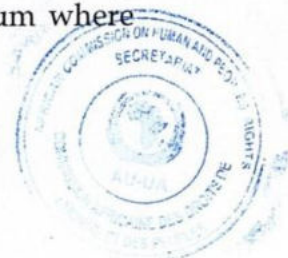


Decision of the African Commission on Human and Peoples' Rights on Merits

Communication 470/14 - Ibrahim Almaz Deng & 6 Others (Represented by the Institute for Human Rights and Development in Africa) v. Republic of the Sudan

Summary of the Complaint:

1. The Secretariat received a Complaint on 29 May 2014 on behalf of Ibrahim Almaz Deng & 6 Others (the Victims), from Institute for Human Rights and Development in Africa (the Complainant).
2. The Complaint is made against the Republic of the Sudan, State Party to the African Charter on Human and Peoples' Rights (African Charter).
3. The Victims were identified as Prisoners 1 to 7, namely Ibrahim Almaz Deng (Prisoner 1), Al Sir Jibreel Teya (Prisoner 2), Mahgoub Ahmed Mohammed Ali (Prisoner 3), Ibrahim Abdulrahman Safi-Elnour (Prisoner 4), Mohammed Khamis Dawood Ismail (Prisoner 5), Yahya Abakar Musa Alnur (Prisoner 6) and Eltoum Hamid Tutu Malik (Prisoner 7).
4. The Complainant alleges that Prisoners 1 to 4 were members of a Justice and Equality Movement (JEM) and were travelling within Darfur in connection with the peace process and ceasefire agreement that had been signed in Qatar. Prisoner 5 and 6 were prior to their arrest by the Sudan Armed Forces (SAF), held by JEM as Prisoners of War. They had been released and were being transported by a JEM convoy in the same company with Prisoners 1 to 4. Prisoners 1 to 6 were arrested on 11 January 2011.
5. The Complainant avers that Prisoner 7 was a JEM Commander and Political Supervisor. He had received Sudan People's Liberation Army (SPLA) permission to travel in an SPLA vehicle through SPLA controlled areas of South Kordofan to locate and evacuate his immediate family from a zone of conflict between the SPLA and SAF near Boram and Kaduli, South Kordofan. He was arrested on 11 July 2011.
6. The Complainant states that Prisoners 1 to 6 claim they were tortured by Military Intelligence of the SAF and that they were interrogated primarily about JEM military leaders and their locations, the available military supplies of JEM, logistic details and perceived connections with Colonel Gaddafi of Libya and the Sudanese leader of the Popular Congress Party.
7. The Complainant alleges that Prisoners 1 to 6 were later handed into the custody of the National Intelligence and Security Services (NISS) in Khartoum where



they claim they were subjected to extreme forms of psychological abuse and physical torture. They were also subjected to racial insults. Prisoner 1 in particular, was whipped at least two hundred (200) times a day. They were also allegedly allowed only three (3) hours or less of sleep and they were forced to stand with their hands raised.

8. According to the Complainant, Prisoners 1 to 6 were later prosecuted before Combating Terrorism Courts where they were allegedly denied the proper environment to defend themselves including presenting defence witnesses of their choice. On 20 March 2012, Prisoners 1 to 6 were convicted and sentenced on all charges brought against them with the death penalty.
9. The Complainant avers that on 25 March 2012, an appeal was lodged at the Terrorism Crimes Appeal Court on the grounds that the Prisoners were not able to properly present their defence; that the Court did not observe the rules applicable to Prisoners of War; and that the majority of witnesses whom the Court relied on were the soldiers who arrested the Prisoners. According to the Complainant, on 31 March 2012, the appeal was dismissed and the Court ordered that the decision be sent to the President of the Republic for approval. The Complainant alleges that the appeal's Court failed to examine the matters brought before it.
10. The Complainant further avers that on 12 July 2012, an urgent request was submitted to the Constitutional Court, the highest judicial authority in the Sudan, to stay the execution of the applicants. Concurrently, the defence submitted a constitutional challenge on the grounds that the Sudan was a State Party to the Geneva Conventions of 1948, whose provisions are binding on the Sudanese Government; and that the trial was not fair because the applicants were not given a chance to properly present their defence. The Complainant submits that on 12 July 2012, the Constitutional Court stayed the executions awaiting its decision.
11. The Complainant alleges that on 11 July 2011, Prisoner 7 was arrested in Eltee village. He was wounded in his head and was unconscious at the time of his arrest due to injuries sustained following an encounter with the SAF. He was taken to the Military Hospital in Kaduli, South Kordofan for surgery to remove shrapnel from his head and body while under military guard. After five (5) days he was transferred from the Military Hospital and detained by the Military Intelligence in Kaduli pending full recovery. The Complainant alleges that the doctors had indicated that he will require blood transfusion which was denied by the Military.



12. The Complainant further alleges that while in detention, Prisoner 7 was allegedly subjected to intense torture and interrogations while standing, despite his ailing condition. In particular, he was subjected to electric shock, *altyala-gamat* or "airplane-takeoff",¹ racial insults, and application of force including applying force with pliers on his sexual organs and body. According to the Complainant, the above treatment coupled with the previous injuries he suffered during his arrest, every beating and torture resulted in him severely bleeding and passing out. The Complainant states that he lost a lot of blood and continued to be in immense pain without being afforded any medical treatment care.
13. The Complainant avers that around 21 August 2011, prisoner 7 was transferred to Police custody, where he was also interrogated in the presence of the Military Intelligence Officers. The Complainant states that the Police did not review any of the evidence brought by the Military Intelligence nor introduce a fresh recording of his statement and witness statements.
14. The Complainant alleges that on 23 August 2011, Prisoner 7 was presented to Kadugli Criminal Court and was convicted after three (3) days on various charges and sentenced to death. Prisoner 7 was not allowed proper defence because he only met his Defence Lawyer on the first day of his Court appearance for only ten (10) minutes before the trial commenced. The Defence Lawyer requested for a postponement of the case to allow for preparation and the court again refused the request. According to the Complainant, for these reasons, the Defence Lawyer withdrew from the case.
15. The Complainant further alleges that a hastily continued team of Defence Lawyers for prisoner 7 on 6 September 2011, submitted an appeal to the Court of Appeal in South Kordofan State, which only nullified one conviction on technical grounds and confirmed all the other convictions including the imposition of the death penalty. The Complainant submits that the Court of Appeal failed to follow any proper procedure by immediately transmitting their appeal decision directly to the Supreme Court for confirmation without informing the Defence Lawyers. According to the Complainant, the Supreme Court confirmed the convictions and sentences of the Court of Appeal. A request for review by the of Defence Lawyers before the same Court was subsequently rejected on 12 April 2012. The Supreme Court rejection was sent directly to the President for endorsement, which endorsement was further sent to the Execution Unit within the High Court to be enforced on 24 May 2012.
16. The Complainant states that on the intended day of the execution, of the Defence Lawyers presented a request to the Supreme Court to stay the execution, which

¹ This involves being raised to the ceiling and concurrently being questioned about supervisory role at JEM



request was granted and the execution delayed for three (3) weeks to allow the Defence Lawyers to obtain the decision of the Supreme Court and submit the order from the Constitutional Court stopping the execution. The constitutional challenge was submitted on 10 June 2012 and the Constitutional Court issued a decision temporarily staying the execution of Prisoner 7 pending its decision.

17. The Complainant submits that Prisoners 1 to 7 encountered continuous subjection to cruel and inhuman conditions of post-conviction detention at Kober Prison. Specific complaints include severe congestion, being restrained by heavy shackles weighing approximately two (2) kilogrammes, poor sanitation and lack of medical attention for chronic illness including those recovering from torture and beatings, while in the Military Police Custody.

Articles alleged to have been violated:

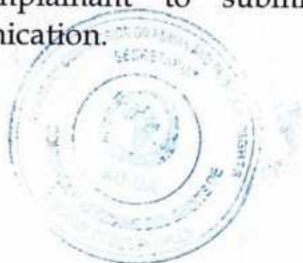
18. The Complainant alleges violation of Articles 1, 2, 3, 4, 5, 6, 7(1) and 26 of the African Charter.

Prayers:

19. The Complainant requests the Commission to recommend that:
- a) The Government of the Sudan conducts new trials and that it duly compensate the applicants for any losses that they have suffered as a result of torture; detention; and cruel, inhuman and degrading treatment.
 - b) The Government of the Sudan takes necessary measures to ensure that law enforcement authorities do not engage in torture and acts that are cruel, inhuman and degrading.
 - c) The Government of the Sudan takes necessary measures to reform and rehabilitate all places of detention and prisons to meet acceptable standards as provided in the Charter.
 - d) The Government of the Sudan takes necessary measures to ensure the independence of the Judiciary.

Procedure:

20. The Secretariat received the Complaint and a request for Provisional Measures from the Complainant on 29 May 2014, and acknowledged receipt of the same on 2 June 2014.
21. On 5 June 2014, the Commission informed both parties of its decision to be seized of the Communication and granted the Provisional Measures. It also requested the Complainant to submit its arguments on Admissibility of the Communication.



22. Admissibility submissions were received by the Commission on 20 August 2014 and an acknowledgment letter and a Note Verbale transmitting the submissions to the Respondent State for its observations were dispatched on 25 August 2014.
23. On 19 March 2015, after the 17th Extra-Ordinary Session held from 19 – 28 February 2015, the Commission through a letter and a Note Verbale informed both parties of its decision to grant a general extension of 30 days to all Respondent States who had pending submissions before the Commission.
24. On 5 May 2015, the Respondent State submitted on Admissibility, which was acknowledged and transmitted to the Complainant on 12 May 2015.
25. On 9 June 2015, the Respondent State made its observations on the Admissibility of the Communication. The observations of the Respondent State were transmitted to the Complainant for its observations on 24 June 2015.
26. On 10 July 2015, the Secretariat received the Complainant's observations and acknowledged receipt of the same and transmitted it to the Respondent State.
27. On 26 August 2015, both parties were informed about the deferral of the consideration of this Communication on Admissibility at the 18th Extra-Ordinary Session.
28. On 25 November 2015, both parties were informed about the deferral of the consideration of this Communication on Admissibility at the 57th Ordinary Session.
29. On 12 July 2016, the Commission informed both parties of its Admissibility decision. It also requested the Complainant to submit its arguments on the Merits of the Communication.
30. By letter dated 27 October 2016, the Complainant submitted its arguments on the Merits and by Note Verbale dated 22 November 2016, the submissions were forwarded to the Respondent State.
31. On 5 March 2018, the Secretariat informed the parties that the Respondent State had been granted an extension of thirty (30) days within which to submit on the Merits, failing which the Commission would proceed to determine the matter on the basis of the available information.



32. On 9 October 2018, the Secretariat informed the parties that the Respondent State's allocated time for submission had expired and the Commission's decision on the Merits once taken, will be communicated to both parties.

33. A decision on the Merits was deferred from the 59th to 70th Ordinary Sessions.

Request for Provisional Measures

34. On 29 May 2014, the Complainant at the time of filing the Complaint, also requested for Provisional Measures on the basis among other things of torture, breach of fair trial guarantees and the imposition of the death penalty on the Victims. On 5 June 2014, the Commission in accordance with Rule 98 of its Rules of Procedure considered the request and decided to grant the provisional measures.

35. The Provisional Measures requested the Respondent State to inter alia suspend the execution of the death sentences imposed on the prisoners while the matter was being considered by the Commission.

36. The Provisional Measures also requested the Respondent State to report on the implementation of the Provisional Measures within fifteen (15) days of receipt of the Request, in accordance with Rule 98(4) of its Rules of Procedure.

37. On 3 December 2015, the Commission re-issued the Provisional Measures after the Respondent State failed to report back in accordance with Rule 98(4) of the Commission's Rules of Procedures.

The Law on Admissibility

Arguments of the Complainant on Admissibility

38. The Complainant submits that all the criteria under Article 56 of the African Charter have been satisfied. The Complainant submits that:

- a) Article 56(1) of the African Charter has been satisfied since the identity and the full address of the Complainant has been furnished to the Commission;
- b) Article 56(2) of the African Charter has been satisfied since the Communication is compatible with the Constitutive Act of the African Union and with the provisions of the African Charter;
- c) Article 56(3) of the African Charter has been satisfied since the Communication has been written in clear, simple and precise language with no intended or actual disparaging language against the Respondent State, its institutions or the African Union and its institutions;



- d) Article 56(4) has been satisfied since the Communication is not based entirely on news disseminated through mass media but also via information obtained from court decisions, court affidavits and written statements from the Prisoners and their lawyers;
 - e) Article 56(6) has been satisfied since the Communication was brought within a reasonable time from the time local remedies were exhausted, or from the date the Commission was seized with the matter;
 - f) Article 56(7) has been satisfied since the Complaint has not been submitted before any other procedure of international investigation or settlement.
39. With regards to Article 56(5) of the African Charter, the Complainant makes two main contentions, namely that: fair trial guarantees are lacking and thus the local remedies are unavailable, ineffective or insufficient; and that local remedies are unduly prolonged.
40. The Complainant submits that local remedies are unavailable, ineffective or insufficient because: (a) in the Respondent State, the independence of the judiciary is in question especially in matters that are considered political, as the Executive has continued to interfere with the operations of the judiciary; and (b) in accordance with the jurisprudence of the Commission, the available remedies are not effective due to the absence of fair trial guarantees.
41. The Complainant submits that the Anti-Terrorism Act of 2001 establishes the special crimes courts and its Judges are politically aligned with the Respondent State or affiliated to the NSIS. The Complainant further submits that according to the report by Amnesty International, since the establishment of the special crimes courts in 2001, the trial are usually summary in nature and that the target have been persons from the Darfur region.²
42. The Complainant submits that the rules of procedure under the Anti-Terrorism Act (82/2008) are in breach of fair trial procedures, including rule 6(d) which allows the court to convict the accused person even when not represented by a lawyer; Rule 18(a) which requires prior submission of witness statements before the witnesses can appear before the court;³ Rule 11(b) which allows for the admission of self-incriminating evidence before the court; Rule 20(c) which empowers the court to accept hearsay evidence during the trial process; Rule 21 allowing for only 7 days appeal period, which is shorter compared to the 15day appeal period of a normal criminal proceedings; and Rule 25 which exempts the court from following the 1991 Criminal Procedure Act and Sudanese Law of Evidence.

² Amnesty International, Sudan: The Special Courts in Darfur, page 1, 2014

³ Out of 18 witnesses proposed by the defence team only one witness was allowed to testify by the court in the present case

43. The Complainant submits that the remedies are not effective in the Respondent State since there is lack of procedural fairness and lack of equality of arms.
44. The Complainant submits that the Terrorism Crime Appeal Court failed to consider the grounds of appeal raised by the defence lawyers and endorsed the procedure, conviction and sentences imposed on the prisoners as having been compliant with the Anti-Terrorism Act and the extraordinary rules of procedure.
45. The Complainant submits that since the anti-terrorism courts deny ordinary courts the jurisdiction to determine cases in the Respondent State's jurisdiction, local remedies are non-existent, ineffective and illusory as was determined under the *Constitutional Rights Project v Nigeria*⁴.
46. The Complainant submits that with regards to Prisoner 7, since he had no legal representation, he had no knowledge about the status of his case as it sailed through the Court of Appeal, the Supreme Court for confirmation and to the President for assent.
47. The Complainant submits that given the trial history of the prisoners, the appeals pending before the Constitutional Court are unlikely to be successful since the right to fair trial has been violated which should be applied concomitantly with the provision to exhaust local remedies as was determined in *Amnesty International, Comite Loosli Bachelard, lawyers' Committee for Human Rights, Association of members of the Episcopal Conference of East Africa/Sudan*.
48. The Complainant further submits that, in practice, once a decision is reached by the Constitutional Court, the President has to first ratify it. The Complainant further submits that the process of ratification by the President is discretionary and in principal should not be exhausted in accordance with *Constitutional Rights Project v Nigeria*,⁵ where the Commission declared such discretionary remedies to be neither adequate nor sufficient.
49. Lastly, from records filed by the Complainant, the current cases have been pending before the Constitutional Court of the Respondent State since July 2012 for Prisoners 1-6 and June 2012 for Prisoner 7.

⁴ ACHPR Communication 60/91

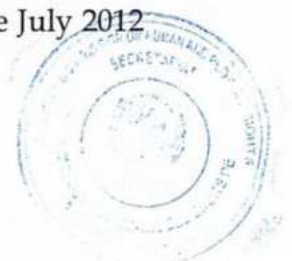
⁵ ACHPR Communication 60/91

Arguments of the Respondent State on Admissibility

50. The Respondent State submits that the Victims were accused and convicted by an ordinary court of law under the Criminal Act 1991 and Anti-Terrorism Act 2001 on various offences including sabotage and terrorism.
51. The Respondent State submits that the Communication is inadmissible since Article 56(5) of the African Charter on the exhaustion of local remedies had not been satisfied because the present Communication is currently pending before the Constitutional Court in accordance with Article 122(1) of the Interim Constitution of the Respondent State.
52. The Respondent State submits that pursuant to Article 119(1) of the Interim Constitution of the Respondent State, the Judges sitting at the Constitutional Court, which has already stayed the execution of the Prisoners, are selected on the basis of sufficient experience, proven competence, integrity, credibility and impartiality. The Constitutional Court is therefore independent from the Legislature and the Executive, and separate from the National Judiciary.
53. The Respondent State submits that all justices of the Constitutional Court are appointed by the President of the Republic following the recommendation of the National Judicial Service Commission and subject to the approval by a two-thirds majority of all the representatives at the Council of States, the Upper House of Parliament.
54. The Respondent State submits that no fair trial guarantees were breached and that the trials were conducted in accordance with the relevant laws and that the accused were defended by a lawyer.
55. The Respondent State submits that the allegations of human rights violations are currently under consideration before the Constitutional Court.
56. The Respondent State submits that the Complainants could also exhaust another remedy which is available - that of petitioning the President to use his prerogative power of pardon available under section 208 of the Criminal Procedure Act, 1991. According to section 209, this power includes the suspension of sentence or the dropping of conviction. The Complainants have yet to choose this direction.

Additional Submissions of the Complainant on Admissibility

57. The Complainant concedes that the current cases are still pending before the Constitutional Court but reiterates that they have been pending since July 2012.



and that the execution of the Prisoners 1-7 will happen immediately a decision is taken by the Constitutional Court.

58. The Complainant submits that the above scenario is more probable since the authorities in the Respondent State executed on 13 April 2009 9 Darfuris despite appeals emanating from the international community.
59. The Complainant reiterates that fair trial guarantees were not observed by the Respondent State particularly with regards to the special crimes courts established under the Anti-Terrorism Act of 2001.
60. The Complainant also submits that the presidential pardon available under Section 208 of the Criminal procedure Act is a prerogative power and therefore discretionary or non-judicial and as such need not be exhausted in accordance with Article 56(5) of the African Charter.

Analysis of the Commission on Admissibility

61. Article 56 of the African Charter sets out seven requirements that a Communication brought under Article 55 of the African Charter must satisfy in order to be declared Admissible for consideration by the Commission. Those requirements apply conjunctively and cumulatively.⁶ Failure to satisfy any one or more of those requirements renders the Communication inadmissible, unless the Complainant provides sufficient justifications as to why any of the requirements could not be met.⁷
62. Having reviewed all the submissions from both parties, the Commission considers that the requirements under Article 56(1), (2), (3), (4), (6) and (7) have been satisfied.
63. Therefore, the Commission will focus its analysis on Admissibility on the requirement under Article 56(5) on the exhaustion of local remedies. In *Sir Dawda K. Jawara v. The Gambia*, the rule on exhaustion of local remedies was established by the Commission as consisting of three main criteria, namely: the remedy must be available, effective and sufficient.⁸ Consequently, 'a remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.'⁹

⁶Rule 106, Rules of Procedure of the Commission, 2010; Communication 304/05 - FIDH & Others v Senegal (2006) ACHPR

⁷ Communication No. 275/2003 - Article 19 vs. Eritrea (2007) ACHPR

⁸ Communication 147/95 and 149/96 - Sir Dawda K. Jawara v. The Gambia (2000) para 31

⁹ As above, para 32



64. First, local remedies should be exhausted if they are available. The Respondent State observes that both the Constitutional Court and the Presidential Pardon are available and that the Complainants are free to exhaust them. On its part, the Complainant concedes that the current cases are currently pending before the Constitutional Court. The Constitutional Court remedy is therefore available, but as will be shown later its effectiveness has been challenged by the Complainant.
65. On Presidential Pardon, pursuant to sections 208 and 209 of the Criminal Procedure Act, 1991, the President of the Respondent State may pardon any person convicted of a crime by either suspending or dropping the conviction. While this remedy is available, the fact that it usually entails discretionary exercise of power by the Executive makes it eligible for exemption as constituting part of the remedies contemplated under Article 56(5) of the Charter. Indeed, as pointed out by the Complainant, in *Constitutional Rights Project v Nigeria*,¹⁰ the Commission declared the discretionary powers of the Governor under the Robbery and Firearms Act 'to confirm or disallow the conviction of the Special Tribunal', even though available, are not contemplated for exhaustion under Article 56(5) of the African Charter.¹¹ Accordingly, the Commission also finds that the Presidential Powers of Pardon available under the Criminal Procedure Act, 1991, are discretionary and therefore are exempted from exhaustion.
66. Local remedies should be exhausted if they are effective. As seen above, the Constitutional Court remedy is available. However, the Complainant has challenged its effectiveness arguing that the judicial system in the Respondent State lacks fair trial guarantees and independence. The evidence adduced by the Complainant however touches on the rules of procedure enacted under the Anti-Terrorism Act of 2001. In effect, according to the Complainant, these rules introduce irregular court procedures bereft of fair trial standards in the context of anti-terrorism. Relying on the fact that the Victims right to fair trial had been violated at the trial stage, the Complainant argues that the Constitutional Court's remedy is unlikely to be effective.
67. The Respondent State on its part has refuted the above claims noting that the recruitment of Judges in its territory is subject to the participation of the National Judicial Service Commission and approval by two-thirds majority of representatives at the Council of States, the Upper House of Parliament. The Constitutional Court is also established outside the judiciary but is independent from the Executive and the Legislature.

¹⁰ ACHPR Communication 60/91

¹¹ ACHPR Communication 60/91

68. It appears to the Commission that the problem lies principally at the special crimes court in terms of its independence and rules of procedure. But, as observed above, the remedy that is available is the Constitutional Court. While allegations of fair trial violations have been made at the trial stage, the Complainant has not presented any evidence touching on the Constitutional Court. In the absence of enough evidence to support the allegations of effectiveness at the Constitutional Court, the Commission has no basis to find the forum not effective. In *Anuak Justice Council v. Ethiopia*, the Commission clarified that the 'underlying question is whether the case is a subject matter of the proceedings before the African Commission and whether it is aimed at granting the same relief the Complainant is seeking before this Commission. As long as a case still pending before a domestic court is a subject matter of the petition before this Commission, and as long as this Commission believes the relief sought can be obtained locally, it will decline to entertain the case.'
69. The third criterion is whether the remedy is sufficient. In order for the remedy to be sufficient, it must be capable of redressing the Complaint. From the submissions of both the Complainant and the Respondent State, it appears that the Constitutional Court has powers to overturn the decision of the subordinate courts if it finds that appropriate. Moreover, it has already issued a stay of execution and as such the remedy is deemed sufficient.
70. In this respect, local remedies were available, effective and sufficient; and the Complainant failed to exhaust local remedies.
71. Before the failure of not exhausting local remedies can be used as a basis for declaring this Communication Inadmissible, Article 56(5) of the Charter also requires the Commission to satisfy itself that the local remedies should not be unduly prolonged.
72. From the facts of the present case, the Prisoners filed two cases before the Constitutional Court of Sudan in July 2012, whose decisions are still pending. The Respondent State has confirmed in its submissions the existence of the Constitutional Court cases in its jurisdiction. The question before the Commission is whether the local remedies have been unduly prolonged.
73. The Commission has in the past considered that the remedies were unduly prolonged after diverse periods of time such as: one year eight months in the case of *Kabambi v. the Democratic Republic of Congo*;¹² ten years in the case of *Modise v. Botswana*;¹³ and five years in the case of *Association of Victims of Post Electoral*

¹² As above, para 47

¹³ Communication 185/2002 – *Modise v. Botswana* (2000), ACHPR, para 69



Violence and Interights v. Cameroon.¹⁴ The time frame therefore may vary from case to case.

74. In order to guide itself on this issue, the Commission has further developed three criteria to be applied in this context, namely: the legal time limits prescribed by the domestic law; the facts of the case; and the specific circumstances of the Complainants.¹⁵ For instance, in *Abubaker Ahmed Mohamed and 28 others (represented by X and Y) v. the Federal Democratic Republic of Ethiopia*, since the legal system provided for a one month period for the consideration of cases by the Council of Constitutional Inquiry before they were submitted to the House of Federation for a decision the eight months in the case delay was untenable.¹⁶
75. The Constitutional Court is established under Article 105(2) (b) of the Constitution with the mandate to, among others, 'decide upon claims by aggrieved persons for the protection of liberties and rights which are guaranteed by the Constitution.' Under Article 105(3) of the Constitution, the court procedures are to be determined by a separate law. The relevant law is The Constitutional Court Act of 1998. Section 21 of the Act dealing with the Judgments of the Constitutional Court also fails to provide for time frame with regards to the conclusion of matters before it. It also fails to mention expediency or similar words. In conclusion, therefore, the legal framework is silent on the issue of timeframe. It is therefore important to rely on the other criteria before concluding on this issue.
76. Factually, the cases filed at the Constitutional Court were more than two years old when the Complainants approached the Commission. The period is now cumulatively over three years. In the absence of evidence explaining one way or the other the delay of over two years, the Commission considers the delay appearing on record could and should in the present circumstances be considered as amounting to *prima facie* evidence of undue delay by the Respondent State.
77. Lastly, the circumstances of the Prisoners are such that, as explained in the Provisional Measures, there are allegations of continuous subjection to cruel and inhuman conditions including: congestion; being restrained by heavy shackles weighing approximately 2 kilogrammes; poor sanitation; lack of medical attention for chronic illness and those recovering from torture; and beatings while in military police custody. While the Commission is not able to reach a

¹⁴ Communication 272/03 - Association of Victims of Post Electoral Violence and Interights v. Cameroon (2009), ACHPR, para. 47

¹⁵ Communication 408/11 - Jose Alidor Kabambi Beya Ushiye and others v. Democratic Republic of Congo, ACHPR, para 40

¹⁶ Communication 455/13, para 124



conclusion as to the above claims it seems that there is a probability that the circumstances under which the Prisoners are being held are not desirable. The fact that Prisoner 7 was injured in the head during arrest also compounds the situation faced by these Prisoners.

78. Since local remedies have been unduly prolonged at the Constitutional Court, the Commission grants the Complainant an exemption from the requirement to exhaust local remedies. Accordingly, the Commission finds that the requirement of Article 56(5) has also been fulfilled.

79. For these reasons, the Commission declares this Communication Admissible.

Merits

The Complainant's submission on the Merits

Alleged Violation of Article 4 of the African Charter

80. The Complainant submits that if the Sudan carries out the death penalty on Prisoners 1 to 7, it would amount to a violation of their rights to life as protected under article 4 of the African Charter. The Complainant cites the Commission's decision in *Communication 277/03 Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*,¹⁷ where the Commission held that the imposition of capital punishment in breach of the due process guarantees under article 7 of the African Charter constitutes a violation of the right to life. The Complainant also refers to *Communication 137/94-139/94-154/96-161/97 International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*, where the Commission held that if the trials which ordered the execution, is itself in violation of the fair hearing standards in article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of article 4 of the African Charter.

81. The Complainant argues that international law requires that the death penalty when applied under a legal system should only be imposed as a result of a fair trial. The Complainant submits that the trial which resulted in the sentences passed on Prisoners 1 to 7 fell grossly short of the fair trial guarantees in article 7 of the African Charter and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (The Principles and Guidelines on Fair Trial). Thus any executions carried out pursuant to the judgment in those trials would amount to a violation of the rights to life of Prisoners 1 to 7.

¹⁷ Para 201

Alleged violation of Article 5 of the African Charter

82. The Complainant submits that Article 5 of the African Charter provides for every individual to have the right to the respect of the dignity inherent in a human being. It further provides that all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. The Complainant further submits that the International Covenant on Civil and Political Rights (ICCPR) also provides in article 7 that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

83. According to the Complainant, neither the African Charter nor the ICCPR contains a definition of torture. However, the Convention against Torture (CAT) defines torture as:

*"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."*¹⁸

84. The Complainant states that this definition is regarded as the customary law definition of torture and has been accepted and applied by the Commission.¹⁹ The Complainant argues that the right to freedom from torture is a non-derogable right and the duty not to subject individuals to torture, is universally recognized that it constitutes an *erga omnes* obligation. Accordingly, it is an obligation owed to the whole world.²⁰ The Complainant argues that in the context of criminal procedures, human rights law recognizes that suspects of a crime should not be tortured to obtain a confession.

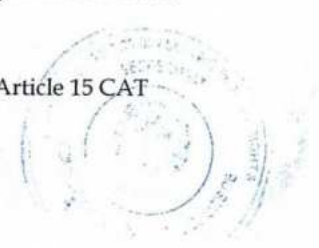
85. Consequently, confessions obtained by using torture should be inadmissible in the courts of law.²¹ According to the Complainant, despite these legal safeguards against using torture on suspects, the agents of the Government of Sudan acting

¹⁸Article 1(1) Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment

¹⁹ Communication 279/03-296/05 Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) v Sudan. At para 155

²⁰ 368/09 Abdel Hadi, Ali Radi & Others v Republic of Sudan

²¹ Article 29, Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa; Article 15 CAT



in official capacity tortured prisoners 1 to 7, for the purpose of forcing them to make a confession to having participated in terrorist activities. The Complainant submit that the acts carried out by the Respondent State's agent meet the threshold of constituting torture.

86. The Complainant states that the torture inflicted by the Military Intelligence on Prisoners 1 to 6 included the prisoners' hands, arms and legs being tightly bound behind their backs; physical and psychological abuse including racial insults and continual beatings with sticks and *hippo-hide whips*. According to the Complainant, witnesses testified to having seen signs of torture on the prisoners including that Prisoner 1 had a broken arm and a severely inflamed eye while in State custody and was put in solitary confinement for ten (10) months, despite there being no indication that he was a threat to other inmates; and Prisoner 3 had bruises on his ear and he complained of pain in his stomach. The Complainant submits that the torture resulted in severe health consequences for the prisoners. Accordingly, the health condition for Prisoners 1, 2, and 3 deteriorated significantly; Prisoner 1 suffers from problems with the kidneys and inflammation of the eyes; Prisoner 2 suffers from gout, his legs are swollen and he has heart problems. The Complainant further submits that despite these health conditions, the prisoners were not provided access to medical care.
87. The Complainant states that while Prisoner 7 was in the custody of the Military Intelligence at Kaduli, he was subjected to intense torture and interrogation, including being forced to talk for long hours while standing despite his severe injuries for more than four (4) days; subjected to electric shock on his body and extensively flogged with a *hippo-hide whip*; use of a method called *al tyara-gamat "airplane-takeoff"*, with Prisoner 7 raised to the ceiling and concurrently being questioned on his role as a JEM supervisor; use of force with pliers on his sexual organs and body; and subjection to racial insults of his family and tribe such as being told that black Sudanese people were slaves and inferior to Sudanese Arabs.
88. The Complainant submits that these acts of beating or torture on Prisoner 7 resulted in bleeding and losing consciousness under immense pain with no medical treatment. The Complainant argues that the Commission has previously found that some of the acts that Prisoners 1 to 7 were subjected to constitute torture. For instance, beating individuals and forcing them to make a confession,²² keeping suspects in chains and locked up in overpopulated cells

²²379/09 MonimElgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan, paras98 - 101; 368/09 Abdel Hadi, Ali Radi& Others v Republic of Sudan, paras 70 - 73

lacking hygiene,²³ and denial of access to medical care,²⁴ have all been held by the Commission to constitute acts of torture.

89. Furthermore, the Complainant submits that the conditions of detention (post-conviction) amount to cruel and inhuman treatment and punishment as per Article 5 of the African Charter. The Complainant argues that all of the prisoners were tortured, not allowed contact with their families or lawyers for about nine (9) months and refused medical attention. The Complainant submits that this extreme form of punishment, is in clear violation of Article 5 guarantees. For these reasons, the Complainant submit that the Republic of the Sudan has violated the rights of Prisoners 1 to 7, to freedom from torture under article 5 of the African Charter.
90. The Complainant states that human rights law also imposes an obligation on the State to investigate all allegations of torture by State officials and even private actors.²⁵ The Complainant submits that Article 1 of the African Charter read together with article 5 imposes an obligation on the State to investigate violations of the right to freedom from torture. In support of its argument, the Complainant refer to the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) which provide that States are to ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment;²⁶ States should investigate all claims of torture that come to the knowledge of State authorities; and that such investigations shall be conducted promptly, impartially and effectively.²⁷ The Complainant also refers to General Comment No. 2 of the United Nations Committee against Torture, which also provides for States to carry out investigations into claims of torture by both State officials and non-State actors and to ensure that such perpetrators of torture are punished accordingly.²⁸
91. The Complainant submits that despite the government's knowledge of the claims of torture made by Prisoners 1 to 7, it did not take any steps to investigate the acts of torture that the prisoners were subjected to. Consequently, no one has been held responsible or punished for torturing the prisoners, and this according

²³64/92-68/92-78/92_8AR Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) / Malawi, para 7; 137/94-139/94-154/96-161/97 International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria. Paras 80 – 81

²⁴ Ibid

²⁵368/09 Abdel Hadi, Ali Radi& Others v Republic of Sudan, para 76

²⁶Articles 17 -18 and 40

²⁷Article 19

²⁸ Paras 15 and 18



to the Complainant, is a violation by the Government of the Sudan of the rights of Prisoners 1 to 7, under article 5 read together with article 1 of the African Charter

Alleged Violation of Article 7 of the African Charter

92. The Complainant submits that Article 7 of the African Charter guarantees for everyone the right to have his/her cause heard. This includes:
- a. *The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
 - b. *The right to be presumed innocent until proved guilty by a competent court or tribunal;*
 - c. *The right to defence, including the right to be defended by counsel of his choice;*
 - d. *The right to be tried within a reasonable time by an impartial court or tribunal."*

93. The Complainant refers to Article 14 (1) and 14 (3) of the ICCPR and the Principles and Guidelines on Fair Trial which lay down essential elements of the right to a fair trial²⁹, noting that the present case discloses several violations of these fair trial guarantees.

Prisoners 1 to 6

94. Regarding Prisoners 1 to 6, the Complainant argues that one of the fundamental elements of a fair trial is to be tried before an impartial and independent court. According to the Complainant, Prisoners 1 to 6 were tried under Anti-Terrorism laws and in courts established under the Anti-Terrorism Act (2001). The Complainant states that the courts are crimes courts and the judges selected for these courts are well-known to be politically aligned with the Government of Sudan or affiliated with the National Security and Intelligence Services. The Complainant cites the Amnesty International report about the Special Courts in

²⁹ "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." These include that respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused; adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence; an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings; an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body; an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and an entitlement to an appeal to a higher judicial body."

Darfur which states that, *"the presence of members of security as judges' calls into question the independence of the judiciary. Trials in these courts are summary and death sentences have been handed down in trials which lasted only an hour."*³⁰ The Complainant submits that since being established in 2001, all accused persons who have been arraigned before these special courts are from Darfur, JEM, and other military movements. Despite the fact that other Sudanese have committed similar offences, they were not tried before these courts, which is an obvious selective application of the law.

95. The Complainant states that these Anti-Terrorism courts operate under the Rules of Procedure of Anti-Terrorism Act (82/2008), which established procedures contrary to those applied in normal courts. Regulations in these courts have deprived the prisoners of the right to effective defense counsel as only one lawyer is allowed to represent them; these courts are further empowered to decide on the witnesses who testify on behalf of the accused persons, and if the court decides on a procedural issue, that decision is final and not appealable.
96. The Complainant submits that the rules of procedure under the Anti-Terrorism Act (82/2008) are in breach of fair trial procedures, including rule 6(d) which allows the court to convict the accused person even when not represented by a lawyer; Rule 18(a) which requires prior submission of witness statements before the witnesses can appear before the court;³¹ Rule 11(b) which allows for the admission of self-incriminating evidence before the court; Rule 20(c) which empowers the court to accept hearsay evidence during the trial process; Rule 21 allowing for only 7 days appeal period, which is shorter compared to the 15 day appeal period of a normal criminal proceedings; and Rule 25 which exempts the court from following the 1991 Criminal Procedure Act and Sudanese Law of Evidence.
97. The Complainant avers that during the trial of Prisoners 1 to 6 at the Court of first instance, the presiding judge continued with the trial proceedings and convicted the prisoners in the absence of their Defense Lawyers; the prisoners brought fifteen (15) witnesses to testify but the presiding judge only afforded one (1) defense witness to present a statement; Prisoner 2's statements given while under duress were used to convict him and his co-accused; the court depended on one witness who came and testified that he heard that Prisoners 1 to 6 had hijacked vehicles; the court did not subpoena nor hear the testimony of several

³⁰Amnesty International Press Release, "Sudan: Incommunicado Detentions, Unfair Trials, Torture and Ill-treatment - The Hidden Side of the Darfur Conflict", available at <https://www.amnesty.org/download/Documents/92000/afr540642004en.pdf>, accessed on 19 September 2016.

³¹ Out of 18 witnesses proposed by the defence team only one witness was allowed to testify by the court in the present case

witnesses, but instead relied exclusively on the statements by the police without provision of oral testimony; and the Court convicted the accused without any evidence to corroborate the police witnesses testimonies. The Complainant submits that the appeal for prisoners 1 to 6 had to comply with the 7 days appeal period despite the fact that the trial record had over 200 pages that the Defense Lawyers had to read.

98. The Complainant argues that in addition to all the aforementioned rules of the Anti-Terrorism Court that breaches the standard court rules of evidence and criminal procedure, Rule 25 explicitly gives the Anti-Terrorism Court powers not to follow the 1991 Criminal Procedure Act and Sudanese Law of Evidence which provide for better fair trial guarantees. The Complainant submits that the Anti-Terrorism Courts in which the prisoners appeared did not take into account the conditions of treatment, the forced confessions, and the torture of the prisoners, nor the procedural irregularities in court against the prisoners. The Complainant argues that the prisoners were denied a fair trial and no effective remedy could have existed in light of the pervasive procedural unfairness of the trials.
99. Additionally, the Complainant submits that contrary to the Article 7(1) of the African Charter and Principle 2(f) of the Principles and Guidelines on Fair Trial, the Defense Lawyers for Prisoners 1 to 6 were only able to see the prisoners for the first time at their initial appearance before the special Combating Terrorism Courts on October 18, 2011, nine (9) months after their arrest. The Defense Lawyers argued for needing additional time to consult with the prisoners and prepare the details of their defense, especially when there was a possibility of severe punishment, however the Court only granted a one (1) week postponement to the start of the trial. The Complainant submits therefore that the prisoners' right to consult with their legal representatives was therefore violated.
100. The Complainant states that the Court issued the Defense Lawyers a letter authorizing them to meet with Prisoners 1 to 6 every Wednesday. However, in practice, legal visits with the Prisoners 1 to 6 were permitted only for one (1) to two (2) hours each week and every meeting between the prisoners and their Defense Lawyers were held under close supervision by the National Intelligence and Security Service (NISS), contrary to Principle M (2) (e) (g) and N (3) (e) of the Principles and Guidelines on Fair Trial. The Complainant further states that the prisoners' families were also only permitted to visit the prisoners once a week. The Complainant submits that the prisoners' lawyers should also be present during questioning, in particular to ward against involuntary confessions.

101. The Complainant further submits that the Human Rights Committee states in its General Comment 32 on the Right to Equality before Courts and Tribunals and to a Fair Trial that:

"The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter."

102. The Complainant also refer to the UN Basic Principles on the Role of Lawyers which provide for "special safeguards in criminal justice matters, "in which principles 5 and 8 give more details on the requirements in regard to access stating that:

"Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials"

103. The Complainant states that Principle 7 of the UN Basic Principles on the Role of Lawyers also proposes a specific time limit wherein *"Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention"*. The Complainants submit that by denying Prisoners 1 to 6 access to their lawyers, the Government of Sudan violated their fair trial rights to adequate legal representation under article 7 of the African Charter.

104. The Complainant argues that at the Terrorism Crimes Appeal Court, the Defense Lawyers for Prisoners 1 to 6 clearly stated their grounds of appeal against the convictions by the court of first instance against the accused persons. According to the Complainant, the appeals court did not apply itself to the grounds of appeal raised by the Defense Lawyers, rather the appeals court endorsed the procedure, conviction and sentences imposed on the prisoners, as having been compliant with the Anti-Terrorism Act and the extraordinary rules of procedure. The Complainant further states that during the preparation of

appeals to the Constitutional Court, the Defense Lawyers did not have sufficient time to canvass all the issues in respect of the decisions of the lower courts due to the urgency of staying the prisoners' executions. In preparing their urgent appeals, the Complainant submit that the Defense Lawyers did not enjoy the cooperation from the Sudanese government and judicial authorities.

105. The Complainant further argues that the defense lawyers submitted an urgent request to the Constitutional Court to stay the executions of the applicants. Concurrently, they also submitted a constitutional challenge on the fact that the trial at the lower court was not fair, because the applicants were not given a chance to properly present their defense; the applicants were tried in contravention of the Sudan Interim Constitution 2005 and the internationally-recognized standards of fair trials enshrined in Article 14 of the ICCPR. The Complainant submits that the Constitutional Court dismissed the challenge.
106. According to the Complainant, by not affording Prisoners 1 to 6 the fair trial guarantees under the African Charter, the Government of the Sudan violated article 7 of the African Charter.

Prisoner 7

107. The Complainant submits that Prisoner 7 was only afforded the opportunity to meet with his Defense Lawyer on the first day of court appearance for only ten (10) minutes before the trial commenced. The Judge did not afford the Defense Lawyer time to interview the prisoner before trial. Furthermore, the Defense Lawyer requested a postponement of the case to allow preparation and that the Defense Lawyer was sick, but the court again refused to indulge this request.
108. The Complainant further submits that the Defense Lawyer withdrew from the matter on the second day of trial citing reasons of limited time to prepare, his ill health and refusal by the court to allow cross-examining of prosecution witnesses and that he was also harassed and intimidated during the trial. According to the Complainant, considering the gravity of the case against Prisoner 7, upon withdrawal of his lawyer, in terms of the Sudanese law the government was supposed to appoint a lawyer to defend him, but this did not happen.
109. The Complainant submits that remarkably the Appeal Court also failed to follow any proper or standard procedure by immediately forwarding its appeal decision regarding Prisoner 7, directly to the Supreme Court for confirmation without providing the Defense Lawyers for Prisoner 7 any notice or information of their decision. Only after the Supreme Court confirmation did Prisoner 7 learn

about the prior Appeal Court decisions and his Defense Lawyers immediately submitted a review request to the Supreme Court, which was rejected on April 12, 2012.

110. The Complainant submits that in addition, Prisoner 7's case was subjected to intense media coverage. The statements in the media were tantamount to trial by the media and public, as newspaper (*Altayar*) and television station (*Alshrouq*) produced video and picture evidence of Prisoner 7, while in custody including the evidence against him, before it was produced in court.
111. The Complainant refers to the Commission's decision in *Communication 224/98 Media Rights Agenda v Nigeria*³² where the Commission found a violation of the right to be presumed innocent based on a State's negative pre-trial publicity³³ and the Commission's Principles and Guidelines on Fair Trial which states that "Public officials shall maintain a presumption of innocence and Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect."
112. The Complainant reiterates its arguments in para 60 to 72 above on the right to fair trial for prisoners 1 to 6 above, as they also apply to the case involving Prisoner 7. The Complainant therefore submits that by not affording Prisoner 7 the fair trial guarantees under the Charter, the Government of Sudan has violated his right to a fair trial under article 7 of the Charter.

Use of Torture to obtain confessions from Prisoners 1 to 7

113. The Complainant argues that in addition to the above, confessions obtained by the use of torture should not be admissible in the Court of law.³⁴ According to the Complainant, to obtain self-incriminating statements and confessions from Prisoners 1 to 7, Military Intelligence severely tortured the prisoners. The Complainant argues that the evidence relied on in the trials were either statements and confessions so obtained or statements fabricated by the Military Intelligence or the Security with no third-party supporting evidence.
114. The Complainant reaffirms its arguments on violations of article 5 above and submits that because the agents of the Republic of Sudan tortured Prisoners 1 to 7 for the purposes of forcing them to make a confession in contravention of the principles enumerated above, the confessions made were used against the

³² At para 54

³³ See also 301/05 Haregewoin Gebre-Sellase & IHRDA (on behalf of former Dergue officials) v Ethiopia, paras 189 - 195.

³⁴ Article 29, Robben Island Guidelines; Article 15 CAT

Prisoners in their trials, therefore amounting to a violation of article 7 of the African Charter.

Alleged violation of Article 1 of the African Charter

115. The Complainant submits that Article 1 of the African Charter obliges States to recognize the rights, duties and freedoms enshrined in the African Charter and to undertake to adopt legislative or other measures to give effect to them.
116. The Complainant states that the Commission decided in *Communication 368/09 Abdel Hadi, Ali Radi & Others v Republic of Sudan* that "if a State Party fails to respect, protect, promote or fulfill any of the rights guaranteed in the African Charter, this constitutes a violation of Article 1 of the African Charter." Thus, any violation of any of the rights in the African Charter is a violation of article 1 of the African Charter.³⁵ The Complainant submits that the Government of the Sudan has violated the rights of Prisoners 1 to 7 under articles 4, 5 and 7 of the African Charter, and urge the Commission to find a violation of article 1 of the Charter.

Prayers

117. The Complainant urges the Commission to find that the Republic of the Sudan has violated the rights of Prisoners 1 to 7 under articles 1, 4, 5 and 7 of the African Charter on Human and Peoples' Rights.
118. The Complainant further asks for the following:
- a) That the Commission should urge the Republic of the Sudan to commute the death sentences that have been imposed on Prisoners 1 to 7 and to either conduct a retrial of the prisoners, according them all fair trial guarantees, or to release them unconditionally.
 - b) That the Commission should urge the Republic of the Sudan to provide compensation and rehabilitation to Prisoners 1 to 7 for the torture they were subjected to by the NISS.
 - c) That the Commission should urge the Republic of the Sudan to effectively investigate the allegations of torture made by Prisoners 1 to 7 and to prosecute and punish all officers responsible for the torture.
 - d) That the Commission should urge the Republic of the Sudan to close its Anti-Terrorism Courts and allow all terrorism related cases be tried by the

³⁵ Comm. 279/03-296/05 - Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) v. Sudan (2010), para 227

ordinary criminal courts as provided by the Constitution of the Republic of the Sudan.

Submission of the Respondent State on Merits

119. In accordance with the provisions of Rule 105(1) of its Rules of Procedure, the Parties shall each have sixty (60) days to make their submissions on the Merits. They shall also have at their express request, an additional period of time not exceeding thirty (30) days per party at each stage of the proceedings, to make their submissions. The Secretariat ensures the exchange of written submissions and compliance with these various deadlines.
120. In the present case, the Commission notes that the above procedural requirements have been complied with. In addition, due to time constraints, the Commission deferred the examination of the Communication to its successive sessions and the Secretariat sent Reminder Notes Verbales to the Respondent on each occasion. Despite these correspondences, the Respondent State did not submit its submission on the Merits nor did it provide any justification for its failure to do so.
121. As such, the Commission decides to examine the Communication on the basis of the information in its possession, in accordance with its own practice. The Commission is therefore called upon to determine whether the actions of the Respondent State as described by the Complainant constitutes a violation of Article 1, 4, 5 and 7 of the African Charter.

Analysis of the Commission on the Merits

'Facts' and Applicable Law

122. Considering the issues identified from the case file and the submissions presented on the alleged violations of rights guaranteed in the African Charter, the Commission now turns its attention to engage, using applicable legal methods of analysis, in an examination of the legal arguments and the evidentiary materials presented relative to the relevant provisions of the African Charter and other relevant laws for determining the existence or otherwise of the alleged violations.
123. This Communication is about violations allegedly committed following the arrest and detention of members of or individuals in the custody of the Justice and Equality Movement (JEM), an organization that is engaged in armed struggle in the Darfur region of Sudan. The context in which the alleged violations took place and the identity of the victims lend themselves to the

question of the legal status of the situation in which the events leading to the violations happened. Accordingly, before proceeding with the analysis on alleged violations of rights, one of the issues that needs to be dealt with is the nature of the context giving rise to the occurrence of the alleged violations as the basis for making a determination on the question of whether international humanitarian law.³⁶

124. Particularly, we have to determine whether the events leading to the alleged violations took place in a context of conflict and whether the conflict situation meets the threshold of armed conflict for purposes of international law. Depending on our determination on this issue, the Commission will consider on whether it should resort to using relevant rules of international humanitarian law and the legal consequences that flow from it as part of its assessment of the existence or otherwise of the alleged violations of rights guaranteed in the African Charter.
125. In order to establish the nature of the context in which the events leading to the alleged violation of rights happened, the Commission will review both the submissions made in the case file and other relevant sources including those from the government of Sudan, the African Union (AU) and the United Nations (UN) which furnish relevant data for the issue at hand. A good starting point for examining this line of inquiry is the case file of this Communication. As such, the Commission now reviews the submission of the parties.
126. It emerges from the submission of the Complainant that the first, second, third, fourth, fifth and sixth prisoners were captured by the Military Intelligence of the Sudan Armed Forces (Military Intelligence) in the Darfur region. At the time of their arrest, Prisoners 1 to 4 and 7 were members of the Justice and Equality Movement (JEM), while the others were in JEM's custody as prisoners of war. Various reports including from international organizations notably the AU and the UN show that, JEM is one of the armed rebel groups established in Darfur in the early 2000s and has been one of the major armed opposition groups that have been engaged in armed fighting against the army of the Respondent State in what is known as the Darfur conflict. The Darfur conflict erupted in 2003 following an attack by two Darfur based armed groups Sudan Liberation Movement/ Army and JEM on Sudanese security forces.³⁷ Despite various peace process efforts and the end of major hostilities, the Darfur conflict involving the

³⁶ As the African Commission discussed in details in its Study on 'Addressing Human Rights Issues in Conflict Situations', distinction is made on the applicable law between cases of international armed conflicts and non-international armed conflicts on the one hand and domestic situations of tensions or disturbances on the other hand.

³⁷ See Report of the AU High-Level Panel on Darfur, AU Doc PSC/AHG/2(CCVII)

armed rebellion of JEM continued to drag on until final agreement was concluded in 2020.

127. JEM is one of the armed groups in Darfur that held various territories in North and South Darfur at various points in time since it started the armed fighting in 2003. According to the AU's High-Level Panel on Darfur, '[d]uring 2007-08, JEM emerged as the principal military force in opposition to the Sudan Government in Darfur. It mounted a series of offensives, culminating in a bold attack on the national capital in May 2008. It is reported that '[i]n mid-2010, before a government offensive that led to heavy casualties on both sides, JEM was the strongest insurgent force in Darfur, estimated to have more than 5,000 men armed with mounted anti-aircraft guns, rocket-propelled grenades, heavy machine guns, AK-47s and several hundred vehicles.'³⁸
128. It is one of the armed groups with whom the Government of Sudan signed various peace agreements in relation to the conflict in Darfur since the signing of the 2004 humanitarian ceasefire agreement signed in Ndjamena, Chad, as part of the peace processes for resolving the conflict in Darfur.
129. In its submission on Admissibility, the Respondent State observed that the Prisoners, whose membership in JEM it did not contest, 'themselves are armed militias or paramilitaries.' It further stated that 'the prisoners were charged with, among others, 'wagging war against the State'.³⁹ It is clear from these characterizations of the prisoners by the Respondent State that they are members of an armed group. Most notably, the Respondent State affirmed that they were engaging in 'war' against the state.
130. It emerges from the foregoing that it was in a context of the Darfur conflict that the events that led to the occurrence of the alleged violations took place. Not only that the existence of this conflict is not contested by the Respondent State but also that the Respondent State considered the conflict that the prisoners have been engaged in as 'war'. For purposes of international law, the characterization by the state of the situation as 'war' by itself alone is not enough. As such, the Commission has to determine the question of whether the conflict in question is of such a nature that is governed by the rules of International Humanitarian Law (IHL).
131. As discussed in the Commission's comprehensive Study on 'Addressing Human Rights Issues in Conflict Situations' prepared and adopted by the Commission within the framework of its Resolution 332, for purposes of IHL,

³⁸ <http://www.smallarmssurveysudan.org/fileadmin/docs/archive/sudan/darfur/armed-groups/armed-opposition-groups/JEM/HSBA-JEM-20-March-2011.pdf>

³⁹ See the submission of the respondent State on admissibility.

there are two types of armed conflicts: international armed conflicts (IACs) and non-international armed conflicts (NIACs). The first type of conflicts, IACs, involves conflicts between the armed forces of two states.⁴⁰ This is not the kind of conflict in the case at hand. The second type of conflicts, NIACs, relate to those identified under IHL as constituting 'armed conflicts that are not of an international character' or simply non-international armed conflicts.⁴¹ Given that in the case at hand the conflict concerns the armed forces of Sudan and a rebel group, JEM, it is clear that this is not an IAC. However, the Commission has to determine whether this conflict is of such a nature that constitutes a non-international armed conflict to which rules of IHL pertaining to such type of armed conflicts apply.

132. Additional Protocol II of the Geneva Conventions in its Article 1(1) provides that, for a conflict to constitute NIAC, the armed opposition forces must be "under responsible command, exercise such control over a part of its territory as to enable them to carry out sustainable and concerted military operations and to implement this Protocol". Based on this definition and drawing on the jurisprudence of the Commission in *Thomas Kwoyelo v. Uganda*⁴² and that of the International Criminal Tribunals for Rwanda and the former Yugoslavia, the Commission's Study identified four cumulative elements that should be met to find the existence of NIAC.⁴³ First, the conflict has to be between armed forces of a state and dissident or other organised armed groups. Second, the conflict takes place in the territory of the state. Third, the dissident or the armed opposition group has to be organised with a command-and-control structure and exercises control over a part of the territory of the state. Fourth, the conflict has to be a situation of regular and intense armed confrontation and hence involving direct hostilities between the armed forces of a state and the dissident or opposition armed group.

133. It has been established above from the submissions of the parties and from reports of the AU and the UN that the conflict in Darfur involved armed fighting between non-state groups who launched armed rebellion and the Sudan Armed forces. JEM was one of the major non-state armed groups involved in the armed rebellion and fighting against the Government of Sudan. The context in which the events that led to the alleged violations is accordingly a conflict situation that meets the first requirement of a NIAC. Concerning the second requirement, the territory where the conflict took place is the Darfur region of Sudan.

⁴⁰ Common Article 2 of the Geneva Conventions of 1949 defines IACs as "all cases of declared war or of any armed conflict that may arise between two or more High Contracting Parties, even if the state of war is not recognised by one of them."

⁴¹ This definition is provided for in Common Article 3 of the 1949 Geneva Conventions

⁴² Communication 431/12 – *Thomas Kwoyelo v. Uganda*.

⁴³ *Ibid* 25

134. The third requirement concerns the qualities that the non-state armed group should possess for the conflict in which it is engaged to be considered as NIAC, namely level of organization and control of territory. As one of the major armed rebel groups in Sudan, JEM mobilized and maintained a fighting force that operated as an organized group with a discernable leadership structure and command and control.⁴⁴ In the same way the Commission considered the Lord's Resistance Army in *Thomas Kwoyelo v. Uganda*⁴⁵ as a dissident armed force or other organized group under Protocol II of the Geneva Conventions, the level of organization that enabled JEM to prosecute an armed rebellion over a long period of time qualifies it to be such a group for purposes of IHL. As the report of the UN Commission of Inquiry observed the rebels, JEM included, also exercised 'e facto control over some areas of Darfur.'⁴⁶
135. Finally, the conflict was also of such a nature that involved hostilities between JEM and the Sudan Armed Forces over an extended period of time. The intensity and protracted nature of the conflict can be gathered not only from the duration of the conflict but also from the human suffering and the material destruction it caused. According to various estimates, the conflict at its most violent in 2003-2004 claimed the lives of people in the range from 70,000 to 400,000.⁴⁷ It also led to 1.65 million internally displaced persons in Darfur, more than 200,000 refugees from Darfur in neighboring Chad and large-scale destruction of villages throughout the three states of Darfur.⁴⁸
136. In the light of the foregoing, the Commission upholds the conclusion of the UN Commission of Inquiry on Darfur that '[t]he conflict therefore does not merely amount to a situation of internal disturbances and tensions, riots, or isolated and sporadic acts of violence. Rather, the requirements of (i) existence of organized armed groups fighting against the central authorities, (ii) control by rebels over part of the territory and (iii) protracted fighting, in order for this situation to be considered an internal armed conflict under common Article 3 of the Geneva Conventions are met.'⁴⁹ The consequence of this conclusion is that the determination of whether violations were perpetrated against the prisoners has to be based not only on the provisions of the African Charter but also is done so by reference to the relevant rules of IHL that govern the detention and treatment in detention of detainees in NIACs based on Articles 60 and 61 of the African Charter on Human and Peoples' Rights.⁵⁰

⁴⁴ See for more, The Report of the UN Commission of Inquiry on Darfur (2005) p. 39, paras. 133-136

⁴⁵ Ibid 48

⁴⁶ Report of the UN Commission of Inquiry on Darfur (2005), p26

⁴⁷ Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics and the War on Terror* (2009) 5

⁴⁸ Report of the UN Commission of Inquiry on Darfur (2005) 3.

⁴⁹ Ibid, 26-27.

⁵⁰ Communication 431/12 – *Thomas Kwoyelo v. Uganda*, para. 148; Also see the ACHPR Study p. 28.

137. However, the Commission makes reference to the relevant provisions of IHL only to make a finding of violation of the African Charter rights and not IHL rules as such. IHL rules serve only as a standard by reference to which the nature of the treatment to which the prisoners have been subjected would be determined for making a finding of violation of the rights allegedly violated.⁵¹ Consequently, as the Commission held in *Thomas Kwoyelo v. Uganda*,⁵² for the instance case as well, the Commission applies the standard of treatment specified in Common Article 3, specifically its reference among others to persons in detention, and Articles 4 and 6 of Additional Protocol II specifically relating to persons deprived of liberty. In the analysis below of alleged violations of specific rights, the Commission accordingly resorts to relevant provisions of IHL based on Article 60 and 61 of the Charter for assessing the existence of violations of the particular rights.

138. Against the background of the foregoing, the Commission now turns its attention to investigating the specific provisions of the African Charter that are alleged to have been violated in this Communication.

Alleged Violation of Article 4

139. Article 4 of the African Charter provides that:

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

140. In its submissions, the Complainant alleges that the trials which resulted in the sentences passed on Prisoners 1 to 7, fell grossly short of the fair trial guarantees in article 7 of the African Charter and the Commission's Principles and Guidelines on Fair Trial and as such, any executions carried out pursuant to the judgment in those trials would amount to a violation of the right to life of Prisoners 1 to 7.

141. Common Article 3 of the Geneva Conventions proscribes, among others 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees.' The determination of whether violations of Article 4 on the right to life would therefore depend on an assessment of the existence of the passing of sentences or/and carrying out of executions without affording all judicial guarantees. The Commission has held in *International Pen and Others (on behalf of*

⁵¹ Ibid 41, paras 150-151.

⁵² Ibid 41, para. 151.

*Ken Saro-Wiwa) v. Nigeria*⁵³ that given that the trial which ordered the executions itself violates article 7, any subsequent implementation of the sentences renders the resulting deprivation of life arbitrary and in violation of Article 4. What led to the finding of violation of Article 4 is the fact that the death sentence was reached at on the basis of a trial conducted in violation of Article 7 of the African Charter.

142. As outlined in the analysis dealing with Article 7 of the African Charter, the Commission held in the instant Communication below that the trial of prisoners 1 to 7 violated Article 7 of the African Charter. Given that this does not meet the standard set in Common Article 3 cited above, it follows that the death sentences passed by the court of first instance on prisoners 1 to 7 took place in conditions that did not afford 'all the judicial guarantees.' As such the passing of the sentence in breach of such 'judicial guarantees' and the accompanying placement on prisoners 1 to 7 on death row represent a threat of an arbitrary deprivation of life and, hence a violation of Article 4 of the African Charter.
143. It is worth recalling that the Complainant informed the Commission that prisoners 1 to 7 were released from prison, after being granted an official pardon by the government.⁵⁴ In assessing the fact that prisoners 1 to 7 were subsequently released from prison and not executed, the Commission draws on its jurisprudence and the jurisprudence of other similar bodies. One such authority that the Commission wishes to refer to is *General Comment No 36* of the UN Human Rights Committee, which states that the obligation of State Parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in the loss of life. States Parties may be in violation of article 6 of the ICCPR, even if such threats and situations do not result in loss of life⁵⁵.
144. The European Commission on Human Rights has also held in several cases the violation of the right to life of individuals who did not die as a consequence of the violating acts. In *Acar and others v. Turkey*⁵⁶, the European Court held that they were victims of a behavior that due to its nature, represented a serious risk to their lives, despite the fact that they survived the attack. In *Makaratzis v. Greece*⁵⁷, the European Court also held that irrespective of whether or not the police actually intended to kill the applicant, the applicant was the victim of a

⁵³ Communication 137/94-139/94-154/96-161/97 International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) / Nigeria, para 103

⁵⁴ See letter of complainants dated 11 January 2019.

⁵⁵ General Comment No 36 of the UN Human Rights Committee, para 7

⁵⁶ Cf. Eur.C.H.R., *Acar et al. v. Turkey*, Judgment of May 24, 2005, App. No. 36088/97 and 38417

⁵⁷ Cf. Eur.C.H.R., *Makaratzis v. Greece* [GC], Judgment of December 20, 2004, App. No. 50385/99, para. 51 and 55.

conduct which by its very nature, put his life at risk, even though in the event he survived, violated article 2 of European Convention.

145. The African Commission also pointed out in its *General Comment No 3* on the right to life that 'where a State or its agent ...has unlawfully threatened the life of a person... a violation of the right to life has occurred.'⁵⁸ The Commission applies the same reasoning to this present case. Having found that the trial which ordered the sentencing to death of prisoners 1 to 7 fell short of the standard of 'all judicial guarantees' in Common Article 3 of the Geneva Conventions and hence the fair trial guarantees in article 7 of the African Charter, it logically follows as noted above that the sentence to death under such conditions constitutes an unlawful serious threat to the lives of prisoners 1 to 7. The fact that they remained in death row and were later released by a pardon of the government, was merely fortuitous. The pardon represents an affirmation of the flawed trial conducted in breach of Article 7 of the Charter rather than its rectification. The pardon did not reverse the death sentence passed without 'affording all judicial guarantees' or due process rights under Article 7 of the Charter. The pardon does not question the validity of the sentence. It merely halts its execution. As such the pardon did not remove the unlawful threat that the death sentence constituted to those on whom it was directed.

146. For these reasons, the Commission finds that the Respondent State has violated article 4 of the African Charter.

Alleged Violation of Article 5

147. Freedom from torture is one of the cardinal rules in international law that cannot be derogated from at any time and under any circumstances including in times of war and emergency.

148. Article 5 of the African Charter provides for:

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

149. Common Article 3 of the Geneva Conventions of 1949 and Article 4(1), (2) (a), (e), (f) and 13 of Additional Protocol II of the Geneva Conventions guarantee

⁵⁸ ACHPR General Comment No 3, para 8.



absolute freedom from torture, inhumane and degrading treatment. These rules are known as rules for the treatment of detainees,' and the protection these IHL rules provide include prohibition of murder, mutilation, torture, cruel, inhumane and degrading treatment, medical or scientific experiments, as well as all forms of violence to life and health. Therefore, both IHL rules (in Common Article 3 of the Geneva Conventions and Article 4 of Additional Protocol II to the Geneva Conventions) and Article 5 of the African Charter prohibit acts of torture, inhumane and degrading punishment under any circumstance.

150. The Complainant alleges that the agents of the government of the Sudan while acting in their official capacity tortured prisoners 1 to 7 for the purpose of forcing them to make confessions to having participated in terrorists' activities. The Complainant refers to some of the acts of torture exacted by the Military Intelligence on Prisoners 1 to 6 to include: the prisoners' hands, arms and legs being tightly bound behind their backs, not being allowed to sleep for multiple days on end; subjection to physical and psychological abuse including racial insults and continual beatings with sticks and *hippo-hide whips*; Prisoner 1 kept in solitary confinement for ten (10) months without any justification; and all of the prisoners were not allowed contact with their families or lawyers for about nine (9) months.
151. The Complainant states that as a result of the torture, the health conditions of Prisoners 1, 2, and 3 deteriorated significantly. Prisoner 1 had a broken arm and a severely inflamed eye while in custody and he was in solitary confinement for ten (10) months, as a result he suffers from problems with his kidneys and inflammation of the eyes. Prisoner 2 suffers from gout, swollen legs and heart problems. Prisoner 3 had bruises on his ear and complains of pain in his stomach. Despite these health conditions, the prisoners were not provided access to medical care.
152. With regards to prisoner 7, the Complainant alleges that the Military Intelligence Officers used electric shock on his body and flogged him with a *hippo-hide whip* extensively; *altyara-gamat* "airplane-takeoff" method was used on him whereby he was raised to the ceiling and concurrently being questioned on his role as a JEM supervisor; he was subjected to racial insults and force with pliers applied on his sexual organs and body. As a result of the injuries suffered, he continued to lose blood, consciousness and was left in immense pain with no access to medical treatment. The Complainant argues that the above-mentioned acts meted on prisoners 1 to 7 by the Military Intelligence amounts to a violation of Article 5 of the African Charter.
153. The Commission has held that Article 5 of the African Charter is aimed at the protection of both human dignity and the physical and mental integrity of

the individual.⁵⁹ The African Charter does not define the meaning of the words or the phrase "torture or degrading treatment or punishment." However, the Commission in its interpretation of Article 5 of the African Charter adopted the definition of torture contained in Article 1 of United Nations Convention against Torture (UNCAT) which states that⁶⁰:

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

154. The Commission also adopted the interpretation of the United Nations Committee against Torture⁶¹ in its General Comment No. 2, which states that *"for torture to have occurred, the incriminated acts must intentionally cause severe suffering, be intended to obtain information or a confession, punish the victim for real or alleged acts, and be attributable to a public official or person acting in that capacity"*.

155. At this juncture, the question to be addressed by the Commission is whether the alleged acts stipulated in paragraph 115 to 117 above, do constitute acts of torture or cruel, inhuman or degrading treatment and punishment, in violation of Article 5 of the African Charter?

156. The Commission recalls its decision in *Sudan Human Rights Organization and Center for Housing Rights and Evictions v Sudan*⁶² in which it set out the principal elements that constitute torture under the African Charter, namely that, severe pain or suffering has to have been inflicted for a specific purpose, such as to obtain information, as punishment or to intimidate, or for any reason based on discrimination; by or at the instigation of or with the consent or acquiescence of state authorities. The Commission in the same Communication held that where the victims were subjected to a series of acts that, singly and in combination, caused severe physical and mental pain and suffering⁶³ inflicted by officials with

⁵⁹ Communication 279/03-296/05 para 155

⁶⁰ *ibid*

⁶¹ *Ibid* 19 & See Article 4 of the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) adopted by the Commission in October 2002

⁶² Communication 279/03 – 296/05 Sudan Human Rights Organization and Center for Housing Rights and Evictions v Sudan (2009) ACHPR para 255 [sic!] & 156

⁶³ Sustained and severe beatings, punched and hit with a pipe and wooden cane on their feet and soles, sleep deprivation and denied access to medical treatment

the purpose of extracting information and inflicting punishment, the acts committed amounted to torture.

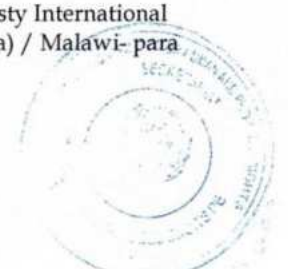
157. Furthermore, the Commission in *Egyptian Initiative for Personal Rights and Interights v Egypt*⁶⁴ held that 'when a person is injured in detention or while under the control of security forces, there is a strong presumption that the person was subjected to torture or ill-treatment. In *Abdel Hadi, Ali Radi & Others v Sudan*⁶⁵, the victims went through various forms of physical torture during their detention ranging from severe beating with whips and sticks, doing the *Arannabb Nut* (rabbit jump), heavy beating with water hoses on all parts of their bodies, death threats, being forced to kneel with their feet facing backwards in order to be beaten on their feet and asked to jump up immediately after. The Commission held that this treatment and the surrounding circumstances were of such a serious and cruel nature that it attained the threshold of severity as to amount to torture.
158. The Commission in determining acts that constitute torture also held in *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*⁶⁶, where the detainees were beaten and forced to make statements; denied the opportunity of sleeping and being held in solitary confinement, that these acts details instances of torture, and cruel, inhuman and degrading treatments. In *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*⁶⁷, that aspects of the treatment of Vera and Orton Chirwa such as excessive solitary confinement, shackling within a cell, extremely poor-quality food and denial of access to adequate medical care, were in contravention of Article 5 of the African Charter.
159. Turning to the facts of this Communication and based on the relevant IHL rules identified in paragraph 114 above and its jurisprudence on instances of torture highlighted above, it is the Commission's view that the acts stated in paragraphs 115 to 117 including deprivation of sleep, beatings, being held in solitary confinement for a prolonged period of time, denial of medical care, applying force on sexual organ and body all done by agents of the state are similar to the acts which the African Commission in the various communications

⁶⁴ Communication 334/06 – Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt para 168.

⁶⁵ Communication 368/09- Abdel Hadi, Ali Radi & Others v Sudan, para 71-77

⁶⁶ Communications 54/91-61/91-96/93-98/93-164/97_196/97-210/98 Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania

⁶⁷ Communication 64/92-68/92-78/92_8AR- Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) / Malawi- para



listed above determined to be acts of inhumane and degrading treatment and torture. The Commission is thus of the view that all the acts Prisoners 1 to 7 were subjected to under the control of the Military Intelligence acting in their official capacity to obtain confessions details such a serious, cruel and inhumane nature that it attains the threshold of severity to constitute torture, which are contrary to Common Article 3 of the Geneva Conventions and Article 4(1), (2) (a), (e), (f) and 13 of Additional Protocol II to the Geneva Conventions and hence constitute violation of Article 5 of the African Charter.

160. In determining whether the physical injuries were indeed inflicted on the prisoners by State agents, the Commission has noted that the prompt access to medical personnel becomes critical⁶⁸. Article 5 (2) (d) of Additional Protocol II to the Geneva Convention and Article 30 of Common Article 3 of the Geneva Convention also provides that persons whose liberty have been restricted shall have the benefit of medical examination and may not be prevented from presenting themselves to the medical authorities for examination.

161. In the present Communication, the Complainant submits that following the acts of torture the prisoners were subjected to and the severe injuries sustained, they were denied access to medical care. The Complainant further submits that because the prisoners were held incommunicado and denied medical access by the Military Intelligence, they were not given an opportunity to be medically examined to obtain a medical report. As such, the Complainant could not submit medical reports to affirm that the physical injuries sustained and the psychological trauma suffered, were inflicted on them by the Military Intelligence while in detention. However, in the absence of such medical reports, the Complainant attached witness statements from the prisoner's relatives, spouses and lawyers attesting that when they saw the prisoners on Sudanese Satellite Television and during their visits to the prisoners at Kabur prison, there were visible signs of injuries from torture on all the prisoners⁶⁹.

162. Pursuant to the circumstances of the case and in light of the above arguments of the Complainant, the Commission will proceed to determine whether the absence of a medical evidence is sufficient proof that the prisoners were tortured by State agents?

⁶⁸ Ibid 62

⁶⁹ **Prisoner 1- 6:** When the prisoners were shown on Sudanese Satellite Television newscast, one of them had his hand wrapped in white gauze and suspended in a sling around his neck, another had a bandage on his ear, which indicated an injury. When the witnesses visited the prisoners at Kabur Prison, all the prisoners were shackled at the wrists and feet with heavy iron chains. The Witnesses found indicators that they had been beaten and tortured including swollen hands and face, severely inflamed eyes and signs of beating all over their back, when they lifted their shirts, including bruises on their ears amongst others

Prisoner 7: The effects of beating and torture were clearly visible by just looking at him. During the trial, he had been injured in the head (gunshot wound) and it had not yet healed

163. It is the practice of the Commission to rely on sworn testimonies and a medical certificate as proof of torture. In *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, the Commission relied on sworn testimonies and a medical certificate in establishing a case of torture.⁷⁰ Similarly, in *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*⁷¹, the Commission went one step further and relied solely on the Complainants' submission of testimonies of the victims to prove sexual molestation which qualified as a violation of Article 5 of the Charter.
164. At the level of the European Court on Human Rights (the European Court), in *M.B and Others vs. Slovakia*⁷² the Court held that the lack of medical evidence or other material evidence is not to be the decisive proof that torture has not occurred. The Court, instead, relied on the circumstantial behavior of the authorities who initially charged and prosecuted the accused officers. Moreover, in *Ilascu and Others vs. Moldova and Russia*⁷³, the European Court accepted corroborative witness statements, although in this case the governments involved did not deny the facts. Moreover, in *Alpar v. Turkey*⁷⁴, the European Court held that the State was obligated to conduct an effective investigation into the claims of the victim, and that having not done so, it violated Article 3 prohibiting torture.
165. Furthermore, the *Istanbul Protocol on the Standard of Proof for Cases of Torture under the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*⁷⁵ provides that "witness and survivor testimony are necessary components in the documentation of torture. To the extent that physical evidence of torture exists, it provides important confirmatory evidence that a person has been tortured. However, the absence of such physical evidence should not be construed to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars".
166. In the instant case, there is no doubt that there are physical signs of torture on the victims. There is however no medical evidence that shows that the injuries suffered were from the acts of torture, inhuman and degrading treatment meted

⁷⁰ Ibid 22. Communication 379/09, *Monim Elgak* para 100.

⁷¹ Ibid 67 para. 131-136; 197 - 202

⁷² Case of *M.B and Others vs. Slovakia* before the European Court of Human Rights (Application no. 45322/17) at para 62

⁷³ Case of *Ilascu and Others vs. Moldova and Russia* before the European Court of Human Rights (Application No. 48787/99)

⁷⁴ Case of *Alpar v. Turkey* before the European Court of Human Rights (Application 22643/07)

⁷⁵ The *Istanbul Protocol on the Standard of Proof for Cases of Torture under the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Para 161

out by security agents of the Sudanese state. Where the circumstances are such that the victims could not have been able to obtain medical certificate linking their injuries to the treatment to which they were subjected while in custody, such as where prisoners are held incommunicado or denied medical attention, it is legally acceptable for the Commission to rely on circumstantial evidence. Accordingly, in the present case, given that the prisoners were held incommunicado and denied access to medical care by the State agents, the Commission cannot satisfy itself that the lack of medical evidence or report to prove that the injuries were sustained through torture means that torture has not occurred. As such, the Commission, in relying on the testimonies of the prisoners and that of their relatives and lawyers, is minded to find that the injuries sustained by the prisoners were as a result of torture, inhumane and degrading punishment meted out on them by the Military Intelligence while in custody.

167. Regarding the Complainant's allegation that all of the prisoners while in custody, were not allowed contact with their families or lawyers for about nine (9) months, Additional Protocol II of the Geneva Convention and the African Commission's Principles and Guidelines on Fair trial provide for persons arrested or detained to receive visits from families and friends.⁷⁶ The Commission recalls its decision in *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights and the Association of Members of the Episcopal Conference of East African Bishops' Conference v. Sudan* and *Law Office of Ghazi Suleiman v. Sudan*, where it held that detaining persons without allowing them any contact with their families and refusing to inform the families of the fact and place of their detention, constitutes inhuman treatment of both the detainees and their families. The Commission adopts the same reasoning in this case and finds that the refusal by the Military Intelligence of family or lawyers visits for the prisoners while in custody amounts to inhuman treatment of both the detainees and their families, in breach of Additional Protocol II of the Geneva Conventions and the Principles and Guidelines on Fair Trial, hence contrary to Article 5 of the Charter in terms of dignified treatment.

168. On the issue of the Complainant's allegations that the Respondent State despite its knowledge of the claims of torture, did not take any measures to investigate the acts of torture Prisoners 1 to 7 were subjected to, the Commission refers to the Robben Island Guidelines, which provides that *states parties are under an obligation to establish fully independent mechanisms to which allegations of torture are brought; ensure that where claims of torture or ill-treatment are brought before the competent authorities, an investigation shall be initiated; investigations shall be conducted promptly, impartially and effectively and reparations are offered to victims*

⁷⁶ Article 4(3)(b) Additional Protocol II to the Geneva Convention & M2(g) of the Principles and Guidelines on Fair Trial.



*irrespective of whether a successful criminal prosecution can or has been brought.*⁷⁷ These provisions are also reinforced in the Commission's Guidelines on Arrest, Police Custody and Pre-trial Detention in Africa (Luanda Guidelines), which provides that *states shall ensure prompt investigations into allegations torture*⁷⁸. The Commission in *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) V Sudan*⁷⁹ where allegations of torture were duly brought to the attention of the authorities of the Respondent State held that because it took no measures to investigate the allegations and bring the perpetrators to justice, the State violated article 5 of the African Charter. Similarly, the European Court of Human Rights in *Alpar v Turkey*⁸⁰ held that the State was obligated to conduct an effective investigation into the claims of the victim on torture, and having not done so, they violated Article 3 prohibiting torture.

169. In this regard, the Commission finds that because the Respondent State did not take any measures to investigate the acts of torture Prisoners 1 to 7 were subjected to, it violated Article 5 of the African Charter.

170. In light of the above findings, the Commission holds that the Respondent State violated Article 5 of the African Charter.

Alleged Violation of Article 7

171. Article 7 of the African Charter guarantees for everyone the right to have his/her cause heard. This includes the right to:

- 1 (a) *an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
(b) *The right to be presumed innocent until proved guilty by a competent court or tribunal;*
(c) *The right to defence, including the right to be defended by Counsel of his choice;*
(d) *The right to be tried within a reasonable time by an impartial court or tribunal."*

172. The Complainant submits that by not affording prisoners 1 to 7 the fair trial guarantees under the African Charter, the Respondent State violated their rights under article 7 of the African Charter. According to the Complainant, one of the

⁷⁷Article 17,18, 19 and 50 of the Robben Island Guidelines

⁷⁸ See Article 22 of the Luanda Guidelines

⁷⁹ Ibid 22

⁸⁰ Case of Alpar vs. Turkey (22643/07) before the European Court of Human Rights



fundamental elements of a fair trial is to be tried before an impartial and independent court, but prisoners 1 to 6 were tried under Anti-Terrorism laws in Special Crimes Courts established under the Anti-Terrorism Act (2001), which established procedures contrary to those applied in normal courts⁸¹.

173. As stipulated in the Principles and Guidelines on the Right to Fair Trial “military courts are required to respect fair trial standards enunciated in the African Charter and in the Guidelines”⁸². Therefore, the Commission will assess the Complainants arguments in relation to the violation of the rights of prisoners 1 to 7 under Article 7 of the African Charter.
174. The Commission will start by assessing the right to counsel of one’s choice as enshrined in Article 7 (1) (c) of the African Charter, which is an important right as it encompasses several other rights such as freedom of ill treatment and the right to prepare a defence⁸³.
175. Article 105 of Common Article 3 of the Geneva Convention provides that a prisoner of war shall be entitled to assistance to defence by a qualified advocate or counsel of his choice and Article 99 of same convention provides that no prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel. Common Article 3 of the Geneva Conventions proscribes, among others ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees.’ Similar guarantees have been referenced in the UN Basic Human Rights reference Guide on Right to a Fair Trial and Due Process in the context of Countering Terrorism, which also provides for the right to counsel of one’s choice and confidential consultations with counsel⁸⁴.
176. The Commission has considered in its Principles and Guidelines on Fair Trial that in proceedings relating to criminal charges, legal representation is the

⁸¹ The right to effective defense counsel as only one lawyer is allowed to represent them; the absence of the defense lawyer does not prevent the court from going ahead with the proceedings and issuing a final decision on the case even if the accused is charged with an offence punishable by death; the courts are further empowered to decide on the witnesses who testify on behalf of the accused persons; If the court makes a decision on a procedural issue, that decision is final and not appealable.; the Court allows self-incriminating evidence to be adduced in court and if there are several individuals accused of the same offence the court can accept any statement by any of the accused persons to convict him and another accused person in the same group; . the court to accept hearsay information to convict the accused; the court is authorized to rely on the inquiry of the police during the trial; the Act provides only 7 days for the defense lawyers to prepare and file an appeal as oppose to the 15 day to appeal requirement under the Criminal Procedure Act of Sudan; the court has powers not to follow the 1991 Criminal Procedure Act and Sudanese Law of Evidence which provide for better fair trial guarantees.

⁸² Ibid Principle L (b)

⁸³ Amnesty International and others v. Sudan (above, n. 27), para. 64.

⁸⁴ Article 8 and 9 of the UN Basic Human Rights reference Guide on Right to a Fair Trail and Due Process in the context of Countering Terrorism

best means of legal defence against infringements of human rights and fundamental freedoms⁸⁵. It also provides for an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceeding including periods of administrative detention, trial and appeal proceedings; and to have adequate opportunity to prepare a case⁸⁶. The Guidelines further give States an obligation to ensure that any arrested or detained person is provided with the necessary facilities to communicate with his lawyer, doctor, family and friends.⁸⁷

177. In the present case, the Defense Lawyers of Prisoners 1-6 were only able to see the prisoners for the first time at their initial appearance before the special Combating Terrorism Court and argued for needing additional time to consult with the prisoners and prepare the details of their defense, but the Court only granted a one-week postponement to the start of the trial. Furthermore, the Court issued the Defense Lawyers a letter authorizing them to meet with Prisoners 1 to 6 for only 1 to 2 hours each week, however these visits always under full observation by the NISS officials. Between 28 December 2011 and 5 March 2012, the presiding Judge summoned the prisoners to appear in the absence of their Defense Lawyers and present a new list of defence witnesses. The Prisoners presented a list of fifteen (15) defence witnesses but the Judge accepted only two (2) witnesses. Moreover, even though the Prisoners protested the continuation of their trial without their Defense Lawyers present, the trial Judge continued with the trial and convicted the prisoners in the absence of their Defense Lawyers.

178. Regarding prisoner 7, he was only afforded the opportunity to meet with his Defense Lawyer on the first day of Court appearance for 10 minutes before the trial commenced. His Defense Lawyer requested for a postponement of the case to allow for adequate preparation but the Court again refused to grant this request. Accordingly, the Defense Lawyer withdrew from the case and the Respondent State did not appoint a lawyer to defend him.

179. The Commission recalls its decision in *Malawi African Association and Others v. Mauritania*⁸⁸ and in *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chinua), Amnesty International (on behalf of Orton and Vera Chinua) v Malawi*⁸⁹ where it held that where the accused either

⁸⁵ N2(a) Principles and Guidelines on Right o Fair Trial

⁸⁶ Articles 20 (c) and 31 of the Robben Island Guidelines and Principle A2 (e) (f) of the Principles and Guidelines on the Right to a Fair Trial.

⁸⁷ Ibid Principle M (2) (e)

⁸⁸ Communications No 54/91,61/91,98/93,164-196/97, 210/98 - *Malawi African Association and Others v. Mauritania*

⁸⁹ Communication 64/92-68/92-78/92 *Krishna Achuthan (on behalf of Aleke Banda),Amnesty International (on behalf of Orton and Vera Chinua), Amnesty International (on behalf of Orton and Vera Chinua) v Malawi*

had no access or only restricted or delayed access to a lawyer, the Respondent State violated article 7(1) (c) of the African Charter. The Commission therefore finds that the denial of access to counsel before the commencement of the trial; the restrictive access granted for the lawyers to consult with the prisoners and prepare their defense; the summoning of the prisoners to appear in the absence of their Defense Lawyers; the acceptance of two(2) witnesses out of the fifteen defence witnesses presented and the continuation of the trial without the presence of their lawyers; goes against fair trial guarantees and impeded the ability of prisoners 1 to 7 to adequately assure their defense. The Commission thus finds a violation of Article 7(1) (c) of the African Charter.

180. The Commission will proceed to address the Complainant's submission that prisoners 1 to 7 were tortured for purposes of forcing them to make confession which were used against the prisoners during their trials.

181. The Commission in interpreting Article 7 of the African Charter has stated in its Principles and Guidelines on Fair Trial that 'any confession or other evidence obtained by any form or coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing'⁹⁰. Similarly, IHL rules in Article 6 (f) of Additional Protocol to the Geneva Conventions states that 'no one shall be compelled to testify against himself or to confess guilt'. Other international human rights norms have also addressed the issue of torture as a means to obtain confession. The United Nations Committee against Torture has stated that "states shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against person accused of torture as evidence that the statement was made"⁹¹.

182. The European Court of Human Rights in *Harutyunyan v. Armenia* held that 'the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings, whether in the form of a confession or real evidence obtained as result of torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value,⁹². All the above principles also apply in the *Sudanese Evidence Act 1994* which states that "in criminal matters, a confession shall not be proper when it comes as a result of inducement or coercion".⁹³

183. In light of the foregoing, the Commission finds that the confessions obtained from prisoners 1 to 7 through torture and admitted as evidence against

⁹⁰ Principle N(6)(d)(1) Principles and Guidelines on Right to Fair Trial

⁹¹ Article 15 Convention Against Torture

⁹² *Harutyunyan v. Armenia*, para 63

⁹³ *Sudanese Evidence Act 1994*, chapter IV rule 20 (2)

them during their trial; and the reliance on such evidence by the Judge as forming part of the basis for their convictions, contravenes the standards in the Geneva Conventions and Additional Protocol II and the principles of fair trial. As such, these amount to a violation of Article 7 of the African Charter.

184. The Commission will also proceed to assess the Complainant's argument relating to undue delay in bringing prisoners 1 to 7 before a judicial authority, following their arrest and detention. The Complainant submits that Prisoners 1 to 6 were arrested on 11 January 2011 and charged by the Prosecuting Attorney of Crimes against the State four (4) months after their arrest on 14 May 2011⁹⁴. According to the Complainant, their first Court appearance took place on 18 October 2011, nine (9) months after their date of arrest. Regarding Prisoner 7, the Complainant submits that he was arrested on 11 July 2011 and had his first court appearance on 23 August 2011, one (1) month and half after his arrest.

185. The Commission has established in its Principles and Guidelines on Fair Trial and the Robben Island Guidelines that *"anyone who is arrested shall be informed, at the time of arrest, of the reasons for his/her arrest and shall be promptly informed, in a language he/she understands, of any charges against him/her; and ensure that all persons deprived of their liberty are brought promptly before a judicial authority"*⁹⁵. Furthermore, the Luanda Guidelines provides that *"all persons in police custody and pre-trial detention shall have the right, either personally or through their representative, to take proceedings before a judicial authority, without delay, in order to have the legality of their detention reviewed"*⁹⁶.

186. The IHL rules in Article 103 of Common Article 3 of the Geneva Convention provides that *judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit so that his trial shall take place as soon as possible. It further provides that a prisoner of war awaiting trial shall not be confined for a period exceeding three (3) months*. Article 6 of Additional Protocol II to the Geneva Convention also provides that *an accused person is to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence*. Consequently, the Commission notes that the length of detention without charge of prisoners 1 to 7 exceeded the prescribed duration under the Sudanese Criminal Procedure Code, which provides for a maximum of two (2) weeks of detention without charge⁹⁷.

⁹⁴ Case No. 447/meem/2011

⁹⁵ See M2 (a)(b) and 3 (A) of the Principles and Guidelines on Fair Trial & Article 25, 26 & 27 of the Robben Island Guidelines

⁹⁶ Principle 35 of Guidelines on Arrest, Policy Custody and Pre Trial Detention (Luanda Guidelines)

⁹⁷ Section 79(3) of the Sudanese Criminal Procedure Act 1991

187. Therefore, it is the Commission's view that the delay in detaining Prisoners 1 to 6 for four (4) months and prisoner 7 for one (1) month and half after their arrest; and the delay of nine (9) months and a month and few weeks respectively, in bringing them to Court, contravenes not only the provisions of the Sudanese Criminal Code, but also fair trial guarantees laid down in IHL rules and other international norms and standards. The Commissions accordingly finds that the Respondent State violated article 7(1) (d) read together with article 6 of the African Charter.
188. The Commission will briefly address the issue of the irregularities in the appeals process for prisoners 1 to 7 at the Terrorism Appeal process, Court of Appeal and Supreme Court respectively. The Commission notes the argument of the Complainants that the Terrorisms Appeals Court held no public hearing on the appeal for prisoners 1 to 6 nor hear oral arguments from their Defense Lawyers, prior to issuing its decision affirming the reasoning of the lower court; and that Prisoner 7 had no legal representation or knowledge about the status of his case, as it sailed through the Court of Appeal, the Supreme Court and to the President for assent.
189. The Principles and Guidelines on Fair Trial guarantee that the right to appeal shall provide a genuine and timely review of the case, including the facts and the law⁹⁸. Moreover, Article 14(5) of the ICCPR also guarantees the right for everyone convicted of a crime to have his or her conviction and sentence reviewed. The UN Human Rights Committee further provides that to comply with the overall right to a fair trial in article 14(1) of the ICCPR, an appeal must be conducted in a fair manner and with due process. This means for example, that an appellant must be provided with adequate facilities for the preparation of the appeal; the appeal must be undertaken in a timely manner; and the appellant must enjoy the right to self-representation or representation by counsel at the appeal hearing⁹⁹.
190. The Human Rights Committee went on to emphasize that in the case of trials that may lead to the imposition of the death penalty, scrupulous respect for the guarantees of fair trial is particularly important including in the context of the right to appeal and the exercise of that right¹⁰⁰. Moreover, the UN Basic Human Rights Fair Trial Guide also details the right to fair trial in the context of countering terrorism and states that the right to appeal is equally applicable to persons convicted by a court of having carried out terrorist acts and any review

⁹⁸ Principles and Guidelines on the Right to Fair Trial in Africa, Principle N(10)(a)

⁹⁹ Human Rights Committee, General Comment 32 (Article 14: Right to equality before the courts and tribunals and to fair trial), paras. 45-51. See further Legal Digest of International Fair Trial Rights, pp. 221-226

¹⁰⁰ Ibid para 59.

of conviction or sentence must be genuine, meaning that the appeal tribunal must be able to conduct a thorough analysis or examination of all the issues debated and analyzed in lower courts¹⁰¹.

191. In the present case therefore, the fact that the Terrorism Appeal Court did not hold a public hearing nor hear oral arguments from the Defense Lawyers for prisoners 1 to 6 prior to issuing its decision on the appeal, and due to the fact that Prisoner 7 had no legal representation or no knowledge about the status of his case as it sailed through the Court of Appeal, the Supreme Court and to the President for assent, the Commission is of the view that the Terrorism Appeals Court, the Court of Appeal and the Supreme Court did not follow due process in the appeals process for prisoners 1 to 7, nor did it conform to the fair trial procedures stipulated above. The Commission finds that the Respondent State violated Article 7(1) (a) of the African Charter.

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

Violation of Article 1

193. Article 1 of the African Charter provides that:

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

194. The Complainant submits that the Respondent State having violated the rights of prisoners 1 to 7 under articles 4, 5 and 7, have violated article 1 of the African Charter. The Commission concurs with the Complainant, having held in numerous Communications that the violation of any of the provisions of the African Charter automatically means a violation Article 1. The African Court also reached the same conclusion in the *Thomas v. Tanzania* where it held that the obligation under section 1 of the African Charter is not complied with or is violated when any of the rights, duties or freedoms set out in the African Charter have been restricted, violated or not applied.

¹⁰¹ United Nations Counter Terrorism Implementation Task Force: Basic Human Rights Reference Guide: Right to Fair Trial and Due Process in the Context of Countering Terrorism paragraph 89. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (A/63/223), para. 15. See, for example: Human Rights Committee, *Fernández v. Spain*, Communication No. 1007/2001, UN Doc CCPR/C/78/D/1007/2001 (2003), para. 7; and Inter-American Court of Human Rights, *Herrera Ulloa*, Series C No. 107 (2004), paras. 157–168.



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

Decision of the Commission

196. In view of the above reasoning, the African Commission on Human and Peoples' Rights:

- (i) Finds the Respondent State is in violation of Articles 1, 4, 5 and 7 (1) (a), (c) and (d) of the African Charter;
- (ii) Recommends reforms of the Respondent State's Anti-Terrorism Act (2001), policies and practices of the States security agents incompatible with the African Charter and other regional and international human rights and IHL legal instruments, to bring it in line with the African Charter and such other international standards;
- (iii) Urges the Respondent State to compensate and rehabilitate prisoners 1 to 7 for prejudices suffered in relation to the violations found;
- (iv) Urges the Respondent State to conduct prompt and impartial investigations into the allegations of torture and ill treatment of prisoners 1 to 7 and to bring the perpetrators to justice;
- (v) Requests the authorities responsible for these violations to apologize to prisoners 1 to 7, as an acknowledgement of violation of their rights, and ensure non-repetition of their actions.
- (vi) Train security officers on relevant standards concerning adherence to custodial safeguards and the prohibition of torture;
- (vii) Adopt and implement procedural safeguards for the prevention of torture and other forms of ill-treatment as required under the Robben Island Guidelines; and
- (viii) 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 at the 71st Ordinary Session, held virtually, from 21 April to 13 May 2022

