

**COMMUNICATION 443/13 – SAFIA ISHAQ MOHAMMED ISSA  
(REPRESENTED BY THE REDRESS TRUST) V. REPUBLIC OF SUDAN**

**SUMMARY OF THE COMPLAINT:**

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat), received a complaint on 26 March 2013 from The REDRESS Trust (the Complainant), acting on behalf of Safia Ishaq Mohammed Issa (the Victim).
2. The Complaint is submitted against the Republic of Sudan (Respondent State), State Party to the African Charter on Human and Peoples' Rights (the African Charter).<sup>1</sup>
3. It is alleged that the Respondent State arrested and detained the Victim due to her participation in student rallies and her affiliation to Girifna, a non-violent resistance movement and the Youth Forum for Social Peace. It is further alleged that the Victim was subjected to torture and ill-treatment at the hands of state agents, who beat, and subsequent to her arrest, gang-raped her.
4. The Complainant claims that the Victim was abducted by state agents on 13 February 2011, and taken to a facility which belongs to the National Intelligence and Security Services (NISS). It is averred that following her abduction, the Victim was subjected to continued beating and verbal abuse at the hands of state agents.
5. The Complainant submits that following interrogations about the Victim's alleged participation in rallies, regime change activities and communism; she was repeatedly raped by three men, while she slipped in and out of consciousness.
6. The Complainant avers that after the rape and beatings, the Victim was told to leave, and threatened that if she was found again, the issue would escalate. The Complainant states that although the Victim was in pain, she did not speak of what happened to her due to the stigma attached to sexual violence in Sudan and because of the threat of further violence. However, on 16 February 2011, the Victim went to a gynaecologist, who confirmed that she was subjected to sexual assault. It is claimed that the gynaecologist did not issue a medical report, due to concerns for his safety.

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<sup>1</sup> Sudan ratified the African Charter on 18 February 1986



7. The Complainant alleges that on the very same day, the Victim reported the crimes to the Attorney General, who refused to register a complaint against the NISS and told her to go to the police, arguing that it should be a complaint against unknown suspects. The Complainant states that the Victim provided a statement to officers at the Bahri-East Police Station who asked her to have a medical examination at the Bahri Hospital, which issued a medical report referred to as 'Form 8A'. It is claimed that after the examination, the Victim was asked to go to the house of the Head of the Bahri East Police Station, where she was interrogated and told not to proceed with filing the complaint because NISS officers would not do something of that nature, and because it would besmirch her family's name.
8. The Complainant submits that the Victim returned to the police station and gave her statement on record to a police officer who accused her of lying and threatened her of the consequences of proceeding with the case. The Complainant avers that the Victim received threats in person from authorities, including the Attorney General, the Head of the Police Station, and the police officer who had taken her statement, to the effect that harm would come to her family, and her reputation would be damaged if she did not stop pursuing the case.
9. The Complainant alleges that following threats to herself and her family, the Victim fled to South Sudan on 18 February 2011 and on 21 February 2011, a video of her first statement at the private clinic, the 'Form 8A', the police record of the Victim's statement and her complaint to the Attorney General were all uploaded on the internet, which garnered her support from activists.
10. The Complainant contends that a group of civil society activists visited the Victim's family to support them in demanding respect for their daughter's rights, but the family was forced by the NISS to lock the activists inside the home and file a case against the activists, accusing them of kidnapping their daughter. The Complainant adds that the NISS sought to bribe the family by promising them money and other benefits in return for persuading the Victim to drop her complaints and to refrain from talking about her case.
11. The Complainant states that the Victim did not feel safe in South Sudan due to its proximity to Sudan and so she left South Sudan for Uganda, and eventually settled in France, where she was granted asylum on 31 March 2012.
12. The Complainant claims that the Victim still suffers from physical injuries due to the beatings on her leg and has difficulty walking. It is also claimed that the



Victim is suffering from post-traumatic stress and a series of other psychological consequences, including hyper vigilance, nightmares, traumatic flashbacks, and feelings of guilt and insecurity, as a result of the torture and ill-treatment she was subjected to. The Complainant adds that the forced exile aggravated these psychological consequences.

**Articles alleged to have been violated:**

13. The Complainant alleges violation of Articles 1, 2, 3, 5, 6, 7, 9, 10, 11, 12, 16 and 18 of the African Charter.

**Prayers:**

14. The Complainant requests the Commission to:

- a. Find the Respondent State in violation of the aforementioned Articles of the African Charter;
- b. Find that the Respondent State is under an obligation to take all necessary measures to ensure that effective remedies and adequate reparation are provided to the Complainant for the aforementioned violated Articles of the African Charter, including compensation, rehabilitation, satisfaction and guarantees of non-repetition;
- c. Urge the Respondent State to pay adequate compensation for the violations suffered by the Victim;
- d. Urge the Respondent State to investigate the allegations of torture and ill-treatment;
- e. Request the Respondent State to publicly acknowledge and issue an apology to the Victim;
- f. Request the Respondent State to amend legislation incompatible with the African Charter, particularly the National Security Act, the Personal Status Law, the Evidence Act, Public Order Laws and the Criminal Act;
- g. Call on the Respondent State to adopt legislation that provides adequate framework for the criminalisation, prosecution and punishment of rape and sexual violence;
- h. Urge the Respondent State to undertake institutional and practical reforms to ensure that women alleging to have been subjected to rape or sexual violence can effectively pursue complaints;
- i. Call on the Respondent State to train NISS members on adherence to custodial safeguards and the prohibition of torture, discrimination or sexual violence in the exercise of their functions; and



- j. Request the Respondent State to establish an independent complaints mechanism to investigate complaints against law enforcement personnel, including the NISS.

**Procedure:**

15. The Secretariat received the Complaint on 26 March 2013 and acknowledged receipt of the same on 2 April 2013.
16. The Commission was seized of the Complaint at its 53<sup>rd</sup> Ordinary Session and the complaint was transmitted to the Respondent State by Note Verbale of 17 May 2013. The Complainant was also informed on the same date of the seizure of the Communication and requested to submit its observations on Admissibility.
17. On 17 July 2013, the observations of the Complainant on Admissibility were received at the Secretariat which acknowledged receipt on 30 July 2013 and forwarded same to the Respondent State for its observations.
18. On 18 December 2013, the Observations of the Respondent State on the Admissibility of the Communication were received at the Secretariat which acknowledged receipt by Note Verbale on 24 December 2013 and forwarded same to the Complainant with a request for its observations on the State's submissions.
19. On 23 January 2014, the Observations of the Complainant were received at the Secretariat and transmitted the same to the Respondent State on 31 January 2014.
20. At its 55<sup>th</sup> Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014, the Commission declared the Communication Admissible. Notice of the Commission's decision was transmitted to the Parties by Letter and Note Verbale respectively on 22 May 2014.
21. By the same letter, the Complainant was requested, in terms of Rule 108(1) of the Rules of Procedure (RoP) 2010, to submit written arguments and supporting evidence on Merits within 60 days of notification.
22. On 25 July 2014, the Secretariat received the Complainant's submissions on the Merits and transmitted the same to the Respondent State for its observations by correspondence dated 4 August 2014.



23. By Letter and Note Verbale of 18 May 2015, the Secretariat informed the Parties about the Commission's decision during its 56<sup>th</sup> Ordinary Session, held from 21 April to 7 May 2015 in Banjul, The Gambia, to grant thirty (30) additional calendar days for the Respondent State to submit on the Merits.
24. Following feedback received from the Promotion Mission of the Commission to the Republic of the Sudan held from 22 to 28 May 2015, that the Complainant's submissions on the Merits had not been received by the Respondent State, the Secretariat proceeded to forward the relevant documents on 29 June 2015. By 30 June 2015, the Respondent State was once again granted thirty (30) calendar days from the date of notification to submit on the Merits.
25. The Respondent State submitted on the Merits on 7 November 2015 and the submissions were forwarded to the Complainant by Letter dated 11 November 2015. By the same Letter, the Complainant was requested to submit its observations on the Respondent State's submissions on the Merits within thirty (30) calendar days, in accordance with Rule 108 (2) of the RoP 2010.
26. The Complainant observations on the Respondent State's submissions on the Merits were received at the Secretariat on 15 December 2015, and transmitted to the Respondent State by Note Verbale of 26 January 2016.
27. Consideration of the Communication and decision on the Merits was deferred during subsequent Sessions of the Commission.

### **Complainant's Submissions on Admissibility**

28. The Complainant provides information substantiating the compatibility of the Communication with all the provisions of Article 56 of the Charter.
29. Regarding Article 56 (5) in particular on the exhaustion of local remedies, the Complainant states that the Respondent State failed to provide the Victim with a remedy despite ample notice and time to do so; that the Victim made several attempts to exhaust local remedies in the Respondent State and while in exile to no avail, and that the victim and her representatives feared for their lives due to the threats, harassment and intimidation to which they were subjected by authorities of the Respondent State.
30. On the issue of notice and the failure to provide a remedy, the Complainant states that the Victim herself brought the violations to the attention of the authorities by filing a criminal complaint with the Attorney General at



Khartoum Bahri, together with her lawyer. On the same day, and following the Attorney General's request, the Victim gave a formal statement to police officers at the East Bahri Police Station where she then filed a formal complaint. The Complainant further informs the Commission that in addition to filing her complaint directly with the authorities, the Victim also issued a detailed public statement and posted a video on the internet about the violations she suffered.<sup>2</sup> It is pointed out that the statement and video attracted a lot of attention from the national and international press as well as human rights organisations and therefore put the Respondent State on notice of the violations.

31. The Complainant contends that a press statement by the Director of the Police of Khartoum State on 8 March 2011, declaring that medical tests on the victim did not prove the act of rape and stating that the Victim's complaint had been referred for investigation is clear testimony of the Respondent State authorities' knowledge of the allegations. The Complainant maintains that neither the victim nor her lawyer was informed of any investigation nor were they at any stage informed of the dismissal of the Victim's complaint.
32. It is submitted that while being aware of the allegations, there is no indication that the Respondent State took any measures to remedy the violations complained of even though prima facie evidence existed to trigger the State's obligation to investigate the allegations. It is submitted further that there is no indication that the authorities in charge of an investigation requested the Director of the NISS to lift the immunity of the NISS officials allegedly responsible for the offence as required under Sudanese law. They state that the response from the Respondent State's authorities was instead characterised by denial, dissuasion of the Victim and her family from pursuing the case as well as intimidation, harassment and threats directed at the Victim, her family, lawyers and journalists covering the case.
33. The Complainant submits further that in addition to failing to remedy the violations, the authorities of the Respondent State threatened, and harassed the Victim, eventually forcing her to leave Sudan and seeking asylum in France on 18 March 2011 where she was admitted on the basis of a 'well-

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<sup>2</sup> 13 See the Victim's testimony entitled 'Safia Ishag's Rape' on Youtube at <http://www.youtube.com/watch?v=4qMQ22ILoCY> (in Arabic, with English subtitles), uploaded on 24 February 2011 and 'Sudanese Police Rape Girl' on Youtube at <http://www.youtube.com/watch?v=zU9rLAOQOjc> (in Arabic, with English subtitles), uploaded on 23 February 2011.

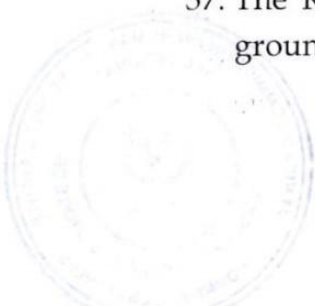


founded fear of persecution'. It is stated that even while in exile, the Victim continued to pursue her case from abroad. In March 2011, she instructed a lawyer in Khartoum to act on her behalf in pursuing the complaint, and provided the lawyer with an affidavit for that purpose. The lawyer sought to progress her case throughout 2011 and 2012 but faced considerable difficulties described in the complaint, including threats, harassment and forcible search and confiscation of case files (including the Victim's) from the lawyer's office. It is submitted that these difficulties also caused the lawyer to flee to the United Kingdom where she was granted asylum.

34. The Complainant submits finally that the Communication complies with Article 56 (5) given that the Victim made several attempts to exhaust local remedies and provided the Respondent State's authorities with ample opportunity to remedy the alleged violations. In addition, the authorities' harassment and threats of the Victim, her family and her lawyers, made any further attempt to exhaust domestic remedies futile and it is obvious that it is impossible for the Victim to obtain justice in the Respondent State in respect of the alleged violations.
35. Regarding the requirement under Article 56 (6) on the submission of the Communication within a reasonable time, the Complainant explains that the Communication was submitted after a series of failed attempts to exhaust local remedies. It is explained further that when she fled due to concerns for her safety, she continued to make efforts to obtain redress domestically through her lawyer who also subsequently fled Sudan due to concerns for her safety. Following these developments, the Victim then concluded sometime in October 2012 that she could not obtain redress at the national level.
36. The Complainant points out that in the meantime, the Victim's situation had drastically changed, as she had to struggle to adapt to a life far away from family and friends in Sudan, in a new country with a culture and language different from her own. The present Communication was then filed with the Commission on 18 February 2013. The Complainant submits that in the light of these circumstances, the Communication was submitted within a reasonable period of time after realising that domestic remedies were no longer available.

#### **Respondent State's Submissions on Admissibility**

37. The Respondent State contests the Admissibility of the Communication on grounds that it fails to meet the requirements under Articles 56 (2), (5) and (6).



38. Regarding Article 56 (2), the Respondent State submits that the facts of the Communication do not reveal a violation of the Articles of the Charter enumerated by the Complainant (Arts 1, 2, 3, 5, 6, 7, 9, 10, 11, 12, 16 and 18) and as a result, contradicts Article 56 (2) as being incompatible with the Charter.
39. Concerning Article 56 (5), the Respondent State points out that the Victim submitted her complaint to the Sudanese authorities on 16 February 2011, who immediately followed up with an investigation and rendered a decision on the investigation in June 2011. The Respondent State also points out that the Victim left Sudan just two days after filing her complaint and the Respondent State continued with its investigation even in her absence. The Respondent State argues that two days cannot be considered ample notice for an effective remedy and that publishing a video on the internet cannot also be considered as an appropriate and reasonable means of putting the Respondent State on notice of the violations. These, the Respondent State claims, portray the victim's 'bad intention in handling the case'.
40. The Respondent State also points out that the Victim made her public Statement on 23 February 2011 and her mother filed a criminal case concerning her disappearance on 22 February 2011.
41. The Respondent State refutes the Complainant's allegations about the threats directed at the person of the Victim and her family and points out that the Complainant's family are peacefully living and enjoying the protection of the Sudanese Legal system, with full access to all recourse mechanisms. The Respondent State refers to the jurisprudence of the Commission in **Article 19 V Eritrea** in which the Commission held that it is incumbent on the Complainant to take all necessary steps to exhaust local remedies.
42. The Respondent State also refutes allegations of harassment against the Victim's lawyer and points out inconsistencies in her statements. The Respondent State questions why the Victim's lawyer did not take any action on the case between February 2011 to April 2012 and why she sought other remedies thereafter instead of following up on the case that had been introduced before the District Attorney.
43. The Respondent State further points out that the rights alleged to have been violated are well protected in Sudanese legislation, citing Article 149 of the Criminal Act which criminalises rape. It also points out that several cases of rape have been tried in Sudan and the perpetrators given heavy sentences.





The Respondent State concludes that remedies in Sudan are therefore available, effective and sufficient.

44. Concerning the requirement under Article 56 (6), the Respondent State submits that the Communication was submitted after an unreasonable period of time from when the violations are alleged to have occurred. According to the Respondent State, the Communication was brought before the Commission on 25 March 2013, 21 months from the date of the dismissal of the Victim's complaint by the District Attorney, 25 months after she left the country and 11 months after her lawyer left the country.
45. The Respondent State refers to jurisprudence of the Commission in *Darfur Relief and Documentation Centre v Sudan and Micheal Majuru v Zimbabwe* wherein the Commission held that a period of 29 months and 22 months respectively was beyond a reasonable man's understanding of reasonable time. The Respondent State accordingly submits that the present Communication does not comply with the Requirement under Article 56(6) of the Charter.

#### **Complainant's Observations on the Respondent State's Submissions**

46. The Complainant, in response to the Respondent State's submissions argues amongst other things that the Communication is filed in accordance with the requirements of Article 56 of the Charter.
47. Concerning Article 56 (5) the Complainant states that contrary to the assertions of the Respondent State, there are significant shortcomings in the latter's legal system and its practical application which render domestic remedies for violations of the Charter unavailable, insufficient and ineffective.
48. The Complainant submits that the Respondent State failed to properly investigate the Victim's complaint despite being notified of the violations. Citing jurisprudence from the Commission, the Complainant submits further that contrary to the Respondent State's claims, there was no obligation on the part of the Victim or her lawyer to take additional steps to ensure that the case was indeed investigation.<sup>3</sup>
49. The Complainant explains that contrary to the Respondent State's claims, there is no evidence that the latter carried out an investigation into the Victim's complaint because neither the Victim, her lawyer nor her family were informed of any investigation into her case and have till date, not been

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<sup>3</sup> Article 19 v Eritrea, Communication 275/03 para 7



provided a copy of the decision dismissing the case. The Complainant cites international standards to the effect that the Respondent State is under an obligation to inform victims about steps taken in response to alleged violations as part and parcel of an effective remedy.<sup>4</sup> The Complainant points out that a failure to inform victims or their lawyers about the outcome of an investigation or judicial proceedings denies them their right to further remedies and is in violation of the Respondent State's own regulations and practice which foresees that decisions can be appealed to the 'Superior Attorney General'. This, the Complainant maintains, presupposes that the authorities are required to inform them about a decision to dismiss their case.

50. Concerning the submission of the Communication within a reasonable time, the Complainant states that the Communication was submitted within a reasonable time from the moment the Victim realized that remedies were ineffective and that she would not be able to obtain justice in the Respondent State.
51. The Complainant submits that the present case must be distinguished from the cases cited by the Respondent State because in the latter cases, the Commission considered that the Complainant had taken no steps even though effective domestic remedies were available or where a domestic body had made a final decision. The Complainant claims that in the absence of any official information about responses to her complaint, the Victim sought to continue to pursue the remedy in the hope that an effective investigation would be undertaken.
52. In light of the above, the Complainant urges the Commission to declare the Communication admissible.

### **The Commission's Analysis on Admissibility**

53. The provisions of Article 56 of the African Charter govern the Admissibility of Communications submitted for consideration to the African Commission. Article 56 sets out seven conditions which must all be complied with for any Communication to be Admissible. The Complainant submits that all these requirements have been met. The Respondent State on the other hand submits that the Communication fails to comply with the requirements of Articles 56 (2), (5) and (6).

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<sup>4</sup> Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section C (b) (3) and Section F (h) (3) and the Robben Island Guidelines, Para 19.



54. The Commission notes from the parties' submissions and the facts of the Communication, that the requirements under subsections (1) (3) (4) and (7) of Article 56 have been adequately substantiated, raise no potentially contentious issues and require no further examination. As such, the Commission will only proceed to examine the provisions of Article 56 that have been contested, namely Article 56 (2), (5) and (6).
55. Article 56 (2), of the Charter provides that a Communication shall be considered by the Commission if it is 'compatible with the Charter of the Organization of African Unity (now Constitutive Act of the African Union) or with the present Charter'. It is the position of the Respondent State that the Communication does not reveal violations of provisions of the African Charter and is therefore incompatible with the latter. The Complainant on the other hand argues that a prima facie case of violations of the Charter has been sufficiently made for the Communication to meet the requirement of Article 56 (2).
56. The Commission recalls its jurisprudence in **Samuel Muzerengwa & 110 Others v Zimbabwe**<sup>5</sup> wherein it was held that for purposes of compatibility with the Charter, a Complainant only needs to show the existence of a prima facie case of violations. In the same case, the Commission held that a person is presumed to have presented a prima facie case of a violation under the African Charter when the facts presented in a complaint show that a human rights violation has likely occurred. Such a case should be one that compels the conclusion that a human rights violation has occurred and is not contradicted or rebutted by the Respondent State.
57. It is worth noting that for purposes of admissibility under Article 56 (2) of the Charter, the Commission only needs to satisfy itself that there is a likelihood of a violation of the provisions of the Charter; that the alleged violations occurred in the territory of the Respondent State or territory under its control; that the complaint is brought by a person competent to do so and that the violations complained of occurred at a time when the Charter was in operation in the Respondent State.
58. In the present Communication, the Complainant has made a prima facie case of violations of the African Charter as it has adduced evidence in support of the allegations. The information provided by the Complainant is enough to convince the Commission of the likelihood that a violation might have occurred. Whether or not the violation did indeed occur is a matter that falls

<sup>5</sup> Communication 306/09, paras 54 - 57



to be properly determined at the Merits stage. There is also no doubt that the alleged violations occurred in the territory of the Respondent State, at a time when the Charter was in operation. The standing of the Complainant is also not in dispute.

59. The Commission is therefore satisfied that the Communication meets the requirements of Article 56 (2).
60. Article 56 (5) of the Charter provides that Communications shall be considered by the Commission after local remedies have been exhausted unless it is obvious that this procedure has been unduly prolonged. In the present Communication, the Complainant has submitted that the Victim made concerted efforts to bring the violations to the attention of the authorities of the Respondent State; that the State had notice of the violations allegedly perpetrated by its agents but failed to take the necessary measures to remedy the violations, and that the victim feared for her life due to the threats and harassment to which she was subjected. These circumstances according to the Complainant render any available local remedies in the Respondent State ineffective and insufficient to remedy the alleged violations.
61. The Respondent State, while admitting that it did indeed have notice of the violations submits that it acted expeditiously in investigating the complaint which was subsequently dismissed because there was apparently no commission of an offence. It denies the Complainant's allegations that the Victim, her lawyer and family were subjected to threats, harassment and intimidation and points out that the rights alleged to have been violated are well protected in Sudanese legislation. According to the Respondent State remedies in Sudan are therefore available, effective and sufficient to redress the alleged violations.
62. From the party's submissions, it is evident that the issue in contention is whether the Respondent State effectively investigated the allegations which it admits were brought to its attention and whether or not the Victim and her lawyer feared for their life to the extent that they were unable to make use of any available local remedies.
63. Concerning the issue of an effective investigation, the Commission notes that there is no contention in the present Communication that the Respondent State was duly notified of the violations allegedly committed by its agents. The Commission notes also that allegations of violations of a criminal nature impose an immediate duty on the State, after being notified of the violations, to initiate a prompt, impartial and effective investigation in order to establish



the veracity of the allegations and bring the perpetrators to justice if the allegations are founded.

64. The Respondent State has submitted that it was officially notified of the allegations on 16 February 2011 and that it initiated investigations thereafter which were concluded in June 2011 when the case was dismissed. The Complainant on the other hand submits that the Victim was never notified of any investigation and was at no point provided with a copy of the decision dismissing her case.
65. The Commission notes that the Respondent State has not supported its assertions with evidence to indicate that an investigation into the allegations was indeed carried out. The Respondent State has not provided the Commission with a copy of the decision dismissing the case, nor have any reasons been advanced for the dismissal of the case. The Respondent State does not also deny that the Victim, her family or her lawyer were not notified of the investigation and were not provided a copy of the decision dismissing the complaint. The Respondent State has also not denied that the Complainant was not involved in the investigation process. In the present circumstances, the Commission is in no position to conclude that the Respondent State fulfilled its primary obligation of carrying out an effective investigation into the complaint that was duly notified to it, which would have led the Commission to conclude that the Respondent State intended to respond to the complaint seriously.
66. The Commission considers that the failure to inform the victim about the investigation and the decision to dismiss her case prejudiced her because she was left in a state of limbo without knowing what further steps to take. This in effect renders any available remedies ineffective.
67. The Commission notes that the Complainant has also sufficiently substantiated the allegation that the Victim, her family and lawyer were subjected to threats, harassment and intimidation on the part of the authorities that led to her forced exile from the Respondent State.<sup>6</sup> The Complainants have maintained that these circumstances render any available local remedies ineffective and insufficient in the Victim's situation. The Respondent State denies these allegations and submits that the Victim's family is peacefully living in Sudan and enjoying the protection of the latter.

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<sup>6</sup> See paras 20 & 21.



68. The Commission has maintained that merely casting aspersions on the effectiveness of local remedies is not enough to absolve the Complainant of the duty to exhaust local remedies. Complainants must provide concrete evidence and sufficiently demonstrate that their apprehensions are well founded.<sup>7</sup> The Commission considers that the fact that the Victim and her lawyer were granted asylum in third countries on grounds of a 'well-founded fear of persecutions' lends credence to the Complainant's assertions. In that regard, the Commission has held in *the Jawara Case* that "if an applicant cannot turn to the judiciary of his country because of generalized fear for his life (or even those of his relatives); local remedies would be considered to be unavailable."<sup>8</sup> Similarly, the Commission considers that well-founded fear of persecution on the Victim's part was enough to have precluded her from pursuing local remedies thus rendering any theoretically available remedies, ineffective in her situation. The Respondent State's assertion that the Complainant's family is living peacefully in Sudan is irrelevant.
69. The Commission therefore considers that any available local remedies were ineffective and insufficient to redress the violations complained of in the Victim's situation hence such local remedies were constructively exhausted.
70. Article 56 (6) provides that a Communication shall be considered by the Commission if it is 'submitted within a reasonable period from the time local remedies were exhausted or from the date the Commission is seized with the matter'.
71. The Complainant has pointed out that the Communication was submitted after a failed number of attempts to exhaust local remedies. It has been explained that after the Victim fled Sudan in 2011, she continued to make efforts to exhaust local remedies and had to struggle to adapt to life in a third country, reason why the Communication was only submitted to the Commission in February 2013, almost 2 years after the violations complained of occurred. It has further been explained that since the Victim was not notified of the outcome of her complaint to the Sudanese authorities, she was uncertain about any further steps she could take. Based on these reasons, the Complainant submits that the Communication was submitted within a reasonable time.

<sup>7</sup> See the Commission's decision in Communication 299/05 - Anuak Justice Council v Ethiopia (2006) ACHPR para 58

<sup>8</sup> As in no 2 above para 35; see also Communication 232/99, Ouka v Kenya, ACHPR. 14<sup>th</sup> Annual Activity Report, para 19.



72. The Respondent State on the other hand has maintained that the Communication does not comply with the reasonable time requirement because it was submitted 21 months from the date of the dismissal of the Victim's complaint by the District Attorney, 25 months after she left the country and 11 months after her lawyer left the country.
73. The Commission recalls that unlike in the other regional human rights instruments, notably the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms which all consider the period of six months<sup>9</sup>, as a reasonable period within which complaints must be submitted after the exhaustion of local remedies, the African Charter has no such period. The Commission by virtue of its mandate under Article 45 of the Charter therefore interprets this provision on a case by case basis taking cognizance of its duty to promote and protect human rights as laid down in the Charter.<sup>10</sup>
74. In the present case, the Communication was submitted almost 25 months after the victim left the country, 21 months after her complaint was purportedly dismissed by the authorities and 11 months after her lawyer left.<sup>11</sup> Judging from the practice of the other regional bodies, these periods apparently appear to be unreasonable. However, the Commission considers that the context of the case and the circumstances in which the victim found herself are cogent enough to justify submitting the application at the time she did.
75. As outlined above, the Victim was not provided with a copy of the decision dismissing her complaint and she was therefore faced with uncertainty concerning the remedy pursued. This notwithstanding, the Commission notes that the Victim continued to make efforts to avail herself of domestic remedies through her lawyer, who subsequently fled from Sudan in April 2012 and the Communication was brought before the Commission in February 2013. It has also been proven through a psychological examination of 26 and 27 December 2012, submitted to the Commission and also made available to the Respondent State that the Victim struggled to adapt to her new situation in a foreign country.

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<sup>9</sup> See articles 56 (1) b & 36(1) respectively of the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Rights and Freedoms.

<sup>10</sup> See the Commission's decision in Micheal Majuru v. Zimbabwe, Communication 308/05(2008) 25<sup>th</sup> Activity Report, ACHPR.

<sup>11</sup> The victim left Sudan in February 2011, the Government maintains that her case was dismissed in June 2011 and her lawyer left Sudan in April 2012.



76. In the light of these circumstances, the Commission considers that the Communication was submitted within a reasonable period of time following the unsuccessful attempts to exhaust local remedies.

### Decision of the Commission on Admissibility

77. In view of the above, the Commission declared the Communication admissible.

### Merits

#### The Complainant's Submissions on Merits

#### Alleged violation of Article 5 of the African Charter

78. The Complainant submits that the Victim was subjected to torture and ill-treatment at the hands of State security agents, who severely beat and gang-raped her, in violation of Article 5 of the African Charter. The Complainant contends that the Commission has confirmed that acts of rape and the failure to prevent and respond to such acts amounts to a violation of Article 5 of the African Charter.

79. The Complainant refers to the case of *The Prosecutor v Anto Furundžija* where the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the following elements constitute rape: i) sexual penetration, however slight, of the vagina of the victim by the penis of the perpetrator or any other object used by the perpetrator; ii) by coercion or force or threat of force against the victim or third person.<sup>12</sup> The Complainant contends that the jurisprudence of human rights treaty bodies confirm that the pain and suffering caused by an act of rape are both physically and psychological severe such as to constitute torture. The Complainant refers to the jurisprudence of the Inter-American Court of Human Rights (IACtHR) where it held that:<sup>13</sup>

...severe suffering of the victim is inherent in rape, even when there is no evidence of physical injuries or disease. Indeed, the after effects of rape will

<sup>12</sup> *Prosecutor v Anto Furundžija* ICTY (16 November 1998) Case No IT--95--17/1--T para 185; *Miguel Castro Castro Prison v Peru* IACHR (25 November 2006) (Merits, Reparations and Costs), Series C No 160 para 310.

<sup>13</sup> *Fernández Ortega et al. v Mexico* IACHR (30 August 2010) (Preliminary Objections, Merits, Reparations and Costs) para 124.





not always be physical injuries or diseases. Women victims of rape also experience complex consequences of a psychological and social nature.

80. The Complainant submits that rape committed against a detainee will always amount to torture. In support of this argument, the Complainant refers to the case of *V.L v Switzerland*, where the United Nations (UN) Committee Against Torture held that multiple rapes by State agents constitutes torture.<sup>14</sup> The Complainant further contends that the rape was a form of torture, for the purpose of obtaining information, punishing and intimidating the Victim, as well as, aimed at degrading and humiliating the Victim, and her family.
81. On the applicable standards of evidence, the Complainant submits that it is widely recognised that there are particular challenges in documenting rape, due to the usual absence of witnesses, the stigma and the difficulty of obtaining timely medical reports. The Complainant contends that these challenges are aggravated in cases of rape in custody, particularly where officials use their position to deny or counter allegations and threaten victims. The Complainant submits that this challenge has been recognised by the Commission in its Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence.<sup>15</sup>
82. The Complainant submits that in light of this challenge, the IACtHR considers the Victim's testimony to be the fundamental evidence in cases involving rape. In support of this averment, the Complainant references the case of *Fernández Ortega et al. V Mexico*, where the Court held that in view of the nature of rape, one cannot await graphic or documentary evidence, thus the Victim's testimony becomes the fundamental proof of that which occurred.<sup>16</sup> The Complainant also argues that other evidence such as a psychological assessment, even if carried out some time after the rape, can constitute sufficient evidence in support of the Victim's testimony.
83. In this regard, the Complainant contends that the Victim testified on several occasions about the severe beatings, humiliation and acts of rape, including in her statement to the police on 16 February 2011, the subsequent complaint filed, her testimony on the internet and her affidavit of 15 February 2013. The Complainant submits that the Victim's testimony corresponds with the

<sup>14</sup> *V.L. v Switzerland*, CAT Committee (20 November 2006) CAT/C/37/D/262/2005 para 8.10.

<sup>15</sup> ACHPR/RES.111 (XXXII) 07 Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence 2007.

<sup>16</sup> (n 13 above) para 100; *Rosendo Cantu et al v Mexico* IACtHR (31 August 2010) (Preliminary Objections, Merits, Reparations and Costs), para 89



findings of the basic medical examination carried out in Bahri on 16 February 2011, albeit inadequate. They further contend that her testimony is consistent with the psychological symptoms suffered, as documented in the Victim's psychological report dated 28 December 2012. The Complainant therefore submits that sufficient evidence exists of the torture and ill-treatment the victim suffered during her detention.

84. The Complainant contends that the burden of proof therefore shifts to the Respondent State to disprove the allegations raised. They submit that the State has failed to adequately investigate the Victim's complaint, and has not provided any evidence in contradiction of the facts. The Complainant argues that the Respondent State's failure to provide the victim with any reparation is contrary to its obligation under Article 5 of the African Charter. In support of this argument, the Complainant refers to the Commission's Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) which stipulates the State's obligation to, *inter alia*, provide victims of torture and their dependents with "appropriate medical care...access to appropriate social and medical rehabilitation and...appropriate levels of compensation and support".<sup>17</sup>

85. The Complainant therefore submits that in light of the foregoing, ample evidence has been presented of the acts of rape the victim was subjected to, and that the rape unequivocally amounts to torture in violation of Article 5 of the African Charter.

### **Alleged violation of Article 2 of the African Charter**

86. The Complainant submits that acts of rape and insults of a sexual nature against a woman in custody are aimed at negating her dignity as a human, on account of her gender. The Complainant therefore submits that the torture and ill-treatment the Victim suffered at the hands of NISS officials, was inherently discriminatory.

87. The Complainant refers to the definition of discrimination in *Egyptian Initiative for Personal rights and Interights v Egypt*,<sup>18</sup> and contends that the Respondent State has a positive obligation under Article 2 to respond to gender-based violence particularly rape, as ending impunity for such

<sup>17</sup> Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), Edition 2008 para 50.

<sup>18</sup> Communication 323/06 - *Egyptian Initiative for Personal rights and Interights v Egypt* para 121.



violence and ensuring access to justice is crucial for women to enjoy their rights under the African Charter. The Complainant submits that in the Victim's case, the NISS officers used sexual violence as a means of repression to punish and intimidate a female activist, and instead of exercising due diligence in their response, the State authorities deliberately tried to silence her, and those acting on her behalf.

88. The Complainant submits that these concerted efforts, constitutes a violation of the Respondent State's duty to ensure non-discrimination on the basis of gender and political opinion as provided under Article 2 of the African Charter.

### **Alleged violation of Article 3 of the African Charter**

89. The Complainant submits that the right to equality before the law requires States to act against discrimination by public and private agencies in all fields. They contend that equality before the law requires the State to remove any formal inequalities, and equal protection of the law entails that gender is not a factor that should lower a person's level of protection under the law. Accordingly, the Complainant contends that the Respondent State must take positive measures to end structural discrimination that leads to violence against women.
90. The Complainant submits that several pieces of Sudanese legislation treat women differently from men with no apparent justification. The Complainant refers to Article 149 of the Sudanese Criminal Act of 1991 on the crime of rape, and avers that the provision disproportionately impacts women, as female victims of rape are at the same time being exposed to possible accusations of adultery.
91. The Complainant therefore argues that the Victim suffered a lack of protection against rape, and an official response that was diametrically opposed to the due diligence standard recognised under international law, in violation of Article 3 of the African Charter.

### **Alleged violation of Article 6 of the African Charter**

92. The Complainant submits that the Victim's arrest by the NISS officials on 13 February 2011 was arbitrary, and as such violates Article 6 of the African Charter. They refer to the Commission's jurisprudence in *Article 19 v Eritrea* where it held that arbitrariness should not only be equated with 'against the



law' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.<sup>19</sup>

93. The Complainant submits that the arrest and detention was executed in accordance with Article 50 (1) (e) of the National Security Act 2010, which vests NISS with the power to arrest or detain any suspected person for a period not exceeding thirty (30) days, provided that his/her relatives are immediately informed. The Complainant contends that this provision does not specify the requisite level of suspicion and lacks sufficient precision and predictability. They aver that in practice, this has given rise to concerns, as the NISS regularly apprehend individuals without a formal arrest warrant or any visible grounds, and without judicial oversight.
94. The Complainant submits that the manner of the Victim's arrest by plain clothes officers of the NISS was akin to a kidnapping rather than an arrest. They contend that the nature of the subsequent "interrogation", which was characterised by beatings, insults and rape, indicates that the purpose of the arrest and detention was to punish the Victim for the past exercise of her freedom of expression, association and assembly, and to intimidate her from exercising these freedoms in the future. The Complainant therefore submits that the Respondent State's failure to guarantee the Victim's protection from arbitrary arrest and detention, and to provide her with an effective remedy in this regard violates Article 6 of the African Charter.

#### **Alleged violation of Article 7 of the African Charter**

95. The Complainant submits that after the rape, the Victim was threatened by authorities in the Respondent State in order to discourage her from seeking justice. They aver that despite these threats, the Victim filed a complaint on 16 February 2011. The Complainant however submits that the Respondent State failed to effectively investigate the complaint; and following the filing of this complaint, agents of the NISS subjected the Victim's lawyer to threats, harassment and intimidation, ultimately forcing him to flee Sudan.
96. The Complainant submits that this impeded the Victim's ability to access the relevant judicial bodies to have her cause heard, and grant her adequate relief in accordance with Article 7 (1) (a) of the African Charter. The Complainant argues that for the right to an effective remedy to be realised, victims frequently require legal assistance, and in that regard referred to the provisions of the Principles and Guideline on the Right to a Fair Trial and

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<sup>19</sup> Communication 275/2003 – *Article 19 v Eritrea* para 93.



Legal Assistance in Africa (Principles of Fair Trial and Legal Assistance) which stipulate that States have an obligation to ensure that lawyers “(i) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper influence...”<sup>20</sup>

97. Further, the Complainant contends that the Respondent State violated the Victim’s rights to a defence, including the right to be defended by a counsel of her choice in violation of Article 7 (1) (c) of the African Charter. The Complainant submits that pursuant to Article 7 (1) (c), any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer present.
98. The Complainant submits that the Victim was not granted access to a lawyer during the eleven (11) hours of her detention. They contend that pursuant to Article 51 (2) of the National Security Act 2010 detainees have the right to inform their families and employers of their detention and may communicate with a lawyer if doing so does not prejudice the progress of interrogation, enquiry and investigation. The Complainant submits that this provision fails to guarantee prompt access to a lawyer, and gives the NISS unfettered discretion to exclude access where it is deemed detrimental to the investigation. The Complainant submits that this provision is incompatible with international standards on the right of access to a lawyer, and as such a violation of Article 7 (1) (c) of the African Charter.

#### **Alleged violation of Article 9 of the African Charter**

99. The Complainant submits that the Respondent State violated the Victim’s right to express and disseminate her opinion within the law as enshrined in Article 9 (2) of the African Charter.
100. The Complainant submits that the Victim was actively engaged in peaceful protests and advocacy, including distributing flyers calling for the respect of human rights in Sudan and engaging in demonstrations. They contend that the arrest, detention, rapes and other forms of torture and ill-treatment were in response to the exercise of her freedom of expression. The Complainant submits that the aim of the punishment was to discourage the Victim from exercising her freedom of expression and therefore amounts to a violation of Article 9 (2) of the African Charter.

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<sup>20</sup>Principles and Guideline on the Right to a Fair Trial and Legal Assistance in Africa 2003 principle I.



### **Alleged violation of Article 10 (1) and 11 of the African Charter**

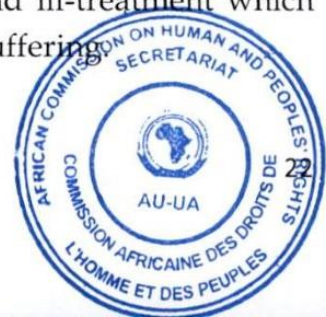
101. The Complainant submits that the rights expressed under Article 9 (2) 10 (1) and 11 of the African Charter are closely related and complement each other, as such a violation of one result in a violation of the others. They contend that State Parties have an obligation to guarantee the right to freedom of assembly as enshrined in Article 11, a right that is intrinsically related to the guarantee of the freedom of association.
102. The Complainant submits that the Victim's arrest closely followed her participation in the demonstrations of 30 January 2011, and she was targeted for being a member of Girifna, a non-governmental, non-violent pro-democracy movement. She contends that the arrest, detention, rapes and torture she suffered were aimed at punishing her for exercising her freedom to assemble and associate, and to prevent her from exercising these rights in future. The Complainant argues that preventing an individual from gathering with others to discuss human rights, by 'punishing' he/she for doing so amounts to a violation of the rights enshrined in Articles 10 and 11 of the African Charter.

### **Alleged violation of Article 12 of the African Charter**

103. The Complainant submits that the Respondent State violated Articles 12 (1) and (2) of the African Charter when the Victim was forced to flee her country of residence on account of her human rights activities.
104. The Complainant submits that the high-profile nature of the Victim's case and the mounting threats forced her to flee Sudan. The Complainant states that the publication of the Victim's video testimony and the aggressive official responses to any person raising her case in Sudan, was a clear indication that she would be at risk if she returned to Sudan.
105. The Complainant therefore submits that the Victim's right to freedom of movement, as well as right to residence within, and return to Sudan have been infringed contrary to Article 12 (1) and (2) of the African Charter.

### **Alleged violation of Article 16 of the African Charter**

106. The Complainant submits that the Respondent State is responsible for the violation of the Victim's right to the best attainable state of physical and mental health pursuant to Article 16 of the African Charter. They submit that the Victim was subjected to physical and mental torture and ill-treatment which resulted in physical injuries and ongoing psychological suffering.



107. The Complainant submits that the UN Committee on Economic, Social and Cultural Rights has held that the right to health is closely related, and dependent upon, the realisation of other human rights, including the prohibition of torture.<sup>21</sup> The Complainant therefore contends that it is generally recognised that rape and other forms of torture and ill-treatment cause severe mental and physical trauma on the victim, as such, the resulting ill-health as a consequence of torture can be attributed to the State as the author of the torture.

#### **Alleged violation of Article 18 of the African Charter**

108. The Complainant contends that the Respondent State has failed in its obligation to ensure the elimination of all forms of discrimination against women pursuant to Article 18 (3) of the African Charter. The Complainant submits that in examining whether a violation had occurred, the Commission had considered whether the alleged violations were indeed gender-specific and discriminatory on the primary basis of gender. They submit that the Commission in *Egyptian Initiative for Personal Rights and Interights v Egypt* found that verbal assaults such as 'slut' and 'whore', as well as physical violence and acts of sexual harassment such as fondling a woman's breasts, were gender specific and as such a violation of Article 18 (3) of the African Charter.<sup>22</sup>

#### **Alleged violation of Article 1 of the African Charter**

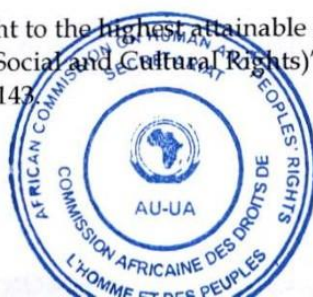
109. The Complainant submits that the Respondent State failed to comply with its obligation to adopt legislative or other measures to give effect to the rights in the African Charter as stipulated under Article 1.

110. The Complainant submits that the Respondent State has a duty to respect, protect, promote and fulfil the rights contained in the African Charter. They argue that this entails, at a minimum, that the Respondent State exercises due diligence in providing effective remedies to victims, including through conducting investigations and providing adequate reparations. The Complainant therefore contends that the failure of the Respondent State to comply with its due diligence obligations violates Article 1 of the African Charter.

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<sup>21</sup> UN CESCR, General Comment 14 'The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' 2000.

<sup>22</sup> Communication 323/06 (n 18 above) para 143.



## The Respondent State's Submissions on Merits

111. The Respondent State contends that the Complainant's averments are groundless, contradictory and unsubstantiated by evidence. The Respondent State submits that on 16 February 2011, the Victim filed a complaint at the office of the Public Prosecutor of Bahri (Khartoum North City) claiming that on 13 February 2011 she was abducted by two persons who drove her to a house near Shendi bus station in Khartoum North, where she was raped by three (3) men who allegedly were members of the security forces.
112. The Respondent State submits that the prosecutor ordered entry of criminal proceedings under sections 20, 149 and 162 of the Criminal Act against anonymous suspects, and directed the victim to the Kafouri police station to proceed with the investigations. The Respondent State contends that the victim did not present the first complaint which carried the prosecutor's order, but instead lodged a new complaint reiterating the same claims and adding that she was driven in a white car to a courtyard near Shendi bus station where she was beaten and raped by three (3) men who allegedly were members of the security forces.
113. The Respondent State submits that initial investigation under section 44 of the Criminal Procedure Act was ordered, and Form 8 (forensic examination) was issued. The Respondent contends that the examining doctor reported on the form that: there were ulcers around the opening of the vagina, that the hymen could not be seen due to circumcision, and that there was blood outside the vagina, which the Victim confirmed as menstrual.
114. The Respondent State contends that the examining doctor stated that the said ulcers could be due to attempted rape, vaginal infections or intentionally self-inflicted, and that she, the doctor could not affirm whether or not rape had occurred. The Respondent avers that the Victim was summoned for re-questioning but never appeared again.
115. The Respondent State further submits that the Victim's sister was also questioned as a witness. The State contends that she stated that the Victim left her aunt's house on 16 February 2011 and did not return home. The Victim's family reported her missing at the North Umbadda police station on 22 February 2011, and that subsequently, the Victim's sister received a phone call from the Victim informing her that she was in Juba. The Respondent State submits that the testimony of the Victim's sister indicated that on the same day, a group of persons affiliated to some political parties went to the Victim's family house and informed the family that the Victim was alright.





116. The Respondent State submits that Mr. Hayder Abdel Gadir, a lecturer at Sudan University testified that the Victim attended the faculty on 13 February 2011, and at about 8:30 to 9:30, she was present at their office. At 14:50, they went out together to buy a mobile phone from Souq Arabi market, and thereafter they went to his house in Remaila quarter in Khartoum and stayed there until 20:30. He then hired a taxicab and took the victim to her house in Umbadda, arriving at the Victim's home at 21:30. They submit that according to the testimony, the Victim asked Mr. Gadir to transfer an account to her mobile phone which he did, and at 22:43 she sent him an SMS message to verify his arrival home, he replied to her message, and she sent another SMS wishing him a good night.
117. The Respondent State contends that based on the above investigations, the senior district prosecutor found that the Victim failed to establish the *prima facie* evidence necessary for continuing the proceedings, and that she failed to pursue her case when summoned for further investigation. As a result, on 2 June 2011 the prosecutor made the decision to close the proceedings and ordered notification of the Victim, and of her right to appeal the decision.
118. The Respondent State submits that on the missing person complaint filed by the Victim's family on 22 February 2011, the preliminary investigation established that the Victim arrived at her aunt's house on 16 February 2011 at about 22:00, and the following morning she informed her aunt that she was going to meet two of her colleagues at the neighbouring quarter.
119. The Respondent State submits that on 23 February 2011, a group of politicians visited the Victim's family in Umbadda introducing themselves as representatives of a human rights organization called *La liqahr alnisaa* (No to suppression of women), and informed the family that the Victim was in a safe place. The Respondent submits that the group agreed with the Victim's family to handover the Victim to one of her relatives residing in Juba, after intensive telephone calls between the group and a man called Monim Algak in Juba.
120. The Respondent State submits that based on the above investigation, the district prosecutor ordered the initiation of criminal proceedings under section 164 (illegal confinement) against Monim Algak and under sections 24 and 26 (abetment and criminal conspiracy) against the *La liqahr alnisaa* group.
121. The Respondent State submits that pursuant to section 51 of the National Security Act 2010, the leadership of NISS initiated a *promptu moto* internal inquiry as soon as it took notice of the allegations, and reached the conclusion that the Victim's allegations are baseless and unsubstantiated, and that the



Victim was never arrested or summoned by the NISS and had never been wanted for any security issue.

122. The Respondent State contends that the Victim's claim that she was abducted is rebuttable by the testimony of Mr. Hayder Abdel Gadir who assured the police that he had been in the company of the Victim from 8:30 in the morning to 11: 00 at night on the day of the alleged incident. The Respondent submits that the assumption that the men who allegedly abducted and raped her were NISS officers or government agents are mere aspersions casted with no evidence to support it. The Respondent also contends that the assertion that several other complainants or former detainees recognised the said place as an NISS building is mere hearsay.

123. The Respondent State submits that the rape itself has not been substantiated, as the medical report which was conducted a few days after the alleged incident was undecided in establishing any allegation of rape. The State contends that rape is a serious offence in Sudan, with a punishment which may amount to death (section 149 Criminal Act 1991). It therefore submits that the State fulfilled its obligation by initiating prompt judicial and administrative proceedings upon the Victim filing her complaint. As such, the Respondent contends that the fact that the Victim was absent for the investigation and failed to pursue her case, which remained open in its primary stage for over five (5) months, whether in person or through a legal representative, casts reasonable doubt to her story.

124. Finally, the Respondent State submits that the Victim's family, particularly her mother who reported the Victim missing, never mentioned that her daughter had complained of any assault on her person, nor did her colleague. The Respondent State submits that the Victim's contention that she was prevented from disclosing what had happened to her due to fear of social stigma is untenable and contradictable by the fact that she later on divulged the whole episode of her assumption on the internet, including by publishing the medical report which is confidential and intimate in nature.

125. For the above reasons, the Respondent State pray the esteemed Commission finds that the Government of the Sudan has not violated any of the articles of the African Charter, and dismiss the Communication accordingly.

#### **Preliminary Objection to the admission of the Respondent State's submission on Merits**

126. The Complainant states that its submission on the Merits were transmitted to the Commission on 25 July 2014, and the Commission acknowledged receipt on



4 August 2014 informing them that the submissions had been forwarded to the Respondent State for its observations in accordance with Rule 108 (1) RoP 2010. Accordingly, the Respondent State's submissions were due on 3 October 2014.

127. The Complainant submit that in the absence of the Respondent State's observation on the Merits, they inquired with the Secretariat about the Commission's decision on the Merits, and were informed on 18 May 2015 that during its 56<sup>th</sup> Ordinary Session, the Commission "granted the Republic of The Sudan a final period of 30 calendar days from the date of notification within which to file its written observations on the Merits", and that the Commission will proceed to adopt a decision on the Merits if the observations are not received within the stipulated time.

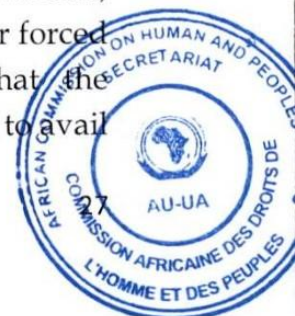
128. The Complainant submits that the extension granted to the Respondent State expired on 17 June 2015. However, despite the generosity of the Commission, the Respondent State again failed to submit its observations in time. The Complainants submit that the Secretariat forwarded the Respondent State's undated response on 11 November 2015 (more than 13 months after the initial cut-off date of 3 October 2014), and invited the Complainant to submit its observation on the response in accordance with Rule 108 (2) of the RoP 2010.

129. In light of the above, the Complainant raises a preliminary objection to the admissibility of the Respondent State's submissions on the Merits in accordance with Rule 103 (1) of the RoP 2010. The Complainant contends that any submission falling outside the stipulated time frame should not be admitted by the Commission. They contend that non-compliance with the time frame causes delay and contributes to the backlog of cases pending before the Commission. These delays they contend have a negative impact on the Victim, particularly as the case involves a violation of Article 5 of the African Charter.

130. The Complainant therefore requests that the Commission promptly proceed to deciding the Merits solely on the Complainants' submission. However, if the Commission decides that the Respondent State's submission is admissible, the Complainant submits its response as elaborated below.

### **The Complainant's Reply to the Respondent State's Submissions on Merits**

131. The Complainant submits that the Commission in its decision on Admissibility has found that the Complainant "sufficiently substantiated the allegation that the Victim, her family and lawyers were subjected to threats, harassment and intimidation on the part of the authorities that led to her forced exile from the Respondent State." The Complainants contend that the Commission also established that the Victim "continued to make efforts to avail



herself of domestic remedies through her lawyer, who subsequently fled from Sudan in April 2012." As such, the Complainant submits that the Respondent State's assertions that the Victim absented herself from the investigation, and failed to pursue her case are unfounded.

132. In response to the Respondent State's assertion that the Prosecutor ordered that the Victim be notified of the decision to close the investigation; the Complainants contend that the Commission has already found in its decision on Admissibility that the Respondent State authorities' failure to inform the Victim of the outcome of the alleged investigation had rendered remedies ineffective.

133. The Complainant submits that the Respondent State did not adduce any evidence to rebut the Victim's substantiated allegations. They submit that the Victim has testified on several occasions, and in all her testimonies provided a consistent account of the torture and rape suffered. The Complainant submits that the Victim's testimony is consistent with the psychological symptom characteristic of victims of rape, as reported in the psychological report dated 28 December 2012. The Complainants therefore argue that these evidence shifts the burden of proof to the Respondent State who has failed to discharge its burden of proof.

134. The Complainant submits that the Respondent State did not provide the alleged testimonies of Ms Safinaz Ishaq and Mr. Hayder Abdel Gadir referred to in its submission, as such, there is no information verifying the claims therein. They submit that Mr. Hayder Abdel Gadir is known to the Victim as a lecturer at the University of Sudan where she attended. However, the Victim has never spent time with Mr. Gadir outside the University, neither on 13 February 2011 nor on any other day.

135. The Complainant submits that on the basis of medical form 8 examination, the doctor could not exclude the possibility that the rapes were committed. They contend that the medical form 8 is a one-page reporting document for reports on physical injuries generally, rather than specifically for allegations concerning sexual violence. The Complainant therefore submits that form 8 does not allow for a comprehensive medical report.

136. Regarding the contention that the Victim's allegation that she was detained at an NISS office near Shandi bus station, are mere aspersions based on hearsay, the Complainant submits that this is in contrast with the well-documented use of this particular office as a place of detention and torture. In support of this averment, the Complainant submits that the Commission found in *Monim Elgak*



*Osman Hummeida Amir Suliman (represented by FIDH and OMCT) v Sudan*<sup>23</sup> that three human rights defenders were detained and tortured in the NISS office near Shandi bus station.

137. In response to the Respondent State's assertion that the Victim's complaint was adequately investigated, the Complainant submits that the investigation was not thorough, as it only consisted of two statements and the medical examination on the basis of form 8. The Complainant submits that these steps are insufficient and further investigations ought to have been conducted, including obtaining the records of NISS officials on duty on the day of the alleged incident, and interrogate them accordingly. As such, the Complainant submits that the failure to adequately investigate the allegations violates Articles 5 and 1 of the African Charter.

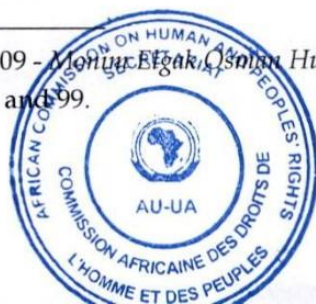
### **The Commission's Analysis on the Preliminary Objection**

138. Pursuant to Rule 103 (4) of the RoP 2010, when a preliminary objection is raised, the Commission shall first determine this objection before any other question relating to the Communication is considered. The Commission therefore notes the Complainant's contention that the Respondent State's submissions on the Merits should not be considered, for failure to comply with the time frame stipulated in Rule 108 (1) of the RoP 2010.

139. As noted in paragraph 24 and 25 above, the Complainant's submissions were re-transmitted to the Respondent State on 29 June 2015, following feedback from the Commission's Promotion Mission to the Republic of Sudan, held from 22 to 28 May 2015. Although the Respondent State's submissions on the Merits were received on 7 November 2015, three (3) months past the stipulated deadline, the Commission considers that admitting the submissions would be in the interest of justice, as both parties would be afforded the opportunity to respond to allegations raised and evidence submitted. This would allow for a constructive analysis of the provisions of the African Charter alleged to have been violated and the relief sought by the Complainant.

### **Decision of the Commission on the Preliminary Objection**

<sup>23</sup> Communication 379/09 - *Mohammed El Mok, Osman Hummeida Amir Suliman (represented by FIDH and OMCT) v Sudan* paras 4 and 99.



140. In view of the foregoing, the Commission dismisses the Complainant's preliminary objection and consequently admits the submissions of the Respondent State on the Merits.

## Commission's Analysis on the Merits

### Alleged Violation of Article 5

141. Article 5 of the Charter reads:

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

142. The Complainant alleges that the Victim was abducted on 13 February 2011 by three men alleged to be NISS officials, and taken to an NISS office near Shendi bus station, Khartoum North, where she was severely beaten, humiliated and gang raped. The Complainant contends that the acts of torture were aimed at damaging the Victim's dignity and punishing her for her participation in student rallies and her affiliation to Girifna, a non-violent resistance movement, and the Youth Forum for Social Peace.

143. The Respondent State however contends that upon an initial investigation, the Victim's claim of abduction was rebutted by the testimony of one Mr. Hayder Abdel Gadir who assured the police that he was in the company of the Victim on the day of the alleged incident. The Respondent submits that the alleged rape has not been substantiated as the report of medical form 8 was undecided in this regard. The Respondent State further contends that the Victim's averments that the torture and rape were carried out by NISS officials are mere aspersions, and that the contention that the location has also been recognized by other complainants as an NISS building, is mere hearsay.

144. The Commission in the case of *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* set out the principal elements that constitute torture as follows: "that severe pain or suffering has been inflicted; for a specific purpose, such as to obtain information, as punishment or to intimidate, or for any reason based on discrimination; by or at the



instigation of or with the consent or acquiescence of State authorities.”<sup>24</sup> The Commission in its interpretation of Article 5 of the African Charter has also adopted the definition of torture contained in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention Against Torture).<sup>25</sup>

145. The Commission in determining whether the alleged acts constitute a violation of Article 5 of the African Charter, must first consider the four constitutive elements qualifying an act as torture, these include: i) the nature of the act; ii) the intention of the perpetrator; iii) the purpose; and iv) the involvement of public official.

146. Regarding the nature of the act, the Commission in its jurisprudence has noted the reasoning of the European Court of Human Rights (ECtHR) in *Ireland v United Kingdom* where it held that the “...ill-treatment must attain a minimum level of severity [and]...The assessment of this is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim etc.”<sup>26</sup> The crime of rape is of such a grave and cruel nature that it automatically fulfils the severity threshold for torture. As observed by the IACtHR in *Fernandez Ortega et al. v Mexico* “...the severe suffering of the victim is inherent in rape, even when there is no evidence of physical injuries or disease”.<sup>27</sup>

147. The Commission notes the Victim’s testimony which describes in detail the abduction, verbal insults, beating and rape by three men whom she alleges to be officers of the NISS. In support of these averments, the Complainant submit medical examination form 8A dated 16 February 2011, a psychological report prepared by TRACES-Reseau Clinique International, Paris and the Victim’s statements taken at the Khartoum North Prosecution Office and the Khartoum North (Bahri) East Police Station on 16 February 2011.

148. An examination of the evidence submitted by the Complainant reveal a high degree of consistency in the accounts of facts given by the Victim to the Public Prosecutor, Police, clinical psychologist, and in her statement submitted to the Commission. These statements were rendered at different times between the

<sup>24</sup> (As above) para 98.

<sup>25</sup> Communication 279/03-296/05 - *Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) v Sudan* para 155.

<sup>26</sup> Communication 225/98 - *Huri-laws v Nigeria* para 41, *Ireland v United Kingdom* ECtHR (13 December 1977) App No 5310/71 Final para 162.

<sup>27</sup> *Fernandez Ortega et al. v Mexico* (n 13 above) para 124.



periods of 2011 to 2013. The Commission however notes that the Respondent State in disputing the Victim's version of events of 13 February 2011 relies primarily on the testimony of one Mr. Hayder Abdel Gadir, a lecturer at the University of Sudan, and the medical form 8A.

149. The Commission notes that neither the testimony of Mr. Gadir nor medical form 8A was submitted in evidence by the Respondent State. The Commission reiterates that in cases of human rights violations, the burden of proof rests on the Respondent State to provide evidence to contradict an allegation of human rights violation made against it.<sup>28</sup> Where the State fails in this regard, the Commission may consider the facts alleged as proven, or at the least probable or plausible.<sup>29</sup>

150. The Commission further notes that medical form 8A was submitted in evidence by the Complainant, and its admission or authenticity has not been challenged by the Respondent State. Medical form 8A reports as follows:

There are sores around the vagina. The vagina opening (entrance) is very small because of the circumcision. That is why I couldn't see the hymen. There is blood coming out of the vagina which the mentioned above [Victim] said it is menstrual blood.

The Commission considers that the nature of the injuries described above is consistent with the prognosis that the Victim may have been subjected to some form of sexual violence, and the Victim's version of events of 3 February 2011 supports this fact. Additionally, the Commission notes that the psychosocial evaluation further corroborates the Victim's allegations, as it concludes that the Victim's symptoms revealed post-traumatic pain and suffering linked to the abuse of 13 February 2011. These symptoms the evaluation lists as follows: sexual troubles, hyper vigilance, nightmares, sadness and anxiety, feelings of guilt, loss and insecurity amongst others.

151. The Commission in assessing the veracity of allegations raised by complainants, generally require that evidence submitted must be compelling,<sup>30</sup> or "contain elements likely to reasonably lead to [] a conclusion [that the alleged violation occurred]."<sup>31</sup> Similarly, the ECtHR held in the case of *Afet Süreyya Eren v Turkey* that proof may "...follow from the co-existence of

<sup>28</sup> Communication 48/90-50/91-52/91-89/93 – *Amnesty International, Comite Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* para 52.

<sup>29</sup> As above.

<sup>30</sup> Communication 212/98 – *Amnesty International v Zambia* para 45.

<sup>31</sup> Communication 144/95 – *William A. Curson v Equatorial Guinea* para





sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.”<sup>32</sup> In light of the foregoing, the Commission finds that the evidence as presented by the Complainant establish that on 13 February 2011 the Victim was indeed subjected to an act of sexual violence which includes rape.

152. The definition of torture as contained in the UN Convention against Torture demands that the severe pain or suffering be inflicted for a prohibited purpose, such as: to obtain information or a confession, to punish, intimidate or coerce, or any reason based on discrimination of any kind. The Commission notes the reasoning of the International Criminal Tribunal for Rwanda (ICTR) in *The Prosecutor v Jean-Paul Akayesu* that “...rape is used for such purpose as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person”.<sup>33</sup>

153. In the present Communication, the course of events as described by the Victim shows that the physical assault, insults and rape were inflicted with intent to obtain information on the Victim’s participation in the activities of Girifna, and aimed at punishing the Victim for her involvement with the said group. The Commission considers that rape under such circumstances constitutes torture when 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. As noted by the ECtHR in the case of *Aydin v Turkey* “[r]ape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim.”<sup>34</sup> The Commission must therefore consider the contentious issue of whether the gang rape, beatings and insults suffered by the Victim were perpetrated by State agents.

154. The Commission notes that the Victim in her testimony taken at Khartoum North (Bahri) Police Station identified her attackers as security agents,<sup>35</sup> and categorically stated in her testimony to the Commission that she “...went to see the Attorney General to file a criminal complaint against the NISS. He completed a petition requesting the police to register [her] complaint against unknown suspects...”<sup>36</sup> The Respondent State does not contest this averment, but denies the involvement of NISS officers.

<sup>32</sup> *Afet Süreyya Eren v Turkey* ECtHR (14 March 2016) App No 36617/07 Final para 29.

<sup>33</sup> *The Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4-T, (Chamber I) 2 September 1998 para 597.

<sup>34</sup> *Aydin v Turkey* ECtHR (25 September 1997) App No 57/1996/676/866 Final para 83.

<sup>35</sup> Complaint filed at Khartoum North (Bahri) East Police Station, Record No 42/ Article 44 (a) (c), Annex 3 to the Initial Complaint.

<sup>36</sup> Testimony of the Victim, Annex 1 to the Initial Complaint para 7



155. The Commission notes that the Robben Island Guidelines stipulates that where an individual raises an arguable claim of torture or ill treatment, the Respondent State is obliged to initiate an effective investigation into the allegations raised, in conjunction with its duties under Articles 1 and 5 of the African Charter.<sup>37</sup> The Istanbul Protocol further provides that the “[t]he investigators, who shall be independent of the suspected perpetrators and the agency they serve, must be competent and impartial.”<sup>38</sup>

156. The Commission notes that rather than undertake an independent investigation into the Victim’s averments, an internal inquiry was conducted by the NISS, and the Respondent State in its submission dismissed the Victim’s allegation as mere aspersions. The Commission considers that the case of *Monim Elgak Osman Hummeida Amir Suliman (represented by FIDH and OMCT) v Sudan* may serve as corroborative evidence of the use of a building near Shendi bus station by the NISS. However, it is important to emphasize that rape constitutes torture even when it occurs outside State facilities. As the IACtHR noted in *Rosendo Cantu et al v Mexico* “...the objective and subjective elements that define an act as torture do not refer to the accumulation of acts or the place where the act is committed, but rather to the severity of the suffering and the purpose of the act ...”.<sup>39</sup>

157. The Commission has found that human rights violations not directly imputable to a State Party (because it is an act of a private person or by unidentified persons) can lead to international responsibility of the State, not because of the act itself, but due to the failure to exercise due diligence to prevent the violation or respond to it as required by the African Charter.<sup>40</sup> In the present Communication, the Respondent State clearly failed in its duty to diligently investigate the acts alleged, identify the perpetrators and accordingly punish those responsible.

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<sup>37</sup> Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) 2008 para 17 and 18.

<sup>38</sup> Istanbul Protocol – Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 August 1999 (reproduced as OHCHR, Professional Training Series No. 8/Rev. 1, UN Doc. HR/P/PT/8/Rev.1, available at <http://www.irct.org/Default.aspx?ID=2701>), para. 79.

<sup>39</sup> *Rosendo Cantu et al v Mexico* IACHR (31 August 2010) (Preliminary Objections, Merits, Reparations and Costs) Series C No. 216 para 118.

<sup>40</sup> Communication 541/2007 - *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Ethiopia* para 122.



158. In view of the foregoing, the Commission finds that the Respondent State's failure to effectively investigate the allegations raised by the Victim; the accumulation of acts of physical and mental violence inflicted on the Victim, and the especially cruel act of rape to which she was subjected amounts to a violation of Article 5 of the African Charter.

### **Alleged Violation of Article 2, 3 and 18**

159. Article 2 of the African Charter provides for the freedom from discrimination of any kind, and Article 3 stipulates that: (1) Every individual shall be equal before the law; (2) Every individual shall be entitled to equal protection of the law.

160. Article 18(3) of the African Charter further provides that: "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."

161. The right to non-discrimination is imperative for the respect and enjoyment of all other rights and freedoms protected in the African Charter.<sup>41</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) defines 'discrimination against women' as "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or exercise by women...of human rights and fundamental freedoms..."<sup>42</sup> The Maputo Protocol further defines violence against women as "all acts perpetrated against women which cause or could cause them physical, sexual, psychological and economic harm..."<sup>43</sup>

162. The Commission notes the sexual nature of the violations alleged, and reiterates its jurisprudence in the case of *Egyptian Initiative for Personal Rights & INTERIGHT v Egypt*, where it held that where the alleged assault is gender-specific, "in the sense that the Victim [was] subjected to acts of sexual harassment and physical violence that can only be directed to women...there can be no doubt that the Victim [was] targeted in this manner due to [her]

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<sup>41</sup> Application 006/2012 – *African Commission on Human and Peoples' Rights v Kenya*, Judgment, 26 May 2017 para. 138.

<sup>42</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) 2003, art 1(f).

<sup>43</sup> (As above) art 1 (j).



gender.”<sup>44</sup> Further, the Commission has held in *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Ethiopia* that “...distinctively exacting violence on someone simply because she is a woman, as opposed to being a man, or exacting more violence on women as compared to men in the same circumstances amounts to discrimination.”<sup>45</sup>

163. In the present case, the Complainant does not only contend that the violence meted on the victim was discriminatory, they further allege that the State authorities were discriminatory in its response to the Victim’s allegations of sexual violence by State security agents. The Respondent State contests this allegation and avers that the Police conducted investigations which revealed the absence of a *prima facie* violation, as such, in the absence of the victim or her representative, proceedings were closed on 2 June 2011.

164. Guaranteeing freedom from discriminatory treatment based on sex or any other ground, is a prerequisite to ensuring effective access to justice for victims of sexual violence, particularly women. The Commission notes the Victim’s written testimony that upon filing her complaint on 16 February 2011, she was termed a ‘liar’ by the Attorney General, Head of the Khartoum North (Bahri) Police Station and the officer who took her statement.<sup>46</sup> She also avers that she was threatened to the effect that her family may come to harm if she continues to pursue the complaint against the NISS. The Complainant submit that following these threats, the Victim fled to South Sudan on 18 February 2011 and eventually settled in France where she was granted asylum on 31 March 2012.

165. The above account is corroborated by the written testimony of the Victim’s lawyer who also alleges that he was forced to flee Sudan due to repeated threats and harassment from the NISS, and sought asylum in the United Kingdom on 23 April 2012. Further, this intimidation was extended to journalists reporting on the Victim’s case, as the Commission notes the witness testimony of a Sudanese journalist submitted by the Complainant, wherein he testifies to facing threats and even imprisonment for the offence of defamation, spreading false news and threatening society’s security.<sup>47</sup>

<sup>44</sup> Communication 323/06 – *Egyptian Initiative for Personal Rights & INTERIGHT v Egypt* para 144.

<sup>45</sup> Communication 341/2007 – *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Ethiopia* Para 145.

<sup>46</sup> Testimony of the Victim, Annex A-1 to the Initial Complaint para 7 and 9.

<sup>47</sup> Statement of Journalist (undated), Annex I to the Complainants’ Reply to the Respondent State’s submission on Admissibility.



166. The Commission has held that to make out a claim of a violation of Articles 2 of the African Charter, the Complainant must establish a *prima facie* case that the Respondent State had “accorded less favourable treatment to the victim than that accorded to others in relevantly analogous situations...”<sup>48</sup> In essence, the Complainant must identify the comparator and show how the treatment complained of and that of the comparator are comparable. The Commission notes that in the present Communication the Complainants do not identify the comparator; and the Commission acknowledges the difficulty in identifying one, particularly in cases of sexual violence involving State security personnel. In the absence of a comparator, the Commission reiterates its position in *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Ethiopia* that it is “... indisposed to affirm that there was discrimination...[however], it is sufficient that the failures of the Respondent State amount to violations of a name other than “discrimination” ...”<sup>49</sup>

167. With respect to Article 3 (2) of the African Charter, the Commission has held in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe* that equal protection of the law relates to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts both in procedures and in the substance of the law.<sup>50</sup> In the present Communication, the Commission notes that the Victim was treated in a manner which denied her the opportunity to seek the protection of the courts, as the Victim and her lawyer were compelled to flee Sudan, due to threats and harassment from State authorities. The Commission in its Resolution on the Right to a Remedy and Reparation for Women and Girls of Sexual Violence emphasized the obligation of States to adopt appropriate measures to ensure that perpetrators and accomplices of such crimes are held accountable by the relevant judicial system, this includes conducting an effective investigation into the victim’s allegations.<sup>51</sup> An obligation the Respondent State failed to uphold.

168. It is important to state that the use of sexual violence by perpetrators embody gendered discrimination, in that these crimes target the gender and sexual identity of victims. Given the above considerations, the Commission finds that

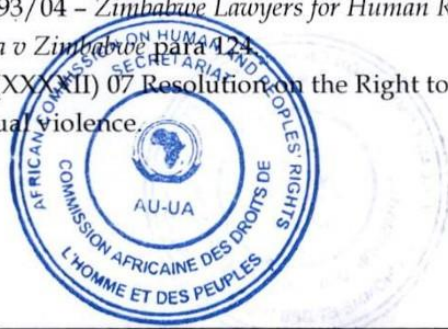
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<sup>48</sup> Communication 341/2007 - *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Ethiopia* para 147.

<sup>49</sup> (As above) para 150.

<sup>50</sup> Communication 293/04 - *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe* para 124.

<sup>51</sup> ACHPR/Res.111 (XXXIII) 07 Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual violence.



the gendered nature of the insults and rape suffered by the Victim, the failure of the State authorities to independently investigate the victim's allegations, as well as the intimidation and harassment which hindered the Victim's access to justice violates Articles 2 and 3 of the African Charter. The Commission therefore does not find it necessary to separately examine the alleged violation of Article 18 (3) of the Charter as it was invoked with regards to discrimination, which has already been confirmed to have been violated.

169. Finally, the Commission notes the Complainants' contention that several pieces of legislation provide for differential treatment between men and women in Sudan, with no apparent justification. The Complainants however only referred to Article 149 of the Sudanese Criminal Act of 1991, and avers that the provision disproportionately impacts women, as female victims of rape are at the same time exposed to possible accusations of adultery. The Commission notes that the referenced provision was amended in February 2015 by the government of Sudan. As such, Article 149 now includes a definition of rape meeting international standards, and the introduction of Article 151 (3) providing a new offence of sexual harassment.<sup>52</sup> Accordingly, the Complainant's contention with the above referenced provision of the Sudanese Criminal Act 1991 has been overtaken by events.

#### **Alleged violation of Article 6 of the African Charter**

170. Article 6 of the Charter reads:

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

171. The Complainant submits that the manner of the Victim's arrest was akin to a kidnapping in violation of Article 6 of the African Charter. The Respondent State however contends that pursuant to section 51 of the National Security Act 2010, an internal inquiry was conducted by the NISS and it was concluded that the Victim was never arrested or summoned by the NISS.

172. The Commission has held in the case of *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda*,

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<sup>52</sup> African Centre for Justice and Peace Studies "Sudan's new law on rape and sexual harassment one step forward, two steps back?" 8 March 2016 available at <http://www.acjps.org/wp-content/uploads/2016/03/Sudan%E2%80%99s-new-law-on-rape-and-sexual-harassment-One-step-forward-two-steps-back-.pdf> (accessed 2 June 2022) 1.



that the right to liberty serves as a substantive guarantee that 'any arrest or detention will not be unlawful or arbitrary'.<sup>53</sup> As such, deprivation of liberty without due process and without the legal protections of a fair trial amounts to a violation of Article 6 of the African Charter.<sup>54</sup>

173. The Commission observes that in the present case, the Respondent State contends that the Victim was neither summoned, arrested or detained by the NISS. The Commission reiterates its findings in paragraph 156 above that indeed the case of *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* is confirmation of the existence of an NISS building near Shendi bus station. In the case of *Monim Elgak*, the facts and evidence presented by the Complainants unequivocally affirmed that their arrest and detention were executed by State security agents. In the present circumstance, the identity of the perpetrators are unknown to the Victim, and sufficient evidence has not been adduced to establish that the Victim was arbitrarily held in the same building referenced in the above Communication. Hence, the Commission is indisposed to affirm that the Victim's abduction and detention were committed by State security agents in violation of Article 6 of the African Charter.

174. Nevertheless, the Commission considers that the Respondent had not acted with due diligence in verifying the victim's statement and clarifying the circumstances of the alleged violation. The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines) stipulates that where there are reasonable grounds to believe that a human rights violation has taken place, the State shall ensure prompt investigation by independent and impartial authorities.<sup>55</sup> In the present case, there is no doubt that the Victim suffered from the lack of due diligence on the part of the authorities in investigating, apprehending and prosecuting the alleged perpetrators identified as NISS officials. Accordingly, the Commission finds a violation of Article 6 of the African Charter.

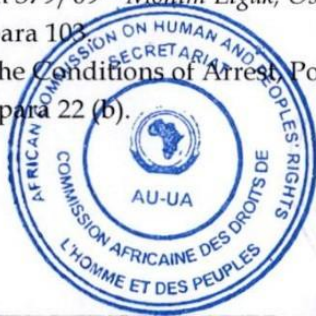
### **Alleged violation of Article 7 of the African Charter**

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<sup>53</sup> Communication 339/2007 – *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Republic of Uganda* para 107.

<sup>54</sup> Communication 379/09 – *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* para 103.

<sup>55</sup> Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) 2014 para 22 (b).



175. The Complainant avers that the Respondent State violated the provisions of Article 7 (1) (a) and (c) of the African Charter. The right prescribed under Article 7 (1) (a) of the Charter includes both the initial right to seize a court, as well as the right to appeal. The Complainant contends that the Respondent State did not only fail to effectively investigate the complaint, active steps were taken by State Security agents to intimidate the Victim's lawyer and impede her access to justice.

176. The Commission in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Fair Trial Principles) elaborates on the right to an effective remedy by competent national tribunals, which includes: access to justice; reparation for harm suffered; and access to the factual information concerning the violations.<sup>56</sup>

177. The Commission notes the written testimony of the Victim's lawyer where he states that on 18 April 2012 he was arrested in his office by NISS officers in connection to the Victim's case; and that the Victim's case file which included a power of attorney issued in March 2011 was confiscated.<sup>57</sup> In light of the foregoing, the Commission emphasizes the critical role of lawyers in providing effective legal assistance and guaranteeing access to justice. Accordingly, States are obliged to ensure that lawyers are able to perform their professional functions without intimidation, hinderance, harassment or improper interference, and to provide adequate safeguards where the security of the lawyer is threatened.<sup>58</sup> The Commission therefore finds that in the present case, the Respondent State failure to uphold its obligation in this regard amounts to a violation of Article 7 (1) (a) of the African Charter.

178. As it pertains to the Complainants' contention on the alleged violation of Article 7 (1) (c) of the African Charter, the Commission has noted in paragraph 172 above that in the absence of compelling evidence on the identities of the perpetrators, it cannot reach a determination that the Victim's abduction and detention were perpetuated by State security agents. Consequently, the Commission is unable to evaluate the alleged violation of Article 7 (1) (c) of the African Charter.

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<sup>56</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Fair Trial Principles) principle C (b).

<sup>57</sup> Statement by the Victim's lawyer dated 10 July 2013, Annex B4 to the Complainant's submission on Admissibility.

<sup>58</sup> (Fair Trial Principles) Principle I (b) and (f).





## Alleged violation of Article 9, 10 (1) and 11 of the African Charter

179. Articles 9 (2), 10 (1) and 11 of the African Charter guarantees the freedoms of expression, association and assembly. The Commission has held that there is a close relationship between these rights, and because of this relationship, the actions of States may not only violate the rights to association and assembly, but also implicitly violate the right to freedom of expression.<sup>59</sup>

180. The Complainant contends that the Victim was arrested and tortured subsequent to her participation in a pro-democracy demonstration organized by Girifna on 30 January 2011. The Respondent State however denies culpability, contending that the Victim was neither arrested nor summoned by the NISS.

181. The Commission has emphasized in the case of *Constitutional Rights Project, Civil Liberties Organization and Media Right Agenda v Nigeria* that freedom of expression is a 'basic human right vital to an individual's personal development and political consciousness, and to [ones] participation in the conduct of public affairs in [ones'] country.'<sup>60</sup> As such, State Parties are obliged to guarantee the right to seek, receive and impart information and ideas of all kinds regardless of frontiers.<sup>61</sup> This includes political discourse and discussions of a human rights nature.<sup>62</sup> In this regard, the Declaration of Principles on Freedom of Expression and Access to information in Africa stipulates the responsibility of State Parties to take effective legal and other measures to investigate, prosecute and punish perpetrators of attacks against journalists, media practitioners and human rights defenders; as well as ensure that victims have access to effective remedies.<sup>63</sup> Further, where discriminatory conduct or physical attack or harassment are carried out by private individuals in the course of or pursuant to an assembly, the Commission's Guidelines on Freedom of Assembly and Association in Africa clearly stipulates the responsibility of States to investigate, prosecute and punish such perpetrators where necessary.<sup>64</sup>

<sup>59</sup> Communication 137/94-139/94-154/96-161/97 – *International PEN, Constitutional Rights Project, Civil Liberties Organization and Interrights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria* para 110.

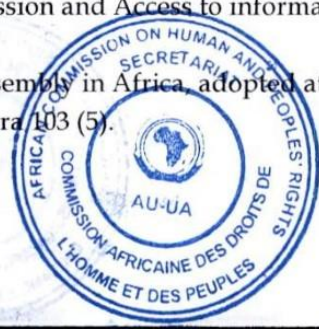
<sup>60</sup> Communication 140/94-141/94-145/95 – *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria* para 36.

<sup>61</sup> General Comment No 34 Article 19: Freedoms of Opinion and Expression para 11.

<sup>62</sup> As above.

<sup>63</sup> Declaration of Principles on Freedom of Expression and Access to information in Africa principles 6 and 20.

<sup>64</sup> Guidelines on Freedom of Association and Assembly in Africa, adopted at 60th Ordinary Session held in Niamey, Niger, from 8 to 22 May 2017 para 103 (5).



182. In the present Communication, the Respondent State has failed to uphold the above obligations, consequently the Commission finds a violation of Articles 9 (2), 10 (1) and 11 of the African Charter.

#### **Alleged violation of Article 12 of the African Charter**

183. Article 12 (1) and (2) of the African Charter stipulates the right to freedom of movement and residence, and the right to leave and return to ones' country.

184. The Complainant contends that the Victim was forced to flee Sudan due to threats she received from NISS officials, and the continuous persecution of persons who offered her support after the publication of her video testimony. The Respondent State disputes this fact, and states that the Victim was only invited for further questioning at the Kafouri police station and never appeared.

185. The Commission in its jurisprudence has found a violation of Article 12 (1) and (2) of the African Charter in circumstances where the complainants were forced to flee their country of residence due to fear of persecution by the authorities.<sup>65</sup> It has been established that by notice of 30 March 2012, the Victim was granted asylum to reside in France based on a 'well-founded fear of persecution' should she return to Sudan.<sup>66</sup> Further, the Commission notes that the harassment and threats alleged were not only targeted at the Victim, but also at journalists, human rights activists and organizations which sought to assist the Victim in obtaining justice, one of such organizations being *La liqahr alnisaa* (No to the suppression of women).

186. The Commission considers that the fact that the Victim and her lawyer were granted asylum in third countries on grounds of a 'well-founded fear of persecutions' lends credence to the Complainant's assertion that the Victim and her lawyer were subjected to threats, harassment and intimidation at the hands of State authorities. Given the above circumstances, the Commission finds a violation of Article 12 (1) and (2) of the African Charter.

#### **Alleged violation of Article 16 of the African Charter**

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<sup>65</sup> Communication 232/99 – *John D Ouko v Kenya* para 31; and Communication 379/09 (n 23 above) para 126.

<sup>66</sup> Décision by the Office Français de Protection des Réfugiés et Apatrides dated 30 March 2012, Annex B5 to the Complainant's submission on Admissibility.



187. Article 16 of the African Charter stipulates the right to enjoy the best attainable state of physical and mental health. The Complainant contends that the Respondent State is in violation of Article 16, as the mental and physical injuries the Victim suffered was as a consequence of torture by State security agents.

188. As noted in paragraph 172 above, the Commission is unable to determine whether the act of torture was perpetrated by State agents. Accordingly, the Commission cannot determine the culpability of the Respondent State as it relates to the violation of the right to health as alleged by the Complainant.

### **Alleged violation of Article 1 of the African Charter**

189. Article 1 of the African Charter underscores the obligation of States to “recognise the rights, duties and freedoms enshrined in the Charter and shall adopt legislative or other measures to give effect to them.” The Complainant contends that the Respondent State’s failure to provide an effective remedy for the Victim violates Article 1 of the African Charter.

190. The Commission reiterates its jurisprudence in *Commission Nationale des Droits de l’Homme et des Libertés v Chad*, where it held that “if a State neglects to ensure the rights in the African Charter, this can constitute a violation [under article 1], even if the State or its agents are not the immediate cause of the violation.”<sup>67</sup> In the present Communication, the Commission has reached a conclusion that the Respondent State had not shown due diligence to seek out, investigate and prosecute the perpetrators of the violations found. Further, the Commission considers that in cases of sexual violence against women, it is important that the investigation is conducted in a determined and effective manner, taking into consideration the collective societal obligation to reject violence against women, and the State’s corresponding obligation to eliminate it.<sup>68</sup> Consequently, the Commission finds that the failure of the Respondent State to uphold this obligation constitutes a violation of Article 1 of the African Charter.

### **Decision of the Commission on Merits**

<sup>67</sup> Communication 74/92 – *Commission Nationale des Droits de l’Homme et des Libertés v Chad* para 20.

<sup>68</sup> *Fernandez Ortega et al. v Mexico* IACHR (30 August 2010) para. 193; 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, 2017 para 61.



Based on the above reasons, the African Commission on Human and Peoples' Rights holds as follows:

- i. That the Respondent State - the Republic of the Sudan has violated Articles 1, 2, 3, 5, 6, 7(1) (a), 9 (2) 10 (1), 11, 12 (1) and (2) of the African Charter on Human and Peoples' Right;
- ii. Requests the Republic of Sudan to:
  - a. Pay adequate compensation to the Victim named in this Communication in accordance with the domestic law of the Republic of the Sudan for medical expenses, physical and emotional suffering, and damages suffered in relation to the violations found;
  - b. undertake institutional and practical reforms to ensure effective redress for victims of sexual and gender-based violence. These measures may include: ensuring adequate documentation; accountability of perpetrators; providing support to victims at all stages of the legal process; identifying the causes and consequences of sexual and gender based violence and take all necessary measures to prevent and eradicate it; establishing efficient and accessible reparation programmes, and ensuring participation of victims in the adoption and implementation of such programmes; as well as providing unimpeded and regular access to comprehensive healthcare;
  - c. Promptly and independently investigate, prosecute, and punish all actors, including State security agents responsible for the abduction, rape and torture of the Victim;
  - d. Adopt and implement procedural safeguards for the prevention of torture and other forms of ill-treatment as required under the Robben Island Guidelines;
  - e. Train security officers on relevant standards concerning adherence to custodial safeguards and the prohibition of torture;
- iii. Inform the Commission, in accordance with Rule 112 (2) of the Commission's Rules of Procedure (2010), within one hundred and eighty days (180) of the notification of the present decision of the measures taken to implement the present decision.

**Done Virtually, at 72<sup>nd</sup> Ordinary Session,  
held from 19 July to 2 August 2022**



रुचिप्र