainees to communicate with the outside world. As such, the present Communication portrays that the Victims were denied access to a lawyer for the first two weeks of their detention in violation of the right to prompt access required under Article 7 (1) (c) of the African Charter. This is compounded by the discretion given to the Minister of Justice under Article 58(1) of the CPA which allows detainees to be held for lengthy periods without being given the possibility to challenge the legality of their detention within a reasonable period of time.

242. Accordingly, the Commission opines that the length of such proceedings should be considered in order to establish whether Article 7(1) (c) of the African Charter was violated. In this case, the Victims waited two weeks before given access to legal counsel. On that basis, it can be surmised that two weeks is neither prompt nor is it in tandem with what is legally prescribed under Article 7(1) (c) of the African Charter and international standards on the right to fair trial. The right to legal counsel begins upon arrest and/or detention and considering that the Victims were held for two weeks without access to that right, a violation under Article 7(1)(c) of the African Charter is thus established against the Respondent State.

243. Concerning the argument relating to lack of impartiality of the Anti-Terrorism Court and fair trial guarantees, the Complainants submit that by reason of the Anti-Terrorism Act of 2001, the Chief Justice in consultation with the Minister of Justice may create special courts. These courts, according to the Complainants, abide by rules of procedure formulated by the Chief Justice which restrict a series of rights protected by the CPA 1991. The Complainants, therefore, state that such special courts are incompatible with Article 7(1) (d) of the African Charter which dictates the “*right to be tried within a reasonable time by an impartial court or tribunal.*”

244. In identifying the basis for this leg of argument by the Complainants, the Commission reviewed the CPA 1991 of the Respondent State, and Section 83 grants an arrested person the “*right to contact his advocate, and the right to meet the Prosecution Attorney, or the Magistrate.*” This is further replicated in Section 135(1) of the same Act.

245. The Commission has dealt with practice of partiality in executing court processes and defaulting in adhering to international human rights standards through the unorthodox and overarching powers bestowed in a person or body. For instance, in ***Egyptian Initiative for Personal Rights and Interights v. Egypt***, the Commission found that “*The victims were tried before the Supreme State Emergency Court, whose competence and procedures fall far short of the above standards [the Commission’s Principles and Guidelines on Fair Trial].*”¹⁰² This was due to the heightened degree of control that the President exercised over the Courts in Egypt.

246. In the same vein, in Hassan ***Ishag Ahmed (Represented by African Centre for Justice and Peace Studies & Ors.) v. Republic of The Sudan***, the Commission stressed the importance of granting the rights of an arrested/detained person, especially the right to be brought promptly before a *competent* judicial authority.¹⁰³ Furthermore, the Commission, in its *General Comment No.4*, also depicted the need for State Parties to establish and ensure that ‘*Relevant State institutions...have the necessary legal mandate and independence... to effectively provide redress.*’¹⁰⁴

¹⁰² Communication 334/06- *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*, para 199-200.

¹⁰³ Communication 577/15- *Hassan Ishag Ahmed (Represented by African Centre for Justice and Peace Studies & Ors.) v. Republic of The Sudan*, para 155.

¹⁰⁴ African Commission on Human and Peoples' Rights, *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, para 21, The Gambia, 2017.



247. In the present Communication, the Complainants aver that the Anti-Terrorism Act allows the Chief Justice to create Special Courts which are incompatible with the African Charter. The Commission notes that the Respondent State has established Special Courts to investigate, prosecute and try crimes committed in State which abide by the standards prescribed in the NSA 2010 and Emergency Laws. Consequently, they do not provide adequate safeguards on the right to fair trial and also gives Officials broad powers that undermine the right to fair trial.
248. The Commission has established that the possibility of a detained person to question the legality and the duration of his detention before a court is fundamental to the enjoyment of the right to a fair trial.¹⁰⁵ Therefore, considering that the Special Courts are enabled by the NSA 2010 and Emergency Laws which do not have any legal basis to contest arbitrary arrests and detention, neither comply with normal standards of justice nor afford the full guarantees stipulated in Article 7 (1) (d) of the African Charter, it is safe to conclude that the Victims' right to fair trial was violated.
249. In light of the above cited international norms, the jurisprudence of the Commission, and the fact that the Victims were denied access to counsel during the first two weeks of their detention, the Commission finds that the rights of the Victims to a fair trial in terms of Article 7 of the African Charter was violated by the Respondent State.
250. Consequently, the Commission finds a violation of Article 7(1)(c) and 7(1)(d) of the African Charter against the Respondent State.

Alleged violation of Article 9 of the African Charter

251. Article 9 (2) of the African Charter reads:
"Every individual shall have the right to express and disseminate his opinions within the law."
252. The Commission has held in the **Media Rights Agenda Case** that:
*"Freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country."*¹⁰⁶ It comprises the right to seek, receive and impart information, ideas or opinions in any form, whether at national or international level.¹⁰⁷ Hence, State Parties are obligated to create an enabling environment for the exercise of the right to freedom of expression and access to information.¹⁰⁸
253. The Complainants submit that the arrest and detention of the Victims was primarily to intimidate and punish them for their participation in the Addis Ababa negotiations which resulted in the adoption of the Sudan Call. It is argued that this intent can be deduced from the circumstances of the Victims' arrest, detention, mistreatment and the subsequent charges

¹⁰⁵ Communication 274/03 and 282/03 – *Interights, ASADHO and Madam O. Disu v Democratic Republic of Congo* para 66

¹⁰⁶ Communication 105/93, 128/94, 130/94, 152/96 – *Media Rights Agenda and Others v Nigeria* para 53.

¹⁰⁷ Declaration of principles on Freedom of Expression and Access to Information in Africa (the Declaration) 2019 Principle 10; Application 0003/2014: *Ingabire Victoire Umuhoza v Republic of Rwanda* 2017 paras 132 and 133.

¹⁰⁸ As above (The Declaration) principle 1 (2).



brought against them. These averments have not been contested by the Respondent State, despite the opportunities afforded it.

254. The ***Declaration of Principles of Freedom of Expression and Access to Information in Africa (the Declaration)***¹⁰⁹ requires that States may only limit the rights contained in the African Charter, if the limitation “*is prescribed by law; serves a legitimate aim; and is a necessary and proportionate means to achieve the stated aim in a democratic society*”.¹¹⁰ The Commission has noted in ***Constitutional Rights Project and Others v Nigeria*** that the only legitimate reasons for the limitation of the rights enshrined in the African Charter are stipulated in Article 27 (2) thereof, which are, that “*the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest*”.¹¹¹

255. The Communication alleges that the Victims were arrested few days after the adoption of the Sudan Call, and charged with offences under the 1991 CPA and the Anti-Terrorism Act 2001 of Sudan, in particular with: undermining the constitutional system; waging war against the State; espionage; promoting hatred against or amongst sects; publication of false news; incitement of terrorism; and establishing or directing an organization involved in terrorism.¹¹² These charges levied against the Victims are a clear indication that the Government of Sudan believed that their participation in the Addis Ababa negotiations and the consequent adoption of the Sudan Call threatened national security and public order.

256. The Commission notes that the Sudan Call was an agreement signed and adopted by Sudanese politicians, civil societies and armed oppositions forces on 3 December 2014 in Addis Ababa, Ethiopia. The document elaborates four pledges, and the ultimate objective of each may be summarized as follows: an end to wars and conflicts, and effective humanitarian response to the crises across Sudan; the prioritization of structural changes in all sectors of the economy and revocation of legislations that restrict fundamental rights and freedoms; the establishment of a dialogue process that leads to a peaceful and democratic transformation; and the formation of a national transitional government mandated to hold an inclusive constitutional conference at the end of the transitional period.¹¹³

257. The Sudan Call makes no reference to armed struggle, but rather adopts a political approach to tackling the complex issues in Sudan. The fact that the Victims advocate for comprehensive peace, the protection of human rights and advancement of democracy is evidence that the Sudan Call neither threatens collective security nor advocate for public disorder. The Commission in its earlier decision affirmed that “*Such actions and expressions are among the most important exercises of human rights and as such should be given substantial protection that do not allow the State to suspend these rights...*”¹¹⁴ In the fight against terrorism, critical care must therefore, be taken to ensure that any restriction on the right to freedom of expression is both necessary and proportionate.

¹⁰⁹ Adopted by the Commission in 2019

¹¹⁰ Declaration of principles on Freedom of Expression and Access to Information in Africa (the Declaration) 2019 principle 9.

¹¹¹ Communication 140/94, 141/94, 145/95 – *Constitutional Rights Project and Others v Nigeria* para 41; *Interights & Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004) para 78.

¹¹² Witness statement of the Complainants (Annex 3) 2.

¹¹³ Sudan Tribune ‘Sudan Call: A Political Declaration on the Establishment of a State of Citizenship and Democracy’ 8 December 2014 available at <https://www.sudantribune.com/spip.php?article53263> (accessed 8 September 2022).

¹¹⁴ Communication 228/1999 – *Law Offices of Ghazi Suleiman v Sudan* para 62.



258. The Commission finds that in the present Communication, the arrest and detention of the First and Second Victims was a means of reprisal, and served to silence views contrary to that of the Government's. As such, the restriction on the exercise of the right to freedom of expression was disproportionate, unnecessary and pursued no legitimate aim. The Commission notes its jurisprudence in **Amnesty International and others v Sudan**, that "...the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law."¹¹⁵ Therefore, Article 9 (2) of the African Charter imposes a crucial obligation on States to guarantee the full enjoyment of the right to freedom of expression and refrain from interference both online and offline. The Respondent State failed in this regard and accordingly, the Commission finds a violation of Article 9 (2) of the African Charter.

Alleged violation of Article 10 of the African Charter

259. Article 10 (1) of the African Charter reads: "Every individual shall have the right to free association provided that he abides by the law."

260. The Complainants argue that the right to freedom of association includes the right to convene, collectively express, and peacefully engage with others in political forums concerning the political environment in Sudan. This right they allege was undermined by the Respondent State through the arrest and detention of the Victims and the subsequent raid of the offices of the Sudanese Human Rights Monitor (founded by the First Victim), by NISS officers on 21 December 2014.

261. The Commission notes the testimony of the Victims' lawyer that "While the warrant ordered the search of Dr. Medani's office, it was executed by searching the premises of Sudan Human Rights Monitor...I was Chairman of the NGO at the time, and the documents seized from the NGO had no relevance to the alleged crimes".¹¹⁶ These averments have not been contested by the Respondent State. In view of foregoing, the Commission shall base its findings on the facts as presented by the Complainants.¹¹⁷

262. The Commission's Guidelines on Freedom of Association and Assembly in Africa stipulates that "[t]he right to freedom of association protects, inter alia, expression; criticism of state action; advancement of the rights of [persons] discriminated-against, marginalized and socially vulnerable communities."¹¹⁸ In **Civil Liberties Organisation (in respect of Bar Association) v Nigeria** the Commission held that the right to freedom of association is "...first and foremost a duty of the State to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join, without state interference, in associations in order to attain various ends".¹¹⁹

263. The Commission notes that Article 26 of the Constitution provides for 'the right to freedom of succession and organization for cultural, social, economic, professional or trade union purposes, without restriction except in accordance with the law'.¹²⁰ In regulating the exercise of

¹¹⁵ Communication 48/90, 50/91, 89/93 – *Amnesty International & others v Sudan* para 79.

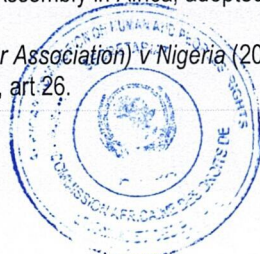
¹¹⁶ Witness Statement in support of Complainant's Merits submission (Annex 3) para 13.

¹¹⁷ Communication 48/90, 50/91, 52/91 and 89/93 - *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* para. 52.

¹¹⁸ Guidelines on Freedom of Association and Assembly in Africa, adopted at the 60th Ordinary Session held in Niamey, Niger from 8 – 22 May 2017 para 28.

¹¹⁹ *Civil Liberties Organization (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995) para 14.

¹²⁰ Constitution of The Republic of Sudan 1998, art 26.



this right, the Commission in its jurisprudence has stipulated that the right to freedom of association should be consistent with State's obligations under the African Charter, and that competent authorities should not enact provisions which would limit the exercise of this freedom".¹²¹ Hence, State Parties are obliged to not override constitutional provisions or undermine fundamental rights guaranteed under the constitution and international human rights standards.¹²²

264. It is important to note that the right to freedom of association encompasses both the negative obligation on the State to refrain from arbitrary interference with the exercise of the right, and the positive obligation to secure the effective enjoyment of the right.¹²³ In this regard, the European Court of Human Rights (ECtHR) has held in the case of ***Ouranio Toxo and Others v Greece*** that "...it is incumbent upon public authorities to guarantee the proper functioning of an association or political party, even when they annoy or give offence to persons opposed to the lawful ideas or claims that they are seeking to promote".¹²⁴ The Commission aligns with this stance, as holding otherwise would be contrary to the spirit of Article 10 of the African Charter.

265. The facts in the present Communication establish that on 21 December 2014 seven NISS officers entered the premises of the Sudanese Human Rights Monitor, temporarily detained one of the participants of the Workshop on the Universal periodic Review of Sudan, and confiscated documents and laptops. The Commission finds that this interference with the free association of the Sudanese Human Rights Monitor is inconsistent with the Respondent State's obligations under the African Charter, as it aims to intimidate the Victims, and deter other associations from openly expressing opinions on highly controversial issues affecting Sudan.

266. Consequently, the Commission finds a violation of Article 10 of the African Charter.

Alleged Violation of Article 1 of the African Charter

267. Article 1 of the African Charter stipulates that: "*The Member States...parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.*"

268. The Commission recalls its decision in ***Jawara v The Gambia*** which held that Article 1 of the African Charter gives the African Charter a legally binding character usually attributed to international treaties, as such, a violation of any provision of the African Charter automatically means a violation of Article 1 thereof.¹²⁵

269. The Complainants submit that the Respondent State has failed in its obligation to investigate the violations, and to provide effective remedies to the Victims for the harm suffered. They aver that the NSA 2010 guarantees the immunity of NISS officers from prosecution and disciplinary action for all acts committed in the course of executing their duties, with the possibility of a waiver of such immunity by the NISS Director.¹²⁶ The Complainants however submit that this rarely occurs in practice, which creates an environment for impunity. On this premise they allege that the Respondent State has violated Article 1 of the African Charter.

¹²¹ Communication 251/2002 – *Lawyers of Human Rights v Swaziland* para 60.

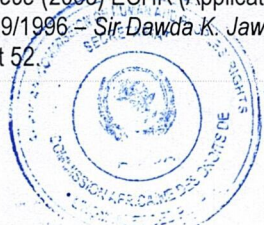
¹²² *Civil Liberties Organization (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995) para 15.

¹²³ *Wilson, National Union of Journalists & Others v The United Kingdom* (2002) ECHR (Applications nos. 30668/96, 30671/96 and 30678/96) para 41.

¹²⁴ *Ouranio Toxo & Others v Greece* (2005) ECHR (Application no. 74989/01) para 37.

¹²⁵ Communication 147/1995, 149/1996 – *Sir Dawda K. Jawara v The Gambia* para 46.

¹²⁶ National Security Act 2010 art 52.



270. General Comment No 4 on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment stipulates that 'State Parties shall carry out prompt, impartial, independent and thorough investigations when there are reasonable grounds to believe that torture and other ill-treatment has been committed, prosecute those responsible and provide adequate, effective and comprehensive reparation to victims'.¹²⁷ It further indicates that the failure to provide prompt access to redress constitutes de facto denial of redress.¹²⁸

271. In *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* the Commission held that a State's failure to thoroughly investigate violations and institute mechanisms to protect Victims from further violations contravenes Article 1 of the African Charter.¹²⁹ There is no evidence before the Commission that an investigation has been conducted by the Respondent State into the violations suffered by the Victims. The Commission further notes that although the Complainants filed a case at the Constitutional Court on 19 December 2014 challenging the Victims' arbitrary arrest, *incommunicado* detention and lack of access to family and lawyers, the matter was only determined on 28 December 2016, one year after the release of the Victims, and provided no relief for the damages suffered.

272. The Commission further notes the Complainants' submission on the immunity enjoyed by NISS official, and in this vein reiterates its position in *Amnesty International v Sudan* that "...ratification obliges a State to diligently undertake the harmonization of its legislation with the provisions of the ratified instrument".¹³⁰ In light of the foregoing, it is the view of the Commission that the Respondent State failed in its duty to: thoroughly investigate the violations, establish effective judicial procedures to impose sanctions on the violators and grant reparation to the Victims, in contravention of Article 1 of the African Charter. As a consequence, the Commission finds that the Respondent State in violation of Article 1 of the African Charter.

Decision of the Commission on Merits

273. Based on the above reasons, the Commission:

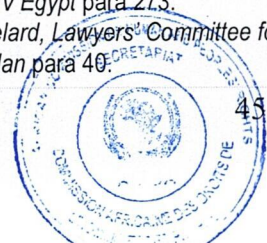
- i. Holds that the Respondent State - the Republic of The Sudan has violated Articles 1, 5, 6, 7(1) (c) and (d), 9 (2) and 10 of the African Charter;
- ii. Requests the Republic of The Sudan to:
 - a. Pay adequate compensation to the First Victim, in accordance with the domestic law of The Sudan for loss of earnings, medical expenses, physical and emotional suffering, and damages suffered in relation to the violations found;
 - b. Pay adequate Compensation to the family of the deceased Second Victim, in accordance with the domestic law of The Sudan, as well as existing human rights precedents and standards, for loss of earnings, medical expenses, emotional suffering and damages suffered in relation to the violations found;

¹²⁷ General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) 2017 para 25.

¹²⁸ (As above) para 26.

¹²⁹ Communication 323/06 - *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* para 273.

¹³⁰ Communication 48/90, 50/91, 89/93 – *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, and Association of Members of the Episcopal conference of East Africa v Sudan* para 40.



- c. Promptly and independently investigate, prosecute, and punish all State actors responsible for the unlawful detention, torture and inhuman treatment of the Victims;
 - d. Continue to reform laws, policies and practices incompatible with the African Charter and international law, in particular:
 - Further amend the **National Security Act 2010** (amended by law No. 12/2020), to ensure that it is in line with the African Charter, as well as other regional and international human rights instruments and standards;
 - Further amend the **Criminal Procedure Act 1991** (amended in 2020) to: Prohibit the arrest of individuals without a warrant where the deprivation of liberty results from the exercise of the rights or freedoms guaranteed under international human rights treaties to which The Sudan is a party; Ensure that any person arrested and detained on a criminal charge is brought before a judge within 48 hours, and is guaranteed the right of access to a lawyer from the beginning of criminal proceedings; and Ensure that an arrested person's right to inform a third party or family member as soon as possible upon arrest is guaranteed and not subject to prosecutorial or judicial approval.
 - e. Adopt and implement procedural safeguards for the prevention of torture and other forms of ill-treatment as required under the *Robben Island Guidelines*;
 - f. Implement Principles and Guidelines to safeguard the right to fair trial as provided in the Commission's *Fair Trial and Legal Assistance in Africa Principles and Guidelines*;
 - g. Train Security Officers on relevant standards concerning adherence to custodial safeguards and the prohibition of torture and ill-treatment;
 - h. Improve conditions of detention in The Sudan; and
 - i. Ensure that Prisons are reformed in accordance with international standards.
- iii. Inform the Commission, in accordance with Rule 112 (2) of the Commission's Rules of Procedure (2010) under which this Communication was instituted, within one hundred and eighty days (180) of the notification of the present decision of the measures taken to implement the present decision.

**Done in Banjul, The Gambia at its 73rd Ordinary Session,
held from 20 October to 9 November 2022**

