

## Communication 368/09 – Abdel Hadi, Ali Radi & Others v Republic of Sudan

### Summary of the Complaint

1. The Communication dated 19 January 2009, was submitted by Ali Agab of Khartoum Centre for Human Rights and Environmental Development (KCHRED) of Sudan and the Redress Trust of London, the United Kingdom (the Complainants), on behalf of Abdel Hadi Ali Radi, Omar Haroun, Abdelmagid Ali Adam Haroun, Ali Daoud Adam Yahia, Mariam Abakar Ali Omar and 83 other individuals (the Victims). The Complaint is brought against the Republic of Sudan (Respondent State).
2. The Victims are Sudanese nationals who fled from Southern Sudan, Darfur, due to the war in that region and became Internally Displaced Persons (IDPs). At the time of the incidents complained of, which took place in May 2005, they lived in the Soba Aradi camp in the South East of Khartoum, which had a population of around 10,000 persons.
3. The Complainants allege that on 18 May 2005, a team of police officers and soldiers entered the camp, sealed off parts of it and tried to forcibly relocate several thousand resident families. The residents resisted and violence broke out when the police tried to force them. In the resulting chaos and violence, 15 police officers and at least 5 IDPs were killed, and the police station in Soba Aradi camp was set on fire.
4. It is further alleged that on 24 May 2005, a police force of over 6,000 officers returned to the camp and made a large number of arrests, with additional arrests being made in the weeks that followed. It is not known how many people were arrested and detained during that period.
5. The Complainants allege that on 24 May 2005, Abdel Hadi Ali Radi, Abdelmagid Ali Adam Haroun, Ali Daoud Adam Yahia and Mariam Abakar Ali Omar were arrested and on 2 June 2005 Abdelrahman Mattar Omar Haroun was arrested. None of the victims were informed of the reason for their arrest and they were held for more than 12 months without any charge, and were denied access to a lawyer, family members, and to medical care. The Victims were unable to challenge the lawfulness

of their detention, until the first Court hearing which took place on 26 February 2006.

6. The Complainants allege that they went through various forms of physical torture during their detention. They further allege that they were subjected to various forms of violations 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, kneeling with their feet facing backwards in order to be beaten on their feet and asked to jump up immediately after; food deprivation for days and denial of medical care.
7. They claim that Mariam Abakar Ali Omar was beaten all over the body despite being pregnant at the time (she gave birth in October 2005 in Omdurman Prison); Ali Daoud Adam Yahia suffered swelling in various parts of his body as a result of the beatings, Abdel Hadi Ali Radi still suffers from pain in the eyes, back and throat and has difficulties sitting down. They further allege that the beatings were so severe that one of the detainees, the late Abdallah Dawelbeit, died as a result of being beaten with a hose filled with metal and another is suffering from psychological trauma. The main objective of the police officers was to extract confessions from the detainees and those who confessed were returned to their cells.
8. It is alleged that it was only on 26 February 2006 that a Court gave the lawyers permission to meet the victims and on 9 March 2006, the Al-Azhari General Criminal Court ordered the immediate release of three of the victims on the grounds that their names had not been entered in the case files. The Court held a further three sessions in June and July 2006, in the course of which it ordered the release of the other victims on the grounds of lack of evidence. Abdelrahman Mattar Omar Haroun was released on 20 July 2006, Abdel Hadi Ali Radi on 27 June 2006, and Abdelmagid Ali Adam Haroun, Ali Daoud Adam Yahia as well as Mariam Abakar Ali Omar on 3 July 2006.
9. The Complainants thereafter, on 18 September 2006, submitted a Complaint alleging having been subjected to torture, against the officers responsible for perpetrating the acts of torture complained of, in a general

meeting convened at the request of the General Police Manager and attended by some top police officials.

10. In the Complaint, the Complainants requested the police to, among other things, commence investigation on the alleged acts of torture, killing or ill treatment of the Victims, abuse of power and to take necessary measures to ensure non-repetition.
11. It is further alleged that on 18 October 2006, the representatives of the applicants submitted a written petition to the General Police Manager in which they asked to be informed on what action, if any, had been taken and requested for the case to be expedited. As there was no response, the applicants petitioned the Secretariat of General Police Manager on 21 October 2007 to commence full investigation. As of October 2008, the applicants had not received any information to the effect that an investigation had been commenced by the police.

#### **Articles alleged to have been violated**

12. The Complainants allege the violation of Articles 1, 5, 6, and 7 of the African Charter.

#### **Prayers of the Complainant**

13. The Complainants request the following remedies to be granted by the African Commission:
  - a) Recognition of a violation of Articles 1, 5, 6 and 7 of the Charter;
  - b) The payment of adequate compensation for the rights violated covering material damages; including costs for medical treatment, psychological and social services, legal or other expert assistance, loss of earnings and loss of earning potential, lost opportunities, including employment and education; special damages, including moral damages.

- c) Commencement of an effective and impartial investigation into the circumstances of arrest and detention and the subsequent treatment of detainees.
- d) Public acknowledgment and apology to the applicants for the violations suffered.
- e) Amendment of legislation incompatible with the Charter so that Sudanese laws: (i) provide protection, such as granting a right to prompt access to a lawyer and a doctor and a right to *habeas corpus*; (ii) repress violations, such as making torture a criminal offence by using the internationally recognised definition of torture and by making it subject to adequate punishment; and (iii) effectively counter impunity and provide effective remedies, which entails the repeal of immunity provisions and the provision of an explicit right to remedy and reparation for victims of serious human rights violations, including torture and arbitrary arrest and detention.
- f) Training of police officers on relevant standards concerning adherence to custodial safeguards and the prohibition of torture.

## **Procedure**

- 14. This Communication was received at the Secretariat of the Commission, on 19 January 2009. The Secretariat acknowledged receipt on 21 January 2009.
- 15. During its 6<sup>th</sup> Extra-Ordinary Session the Commission was seized of the Communication. The parties were informed of the fact of seizure on 7 April 2009 and were requested to submit their arguments on Admissibility.
- 16. During its 45<sup>th</sup> Ordinary Session, the Commission decided to defer the Communication to its 46<sup>th</sup> Ordinary Session pending receipt of the parties' Submissions on Admissibility.

17. On 30 June 2009, the Secretariat received the Complainants' submission on Admissibility. It acknowledged receipt on 13 July and forwarded the submissions to the Respondent State for its comments on the same day.
18. On 21 November 2009, the Submissions of the Respondent State on Admissibility were received at the Secretariat which acknowledged receipt on 30 November 2009 and forwarded same to the Complainants on the same day.
19. The Communication was subsequently deferred during the 47<sup>th</sup>, 48<sup>th</sup>, 49<sup>th</sup> 50<sup>th</sup> and 51<sup>st</sup> Ordinary Sessions to allow the Secretariat time to draft a decision on Admissibility.
20. The Communication was declared admissible during the 12 Extraordinary Session of the Commission held in Algiers, Algeria from 30 July to 4 August 2012 and the parties were accordingly informed. The Complainants were also requested to submit their observations on the merits by letter dated 30 August 2013.
21. On 5 November 2012, the Complainants submissions were received at the Secretariat and transmitted to the Respondent State on 6 November 2012 and the latter was requested to submit its observations on the Merits.
22. The Communication was deferred during the 53<sup>rd</sup> Ordinary Session due to the failure of the Respondent State to submit its observations on the Merits and correspondence was sent to the latter on 15 May 2013 informing it that the Commission would proceed to examine the Communication on the basis of the information before it if the observations were not received.

### **The Law on Admissibility**

### **The Complainants' Submissions on Admissibility**

23. The Complainants submit that with the exception of the requirement under Article 56 (5) of the African Charter which they request the Commission to dispense with, all other conditions necessary for a Communication to be declared admissible under the African Charter have been complied with.

24. According to the Complainants, the representatives of the Victims filed a criminal complaint against several individually named police officers with the Directorate of the Police on 18 September 2006 concerning the torture in the case of the Soba Aradi camp in the period of 24 May 2005 to June/July 2006. In spite of repeated written requests and telephone inquiries, no investigation had been commenced as of October 2008, more than two years after the complaint had been lodged and more than three years after the violations had taken place.
25. They submit that the Criminal Procedure Code, or any other legislation for that matter, does not stipulate a duty to commence an investigation following a complaint of torture and any criminal suit against police officers is subject to the lifting of immunity that police officers in Sudan generally enjoy. There is neither an explicit right nor an established procedure or precedent of using mandamus or other remedies to compel the police to commence an investigation.
26. In that regard, the Complainants cite the Commission's decision in *Dawda Jawara v. The Gambia*, wherein the Commission held that a remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."<sup>1</sup>
27. The Complainants further submit that the Criminal Procedure Code provides for the right to bring a private prosecution.<sup>2</sup> However, such prosecution can only proceed with the approval of the head of the police forces who will need to lift the immunity of the individual officer(s) concerned. It is also subject to the approval of the Attorney General.<sup>3</sup> They conclude that there is no prospect of any immunity being lifted where the police have not even commenced the initial investigation as in the present case.
28. The Complainants state that individual officers are immune from civil suits unless their immunity is lifted, which has not been the case more

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1 Communication Nos. 147/95 and 149/96 - *Dawda Jawara v. The Gambia*, para.32.

2 See Part III, Chapter I of the Criminal Procedure Code.

3 Section 35 of the Criminal Procedure Code.

than two years after the complaints were filed.<sup>4</sup> Where the permission to sue a member of the police forces is refused or not granted, the person alleging a violation cannot take separate legal action against the state because the liability is vicarious on the grounds of employers' liability<sup>5</sup> and therefore not independent of the liability of the responsible perpetrator(s).

29. They argue that in any case, the prospect of bringing a civil claim is not an effective remedy where the applicants are seeking an investigation into serious violations such as torture.<sup>6</sup> A civil claim does not deal with establishing facts by means of an effective and impartial investigation and cannot result in a determination of whether there is sufficient evidence against the individual officer concerned to prosecute and to punish where so warranted.
30. In addition, the Complainants argue that the collective nature of arrests, detention and subsequent ill-treatment and torture, which concerned a total of 684 persons, 88 of whom are represented in the present application, absolve the authors from exhausting local remedies on the grounds that the nature of violations make it impossible to effectively pursue any remedies that may exist.
31. The Complainants further argue that the Respondent State has not taken any steps even though it had ample notice that gave it the opportunity to remedy the violations. The Commission has repeatedly held in its jurisprudence that the exhaustion requirement does not apply in such situation.<sup>7</sup> In other words, the state effectively forfeits its prerogative to deal with a case domestically where its conduct clearly demonstrates that it is not willing to seriously respond to the violation(s). This applies equally to the present case as the State authorities have been aware of the violations complained of since the judgment of the Al-Azahri General Criminal Court on 9 March 2006 and in the course of June and July 2006 and of well-founded allegations of torture and ill-treatment at least since

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

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

6 See European Court of Human Rights, *Assenov and Others v. Bulgaria*, (1999) 28 E.H.R.R. 652 para.86.

7 *Ibid.*, paras.77, 78 with further references.

the date of the complaint brought by the applicants in September 2006. In spite of this notification, the authorities have not taken any action whatsoever to remedy the situation.

32. For the above reasons, the Complainants conclude that there are no effective remedies of which the applicants could avail themselves to compel a full investigation without the approval of the police and/or to seek other forms of reparation and urge the Commission to dispense with the requirement to exhaust local remedies in the circumstances.

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

33. The Respondent State submits that the Complainants have failed to exhaust local remedies. According to the Respondent State the Directorate of Police to whom the Complainants submitted their complaint is neither a court nor a prosecution office and above all, is not the highest court in Sudan, which would satisfy the requirement of article 56 (5) of the African Charter.
34. The Respondent State submits that in the Sudanese legal system, no criminal suit is initiated by virtue of a complaint to the Directorate of the Police. In that regard, the Respondent State cites Article 32 of the Sudanese Criminal Procedure Act of 1991, which provides that a criminal suit shall either be initiated upon taking cognizance by the General Criminal Police or the Prosecution Attorney based on the local jurisdiction.
35. The Respondent State argues that the lawyers of the Victims know the procedure for initiating criminal cases against the police but failed to pursue the right procedure by approaching the Prosecution Attorney who is the competent authority in such cases.
36. On the issue of immunity enjoyed by members of the police force, the Respondent State submits that this is just a mere procedural immunity granted to them for the purpose of accomplishing their work. If after a preliminary investigation, a *prima facie* evidence exists implicating a policeman in the commission of any crime, the prosecutor general requests the Ministry of Interior to lift the immunity. The Respondent



State further submits that all decisions during this procedure are subject to appeal and that in all cases where there are crimes committed by members of the police, their immunities are lifted and the perpetrators are tried in ordinary courts

37. The Respondent State finally submits that the Victims could have approached the Constitutional Court if they felt they had been denied the right to litigation. The Respondent State cites Article 35 of the 2005 Interim National Constitution of the Sudan which provides that the right to litigation shall be guaranteed for all persons and that no person shall be denied the right to litigation.
38. For the above reasons, the Respondent State implores the Commission to declare the Communication inadmissible for non-exhaustion of local remedies.

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

39. The provisions of Article 56 of the African Charter govern the Admissibility of Communications submitted before the Commission. Article 56 sets out seven conditions which must be complied with cumulatively for any Communication to be Admissible.
40. From the submissions of the parties above, it is evident that the Admissibility of the Communication is only contested on the grounds of exhaustion of local remedies under Article 56 (5) of the Charter. The Commission is satisfied that sub-sections 1, 2, 3, 4, 6 and 7 of Article 56 of the African Charter have been complied with and will further examine the issues raised under Article 56 (5) to determine whether local remedies have been exhausted.
41. The Complainants submit that they have not exhausted local remedies but urge the Commission to declare the Communication admissible for a number of reasons. They contend that the Respondent State has failed to investigate their allegations of torture after a very long time and in spite of being put on notice; the Criminal Procedure Code of Sudan does not oblige officials to commence an investigation following a complaint of torture and any criminal suit against police officers is subject to the lifting of the immunity which police officers in Sudan generally enjoy. The

Complainants also argue that there is neither an explicit right nor any established procedure for compelling police officers to commence an investigation.

42. The Complainants further argue that the Sudanese Criminal Procedure Code provides for the right to bring a private prosecution which can only proceed with the approval of the head of the Police and after the lifting of the immunity of the individual police officers concerned. The Complainants also maintain that individual police officers are immune from civil suits unless their immunity has been lifted. They conclude that because no investigation against the alleged perpetrators has been initiated by the Respondent State, there is no possibility of initiating a private prosecution or a civil suit against them, hence local remedies are ineffective and cannot be pursued without impediment. It is also the Complainants' argument that the Respondent State had ample notice of the events complained of and that the collective nature of arrests and the violations that followed make it impossible to effectively pursue any remedies that might exist.
43. The Respondent State on the other hand argues that the Complainants failed to exhaust local remedies. According to the Respondent State, by submitting their complaint to the Directorate of Police, the Complainants failed to pursue the right procedure and did not approach any court. On the issue of immunity granted to police officers, the Respondent State submits that this is a mere procedural immunity granted to them for the purpose of accomplishing their duties, which immunity could be lifted after a preliminary investigation. It is also argued that the Complainants had the option of approaching the Constitutional Court by virtue of Article 35 of the 2005 Interim Constitution which provides for the right to litigation.
44. The Commission has in its jurisprudence consistently reiterated the necessity and rationale of the exhaustion of local remedies rule as a means of enabling a State against which a Complaint is brought, to be given the opportunity to deal with the claim using its own judicial and administrative procedures, before being called before an international

body.<sup>8</sup> It also serves as a means of giving the State notice of events occurring within its territory.

45. The Commission notes that allegations of torture against public officials impose an immediate duty on the State to initiate a prompt, impartial and effective investigation in order to establish the veracity of these allegations and bring the perpetrators to justice if the allegations are founded.<sup>9</sup> The Commission also notes that allegations of torture were brought against officers of the Sudan police force since 18 September 2006 and no investigation had been initiated when this Communication was submitted to the Commission in January 2009. The Respondent State's argument that the Complainants failed to follow the proper procedure in initiating their case is unfounded. What is important is whether the Respondent State was aware of these allegations and whether it took steps to investigate the allegation.
46. It is evident from the submissions of both parties that the State had ample notice of the allegations that its agents had committed serious abuses, including torturing the Victims. This notwithstanding, the Respondent State took no measures to investigate these allegations. The State's failure to act on the Complainants' allegations which were duly brought to its attention is a clear indication that it was not willing to respond to the allegations, their seriousness notwithstanding. According to the Commission's jurisprudence in *Article 19 v Eritrea*, the Respondent State by failing to take measures to investigate these allegations in spite of being

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<sup>8</sup> See *World Organization Against Torture v Zaire* (1996) ACHPR. 19<sup>th</sup> Activity Report para 36; Communication 25/89, 47/90, 56/91, 100/93 – *Free Legal Assistance Group and Others v Zaire* (1995) para 36; Communication 71/92 – *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia* (1997) para 10.

<sup>9</sup> See Articles 17 – 19 of the Resolution and Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, adopted by the African Commission at its 32<sup>nd</sup> Ordinary Session as an authoritative interpretation of Article 5 of the African Charter on the prohibition of torture. See also Articles 12 & 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which Sudan has signed), also oblige State Parties to conduct prompt and impartial investigations whenever there is reasonable ground to believe that an act of torture has been committed; See also *Article 19 v Eritrea* wherein the Commission found that “whenever there is a crime that can be investigated and prosecuted by the state on its own initiative, the state has the obligation to move the criminal process forward to its ultimate conclusion. In such cases one cannot demand that the Complainants, or the victims or their family members assume the task of exhausting domestic remedies when it is up to the state to investigate the facts and bring the accused persons to court in accordance with both domestic and international fair trial standards’ (Communication 275/03 – *Article 19 v Eritrea*, para 72)

notified has forfeited its prerogative to deal with the matter domestically.<sup>10</sup>

47. The Respondent State also admits that police officers in Sudan generally enjoy immunity which can only be lifted after a preliminary investigation. It does not also dispute the fact that there is no established procedure or right to compel the Prosecution Attorney to commence an investigation where there is an allegation of wrongdoing by the police, nor that as established above; an attempt at investigating the allegations was made. The Commission considers the granting of such blanket immunities to police officers as an impediment to the exhaustion of local remedies since it is not disputed that there is no legal obligation on the part of the police hierarchy to lift the immunities of these officers on demand. Because of the immunity granted to police officers, neither a private prosecution nor a civil suit could be brought against them unless such immunities were lifted, which immunities could only be lifted after a preliminary investigation.
48. By failing to initiate an investigation into the complaints, the Respondent State thereby made any local remedies that theoretically existed, ineffective. The Commission has established in its jurisprudence that a Complainant is not required to exhaust local remedies which as a matter of fact, are ineffective.<sup>11</sup> This case is no exception since the inaction of the Respondent State in failing to investigate serious allegations about torture, precluded the Complainants from availing themselves of the available local remedies, thereby rendering them ineffective. It follows that the Respondent State has forfeited its prerogative to deal with the matter domestically and the Commission consequently considers that the requirement to exhaust local remedies must be dispensed with.
49. The Commission therefore holds that in the present Communication the local remedies in Sudan were not adequate and effective, and hence the Complainants have constructively exhausted local remedies pursuant to Article 56(5) of the African Charter.

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<sup>10</sup> See Communication 275/2003, ACHPR (2007) 22<sup>nd</sup> Activity Report paras 77 & 78.

<sup>11</sup> See Communication 87/98 - Constitutional Rights Project (in respect of Zamani Lekwot and 6 others v. Nigeria, ACHPR (2000), 8<sup>th</sup> Activity Report ; see also Communication 149/96 - Sir Dawda Jawara v. The Gambia, ACHPR (2000) 13<sup>th</sup> Activity Report paras 31-32.

## Decision of the Commission on Admissibility

50. In view of the above, the Commission declares this Communication Admissible in accordance with Article 56 of the African Charter;

## Merits

### Complainant's Submissions on the Merits

51. The complainants allege that the victims were arbitrarily arrested and detained by the Respondent State and prevented from communicating with their lawyers and family members and from having the opportunity to challenge the legality of the detention. They were also allegedly subjected to torture and ill-treatment at the hands of state agents. The authorities of the Respondent State also allegedly failed to investigate these violations and/or to provide other forms of reparation even though a complaint to this effect was lodged in September 2006. The complainants submit that this conduct violated articles 1, 5, 6, and 7 of the African Charter.

### Alleged Violation of Article 5

52. The Complainants submit that the sustained beatings, whippings, *falaga*, food deprivation, death threats and the other forms of ill-treatment to which the Victims were subjected constituted torture and cruel, inhuman or degrading treatment or punishment in violation of article 5 of the African Charter. The Complainants refer to the Commission's decisions in *Zimbabwe Human Rights NGO Forum v Zimbabwe* and *Egyptian Initiative for Personal Rights v Egypt*<sup>12</sup>, wherein the Commission adopted the definition of torture under Article 1 of the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT). They aver that the officers at the Soba Aradi police station, in Kober prison and in other localities deliberately used a range of methods to inflict severe pain or suffering.

53. The methods of torture used and inflicted on the complainants resulted in physical injuries and psychological trauma as set out in several affidavits which the complainants submitted to the Sudanese authorities. The Complainants point out that where a person is injured while in detention

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<sup>12</sup>Communication 245/2002 (2006), *Zimbabwe Human Rights NGO Forum/Zimbabwe*, para.180 and Communication 334/06 (2011), *Egyptian Initiative for Personal Rights and Interrights v Egypt* para 162

or otherwise under the control of the police, any such injury will give rise to a strong presumption that the person was subjected to ill-treatment and is incumbent on the State to provide a plausible explanation of how the injuries were caused.<sup>13</sup>

54. The Complainants point out that the types of ill-treatment inflicted on the Victims was meant to punish them and extract confessions, and were based on discrimination on account of the Victim's status as IDPs and members of ethnic and religious groups, particularly, Darfurians. They cite the Commission's decision in **Sudan Human Rights Organization and Centre on Housing Rights and Evictions**<sup>14</sup> where the Commission defined torture and indicate that the acts perpetrated against the Victims constituted torture.
55. Regarding the incommunicado detention of the Victims, the Complainants submit that the denial of access to the outside world for up to 45 days after their transfer to the Kober Prison constituted prolonged incommunicado detention in violation of Article 5 of the Charter. This, according to the Complainants constitute cruel, inhuman and degrading treatment, taking into consideration the jurisprudence of the Commission and the principles established in the Robben Island Guidelines.
56. The Complainants submit further that the denial of access to medical treatment and to adequate toilet facilities violates Article 5 of the Charter and is contrary to various standards contained in international human rights instruments.

#### **Alleged violation of Article 6**

57. The Complainants submit that the operation of the police on 24 May 2005 was a mass arrest that targeted all residents of the Soba Aradi camp in an indiscriminate manner and was carried out irrespective of the availability of any evidence of individual wrongdoing. According to them, the arrest of such a large number of persons on the grounds that some or all of them might have been responsible for criminal acts finds no basis in Sudanese legislation according to which a person must have been "suspected, or accused of having committed an offence, in which an arrest warrant may be made."<sup>15</sup>

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<sup>13</sup> *Colibaba v. Moldova* (Appl. no. 29089/06), ECtHR, Judgment of 23 October 2007, para. 43, cited in Communication No. 334/06 (2011), *Egyptian Initiative for Personal Rights and Interights v. Egypt*, para.168.

<sup>14</sup> Communication 279/03-296/05 (2009), *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, para.156.

<sup>15</sup> Section 68 (b) Criminal Procedure Code of Sudan, 1991.

58. They point out that it is not apparent that the arrests were based on the existence of facts or information which would have satisfied an objective observer that the persons concerned may have committed the offence. There was no requisite sufficient *prima facie* evidence, as evidenced by the fact that most of the detainees were released on the grounds of a lack of evidence after they had been brought before a judge on 9 March 2006 and in the course of June and July 2006 respectively. The arrests were seemingly carried out as an act of revenge for the killing of the police officers' colleagues and the refusal to comply with the relocation orders, as indicated by the large number of arrested persons and the length of subsequent detention without charges. This conduct, according to the Complainants, constituted an abuse of process and was fundamentally unjust.
59. The Complainants also claim that the detention of the Victims was unlawful under Sudanese laws because the length of detention exceeded the limitation periods prescribed by the Sudanese Criminal Procedure Code, which provides for a maximum of two weeks of detention without any charges being brought.<sup>16</sup> This according to them, constituted arbitrary detention, in violation of Article 6 of the Charter.

#### **Alleged violation of Article 7**

60. According to the Complainants, the denial of *habeas corpus*, the lack of information about the grounds of arrest, the denial of access to a lawyer and the incommunicado detention of the victims violate the right to complain and to have one's case heard as guaranteed in article 7 of the Charter.
61. The Complainants point out that the victims were not brought before a judge until more than nine months after their arrest. They argue that there are no circumstances that would have prevented the authorities from bringing the applicants before a magistrate within a few days following the arrest. On the contrary, given the large number of arrested persons and the inherent risk that there were no sufficient grounds for the arrest and detention of at least some of the persons, it was all the more critical to

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<sup>16</sup> Section 79 Criminal Procedure Code of Sudan: "A person arrested for inquiry, by the Police, may remain in detention, for period not to exceeding twenty four hours for the purpose of inquiry; The Prosecution Attorney, where the matter requires the same, may renew detention of the arrested person, for a period not exceeding three days, for the purpose of inquiry; The Magistrate, under the report of the Prosecution Attorney, may order detention of the arrested person, for purposes of inquiry, every week, for a period not exceeding in total, two weeks, and he shall record the reasons on the Case Diary; The superior Magistrate, in case of the arrested person, who is charged, may order renewal of his detention, for purposes of inquiry, every week; provided that the period of detention shall not, in total, exceed six months, save upon the approval of the competent Head of the Judicial Organ."

bring all arrested individuals before a judge within the shortest possible time. The delay in so doing according to the Complainants was contrary to the requirements of the right to habeas corpus.<sup>17</sup>

62. Regarding the right to be informed about the reasons for the arrest, it is submitted that the victims were arrested and detained on 24 May 2005 and thereafter were not informed about the reasons for their arrests. The applicants were also not informed of any charges against them as no charges were brought in the course of their detention. This, in the Complainant's view constituted a violation of the right to be informed about the reasons for their arrest.
63. The Complainants also submit that the victims were not given access to a lawyer until the 26 February 2006, i.e. for more than nine months, which violated their right to be defended by counsel of their choice. Instead, they were held incommunicado, in contravention of article 7 of the Charter and the standards and jurisprudence laid down by the Commission.<sup>18</sup>

#### **Alleged violation of Article 1**

64. The Complainants submit that Sudanese legislation does not effectively repress and/or prevent human rights violations. The legislation in place fails to protect against arbitrary arrest and detention.<sup>19</sup> Equally, there are no adequate safeguards against torture and inhuman treatment.<sup>20</sup> The Criminal Procedure Code does not explicitly provide for a right to access a lawyer of one's choice at all stages of proceedings.<sup>21</sup> Neither does it stipulate an explicit right to consult a doctor.<sup>22</sup> In addition, the law does not grant the right to habeas corpus. They submit further that Sudanese legislation does not provide sanctions and effective remedies in cases of breach.

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<sup>17</sup> Communication No.153/96 (1999), *Constitutional Rights Project v. Nigeria*, para.18; Communications Nos. 64/92, 68/92, and 78/92 (1995), *Achuthan and Another (on behalf of Banda and Others) v Malawi*, para.9; Communication No. 206/97 (1999), *Centre for Free Speech v Nigeria*, para.18; Communication No. 225/98 (2000), *Huri-Laws v Nigeria*, para.46

<sup>18</sup> Communication 275/2003, *Article 19 v. Eritrea*, paragraphs 99, 100.

<sup>19</sup> See *Report of the Special Rapporteur on the human rights situation in the Sudan, Sima Samar*, UN Doc. A/HRC/9/13, 2 September 2008, paras.27 et seq.

<sup>20</sup> Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.16.

<sup>21</sup> Section 83 (3) of the Criminal Procedure Code, 1991: "An arrested person shall have the right to contact his advocate, and the right to meet the Prosecution Attorney, or the Magistrate [...]."

<sup>22</sup> *Ibid.* section 83 (1): "An arrested person shall be treated in such way, as may preserve the dignity of the human being; he shall not be hurt physically, or mentally, and appropriate medical care shall be provided thereto."



65. According to them, the Respondent State has therefore failed in its positive obligation to recognise the rights, freedoms and duties guaranteed in the Charter and to adopt legislative and other measures to give effect to them.

### **The Commission's decision on the Merits**

66. The Commission is called upon to determine whether the actions of the Respondent State as described above constitute a violation of Articles 1, 5, 6, and 7 of the African Charter as alleged by the Complainant. The Commission observes that the Respondent State has not made submissions on the Merits despite having been requested to do so on a number of occasions. The Commission will therefore examine the Communication on the basis of the information at its disposal and must give due weight to the Complainant's allegations insofar as these have been adequately substantiated.

### **Alleged violation of Article 5**

67. Article 5 of the Charter provides as follows:

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

68. The Commission notes from the onset that the present Communication does not raise any issues related to slavery and slave trade and will therefore confine its analysis of Article 5 to torture, cruel, inhuman or degrading treatment or punishment.

69. Torture is considered as one of the most egregious and morally reprehensible human rights abuses and its prohibition is one of the most fundamental values of democratic societies. The prohibition is absolute and non-derogable and applies even in the most difficult of circumstances including public emergencies.

70. In interpreting Article 5 of the Charter in respect of torture, the Commission has adopted the definition of torture contained in Article 1 of

the Convention against Torture.<sup>23</sup>In **Sudan Human Rights Organization and Center for Housing Rights and Evictions v Sudan**,<sup>24</sup> the Commission set out the elements that constitutes torture, 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.

71. The Complainants have submitted that 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, forcing them to kneel with their feet facing backwards in order to be beaten on their feet and asked to jump up immediately after, as well as other forms of ill-treatment. These facts have not been contested.
72. The medical certificates submitted by the Complainants point to the fact that the treatment of the victims while in detention resulted to serious physical injuries and psychological trauma. The course of events as described by the Complainants also shows that the treatment was inflicted by security forces acting in their official capacity with the aim of extracting confessions from the victims and as punishment for the killing of police men at the Soba Aradi IDP camp.
73. The Commission considers 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.
74. Regarding the incommunicado detention, death threats, denial of access to medical care and adequate toilet facilities, the Commission observes that holding a person in detention under conditions that are not in keeping with his dignity and pose a threat to his health amounts to cruel, inhuman and degrading treatment or punishment.
75. The Commission considers that the term 'cruel, inhuman or degrading treatment or punishment' is to be interpreted so as to extend to the widest

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<sup>23</sup> 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. See also

<sup>24</sup> Communication 279/03 – 296/05 – Sudan Human Rights Organization and Center for Housing Rights and Evictions v Sudan (2009) ACHPR para 255 & 156,

possible protection against abuse, whether physical or mental.<sup>25</sup>As outlined in the Commission's Robben Island Guidelines<sup>26</sup>, States Parties are under an obligation to put in place certain procedural safeguards in order to prevent detainees from being subjected to abuse.

76. Where abuse does occur, State Parties are also under an obligation to initiate a prompt, impartial and effective investigation in order to bring the perpetrators to justice as well as to afford redress to the victims.
77. From all indications, the Respondent State failed to uphold these standards and the Commission finds as a consequence that there was a violation of Article 5 of the Charter.

### **Alleged violation of Article 6**

78. Article 6 of the African Charter provides as follow:

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

79. The Commission observes that the right to liberty as enshrined in the Charter does not grant complete freedom from arrest or detention, given that deprivation of liberty is one of the legitimate forms of state control over persons within its jurisdiction. However, any arrest or detention must be carried out in accordance with the procedure established by domestic law otherwise; such arrest would be considered to be arbitrary.<sup>27</sup> The Commission observes also that any such domestic law or procedure must meet the requisite international standards in order for it to be considered valid.
80. The facts as outlined above reveal that the arrest of the victim had no basis in Sudanese legislation which requires that a person must have been suspected or accused of committing an offence before a warrant of arrest may be issued. The victims were indiscriminately arrested *en masse* without any measures taken to ascertain the likelihood that they had individually been involved in the commission of an offence. The Commission considers that arresting a large number of individuals as was

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<sup>25</sup> See Communication 224/98 – Media Rights Agenda v Nigeria (2000) ACHPR para 71.

<sup>26</sup> See Part II of the Robben Island Guidelines adopted by the Commission in October 2002 as an interpretation of State Parties' obligations under Article 5 of the Charter

<sup>27</sup> See Communication 241/01 – Purohit v The Gambia (2003) ACHPR, para 64 &65.

the case in the present communication, in disregard of domestic legislation and without taking any measures to ascertain the likelihood of individual wrongdoing amounts to arbitrary arrest in contravention of the Charter.

81. The Complainants have also submitted that the detention of the victims was unlawful under Sudanese legislation given that the length of detention exceeded the prescribed duration under the Sudanese Criminal Procedure Code, which provides for a maximum of two weeks of detention without charge. In the case of the victims, they were held in detention for over 12 months without charge.
82. The Commission has established in its **Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa** and in 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.<sup>28</sup>
83. Detaining the victims for a period of twelve months before bringing charges against them was therefore not only unlawful under Sudanese legislation, but also contravened the standards laid down by the Commission
84. It follows that the deprivation of the victim's liberty and their subsequent detention without charge for a period of twelve months was unlawful and arbitrary and the Commission considers as a consequence that there was a violation of Article 6 of the Charter.

#### **Alleged violation of Article 7**

85. The Complainants submit that the conduct of the respondent state violated the provisions of Article 7 (1) (c) and (d). This provision guarantees the right of every individual to have his cause heard, the right to defence, including the right to be defended by counsel of one's choice, and the right to be tried within a reasonable time.
86. Regarding the right to be heard, it is a clearly established norm that anyone who is deprived of his/her liberty through arrest or detention is entitled to initiate proceedings before a judicial body in order that the

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<sup>28</sup> See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and the Robben Island Guidelines Arts 25 and 26. See also Communication 224/88 – Media Rights Agenda v Nigeria (2001) ACHPR para 43.

judicial body may decide without delay on the lawfulness of the arrest or detention.

87. The Commission's **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** provide that "judicial bodies shall at all times hear and act upon petitions for habeas corpus...or similar procedures. No circumstances whatever must be invoked as a justification for denying the right to habeas corpus..." The Commission has also established in **Purohit v The Gambia** that "... in circumstances where persons are to be detained, such persons should at the very least be presented with the opportunity to challenge the matter of their detention before the competent jurisdictions that should have ruled on their detention"<sup>29</sup>
88. From the Complainant's submissions, the victims were denied habeas corpus, thereby preventing them from having the opportunity of inquiring into the lawfulness of their detention. They were only brought before a judge almost one year after their arrest. The Commission agrees with the Complainants that given the large number of arrested persons and the inherent risk that there were no sufficient grounds for the arrest and detention of at least some of the persons, it was all the more critical to bring all arrested individuals before a judge within the shortest possible time. The Commission considers that the failure to do so constitutes a violation of Article 7 (1) (d) of the Charter. The lack of information about the grounds of arrest also constituted a violation of Article 7 (1) read in conjunction with Article 6 of the Charter.
89. Regarding the right to defence, including the right to be defended by Counsel of one's choice, the Commission has established in the **Robben Island Guidelines** and in the **Principles and Guidelines on the Right to a Fair Trial in Africa** that any person who has been arrested or detained shall have prompt access to a lawyer.<sup>30</sup>
90. It has been submitted by the Complainants that the victims were not given access to a lawyer until the 26 February 2006; that is for more than nine months after they were arrested. The Commission considers that not having access to Counsel for such a long period of time while in detention impeded the ability of the victims to adequately assure their defence, and constitutes a violation of article 7 (1) (c) of the Charter.

### **Alleged violation of Article 1**

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<sup>29</sup> See Communication 241/01 – Purohit v The Gambia (2003) ACHPR para 72.

<sup>30</sup> See Articles 20 (c) and 30 of the Robben Island Guidelines.

91. Article 1 of the Charter stipulates that ...'parties to the Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall adopt legislative or other measures to give effect to them'. The Commission has held in previous Communications that a violation of any provision of the Charter by a State Party automatically engages its responsibility under Article 1.<sup>31</sup>
92. The Commission considers that if a State Party fails to respect, protect, promote or fulfill any of the rights guaranteed in the Charter, this constitutes a violation of Article 1 of African Charter. In the present Communication, the Commission has reached the conclusion that the Respondent State's agents failed to protect the victims from being subjected to torture and other forms of ill-treatment; and failed to respect their right to liberty as well as their right to a fair trial. The Respondent State also failed to investigate allegations of wrongdoing by its agents and took no measures to afford an adequate remedy to the victims. The failure to put in place an adequate legislative framework to protect the physical integrity of individuals within its jurisdiction also constitutes a failure on the part of the Respondent State to uphold its obligations under Article 1 of the Charter.

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

93. Based on the above, the African Commission on Human and Peoples':
- i. Finds that the Republic of The Sudan has violated Articles 1, 5, 6 and 7 (1) (c) (d) of the African Charter on Human and Peoples' Right;
  - ii. Requests the Republic of Sudan to:
    - a) Pay adequate compensation to the victims named in the present Communication in accordance with the domestic law for the rights violated;

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<sup>31</sup> See Communication 279/03-296/05 - Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan (2010) ACHPR, para 227.

- b) Initiate an effective and impartial investigation into the circumstances of arrest and detention and the subsequent treatment of the Complainants.
  - c) Where appropriate, amend the legislation incompatible with the Charter.
  - d) Train security officers on relevant standards concerning adherence to custodial safeguards and the prohibition of torture.
- iii. Inform the Commission, in accordance with Rule 112 (2) of the Commission's Rules of Procedure, within one hundred and eighty days (180) of the notification of the present decision of the measures taken to implement the present decision.

**Done in Banjul, The Gambia at the 54<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights held from 22 October to 5 November 2013.**