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Dear Dr Maboreke,

RE: Introduction of Communication: Magdy Moustafa El-Baghdady v Sudan

This complaint is submitted by Magdy Moustafa El-Baghdady (the Applicant), a British citizen represented by the REDRESS Trust (REDRESS), pursuant to Articles 55 and 56 of the African Charter on Human and Peoples' Rights (African Charter) and Rule 93(1) of the Rules of Procedure of the African Commission on Human and Peoples' Rights (Commission).¹ The complaint is filed against the State of Sudan (Respondent State), which ratified the African Charter on 18 February 1986.² The Applicant has not submitted this complaint to any other procedure of investigation or settlement.

The Applicant alleges that in 2011, the Respondent State arbitrarily arrested and detained him on allegations that he intended to incite a revolution in Sudan. He further alleges that the Respondent State prevented him from communicating with the British embassy in Khartoum, his lawyers and family members, and from having the opportunity to challenge the legality of the detention. The Applicant alleges that he was subjected to torture and ill-treatment at the hands of Respondent State agents. To date, authorities of the Respondent State have failed to investigate these alleged violations and/or provide other forms of reparation. The Applicant submits that the conduct violated Articles 1, 2, 5, 6, 7, 14 and 16 of the African Charter.

¹ See Organisation of African Unity, *African Charter on Human and Peoples' Rights* ("African Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art.55-6, available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf; African Commission on Human and Peoples' Rights, *Rules of Procedure*, para. 93(1), available at http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf, ("Rules of Procedure"), 26 May 2010.

² Ratification deposited on deposited on 11 March 1986; <http://www.achpr.org/instruments/achpr/ratification/>

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1. Facts³

1. The Applicant is a British citizen born on 19 November 1980 in the United Kingdom (UK). His father is of Egyptian descent and his mother is of Polish descent. The Applicant has worked in the field of information technology, and as a chef in a family owned restaurant in London, England (UK).
2. In August 2009, the Applicant moved with his blind father to Tanta, Egypt. The Applicant was his father's caregiver. While in Egypt he met a former school friend, Omar al-Mahdi, the nephew of the former Sudanese Prime Minister, Sadiq al-Mahdi. The Applicant also made contact, through mutual friends, with an entrepreneur named Ahmed who worked in the telecommunications industry.⁴
3. In January 2011, the Applicant decided to travel to Sudan with al-Mahdi. His intention was to start a small, mobile restaurant, while also gaining greater understanding of the Sudanese telecommunications market.
4. The Applicant and al-Mahdi flew from Egypt to Khartoum, Sudan, on 27 January 2011. They carried with them, at the request of an acquaintance named Ahmed, some telecommunications equipment (wires, network boards, and a server case), and cooking equipment for the planned restaurant. The Applicant and al-Mahdi declared all items at customs. The Applicant was told by custom officials that there was no requirement for him to pay customs duty on the products that he brought into Sudan.

Arrest by National Intelligence Security Service officials

5. At approximately 2pm on 14 February 2011, about twenty armed men (some in plain clothes, others in regular uniform and another in sand camouflage uniform) raided the flat that the Applicant was residing in. The officers said that they were from the "Amn Dawlah". The Applicant (who does not speak Arabic) understood (from his time in Egypt) this to mean national security and concluded that the men represented the National Intelligence Security Services (NISS). One NISS officer stated that the Applicant had arrived in Sudan to incite a revolution through telecommunication materials brought into the country. The officer further claimed that the Applicant had sent over seven million text messages calling for protests similar to those that were taking place in Tahrir Square, Egypt, at the time. The armed officers also accused the Applicant of being a British and/or Israeli spy, and questioned him about a company owned by Ahmed. NISS officers asked to see the Applicant's electronic equipment. The Applicant handed over the telecommunications equipment (network boards and wires) to the NISS officers. The officers checked the Applicant's phone records and emails, and confiscated all possessions, including family pictures, cooking spices, clothing, and the Applicant's British passport.
6. Thereafter, the NISS officers blindfolded and arrested the Applicant. The Applicant was not shown a warrant but recalls that the arresting officer carried what seemed to be incomplete documents with Arabic text. These documents were not referred to prior to, or during, his arrest. The Applicant has since identified the officer carrying the papers as Major Mohammed Saleh. The Applicant was placed in hand

³ Unless otherwise stated, for support see the Applicant's witness statement, attached at Appendix 1 ("**Witness Statement of Magdy el-Baghdady**").

⁴ The Applicant is not aware of Ahmed's second name.

and foot cuffs before being transported to a building. The Applicant was not informed of where he was being taken.

7. Upon arriving at the building, the Applicant saw his friend, al-Mahdi, and learned that al-Mahdi had been arrested at approximately the same time. Al-Mahdi informed the Applicant that they were both being held at NISS headquarters in Khartoum. The Applicant repeatedly requested that he be able to contact the British Embassy and consult with a lawyer. The Applicant's requests were refused.
8. The Applicant was taken to a separate room where he was surrounded by interrogators who insisted that he speak Arabic and where he was threatened with being taught Arabic by force. The Applicant's hair was violently held back by a man who positioned himself as if preparing to slam the Applicant's head on the table. Some of the Applicant's hair was ripped from his head.
9. The Applicant asserted that he spoke only English and Polish. Upon discovering the Applicant spoke Polish, interrogators took him into another room. Here, they questioned the Applicant to find out whether he had Jewish heritage, and referred to him as 'Jew'. The Applicant felt confused, intimidated and humiliated.
10. The Applicant continued to request access to the British Embassy, a lawyer, and to inform his family of his arrest. In response, the arresting NISS officer, Major Mohammed Saleh, repeatedly refused.
11. The following day, 15 February 2011, the Applicant and al-Mahdi were present in Major Mohammed Saleh's office to hear a conversation between Major Mohammed Saleh and four men; one wearing a sand coloured camouflage uniform and the other three dressed in blue coloured camouflage uniforms. Major Mohammed Saleh informed the four men (in Arabic) that the Applicant and al-Mahdi (who translated for the Applicant) were to be held in political remand in Kober prison as suspected spies, and at the direction of Mohammed Atta.
12. Of the men dressed in blue coloured camouflage uniform, one pointed a gun in the direction of the Applicant and al-Mahdi while the other two chained and blindfolded them. The Applicant and al-Mahdi were then transferred to Kober prison.
13. Upon arriving at Kober prison, the Applicant and al-Mahdi were taken to an outdoor, walled area, which the Applicant identifies as a "Transfer Room". In the Transfer Room area their blindfolds were removed and photographs taken. Immediately after, the man dressed in sand coloured camouflage began hitting the Applicant's and al-Mahdi's throats repeatedly. The Applicant describes this as repeated "open handed strikes" (rather than punches).⁵
14. The Applicant and al-Mahdi were subsequently dragged into a cell. The cell contained approximately fifteen other men, though they were not permitted to stand, speak or communicate in any way with the other prisoners. Later that same day, officers cuffed both the Applicant's and al-Mahdi's hands and feet and took them to another room within Kober prison where they were sat down and chained to a metal table while guards held AK47s aimed at their genitals.

⁵ Witness Statement of Magdy el-Baghdady, Appendix 1, above n.3; para. 30.

15. A large man entered the room with syringes, one of which he inserted into the Applicant's left arm. The officers laughed at the Applicant when he turned away as the syringe entered his arm. The Applicant was not told what was in the syringe but assumed it was a sedative. The Applicant says after being given the injection he "felt strangely calm".⁶ The Applicant and al-Mahdi were then returned to their cell (referred to in the paragraph above, paragraph 14).

Transfer to NISS Headquarters and Interrogation at NISS Headquarters

16. On 16 February 2011, officers removed the Applicant and al-Mahdi from their cell and again blindfolded and cuffed the Applicant's hands and feet before taking them towards the Transfer Room. Outside the Transfer Room, officers beat the Applicant with plastic pipes. The Applicant was beaten on his right shoulder, the right side of his ribs and on his thighs, and eventually fell. Officers continued to beat the Applicant. The Applicant attempted to protect himself with his handcuffed arms. This continued for approximately ten minutes.
17. The Applicant was taken to the Transfer Room and then transferred to a van. In the van, officers struck the back of the Applicant's head against a metal bar. On the journey, some of the transport officers were beating the passengers indiscriminately, including al-Mahdi. The Applicant yelled in pain and outrage at the indiscriminate beating. In response, an officer punched the Applicant by his collarbone and left cheek, and called him a "Lebanese Dog".⁷
18. The Applicant and al-Mahdi arrived at the NISS headquarters where they faced joint interrogation. Interrogating NISS officers told the Applicant and al-Mahdi that their bail was \$2 million. They stated that the Applicant and al-Mahdi had sent millions of text messages to Sudanese mobile phones calling for mass rallies or protests. The Applicant was not informed of whether there was any evidence to substantiate these claims, and no evidence was put before him. The interrogation took place in Arabic and al-Mahdi acted as an informal translator for the Applicant.
19. At a certain point during the interrogation, a customs official (which the Applicant identified as the head of customs) was brought in, accompanied by NISS officers. The head of customs verified that the Applicant had held an authentic customs document, which clearly showed that he had declared the electrical items when entering Sudan. The NISS officers also tested the equipment and found that they were simply common computing spare parts.
20. NISS officers continued to interrogate the Applicant. The Applicant was asked to provide information about how many times he had visited Poland, and why he spoke Polish and not Arabic. The Applicant was referred to as being Jewish.
21. Events which took place on 16 February 2011 (concerning the transfer to NISS headquarters and the interrogation therein) were repeated at least four times between 17 February and 23 February 2011. During this time, the Applicant and al-Mahdi remained detained in Kober prison. Prior to each transfer to NISS headquarters, the Applicant and al-Mahdi were taken from their cell in Kober prison to the Transfer Room. While there, they were beaten by officers for approximately ten minutes with a pipe and then beaten while en route to NISS headquarters in a van.

⁶ *Ibid.*, para. 32.

⁷ *Ibid.*, para. 35.

22. At NISS headquarters, interrogations consisted of questions about the Applicant's relationship with Poland and Israel, Jewish heritage, espionage, and mass rallies. On each occasion, the Applicant was refused permission to contact the British Embassy in Khartoum, a lawyer, and his family.

Conditions at Kober Prison

23. The Applicant remained in Kober prison from between 15 February 2013 and 13 March 2013. The Applicant was imprisoned together with more than six prisoners in a cell. During his time there, guards told the Applicant that half of the men who enter Kober prison never leave, some die or are killed and for this reason, guards did not learn the names of detainees in Kober prison.
24. During his time in Kober prison, the Applicant witnessed beatings of other detainees, and heard many stories of detainee torture, including beatings, application of electric shocks, burning, flogging, sexual assault, falaqa (foot-whipping) starvation, water deprivation, and drugging. The Applicant did not witness such treatment first-hand, but did see prisoners return from interrogations at Kober prison and NISS headquarters distressed, withdrawn, emotional, in pain, and covered with injuries and blood.
25. The Applicant consistently, throughout the period of his detention, requested to contact his family, and particularly his father, but was denied permission. The only drinking water in Kober prison was from an outlet where the other detainees washed themselves. Lights were on at all times and noise was constant. The Applicant was unable to sleep for more than three hours at a time, resulting in an inability to distinguish night from day. He was in a constant state of anxiety.
26. One day, guards confiscated a chess set that the Applicant had been making from old shoes, date seeds and old wires. Guards intimidated the Applicant such that he believed he would be struck at any moment. Later the same evening, guards entered the Applicant's cell while all the prisoners were asleep and beat everyone, ultimately forcing them to stand next to a wall outside the cell. Some guards aimed their weapons at the detainees while other guards searched the cell.

Mock execution

27. On approximately 19 or 20 February, armed guards entered the Applicant's cell, blindfolded him, and placed his arms and feet in cuffs before leading him out of the cell. The Applicant's friend, al-Mahdi, experienced the same treatment. The Applicant believed he was being taken to the Transfer Room but was instead guided to an unfamiliar part of the prison, outdoors, and eventually told to stand in-front of a wall where armed guards cuffed his hands behind his back, pushed his head towards the wall, and removed his blindfold. Others were also standing against the wall in this way. The Applicant saw that an officer stood behind each prisoner with their heads against the wall. The officers were wielding what seemed to be AK47 guns while standing in line. The Applicant could also see what appeared to be a high ranking officer standing on an elevated surface. The Applicant recalls that al-Mahdi became visibly upset and spoke in a pleading voice. Blindfolds were placed on the Applicant and other prisoners again. An officer gave an order in Arabic which the Applicant did not understand. In response to the order, an officer standing behind the Applicant placed the muzzle of his weapon against the back of the Applicant's head and pressed the weapon into the Applicant. The Applicant heard a loud voice. Officers, including the one standing behind the Applicant, cocked their weapons as if to fire. After a pause, the Applicant again heard loud shouts, in the manner of orders. In response, the guns were cocked again. The Applicant's blindfold was removed and he and al-Mahdi were taken back to their cell.

28. On or around 24 February 2011, guards dragged the Applicant and al-Mahdi by their arms from their cell. The guard dragging the Applicant stomped on the Applicant's right foot with his boot heel. This caused purple swelling and prevented the Applicant from walking without pain. The Applicant requested but did not receive any medical treatment, and remains affected by this injury today. The Applicant asserts that he has been unable to walk on his right foot properly since and that his right knee has also been affected by this injury as he cannot run and has trouble stretching out his heel. Guards burnt the Applicant's left foot with cigarettes and kicked him in the genitals. The Applicant fell to the floor on the left side of his body and the shackles dug into his skin. He was beaten and kicked in the genitals as he attempted to stand.⁸
29. The same day, the Applicant and al-Mahdi were then taken to the Transfer Room and beaten en route; they continued to be beaten in the van en route to NISS headquarters. At the NISS headquarters, the Applicant was visibly in distress, tired, in pain, nauseous, and ill. The Applicant pleaded with Major Saleh that he instruct the transport officers and Kober prison guards to stop the beating. The Applicant also again requested access to the British Embassy. Major Saleh instructed officers, including the man in the sand coloured camouflage uniform (first mentioned at paragraph 5 above), to desist. Major Saleh stated that the Applicant and al-Mahdi would not be facing any charges and that they were both cleared. The Applicant and al-Mahdi were returned to Kober prison. After this encounter, the Applicant and al-Mahdi were not transferred to the NISS building or questioned by NISS officers again; however, they continued to be held in Kober prison.
30. One morning at Kober prison, a guard named Mansouri came to the cell that the Applicant and al-Mahdi were in and stated that they would be released. At this point, guards forced the Applicant and al-Mahdi, at gunpoint, to sign documents. The Applicant could not read the documents as they were in Arabic and was told by the guards that the documents contained an agreement not to mention the treatment suffered in Kober prison; the consequences of doing so would be re-imprisonment. The Applicant and al-Mahdi signed the documents.
31. On 12 March 2011, the Applicant and al-Mahdi were handcuffed, blindfolded, and driven around for hours while the guards argued because no department was willing to take responsibility for them. After a day of driving, without access to food and water, they were returned to Kober prison. The Applicant asked to clean his face and was slapped in response.

National Security Office "Crimes against Sudan"

32. The next morning, on 13 March 2011, the Applicant and al-Mahdi were again taken to a van handcuffed and blindfolded, and driven for approximately six hours before arriving at a National Security Office labelled "Crimes against Sudan." The Applicant had not received anything to drink or eat since the previous day, and was barely able to walk due to pain in his kidneys. The Applicant and al-Mahdi were placed in a cell in this building without access to a toilet or water. At the time of the handover, officers at this new location were not provided with any case files on the Applicant or al-Mahdi.
33. The cell was overcrowded, containing thirteen men. The cell lacked sufficient room and bedding for all the detainees to sleep. There was no access to water or a toilet in the cell. Guards demanded bribes in exchange for food, water and toilet access. On one occasion, the Applicant was refused to leave his cell

⁸ Documented in Appendix 2; Dr. John Gilmurray, Medical Foundation, Medico-Legal Report Service, ("**Medico-Legal Report**"), 9 April 2013, p. 8., para. 42.

to use the toilet. The Applicant urinated in a bottle and, in a rage, threw this at an officer outside the cell. Having thrown the bottle, the Applicant gripped the cell bars and shouted at the guards. An officer lifted the padlock of the cell and struck the Applicant's hand with it. Three quarters of the Applicant's nail came off in this incident and became infected. The Applicant was not provided with access to medical treatment. Prison staff offered to release the Applicant and al-Mahdi if they paid \$1,000 in total, which they refused. A new investigation team interrogated them, and refused to give the Applicant access to the British Embassy and a lawyer. No charges were brought against the Applicant.

Detention at the "Information Police" ("Muhabis")

34. After about three or four weeks in the cell in the National Security Office, the Applicant and al-Mahdi were transferred in April to a different location called "Information Police", also known as "Muhabis", where they remained for approximately fifteen days. At the Information Police location, detainees were provided with limited food. The Applicant's daily food regularly consisted of sharing one sandwich between three men, with the sandwich often arriving after 11pm. Guards frequently beat detainees, and the Applicant witnessed the beating of two adolescents (aged 16 and 17) in his cell – on one occasion, two male adolescent children were beaten six times in one day. The guards hit one of the boys with a baton on the thighs and the soles of his feet while the other boy watched. The boys were later removed from the cell and returned with their knees covered in blood. The boys had been dragged on concrete, and in real pain, the boys defecated themselves. The Applicant describes this experience as "one of the most disturbing things I have ever seen and heard".⁹ On another occasion, the Applicant describes a third boy being punched.
35. The Applicant and al-Mahdi were again interrogated and no charges were brought against them. The Applicant felt extremely intimidated and was denied access to the British Embassy or a lawyer.

Omdurman prison

36. After approximately two weeks at the Information Police place of detention, the Applicant and al-Mahdi were transferred to Omdurman prison. The Applicant remained in Omdurman prison for approximately ten days while al-Mahdi was released earlier. Part of this prison was in the open, without a roof, which meant that detainees in this area slept in this condition exposed to nature.
37. During his roughly ten days at Omdurman prison, the Applicant was again denied access to a lawyer and the British Embassy. The Applicant was harassed and assaulted by other prisoners, as prison guards were not present from 6pm to 6am. The Applicant's clothes and shoes were stolen and because of his light skin, he was referred to derisively as a 'Jew'. Later, the prisoners returned the Applicant's possessions.
38. On one occasion, guards searched the Applicant for money and told him to pay a bribe to be left alone. The Applicant did not pay it and was told to sleep in the open area.
39. During his detention at Omdurman prison, a fellow detainee offered a phone to the Applicant so that he could call his family and fiancé. This was the first time since his detention, on 14 February 2011, that the Applicant was able to speak with his family.

⁹ Witness Statement of Magdy el-Baghdady, Appendix 1, above n.3; para. 76.

40. On one morning during his detention in Omdurman prison, the Applicant was taken to court without notice. He was not given a lawyer and no judge appeared so he was returned to Omdurman prison, and after a total of approximately ten days in detention he was released. This was approximately 78 days after his initial detention.

Following release

41. In total, the Applicant spent approximately 78 days in prison without consular assistance, access to a lawyer or his family. He was never informed of his legal rights nor formally charged. Throughout his detention, he was subjected to severe physical and psychological harm. His weight fell from an average of 110kg before his detention to approximately 73 kg at the point of his release from detention.
42. Upon release the Applicant stayed with al-Mahdi's family in Omdurman. He remained in Sudan for eight months. During this time, the Applicant faced charges under Article 23 of the Informatic Offences (Combating) Act of 2007, and he was prevented from leaving the country until these charges were adjudicated upon. Article 23 of the Informatic Offences (Combating) Act concerns abetment or conspiracy to commit an offense listed in that Act. It is not clear from the court documents available to REDRESS which of the offenses listed under the Act the Applicant was alleged to have committed. It appears that the act of bringing network boards and other telecommunications equipment into the country was sufficient to amount to an offense. Further, the Applicant was accused of having caused loss to a government owned company as a result of having brought the equipment into Sudan.
43. On 6 December 2011, al-Mahdi was cleared of any wrongdoing and found not guilty of charges levied against him under the Informatic Offences (Combating) Act. The Applicant was found guilty and a fine was levied against him. Mr al-Mahdi's family paid the fine and the Applicant was released, and was thereafter free to leave the country. The Applicant left Sudan in the middle of December 2011.
44. On 6 February 2012, the UK Special Representative for Sudan summoned the Sudanese Deputy Ambassador to the UK Foreign and Commonwealth Office (FCO) in London and formally raised the Applicant's case. The UK FCO called on the Sudanese authorities to conduct a prompt investigation citing concern that the Applicant, a British national, had been detained in Sudan for many months without UK consular authorities being informed; and citing further the Applicant's allegations of torture and other mistreatment.¹⁰
45. A medical-legal report prepared by Dr. John Gilmurray, who examined the Applicant on 29 January and 12 February 2013, shows that the Applicant has scars that are consistent with the Applicant's account of his torture and other ill-treatment in Sudan. The report also indicated that there was compelling evidence of Post-Traumatic Stress Disorder (PTSD) directly related to the Applicant's torture experience. The report concludes that the Applicant is a torture survivor and that he has been deeply traumatised by the treatment he has faced.¹¹ The report specifically notes that the mock execution was a major factor in the extreme trauma which precipitated the Applicant's PTSD.¹² Dr. Gilmurray's report also indicates several scars from cigarette burns and beatings, noting that the Applicant had a scar consistent with a

¹⁰ Documented at Appendix 3, Letter from Dr. Peter Tibber, British Ambassador, Khartoum (Sudan) to REDRESS, ("**British Embassy Khartoum Letter**"), 5 August 2013, para. 5.

¹¹ Medico-Legal Report, Appendix 2, above n.8, p. 10., para. 46.

¹² *Ibid.*

wound “inflicted by shackles when he was on the floor, struggling to avoid the blows and kicks of his assailant”.¹³

2. Particular Context for Consideration of Admissibility and Merits

46. The Applicant’s case is indicative of the absence of a legal framework in Sudan to adequately address widespread allegations of ill-treatment and torture committed by Sudanese authorities, and in particular the NISS. The Applicant’s case also underlines serious concerns as to Sudan’s legal framework concerning custodial rights.

2.1 Inadequate legal framework

47. The Sudanese Bill of Rights, which forms part of the 2005 Interim National Constitution, prohibits torture but there is no criminal offence of torture in line with international standards, and the definition of torture provided in Article 1 of The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) is not reflected in Sudanese law.¹⁴
48. The National Security Act 2010 (NSA 2010) contains broad provisions which enable and facilitate arrests and detention contrary to international standards. The NSA 2010 does not clearly stipulate the need for “reasonable suspicion” (that a crime is being or shall be committed) to form the basis of an arrest and/or detention. The NSA 2010 does not provide an unconditional right to meet and consult a lawyer, and fails to require security authorities to ensure that detainees have access to a judge “promptly” or even within a reasonable time (a person can be held for up to four-and-a-half months without any judicial supervision). NISS officers are permitted to search, seize and detain individuals with only a written order from the Director of the NISS. In its Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, the Commission stated that:

Despite its concerns expressed in its Third Concluding Observations, about harsh prison conditions, arbitrary arrest and detention, including incommunicado detention, these practices are permitted by the 2010 National Security Act that allows security officials to detain suspects for up to four and a half months without judicial review before charges are levied.¹⁵

These extraordinarily wide powers make it virtually impossible for any detention under the NSA 2010 to be considered unlawful, which renders a right to a remedy for a breach of Article 6 (right to liberty and security) of the African Charter illusory.¹⁶

¹³ *Ibid.*, p. 8-9, para. 42.

¹⁴ Criminal Act 1991, Article 115; stipulates that abuse, threats or torture by public officials shall be punished with imprisonment for a term not exceeding three months or with fine or with both. See; African Commission on Human & Peoples’ Rights (“ACmHPR”), “Concluding Observations and Recommendations on the Fourth and Fifth Periodic Reports of the Republic of Sudan (2008-2011)”, available at: <http://www.achpr.org/states/sudan/reports/4thand5th-2008-2012/>; para. 40 (“**Concluding Observations 2012**”); Intersession Activity Report of the Committee for the Prevention of Torture in Africa, Presented to the 51st Ordinary Session of the African Commission on Human and Peoples’ Rights; 18 April – 2 May 2012, Banjul, The Gambia; available here: <http://www.achpr.org/sessions/51st/intersession-activity-reports/cpta/> (“**Intersession Activity Report 2012**”).

¹⁵ *Ibid.*, Concluding Observations 2012, para. 26.

¹⁶ African Centre for Justice and Peace Studies, REDRESS, Sudanese Human Rights Monitor, International Federation for Human Rights, 109th Session of the UN Human Rights Committee – Pre-sessional meeting on Sudan, 9 August 2013, available at: <http://www.redress.org/downloads/publications/130812%20Submission%20List%20of%20Issues%20REDRESS%20ACJPS%20SHRM%20FI%20DH.pdf> (“**REDRESS and others UNHRC Pre-sessional meeting submission (August 2013)**”); Concluding Observations 2012, above n.14;

49. Article 83 Criminal Procedure Act 1991 (CPA 1991) (pertaining to the criminal justice process) provides for several custodial safeguards concerning the treatment of detainees, including the right of access to a lawyer, right to inform a family member and provision of medical care. However, the wording of the provision casts doubt on the effectiveness of these safeguards.¹⁷ Article 83(3) of the CPA 1991 provides the right for an arrested person to “contact his [or her] lawyer” but does not specify modalities, particularly the right to do so from the earliest stages of proceedings. The right to inform a family member is subject to the approval of the Prosecution Attorney, or the court, which can result in delays and introduces a discretionary element for what should be a clearly defined right.¹⁸ The provision of medical care is not formulated as a right and lacks details as to how such care is to be provided, i.e. upon entering and leaving detention and throughout the period of detention (where necessary), in line with internationally recognised standards.¹⁹ Further, being cut off from the outside world considerably enhances one’s vulnerability of being subjected to torture, and constitutes a form of ill-treatment in its own right.²⁰
50. The lack of custodial safeguards creates an environment conducive to torture and ill-treatment, which is furthermore fostered by broad provisions of immunity for official acts. Article 52(3) of the NSA 2010 provides members of the NISS and their associates with immunity from criminal and civil procedures for acts connected with the official work of the member. The Commission and others have expressed concern regarding these provisions.²¹ This immunity can only be lifted by the head of the NISS.²² However, there are no known instances where immunity has been lifted for NISS guards who were alleged to have tortured detainees.²³ The result is frequent impunity and lack of reparation. Immunities

African Centre for Justice and Peace Studies (ACJPS), *Human Rights Violations in the Republic of Sudan: A Shadow Report to Sudan’s Fourth and Fifth Periodic Report to the African Commission on Human and Peoples’ Rights*, April 2012, available at: <http://www.defenddefenders.org/wp-content/uploads/2012/05/Human-Rights-Situation-in-Sudan-A-Shadow-Report-April-2012.pdf> (“**ACJPS Shadow Report (April 2012)**”); REDRESS and others, *Comments to Sudan’s 4th and 5th Periodic Report to the African Commission on Human and Peoples’ Rights: The need for substantial legislative reforms to give effect to the rights, duties and freedoms enshrined in the Charter*, April 2012 available at: <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%20Report%20-%20Legislative%20Reforms.pdf> (“**REDRESS and others Shadow Report: Reform (April 2012)**”); REDRESS African Centre for Justice & Peace Studies, the Sudan Democracy First Group and REDRESS, Joint Alternative Report, Comments to Sudan’s 4th and 5th Periodic Report to the African Commission on Human and Peoples’ Rights: Article 5 of the African Charter: Prohibition of torture, cruel, degrading or inhuman punishment and treatment, April 2012, available at: <http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%204th%20and%205th%20Periodic%20Report.pdf> (“**REDRESS and others Shadow Report: Torture (April 2012)**”); Submission by REDRESS and the Sudanese Human Rights Monitor, *Universal Periodic Review Shadow Report: Implementing international human rights obligations in domestic law*, November 2010, available at: http://www.redress.org/downloads/publications/UPR_Sudan_Nov_2010.pdf (“**REDRESS and others UPR Shadow Report (2010)**”).

¹⁷ *Ibid.*, REDRESS and others Shadow Report: Reform (April 2012).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ ACmHPR, *Article 19 v Eritrea* (2007), Communication No. 275/2003, paras. 101-102.

²¹ Concluding Observations 2012, above n. 14, paras.31, 66; National Security Act 2010, Art. 50, 52(3).

²² REDRESS, *Security for all: Reforming Sudan’s National Security Services*, September 2009, available at:

<http://www.redress.org/downloads/country-reports/Security%20for%20all%20Final.pdf>; REDRESS, *Extraordinary Measures, Predictable Consequences: Security legislation and the prohibition of torture*, September 2012, available at:

http://www.redress.org/downloads/country-reports/1209security_report.pdf; Amnesty International, *Sudan: Agents of Fear: The National Security Service in Sudan*, 19 July 2010, available at: <http://www.amnesty.org/en/library/info/AFR54/010/2010>.

²³ UN Human Rights Committee (UNHRC), “Concluding Observations: the Sudan”, 29 August 2007, CCPR/C/SDN/CO/3, paras. 9, 16, available at: http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/SDN/CO/3; UN Security Council, Report of the Panel of Experts on Sudan, UN Doc. S/2011/11, 20 September 2010, circulated 8 March 2011, para. 159, available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/11.

are further maintained in the Armed Forces Law of 2007 and the Police Act of 2008, notwithstanding repeated calls to abolish immunity laws by the United Nations (UN) Human Rights Committee, the Commission, various UN bodies, the AU High-Level Panel on Darfur and others.²⁴

51. Article 35 of the Sudanese Bill of Rights provides that “[t]he right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to justice.” However, the Constitutional Court has failed to act as a constitutional protector of rights. It has, for example, upheld the constitutionality of immunities.²⁵ Further, remedies provided for in statutory law have proved largely ineffectual.²⁶ The right of the detainee to challenge their arrest before a competent court (a fundamental right required by the International Covenant on Civil and Political Rights (ICCPR) and African Charter²⁷) is not recognised in legislation.

2.2 Inadequate conditions of detention contrary to international standards

52. Conditions in detention facilities in Sudan are reportedly very poor, and lack adequate health care and food supplies, in particular police detention centres, which is due to inadequate resources being made available and results in the perpetuation of a poor overall infrastructure of the system.²⁸ The Concluding Observations and Recommendations of the Commission (on the 4th and 5th period Report of the Republic of Sudan) express concern at the backlog of cases which result in overcrowding of prisons and detention centres.²⁹ Treatment of prisoners often runs counter to international standards, including being routinely shackled or subjected to confinement in small cells.³⁰ The 2010 Prison Law provides the Minister of Interior and the General Director of Prisons broad powers to impose and issue special orders and regulations.³¹ The law does not envisage a system of independent oversight.
53. The Committee for the Prevention of Torture in Africa has urged States to ensure that torture is criminalised in the national legal framework in conformity with the Torture Convention, and the *Robben Island Guidelines on the Prohibition and Prevention of Torture* adopted by the Commission (*Robben Island Guidelines*).³² The Committee has said States Parties must go beyond the simple prohibition of torture in their constitutions and adopt specific legislation criminalising torture that provides for adequate sanctions and a framework where victims of torture can be compensated and

²⁴ UN HRC, “Concluding Observations: the Sudan”, 29 August 2007, CCPR/C/SDN/CO/3, paras. 9, 16, available at: http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/SDN/CO/3, para. 9(e); The African Union High Level Panel on Darfur (AUPD), *Darfur: The Quest for Peace, Justice and Reconciliation*, PSC/AHG/2(CCVII), 29 October 2009, xix, para. 25(c) and (d); 56-63, paras. 215-238; and 91, 92, para. 336.

²⁵ REDRESS and Sudanese Human Rights Monitor, *Arrested Development: Sudan’s Constitution Court, Access to Justice and the Effective Protection of Human Rights*, August 2012, available at: http://www.redress.org/downloads/country-reports/1208arrested_development_sudan.pdf

²⁶ *Ibid.*

²⁷ Amnesty International, *Sudan: Agents of Fear: The National Security Service in Sudan*, 19 July 2010, available at: http://www.amnesty.org/en/library/info/AFR54/010/2010_p.21.

²⁸ REDRESS and others UNHRC Pre-sessional meeting submission (August 2013), above, n.16; part VIII.

²⁹ Concluding Observations 2012, above n. 14, para. 27.

³⁰ REDRESS and others UNHRC Pre-sessional meeting submission (August 2013), above, n.16; part VIII.

³¹ National Prison and Treatment of Inmates Act of 2010, Articles 48 and 49.

³² Resolution of the ACmHPR on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (“*Robben Island Guidelines*”), 32nd Session, Banjul, The Gambia, October 2002, para. 24.

54. rehabilitated.³³ Furthermore, in its last two concluding observations and recommendations, the Commission has expressed the need for Sudan to show compliance with the *Robben Island Guidelines*.³⁴
55. The Sudanese government has disregarded rulings in cases where the Commission has found a violation of Article 5 of the African Charter. It has disregarded requests by the Commission that the government amend its domestic framework “in conformity with its obligations under the African Charter and other international instruments”.³⁵ The Commission has previously found Sudan responsible for violations of a wide range of human rights, including the right to life and to be free from torture.³⁶ The prevalence of torture coupled with the lack of effective access to justice for victims demonstrates the systemic nature of torture and ill-treatment in Sudan.

2.3 Prevalence and Failure to Provide Reparation to Victims of Torture and Ill Treatment

56. In April 2012, the African Centre for Justice & Peace Studies, the Sudan Democracy First Group and REDRESS submitted comments to the Commission on the occasion of Sudan’s 4th and 5th Periodic Report, focusing on Article 5 (prohibition on torture) of the African Charter. The comments cited over forty-five documented cases of alleged torture in Sudan.³⁷ Numerous reports have documented consistent allegations of torture in Sudan over the past years.³⁸ A recent report found that detainees released from detention have reported that national security officers subjected them (and others) to severe beatings, sleep deprivation, and other forms of torture during interrogations and detentions.³⁹ Upon release, many of these detainees were required to renounce political activism, discontinue political activity, and/or work as informants to expose political activists.⁴⁰

³³ Intersession Activity Report of the Committee for the Prevention of Torture in Africa, Presented to the 51st Ordinary Session of the African Commission on Human and Peoples’ Rights; 18 April – 2 May 2012, Banjul, The Gambia; available here: <http://www.achpr.org/sessions/51st/intersession-activity-reports/cpta/>, para. 1.

³⁴ Concluding Observations 2012, above n.15; see also “Concluding Observations and Recommendations on the Third Periodic Report of the Republic of Sudan (2003-2008)”, 27 May 2009, available at: http://www.achpr.org/files/sessions/45th/conc-obs/3rd-2003-2008/achpr45_conc_staterep3_sudan_2009_eng.pdf, p. 5.

³⁵ ACmHPR, *Curtis Francis Doebbler v Sudan*, 236/2000 (2003); see also *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, 279/03-296/05.

³⁶ ACmHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication No. 279/03-296/05; 236/2000: *Curtis Francis Doebbler v Sudan* (2003).

³⁷ The following report cited more than forty-five documented cases of alleged torture in Sudan: REDRESS and others Shadow Report: Torture (April 2012), above n.17.

³⁸ *Ibid.* See also; REDRESS and SORD, *Security for all: Reforming Sudan’s National Security Services*, September 2009, available at: http://www.redress.org/downloads/publications/Security_for_all_Final.pdf; REDRESS, *Extraordinary Measures, Predictable Consequences: Security Legislation and the Prohibition of Torture*, September 2012, available at: http://www.redress.org/downloads/publications/1209security_report.pdf; Human Rights Watch, *World Report 2013: Sudan*, 2013, available at: <http://www.hrw.org/world-report/2013/country-chapters/sudan>; Amnesty International, *Sudan: Agents of Fear: The National Security Service in Sudan*, 19 July 2010, available at: <http://www.amnesty.org/en/library/info/AFR54/010/2010>; OHCHR, *Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan: Arbitrary arrest and detention committed by national security, military and police*, 28 November 2008, available at: <http://www.ohchr.org/Documents/Countries/10thOHCHR28nov08.pdf>; and African Centre for Justice and Peace Studies, *Excessive force, mass arbitrary detentions, ill-treatment and torture used to crack down on popular protests in Sudan*, 27 July 2012, available at: <http://www.africancentreforjustice.org/wp-content/uploads/2012/12/07-27-12-Excessive-force-mass-arbitrary-detentions-ill-treatment-and-torture-used-to-crack-down-on-popular-protests-in-Sudan.pdf>.

³⁹ Concluding Observations 2012, above n. 15, p. 4; Human Rights Watch, *World Report 2013: Sudan*, 2013, available at: <http://www.hrw.org/world-report/2013/country-chapters/sudan>.

⁴⁰ *Ibid.*

57. The shortcomings of Sudan’s legal framework referred to above also results in a denial of reparation to victims. Compensation as one form of reparation can be claimed in the course of proceedings. However, Sudanese criminal law does not recognise violations such as torture, as defined in international law, as a criminal offence. A victim of human rights violations may claim damages for tort under civil law⁴¹ but due to immunities and lack of investigations there is virtually no practice of victims having effective access to justice and obtaining reparation.
58. In practice, due to immunities, short statutes of limitation⁴² and a lack of adequate protection,⁴³ there is an almost a complete absence of cases that have resulted in compensation or other forms of reparation being awarded to victims of torture and other serious human rights violations.
59. The Commission has recognised that there are no effective remedies by noting that in light of the immunity provisions under Sudanese law, “it would be a mockery of justice to expect that the victims would get justice from such a discretionary remedy”.⁴⁴ The UN Panel of Experts on Sudan also noted that it was “unaware of any case where victims of arbitrary arrest and detention or victims of torture and ill-treatment were accorded the right to an effective remedy.”⁴⁵

3. Admissibility

60. The Applicant submits that the conditions set out in Article 56 of the African Charter are complied with, including particularly Articles 56 (5) and 56 (6).

3.1 Exhaustion of domestic remedies

There are no effective and sufficient remedies available in the Respondent State to the Applicant for the alleged violations

61. According to the well-established jurisprudence of the Commission, complainants are required to exhaust local remedies only if the local remedies are available, effective and sufficient. A local remedy is considered available “if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complainant.”⁴⁶

⁴¹ Civil Transaction Act 1984, Article 153(1).

⁴² Criminal Procedure Act 1991 (CPA 1991), The criminal offence of torture is subject to a limitation period of two years (article 115 (2) of the CPA 1991) and/or, the offence of hurt for a maximum period of five years (article 142 (2)) pursuant to Article 38 (1) (b) CPA 1991. These periods are unduly short given the seriousness of the crime of torture, which should not be subject to any limitation periods.

⁴³ Individuals who allege that they have been tortured have received threats that prompted them to leave Sudan. Article 4(e) of the CPA 1991 provides that witnesses should not be subject to any injury or ill-treatment. Beyond this general prohibition, Sudanese law does not provide for the effective protection of victims and witnesses in torture cases. The complainants in ACmHPR, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* all suffered threats following their complaints, forcing them to leave Sudan.

⁴⁴ ACmHPR, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication No. 379/09, Admissibility Decision, August 2012, para. 67.

⁴⁵ UN Security Council, Report of the Panel of Experts on Sudan, UN Doc. S/2011/11, 20 September 2010, circulated 8 March 2011, para. 159, available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/11.

⁴⁶ ACmHPR, *Dawda Jawara v. The Gambia*, Communication Nos. 147/95 and 149/96, para. 32.

(i) The Respondent State failed to remedy the violation despite ample notice and time to do so

62. It is the Commission's established jurisprudence that the exhaustion of domestic remedies is not required in cases where it can be shown that the Respondent State failed to remedy a situation despite "*ample notice and time to do so*".⁴⁷
63. The Applicant himself brought allegations to the attention of numerous prison staff throughout the 71 to 78 days that he was detained.⁴⁸ On 26 July 2011, the Applicant notified the British Embassy in Khartoum of his detention and mistreatment. The Applicant asked the British government to refrain from making representations while he remained in Sudan.
64. The following information is based on a letter sent to REDRESS from Dr Peter Tibber, HM Ambassador of the United Kingdom to Sudan. The letter dated 5 August 2013 (received on 23 August 2013), from the British Embassy in Khartoum, sets out the representations made by the British Government to the Sudanese government on behalf of the Applicant:⁴⁹
65. On 2 February 2012, shortly after his return to the UK, the Applicant diligently wrote to the UK Foreign and Commonwealth Office (FCO) giving his full permission for them to make representations in relation to his allegations to the Respondent State.
66. On 6 February 2012, the UK Special Representative for Sudan summoned the Respondent State's Deputy Ambassador in London to the FCO and formally raised the Applicant's case. The UK Special Representative said that the UK was concerned a British national had been detained in Sudan for many months without UK consular authorities being informed. In addition, the UK Special Representative highlighted the Applicant's allegations of torture and general mistreatment by the security forces of the Respondent State. The FCO called on the authorities of the Respondent State to conduct a prompt investigation. Following the meeting, the Respondent State's Deputy Ambassador undertook to pass on the concerns to his government in Khartoum.
67. On 9 February 2012, the then British Ambassador raised concerns about the Applicant's treatment and called on the Sudanese authorities to conduct a prompt investigation. The same points as above were raised. The Respondent State agreed to look into the case. The then British Ambassador again raised the matter on 7 March 2012 and urged the Sudanese government to respond on the Applicant's case. The Respondent State's Undersecretary (Head) of the Ministry of Foreign Affairs stressed that the Ministry of Foreign Affairs in Khartoum was working on the case.
68. In the week commencing Monday 11 June 2012, the British Embassy in Khartoum also raised the Applicant's case with the UN Independent Experts on Human Rights in Sudan, who had been visiting the country. The British Embassy also raised the Applicant's case with the National Commission for Human Rights.
69. On 6 September 2012, the UK Special Representative for Sudan raised the Applicant's case at a meeting with the Respondent State's Ambassador in London and requested a report on:

⁴⁷ ACmHPR, *Article 19 v Eritrea*, Communication No. 275/03, paras. 72-77.

⁴⁸ Witness Statement of Magdy el-Baghdady, Appendix 1, above n.3, paras. 35 and 68.

⁴⁹ British Embassy Khartoum Letter, Appendix 3, above n. 10.

- a. a formal investigation into the circumstances of the Applicant's arrest;
- b. the reasons for not notifying the British embassy at the time of the Applicant's detention;
- c. the Applicant's allegations of ill-treatment while in detention.

The Sudanese Ambassador undertook to obtain an update on the Applicant's case from the Ministry of Foreign Affairs in Khartoum.

70. On 12 February 2013, the British Ambassador in Khartoum and the Deputy Head of Mission met with the Respondent State's new Director of European Affairs at the Sudanese Ministry of Foreign Affairs in Khartoum and took the opportunity to enquire about the progress of the Applicant's case. The Director of European Affairs at the Sudanese Ministry of Foreign Affairs was unfamiliar with the case. The UK Deputy Head of Mission agreed to send the Director of European Affairs at the Sudanese Ministry of Foreign Affairs the details of the Applicant's case.
71. On 24 March 2013, the Respondent State's Ministry of Foreign Affairs sent its official reply to the Applicant's case. The official reply simply stated that they had no record of "Mahdi ElBaghdady" being arrested or tortured.
72. On 17 April 2013, The British Embassy wrote back to the Respondent State's Ministry of Foreign Affairs to request that another search be made with the correct spelling of the Applicant's name.
73. On 14 May 2013, the British Chargé d'Affaires met the Respondent State's Permanent Secretary of the Ministry of Foreign Affairs. The Chargé raised the Applicant's case and again requested that the search be made using the correct name.
74. On 2 June 2013, the British Embassy received a reply from the Respondent State's Ministry of Foreign Affairs, dated 26 May 2013, confirming that the Applicant had indeed been arrested, but with no reference to his allegations of arbitrary detention and torture or any investigation being made into these allegations.
75. On 18 June 2013, the British Embassy sent a diplomatic note back to the Respondent State's Ministry of Foreign Affairs reiterating the FCO's deep concern at the lack of substantive response, and calling again for full details of the Sudanese investigation and a thorough explanation of any findings. The FCO in London also sent a copy of the letter to the Sudanese Embassy in London.
76. By way of letter addressed to REDRESS and dated 5 August 2013 (received on 23 August 2013), the British Embassy in Khartoum informed REDRESS that the embassy would continue its efforts to press for a full investigation into the Applicant's allegation of torture and keep the Applicant informed of steps taken.

(ii) Threats forced the Applicant to withhold disclosing information of his treatment while in Sudan, and preclude him from returning to pursue action domestically

77. The Applicant was unable to formally raise a complaint through a lawyer while detained as he was held incommunicado. Officials precluded the Applicant access to a lawyer, diplomatic consular staff and even his family during his time in detention in Sudan.
78. Further, while held in detention, the Applicant was forced to sign a statement stating that he would not mention his experiences in Kober prison. The Applicant was threatened with re-arrest and re-

imprisonment if he raised allegations of mistreatment. Thus, the Applicant was at a genuine risk of suffering adverse consequences had he raised a complaint upon being released from detention but while still in Sudan. As such, the Applicant was intimidated not to raise a complaint while he was facing trial in Sudan for charges under Article 23 of the Combating Information Offences Act of 2007 between May 2011 and December 2011. Under these circumstances, it would be “repugnant to expect anyone within Sudan who sympathizes with the cause of” the Applicant to continue pursuing the Applicant’s complaint inside Sudan.⁵⁰

79. The Applicant decided to seek justice for his ill-treatment from abroad. The Applicant waited until he had reached the UK before writing to the UK FCO giving them permission to raise his allegations and demand a full investigation from Sudanese officials in relation to the torture and ill-treatment he suffered in Sudan. The Applicant submits that the threat of re-arrest and re-imprisonment by the authorities of the Respondent State prevented him from exhausting local remedies. The Applicant did, however, diligently write to the UK FCO giving his full permission to the UK FCO for them to make representations to the Sudanese government.

3.2 Failure to investigate

80. The Respondent State has been aware of the allegations since at least 6 February 2012 but there are no indications that the authorities have taken any steps to investigate the allegations or that the Respondent State has taken any other measures capable of providing the Applicant with a remedy. The British Government has repeatedly requested clarification on the steps, if any, that the Respondent State has taken in this regard. However, Sudanese authorities - following a prolonged delay - have only confirmed the Applicant’s arrest.⁵¹ The lack of response underlines the fact that effective remedies are not available to the Applicant.
81. The failure to investigate the allegations of serious human rights violations such as torture by NISS officers raised by the Applicant and the UK FCO is symptomatic of a culture of impunity. Sudanese legislation and responses to complaints have rendered any theoretically existing remedies (i) unavailable as they cannot be pursued without impediment, (ii) ineffective, as there is no realistic prospect of success, and (iii) insufficient, that is, incapable of redressing the complainant.⁵²
82. The actions of the Applicant and the UK FCO provided the Respondent State notice about the alleged human rights violations, which should have resulted in taking the necessary steps to investigate the matter. The Respondent State has not, to date, provided any information as to the measures it has taken (if any) to investigate the allegations of arbitrary incommunicado detention and torture, and bring those found to be responsible to justice.

3.3 Capable of redressing the complainant

83. The legal system in Sudan fails to provide effective remedies for torture. Sudanese criminal law criminalises torture. However, it does not define torture in line with internationally recognised

⁵⁰ ACmHPR, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, Admissibility Decision, August 2012, para. 56.

⁵¹ British Embassy Khartoum Letter, Appendix 3, above n.10, bullet point para. 15.

⁵² ACmHPR, *Dawda Jawara v. The Gambia*, Communication Nos. 147/95 and 149/96, para. 32.

standards nor provide adequate punishment. Offences that may be prosecuted instead, such as the offence of hurt (article 142 (2) Criminal Act of 1991) are not subject to adequate punishments. Article 142 (2) of the Criminal Act 1991 states that:

Where hurt occurred by dangerous means such as poison or intoxicating drugs or where hurt is caused with the intention of drawing a confession from another or compelling that other to do an act contrary to the law, the offender shall be punished with imprisonment for a term not exceeding two years and may also be punished with fine.⁵³

84. Where a complaint is raised, NISS officials enjoy immunity under the NSA 2010. Immunities are also maintained in the Armed Forces Law of 2007 and the Police Act of 2008. Although immunities under the NSA 2010 can be waived by the NISS Director, there are neither clear judicial remedies nor any practice of lifting immunity.⁵⁴ Combined with the lack of impartial investigative bodies, non-existent victim and witness protection mechanisms, the absence of timely and effective judicial oversight, and a pervasive deference to the NISS on the part of other official bodies, the system effectively grants the very body, i.e. the NISS, the sole prerogative of deciding whether to take any action in response to allegations of violations. As has been repeatedly highlighted in reports by treaty and UN Charter bodies, and as is evident in the Commission's jurisprudence,⁵⁵ the system has resulted in legally sanctioned and institutionally tolerated impunity that negates victims' right to an effective remedy.
85. In formally raising the case with the British Embassy in Khartoum, the Applicant hoped they or the UK FCO might be able to help persuade the Respondent State to initiate an investigation. As indicated above, however, the Respondent State has failed to adequately respond to queries raised by the British Embassy in Khartoum and the UK FCO. The Respondent State has, in particular, failed to keep the UK FCO, British Embassy in Khartoum and the Applicant informed of any steps it has taken to conduct any investigation. On receipt of the UK FCO's letter dated 5 August 2013, it became clear that there was no prospect of the Respondent State conducting an investigation with a view to providing a remedy.

3.4 The Communication complies with the 'reasonable time period' requirement of Article 56 (6)

86. Article 56 (6) of the African Charter stipulates that communications must be submitted within "a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter".⁵⁶ The rationale for the reasonable time requirement is to prevent challenges to domestic decisions within a jurisdiction long after they have been delivered, in the interests of legal stability and certainty. Where remedies are found to be unavailable, ineffective or insufficient, as in the present case, the Commission estimates the "timeliness of a communication from the date that the last available local remedy is exhausted by the complainant. In the case of unavailability or prolongation of

⁵³ REDRESS, *Sudan Country Report*, available at: <http://www.redress.org/downloads/country-reports/Sudan.pdf>, p. 7.

⁵⁴ Amnesty International, Submission to the UN Universal Periodic Review (11th session of the UPR Working Group) Sudan, May 2011, available here; http://lib.ohchr.org/HRBodies/UPR/Documents/Session11/SD/AI_AmnestyInternational-eng.pdf; p. 1.

⁵⁵ ACmHPR; *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication No. 379/09, Admissibility Decision, August 2012, para. 67.

⁵⁶ African Charter, above note 1, Article 56 (6).

local remedies, it will be from the date of the complainant's notice thereof,"⁵⁷ taking into account the circumstances of the case.⁵⁸

87. The European Court of Human Rights has held that in difficult cases (such as disappearances) the Court's own six-month time-limit on admissibility will be examined depending on the circumstances of the case and other factors, such as the diligence and interest displayed by the complainants, as well as the adequacy of the investigation in question. The European Court of Human Rights has held that:

as long as there is some meaningful contact between families and authorities concerning complaints and requests for information, or some indication, or realistic possibility, of progress in investigative measures, considerations of undue delay will not generally arise. However, where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a moment when the relatives must realise that no effective investigation has been, or will be provided. When this stage is reached will depend, unavoidably, on the circumstances of the particular case.

88. Applying the above principles, the European Court of Human Rights has found that applicants who had waited for a period of almost ten years before lodging their application had complied with the six-month rule because an investigation, even if sporadic, was being conducted at the national level. The Court reached similar conclusions in another case, where the domestic investigation into the events had been pending for over eight years without any significant periods of inactivity by the time of the application to the European Court of Human Rights, and where the applicants were doing all that could be expected of them to assist the authorities.
89. From 2 February 2012 onwards, the Applicant wrote the UK FCO giving his full permission to make representations to the Sudanese government. The UK FCO made numerous unsuccessful attempts to ensure that the Respondent State investigate allegations of ill-treatment and respond to further concerns regarding the Applicant's incommunicado detention. The UK FCO has kept the Applicant informed of the developments.
90. Representatives of the Respondent State assured the UK FCO, and thereby the Applicant, on numerous occasions that an investigation into the Applicant's case would be carried out and indeed, that the Respondent State was "working on the case".⁵⁹ The Applicant and the UK FCO diligently continued to raise the allegations of arbitrary incommunicado detention and torture with the authorities of the Respondent State. However, after more than sixteen months, the Respondent State was only able to confirm (on 2 June 2013) that the Applicant had indeed been arrested. The Respondent State provided this confirmation without reference to the Applicant's allegations of arbitrary incommunicado detention and torture or to any investigative steps taken. On 18 June 2013, the British Embassy reiterated its deep concern at the lack of substantive response and called for a full investigation and thorough explanation of any findings.

⁵⁷ ACmHPR, *Tsikata v Ghana*, Communication No. 322/2006, para. 37.

⁵⁸ ACmHPR, *Darfur Relief and Documentation Centre v Sudan*, Communication No. 310/2005, para. 75.

⁵⁹ British Embassy Khartoum Letter, Appendix 3, above n.10, 5 August 2013, bullet point para. 7.

91. As of 5 August 2013, the FCO had not received a response to their 18 June 2013 note from the Respondent State. The Applicant received the letter dated 5 August 2013 on 23 August 2013. Upon receipt, it became evident that the Respondent State did not intend to investigate the allegations and that any further attempts to exhaust domestic remedies in the Respondent State would be futile.
92. In light of these circumstances, it is submitted that this communication complies with Article 56 (5) and (6).

4. Violations of the African Charter

93. The Applicant alleges that the Respondent State arbitrarily arrested and detained him as a consequence of his perceived involvement in calling for mass protest gatherings in Khartoum. It is further alleged that the Respondent State prevented the Applicant from communicating with his lawyers and with his family members, and from accessing consular assistance from the British consular office in Khartoum. The Respondent State further prevented the Applicant from having the opportunity to challenge the legality of his detention. The Applicant alleges that he was subjected to torture and ill-treatment at the hand of State agents. To date, the authorities of the Respondent State have failed to investigate these violations and/or provide other forms of reparation. The Applicant submits that this conduct violates Articles **1, 2, 5, 6, 7, 14 and 16** of the African Charter.

4.1 Article 5: Right to Dignity and Prohibition of Torture and Ill Treatment

94. The treatment of the Applicant constitutes torture and ill-treatment in violation of Article 5.
95. In interpreting Article 5 of the African Charter, the Commission has referred to Article 1 of the UN Torture Convention,⁶⁰ which defines torture as:

[A]ny 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.⁶¹

96. The Commission has also drawn on the jurisprudence of the European Court of Human Rights (ECtHR) on Article 3 of the European Convention on Human Rights (prohibition of torture).⁶² For example in *Huri Laws v. Nigeria*,⁶³ the Commission referred to the ECtHR's definition of torture in *Ireland v. United*

⁶⁰ ACmHPR, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication No. 245/2002 para. 180.

⁶¹ *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/RES/39/46, 10 December 1984, available at: <http://www.un.org/documents/ga/res/39/a39r046.htm>.

⁶² ACmHPR, *Huri Laws v Nigeria*, Communication No. 225/98, para. 41.

⁶³ *Ibid.*

Kingdom, which defines torture as “deliberate inhuman treatment causing very serious and cruel suffering”.⁶⁴

97. The vulnerability of the victim as well as the environment and totality of the cumulative circumstances should be taken into account to determine whether a case amounts to torture.⁶⁵ The Applicant was subject to:
- a. incommunicado detention for a period of 71 to 78 days, during which he was not granted the right to speak with his family, a lawyer or seek consular assistance;
 - b. shackling at gunpoint with his head being shaken so violently that hair ripped from his scalp (between 14 February 2011 and 15 February 2011, at NISS Headquarters);⁶⁶
 - c. hit repeatedly on his throat on 15 February 2011;
 - d. beaten regularly in the “Transfer Room” of Kober prison;⁶⁷
 - e. injected with a syringe while guards held weapons aimed at his genitals at Kober prison, on 15 February 2011;⁶⁸
 - f. beaten with plastic pipes while in transit from Kober prison to NISS headquarters, the Applicant's head was struck against a metal bar in the transit vehicle, on the first occasion he was also punched and referred to as a "Lebanese Dog" (between 16 February and 23 February 2011);⁶⁹
 - g. subject to sustained sleep deprivation at all his places of detention;
 - h. beaten in his cell at Kober prison and forced to stand outside the cell, together with other detainees, at gunpoint;⁷⁰
 - i. subject to a mock execution around the 19 or 20 February 2011, at Kober prison;⁷¹
 - j. dragged by Kober prison guards who stomped on the Applicant's right foot, causing purple swelling, preventing the Applicant from walking correctly, on or around 24 February 2011;⁷²
 - k. burnt on his feet with cigarettes, kicked in the genitals and beaten at Kober prison;⁷³
 - l. handcuffed, blindfolded, and driven around for hours without access to food and water, and returned to Kober prison on 12 March 2011. The Applicant requested that he be able to clean his face and was slapped in response;⁷⁴
 - m. on one occasion, refused the right to leave his cell to use the toilet. The Applicant's finger was crushed with a padlock, causing damage to a fingernail. He received no access to medical treatment;⁷⁵
 - n. held for 15 days in a location called “Information Police”, also known as “Muhabis”, where food was scarce. Guards beat detainees, and the Applicant witnessed two children (aged 16 and 17) being severely beaten, and a third child being punched. The Applicant describes this experience as “one of the most disturbing things I have ever seen and heard”.⁷⁶

⁶⁴ ECtHR, *Ireland v. UK*, Application No.5310/71, Judgment 18 January 1978, para. 167.

⁶⁵ ACmHPR, *Gabriel Shumba v Zimbabwe*, Communication No. 288/04, para. 139.

⁶⁶ Witness Statement of Magdy el-Baghdady, Appendix 1, above n.3; para. 23.

⁶⁷ *Ibid.*, para. 29.

⁶⁸ *Ibid.*, para. 31.

⁶⁹ *Ibid.*, para. 34.

⁷⁰ *Ibid.*, para. 46.

⁷¹ *Ibid.*, paras. 49-50.

⁷² *Ibid.*, para. 63.

⁷³ *Ibid.*, para. 64.

⁷⁴ *Ibid.*, para. 69.

⁷⁵ *Ibid.*, para. 73.

⁷⁶ *Ibid.*, para. 76.

98. In addition to witnessing beatings and ill-treatment during his time in Kober prison, the Applicant also heard many stories of torture of other detainees, including electroshocks, sexual assault, falaqa,⁷⁷ and drugging. The Applicant did not witness this but did see prisoners return from interrogations at Kober prison and NISS headquarters distressed and often bleeding and in pain.
99. Underlying the torture was a number of prohibited purposes, including;
- *Obtaining information*: the Applicant was initially perceived as inciting a revolution and as a British or Israeli spy. NISS officers repeatedly tortured the Applicant prior to interrogations, apparently in an attempt to obtain information in relation to these allegations.
 - *Punishment*: the Applicant was apparently being punished for his alleged conspiracy against the Respondent State by virtue of his suspected involvement in protests and resistance (he was accused of sending millions of text messages to incite mass protests similar to those in Egypt at the time). He was also accused of being a Jew because of his Polish descent and light skin, and apparently punished for this reason, as well as for refusing to confess to being a British or Israeli spy.
 - *Intimidation*: the Applicant was subject to a mock execution, the purpose of which was clearly, at least in substantial part, to intimidate and harass him.
 - *Discrimination*: the Applicant was discriminated on the basis of his perceived Jewish ancestry as a result of his Polish mother.
100. The methods used against the Applicant, singly and in combination, resulted in the deliberate infliction of severe pain and suffering. This treatment of the Applicant by Sudanese officials with the purpose of inflicting punishment, intimidation, extracting a confession and discrimination amounted to torture in violation of Article 5 of the African Charter.

Conditions of Detention

101. The Commission has recognised in *Zegveld and Ephrem v. Eritrea* that every detained person is entitled “to proper conditions of detention”.⁷⁸ Consistent with the *Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment 1988* (UN *Body of Principles*),⁷⁹ and the UN *Standard Minimum Rules for the Treatment of Prisoners* (UN *Minimum Rules*),⁸⁰ the Commission stated in *Zegveld and Ephrem v. Eritrea* that detention “must be subject to basic human rights standards”.⁸¹ The conditions the Applicant was held in violated the Applicant’s right to be treated humanely.⁸²

⁷⁷ Foot whipping.

⁷⁸ ACmHPR, *Zegveld and Ephrem v. Eritrea*, Communication No. 250/2002, para. 55.

⁷⁹ UN *Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment 1988*, adopted by UN General Assembly Resolution 43/73 (9 December 1988) UN Doc A/RES/43/173, Principle 33 (4): “Every request or complaint shall be promptly dealt with and replied to without undue delay.” (“**UN Body of Principles**”).

⁸⁰ UN *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, Rule 36 (4): “Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.” (“**UN Standard Minimum Rules**”).

⁸¹ *Ibid.*

⁸² See also IACtHR, *García-Asto and Ramírez-Rojas v. Peru*, order of 25 November 2005, para. 221, (citing IACtHR, *Raxcacó-Reyes v. Guatemala*, judgment of 15 September 2005, para. 95; IACtHR, *Fermin Ramírez v. Guatemala*, judgment of 20 June 2005, para. 118; IACtHR, *Caesar v. Trinidad and Tobago*, judgment of 11 March 2005, para. 96). In the case of *García-Asto and Ramírez-Rojas v. Peru*, the IACtHR recalled its earlier decisions in which it had decided that “detention conditions where prison facilities are overcrowded...without beds for resting and without adequate hygiene, and suffering lack of communication or restrictions to visits, constitute a violation of the right to humane treatment.”

Incommunicado pre-trial detention

102. The denial of access to the outside world during the detention of the Applicant for between 71 and 78 days was in violation of Article 5. The Commission held, in the case of *Media Rights Agenda v. Federal Republic of Nigeria*:

that the term ‘cruel, inhuman or degrading punishment or treatment’ is to be interpreted so as to extend the widest possible protection against abuses, whether physical or mental.

103. In the case of *Zegveld and Ephrem v. Eritrea*, the Commission held that:

of itself, prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment.⁸³

In its General Comment Number 20, the UN Human Rights Committee emphasised that provisions should also be made against incommunicado detention.⁸⁴

104. The case of *Mukong v Cameroon* concerned an individual that was held in incommunicado detention, received threats of torture and death, was intimidated and deprived of food, and locked in a cell for several days without the possibility of recreation. Referring to its General Comment 20, the UN Human Rights Committee noted that “total isolation of a detained or imprisoned person may amount to acts prohibited by article 7”, and it concluded that Mr. Mukong had been subjected to “cruel, inhuman and degrading treatment” in this case contrary to article 7 of the ICCPR (concerning the prohibition on torture). In *Polay v. Peru* the UN Human Rights Committee found that the refusal of the prison authorities to allow a detainee or prisoner to write to, and receive visits by, family members, may violate both article 7 (prohibition on torture) and article 10(1) (liberty and security) of the ICCPR.⁸⁵

105. The *Robben Island Guidelines* stipulate that States should provide basic custodial safeguards that “prohibit the use of incommunicado detention.”⁸⁶

106. The denial of access to family members inherent in the incommunicado detention also constitutes a violation of Article 5 according to the jurisprudence of the African Commission:

holding an individual without permitting him or her to have contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned.⁸⁷

107. The lack of outside communication for between 71 to 78 days in the given circumstances was employed to increase the vulnerability and anxiety of the Applicant, and thereby cause suffering. Blindfolding, transferring and holding the Applicant in such a place of detention and subjecting him and others to a

⁸³ ACmHPR, *Zegveld and Ephrem v. Eritrea*, Communication No. 250/2002, para. 55.

⁸⁴ UN Human Rights Committee, General Comment 20 Concerning Prohibition of Torture and Cruel Treatment of Punishment (Art.7), 10 March 1992, para. 14.

⁸⁵ UNHRC, *Polay Campos v. Peru*, Communication No. 577/1994, Views of 6 November 1997.

⁸⁶ *Robben Island Guidelines*, above n. 33, para. 24.

⁸⁷ ACmHPR, *Amnesty International and others v. Sudan*, Communication Nos 48/90, 50/91, 52/91, 89/93 para. 54. See also *Article 19 v Eritrea*, Communication No. 275/2003, paras. 100, 101.

torture heightened his sense of absolute powerlessness.⁸⁸ The incommunicado detention of the Applicant was, in these circumstances, sufficiently long to reach the threshold of constituting a violation of Article 5.

Sleep deprivation and Overcrowding

108. The UN Human Rights Committee in *Mukong v. Cameroon* stated that “certain minimum standards regarding the conditions of detention must be observed regardless of a State party’s level of development”. These include, in accordance with Rules 10, 12, 17, 19 and 20 of the UN *Standard Minimum Rules*: minimum floor space and cubic content of air for each prisoner; adequate sanitary facilities; clothing which shall be in no manner degrading or humiliating; provision of a separate bed; and provision of food of nutritional value adequate for health and strength.⁸⁹ The European Court of Human Rights has stipulated, in *Kalashnikov v. Russia* for example, that prison overcrowding may lead to a violation of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment.⁹⁰
109. The Applicant was deprived of adequate sleep in all his places of detention. It is recognised that sleep deprivation, which heightens vulnerability, anxiety and results in psychological suffering, may amount to inhuman treatment if not torture.⁹¹ In the building described as “part of the National Security offices with ‘Crimes against Sudan’ written above the entrance” (Second Place of Detention),⁹² another described as “Information Police”⁹³ (Third Place of Detention) and at Omdurman Prison the sleep deprivation was, to a large extent, a result of over-crowding.⁹⁴ In the Second Place of Detention, the Applicant was detained in over-crowded cell without access to a toilet or water.⁹⁵
110. Throughout his detention, the Applicant had little to no access to bedding (and never a separate bed), clean water, food, a toilet, a bath, or medical treatment. The Applicant was made to share a small cell with up to thirteen individuals at his Second Place of Detention. Further, the Applicant slept on the concrete floor without bedding, and used his shoes as a pillow. On occasion, inmates slept on top of each other.
111. In his Third Place of Detention, the Applicant was also made to share his cell with a number of individuals, including children. Although neither charged nor convicted, the Applicant was held for 71 to 78 days in pre-trial detention. Principle 8 of the UN *Body of Principles* provides:

persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.⁹⁶

⁸⁸ On the element of powerlessness see; Report of the Special Rapporteur on the question of torture, UN Doc. E/CN.4/2006/6, 23 December 2005, paras. 39, 40.

⁸⁹ UNHRC, *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994), views of 21 July 1994, para. 9.3.

⁹⁰ ECtHR, *Kalashnikov v. Russia*, judgment of 15 July 2002, Application No. 47095/99, paras. 102–103.

⁹¹ ECHR, *Guliyev v Russia*, ECHR (Application No. 24650/02). 19 June 2008), para. 64.

⁹² Witness statement of Magdy el-Baghdady, Appendix 1, above n.3, para. 72

⁹³ *Ibid.*, para. 77.

⁹⁴ *Ibid.*, para. 91.

⁹⁵ *Ibid.*, paras. 70-71.

⁹⁶ UN *Body of Principles*, above n. 79, Principle 8.

However, the Applicant shared a cell with convicted criminals in Kober prison, the Third Place of Detention and Omdurman Prison.

112. In a case before the Inter-American Court of Human Rights, involving a “situation of permanent overcrowding” and detention of a number of individuals in the same cell who slept on the floor for a long period of time, the Court concluded that the applicant in that case had not been “treated with the due respect to his human dignity, and that the State did not comply with the duties that correspond to it in its condition of guarantor of the rights of the detainees.”⁹⁷ In a recent case before the European Court of Human Rights, where prisoners shared three square meters (3.6 square yards) of personal space, this was found to violate the basic rights of inmates.⁹⁸

Denial of access to medical treatment

113. The Applicant was in need of medical treatment on several occasions but was denied access to a nurse or doctor in violation of Article 5.
114. The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* provides that States:

shall ensure that all persons under any form of detention or imprisonment are treated in a humane manner and with respect for the inherent dignity of the person⁹⁹ and must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her...doctor...¹⁰⁰

115. In determining whether an act constitutes cruel, inhuman or degrading treatment, the Commission has drawn on the UN *Body of Principles*¹⁰¹ whose Article 1 stipulates that:

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.¹⁰²

116. Article 24 of the UN *Body of Principles* provides that:

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.¹⁰³

⁹⁷ IACtHR, *López-Álvarez v. Honduras*, judgment of 1 February 2006, para. 110.

⁹⁸ ECtHR, *Torreggiani and others. V. Italy*, Application Nos. 43517/09, 35315/10, 37818/10 et al., 8 January 2013.

⁹⁹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (xxx) 247 (2001), M (7) (a) (“**Fair Trial in Africa Guidelines**”).

¹⁰⁰ *Ibid.*, M (2) (e).

¹⁰¹ ACmHPR, *Huri Laws v Nigeria*, Communication No. 225/98 (2000), para. 40.

¹⁰² UN *Body of Principles*, above n. 79, Article 1.

¹⁰³ *Ibid.*, Article 24.

117. The UN *Standard Minimum Rules*,¹⁰⁴ which apply by virtue of the *Robben Island Guidelines*, equally stipulate that prisoners should be provided with adequate medical services.¹⁰⁵
118. The European Court of Human Rights has also elaborated on the duty to provide access to adequate health care, finding that failure to do so constitutes inhuman treatment if not torture.¹⁰⁶ The denial of health care also violates Article 16 (2) of the Charter, according to which:

States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

119. The Commission held in *Malawi African Association and others v. Mauritania* that:

The State's responsibility in the event of detention is even more evident to the extent that detention centres are of its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities. Some prisoners died as a result of the lack of medical attention. The general state of health of the prisoners deteriorated due to the lack of sufficient food; they had neither blankets nor adequate hygiene. The Mauritanian state is directly responsible for this state of affairs and the government has not denied these facts. Consequently, the Commission considers that there was violation of Article 16.¹⁰⁷

Denial of access to adequate toilet facilities

120. The Applicant was also denied access to toilet facilities on occasion such that he had to use a bottle in his cell. Denying adequate access to toilet facilities so that detainees have to defecate inside their cell constitutes humiliating treatment that violates human dignity and is contrary to Article 1 of the UN *Body of Principles*¹⁰⁸ and the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.¹⁰⁹ It is also in violation of Article 12 of the UN *Standard Minimum Rules* which provides that:

¹⁰⁴ UN *Standard Minimum Rules*, above n. 80.

Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, Economic and Social Council Res. 663 C (XXIV) (31 July 1957) and 2076 (LXII) (13 May 1977), paras. 22-26.

¹⁰⁵ *Robben Island Guidelines*, above n. 32, para. 33: "[States should] Take steps to ensure that the treatment of all persons deprived of their liberty are in conformity with international standards guided by the UN Standard Minimum Rules for the Treatment of Prisoners."

¹⁰⁶ ECtHR, *Ilascu and Others v. Moldova and Russia*, (2005) 40 EHRR 46, paras. 428, 438, 445 and *Khudobin v Russia*, Appl. No.59696/00, 26 October 2006, para. 96.

¹⁰⁷ ACmHPR, *Malawi African Association and others v. Mauritania*, Communication Nos 54/91, 61/91, 98/93, 164/97 and 210/98, para. 122.

¹⁰⁸ See also ECtHR, *Fedotov v. Russia*, Application no. 5140/02, Judgment of the European Court of Human Rights, 25 October 2005, para. 68: "The Court notes that the applicant was kept overnight in a cell unfit for an overnight stay, without food or drink, or unrestricted access to a toilet. These unsatisfactory conditions exacerbated the mental anguish caused by the unlawful nature of his detention. In these circumstances, the Court considers that the applicant was subjected to inhuman treatment, incompatible with Article 3 of the Convention."

¹⁰⁹ Fair Trial in Africa Guidelines 2001, above n. 99, M (7) (a).

The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.¹¹⁰

Access to Food

121. The Applicant was also regularly denied access to sufficient food and water. During the approximately fifteen days while detained in the Third Place of Detention, the Applicant would regularly be provided only one sandwich per day, which he would be to share between three men a day. No other food was offered. The Applicant alleges that upon being released from detention, he had lost 40kg of his body weight.¹¹¹

122. Rule 20(1) of the *UN Standard Minimum Rules* provides:

Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.

123. The Commission, the Inter-American Court of Human Rights, the UN Human Rights Committee,¹¹² and the European Court of Human Rights¹¹³ have found that food deprivation violates the principle that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and/or violates the principle that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

124. In *Achuthan and Amnesty International*, the Commission found that jointly and severally with other acts, a reduction in diet and restricting access to water or food were “examples of torture, cruel and degrading punishment and treatment”.¹¹⁴ In *Mukong v. Cameroon*, the UN Human Rights Committee found that being kept incommunicado, threatened with torture and death and intimidated, deprived of food, and kept locked in a cell for several days on end without the possibility of recreation also can amount to “cruel, inhuman and degrading treatment” under Article 7 of the ICCPR.¹¹⁵ In *H. Elahie v. Trinidad and Tobago*¹¹⁶ and *H. Kalenga v. Zambia*¹¹⁷ the UN Human Right Committee found violations of Article 10(1) of the ICCPR in cases concerning denial of access to recreational facilities, inadequate provision of sleeping facilities,¹¹⁸ occasional deprivation of food and denial of medical assistance when

¹¹⁰ See also Article 15 of the *UN Standard Minimum Rules*, above n. 80: “15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet Articles as are necessary for health and cleanliness.”

¹¹¹ Witness statement of Magdy el-Baghdady, Appendix 1, above n. 3, para. 97

¹¹² UNHRC, *Mukong v. Cameroon* (Views adopted on 21 July 1994), Communication No. 458/1991, in UN doc. GAOR, A/49/40 (vol. II); *F. Birindwa ci Birhashwirwa and E. Tshisekedi wa Malumba v. Zaire* (Views adopted on 2 November 1989), Communications Nos. 241 and 242/1987, in UN doc. GAOR, A/45/40 (vol. II); *Kelly v Jamaica*, (253/1987), 8 April 1991, Report of the Human Rights Committee, (A/46/40), 1991; *Párkányi v Hungary* (410/1990), 27 July 1992, Report of the Human Rights Committee, (A/47/40), 1992.

¹¹³ ECtHR, *Tomasi v. France*, judgment of 27 August 1992, Series A, No. 241-A, p. 40, para. 108.

¹¹⁴ ACmHPR, *Krishna Achuthan and Amnesty International (on behalf of Aleke Banda and Orton and Vera Chirwa) v. Malawi*, Communications Nos. 64/92, 68/92 and 78/92, decision adopted during the 16th session, October-November 1994, para. 33.

¹¹⁵ UNHRC, *Mukong v. Cameroon* (Views adopted on 21 July 1994), Communication No. 458/1991, in UN doc. GAOR, A/49/40 (vol. II), p. 180, para. 9.4

¹¹⁶ UNHRC, *H. Elahie v. Trinidad and Tobago* (Views adopted on 28 July 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 37, para. 8.3

¹¹⁷ UNHRC, *H. Kalenga v. Zambia* (Views adopted on 27 July 1993), Communication No. 326/1988, in UN doc. GAOR, A/48/40 (vol. II), p. 71, para. 6.5.

¹¹⁸ The UNHRC considered the allegations of the complainant that the detainees had only “a piece of sponge and old newspapers” to sleep on...food not fit for human consumption” and was treated with brutality by staff whenever complaints were made and found that the author was not treated with humanity and respect for the inherent dignity of the human person, in violation of article 10, paragraph

needed.¹¹⁹ In *F. Birindwa ci Birhashwirwa and E. Tshisekedi wa Malumba v. Zaire*, the Committee found a violation of Article 7 of the ICCPR when an individual was “deprived of food and drink for four days after his arrest” and “subsequently kept interned under unacceptable sanitary conditions”.¹²⁰

125. The treatment the Applicant faced and the conditions of his detention cumulatively meet the threshold of a violation of Article 5.

4.2 Article 6: Right to Liberty and Security

126. The circumstances of the Applicant’s arrest and detention, the lack of information about the ground of arrest, the denial of access to a lawyer, the lack of opportunity to contact family members or British consular staff in Khartoum (incommunicado detention), and the denial of *habeas corpus* constitutes a violation of Article 6.

Arbitrary Arrest

127. Article 6 prohibits arbitrary arrest. The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* in Africa provide that “States must ensure that no one shall be subject to arbitrary arrest or detention.”¹²¹

128. As recognised by the Commission in *Article 19 v. Eritrea*, quoting the decision of the UN Human Rights Committee in the *Mukong* case:¹²²

Arbitrariness is not to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law... remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances...¹²³

129. An arrest is only lawful where it is based on reasonable suspicion. As held by the European Court of Human Rights in the case of *Gusinskiy v. Russia*:¹²⁴

...the requirement that the suspicion must be based on reasonable grounds forms an essential part of the safeguard against arbitrary arrest and detention. The fact that a suspicion is held in good faith is insufficient. The words “reasonable suspicion” mean the existence of facts or information which would satisfy an objective observer that the person

1, of the Covenant, UNHRC, *H. Elahie v. Trinidad and Tobago* (Views adopted on 28 July 1997), Communication No. 533/1993, in UN doc. GAOR, A/52/40 (vol. II), p. 37, para. 8.3.

¹¹⁹ UNHRC, *H. Kalenga v. Zambia* (Views adopted on 27 July 1993), Communication No. 326/1988, in UN doc. GAOR, A/48/40 (vol. II), p. 71, para. 6.5.

¹²⁰ UNHRC, *F. Birindwa ci Birhashwirwa and E. Tshisekedi wa Malumba v. Zaire* (Views adopted on 2 November 1989), Communications Nos. 241 and 242/1987, in UN doc. GAOR, A/45/40 (vol. II), p. 84, para. 13(b); see also *Kelly v Jamaica*, (253/1987), 8 April 1991, Report of the Human Rights Committee, (A/46/40), 1991; *Párkányi v Hungary* (410/1990), 27 July 1992, Report of the Human Rights Committee, (A/47/40), 1992, para. 5.

¹²¹ Fair Trial in Africa Guidelines 2001, above n. 100, M (1) (b).

¹²² ACmHPR, *Article 19 v. Eritrea*, Communication No. 275/2003, para. 93.

¹²³ UNHRC, *Albert Mukong v Cameroon*, Communication No. 458/1991, 10 August 1994, para. 9.8.

¹²⁴ ECtHR, *Gusinskiy v. Russia*, (Application no. 70276/01, 19 May 2004), para. 53; IActHR, *Servellon Garcia and others v Honduras* (Merits, Reparations and Costs), Judgment of 21 September 2006, para. 90.

concerned may have committed the offence.¹²⁵

130. At the time of,¹²⁶ and prior to, the Applicant's arrest, civil society activists were subject to arbitrary arrest often following the organising of events or dissemination of civic education materials.¹²⁷ Heightened concerns of a popular movement against the regime (similar to those taking place in Tunisia, Egypt and other places) led to a string of arbitrary arrests.¹²⁸ Even outside of this particular context, in Khartoum and other parts of Sudan, the National Intelligence and Security Services (NISS) systematically use arbitrary arrest and detention against political dissidents.¹²⁹
131. The case of the Applicant falls within this pattern of arbitrary arrests and detention. The manner of his arrest by NISS officers, the nature of the subsequent "interrogation", which was characterised by beatings and insults, suggest that the ostensible purpose of the arrest and detention was to punish the Applicant for bringing supposedly suspicious technological equipment into the country, and obtain information about its suspected use to incite protests. The Applicant was not charged with any criminal offence throughout the 71 to 78 days of his detention, indicating that there was no requisite *prima facie* evidence or reasonable suspicion of him having committed an offence. The main reason for his deprivation of liberty was apparently his perceived opposition to the regime, which, together with the manner of his arrest and detention, renders it unjust, inappropriate and manifestly incompatible with basic notions of due process. The Commission has held that, in circumstances similar to this, there is a presumption in favour of release under Article 6.¹³⁰
132. Article 50 (1) (e) of the NSA 2010 vests the NISS with the power to "[a]rrest or detain any suspected person for a period not exceeding thirty days provided that his/her relatives are immediately informed". This provision does not specify the requisite level of suspicion and lacks sufficient precision and predictability. In practice, this has given rise to concerns because the NISS regularly apprehends individuals without a formal arrest warrant or any visible grounds, and frequently fails to bring charges subsequently.¹³¹ NISS detention can typically be accompanied by additional serious human rights violations such as incommunicado detention, ill-treatment, torture or detention in unofficial places of detention. The human rights concerns related to the NISS are longstanding and reflect institutionalised problems.¹³²

Right to Information for the Basis of Arrest

133. The Commission has applied its *Resolution on the Right to Recourse and Fair Trial* in its jurisprudence, such as in the case of *Media Rights Agenda v. Nigeria*, according to which:

¹²⁵ ECtHR, *Gusinskiy v. Russia*, (Application no. 70276/01, 19 May 2004), para. 53; see also ECHR, *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, Series A no. 182, pp. 16-17, para. 32

¹²⁶ Office of the High Commissioner for Human Rights, 'Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan: Arbitrary arrest and detention committed by national security, military and police', 28 November 2008, available at: <http://www.ohchr.org/Documents/Countries/10thOHCHR28nov08.pdf>, p.3.

¹²⁷ REDRESS and others Shadow Report: Torture (April 2012), above n. 16, p. 4-8; see also, ACJPS Shadow Report, above n. 16, pp. 8-14.

¹²⁸ *Ibid.*

¹²⁹ REDRESS and others UNHRC Pre-sessional meeting submission (August 2013), p. 8.

¹³⁰ ACmHPR, *Jawara Case*, Communication 10/193; *Civil Liberties Organisation in respect of Bar Association v Nigeria*.

¹³¹ REDRESS and others Shadow Report: Reform (April 2012), above n. 16, p.12-14.

¹³² Office of the High Commissioner for Human Rights, 'Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan: Arbitrary arrest and detention committed by national security, military and police', 28 November 2008, available at: <http://www.ohchr.org/Documents/Countries/10thOHCHR28nov08.pdf>, p. 3.

persons who are arrested shall be informed at the time of the arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them.¹³³

134. As the *Resolution on the Right to Recourse and Fair Trial* makes clear, it is not sufficient for the arrested person to be able to guess why he has been arrested but he must be told by way of official notification.¹³⁴
135. The Applicant was told in general terms of the suspicion that he had arrived in the country to incite a revolution using the telecommunication materials and that he was a British or Israeli spy. The Applicant was not officially informed of the reasons for his arrest. The Applicant recalls one of the NISS armed men (who he later identified as Major Mohammed Saleh) carried white papers with information in Arabic on them which were not referred to prior to, or during, his arrest.

Arbitrary Detention

136. Article 6 prohibits arbitrary detention. The Sudanese Criminal Procedure Code provides for a maximum of two weeks of detention without any charges being brought;¹³⁵ the National Security Act permits detention without charges for up to four and a half months, in contravention of international human rights standards. The detention of the Applicant for between 71 to 78 days was unlawful. As held by the Commission,

where individuals have been detained without charges being brought ... this constitutes an arbitrary deprivation of their liberty and thus violates Article 6.¹³⁶

137. Moreover, the detention suffers from the same arbitrariness as the preceding arrests. It also violates the standards prescribed in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, namely that:

unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial.¹³⁷

The Applicant did not pose risks of fleeing, interfering with witnesses, nor did he pose a clear and serious risk to others. The Applicant's lengthy pre-trial detention is a violation of Article 6.

¹³³ ACmHPR, *Media Rights Agenda v. Nigeria*, Communication No. 224/1998 (2000), paras. 43, 44. See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001, M (2) (a).

¹³⁴ *Resolution on the Right to Recourse and Fair Trial*, adopted at the 11th Ordinary Session of the African Commission on Human and Peoples' Rights in Tunis, Tunisia in 1992; available at: <http://www.achpr.org/sessions/11th/resolutions/4/>, para. 2(b).

¹³⁵ Criminal Procedure Code 1991, Section 79: "A person arrested for inquiry, by the Police, may remain in detention, for a period not to exceed 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."

¹³⁶ ACmHPR, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, Communication Nos 143/95 and 150/96, para. 55.

¹³⁷ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, <http://www.achpr.org/instruments/fair-trial/>, M(1)(e).

138. The Office of the High Commissioner for Human Rights has found excessive use of arbitrary arrest and detention in criminal investigations in Sudan.¹³⁸

Incommunicado Detention

139. The Applicant was held in incommunicado detention throughout the period of his detention. In *Zegveld and Ephrem v. Eritrea*, the Commission stated that:

Incommunicado detention is a gross human rights violation that can lead to other violations such as torture or ill-treatment or interrogation without due process safeguards...The African Commission is of the view that all detentions must be subject to basic human rights standards. There should be no secret detentions and States must disclose the fact that someone is being detained as well as the pace of the detention. Furthermore, every detained person must have prompt access to lawyer and to their families and their rights with regards to physical and mental health must be protected as well as entitlement to proper conditions of detention.¹³⁹

140. The right to notify a person of one's choice about an arrest, and to have access to a lawyer constitute important rights as well as crucial safeguards to prevent torture and ill-treatment.

(i) Access to a Lawyer

141. Authorities must give arrested and detained persons prompt access to a lawyer, as for example was held in the cases of *Media Rights Agenda and Constitutional Rights Project v. Nigeria*.¹⁴⁰ Furthermore, The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* provide that:

any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present.¹⁴¹

(ii) Right to notify family

142. Denying the Applicant contact with his family members also violates Article 6. As provided for in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*:

anyone who is arrested or detained has the right to inform, or have the authorities notify, their families or friends. The information must include the fact of their arrest or detention and the place the person is kept in custody...

State must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor, family and friends.¹⁴²

¹³⁸ Office of the High Commissioner for Human Rights, 'Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan: Arbitrary arrest and detention committed by national security, military and police', 28 November 2008, available at: <http://www.ohchr.org/Documents/Countries/10thOHCHR28nov08.pdf>, p.26

¹³⁹ ACmHPR, *Zegveld and Ephrem v. Eritrea*, para. 55

¹⁴⁰ ACmHPR, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998). paras. 55-56.

¹⁴¹ Fair Trial Guidelines 2001, above n. 99, M(1)(e), Article M(2)(f).

¹⁴² *Ibid.*, M(2)(c) and (e).

143. Rule 92 of the *UN Standard Minimum Rules* states that:

An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

144. Principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.¹⁴³

145. Further, Principle 16 of the UN *Body of Principles* stipulate that:

Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

Such notification to be made or permitted to be made “without delay” while permitting delay of a “reasonable period where exceptional needs of the investigation so require”.¹⁴⁴

(iii) Right to notify consular staff

146. The Applicant was not permitted to contact the relevant diplomatic and consular representatives. Rule 37 of the *UN Standard Minimum Rules* provides that prisoners who are foreign nationals:

shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong [or] with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.¹⁴⁵

147. Further, Principle 16 of the UN *Body of Principles* states that:

If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.¹⁴⁶

148. The Applicant was not permitted to contact the relevant diplomatic and consular representatives. Under Article 61 of the Charter, the Commission shall also take into consideration, as subsidiary measures to

¹⁴³ UN *Body of Principles*, above n. 79, Principle 15.

¹⁴⁴ *Ibid.*

¹⁴⁵ UN *Standard Minimum Rules*, above n. 80, Rule 38(1) and (2).

¹⁴⁶ UN *Body of Principles*, above n. 79, Principle 16.

determine the principles of law, other general or special international conventions, laying down rules expressly recognised by member States of the Organization of African Unity.

149. Under Article 61, the Commission shall consider Article 36(1)(b) of the Vienna Convention on Consular Relations¹⁴⁷ 24 April 1963 (Vienna Convention) and the right to consular assistance:

A foreign national arrested or detained in another country must be notified by State officials of his right to have the consulate informed of his detention....If the detained individuals requests it, the consulate must be notified.

150. In the *LaGrand case* (Germany v United States),¹⁴⁸ the International Court of Justice found that Article 61 of the Vienna Convention granted rights to individuals on the basis of its plain meaning, and that domestic laws could not limit the rights of the accused under the convention, but only specify the means by which those rights were to be exercised.

151. In violation of the Vienna Convention (applicable under Article 61 of the African Charter) and the UN *Body of Principles*¹⁴⁹, the Applicant was never notified of his rights to have the UK consulate notified of his detention, he repeatedly requested access to the UK embassy but was denied the right to contact the embassy. The failure to accord the applicant this important safeguard deprived him of the protection against arbitrary arrest and detention provided under Article 6 of the African Charter.

4.4 Article 7: Right to a Fair Trial

152. Throughout the period of his detention, the Applicant was not given access to a lawyer or brought before a judge in violation of his rights under Article 7 of the African Charter.

(i) Access to a Lawyer Chosen by the Defendant

153. As outlined above, the Applicant was not permitted access to a lawyer. Article 7(1)(c) provides:

the right to defence, including the right to be defended by counsel of his choice.

154. Authorities must give arrested and detained persons prompt access to a lawyer as the Commission has elaborated in its jurisprudence, such as in the cases of *Media Rights Agenda and Constitutional Rights Project v. Nigeria*¹⁵⁰ and *Zevgeld and Ephrem v. Eritrea*.¹⁵¹

¹⁴⁷ Vienna Convention on Consular Relations, adopted Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Sudan ratified this treaty on 23 March 1995: “[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.”

¹⁴⁸ International Court of Justice, *LaGrand case (Germany v USA)*, Judgment, I.C.J. Reports 2001, p. 466 (concluding that Article 36 of the Convention creates individual rights which the United States failed to uphold); and *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12 (finding that the United States breached its obligations under the Vienna Convention for failing to inform detainees of their rights under Article 36 and failing to notify the appropriate Mexican consular post without delay, among other findings regarding the Convention).

¹⁴⁹ UN *Body of Principles*, above n. 79.

¹⁵⁰ ACmHPR, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998), paras. 55-56.

¹⁵¹ ACmHPR, *Zevgeld and Ephrem v. Eritrea*, Communication No. 250/2002, para. 55.

155. The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* stipulate that the right to fair trial includes:

an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of proceedings;¹⁵²

An accused person...has the right to an effective defense or representation and has a right to choose his or her own legal representative at all stages of the case.¹⁵³

[and the right to have] ... adequate time and facilities for the preparation of their defence and to communicate in confidence with the counsel of their choice.¹⁵⁴

156. This right applies:

during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings.¹⁵⁵

157. The Applicant asked for, and was repeatedly denied, access to a lawyer during the 71 to 78 days of his detention. He was not, therefore, granted prompt access to a lawyer. His incommunicado detention, violated Article 7.¹⁵⁶

158. Article 51 (2) of the NSA 2010, stipulates that: “The arrested, detainee or person in custody shall have the right to inform his/her family or mother employer of his/her detention and shall be allowed to communicate with his/her family or advocate *if this does not prejudice the progress of interrogation, enquiry and investigation.*” This law only permits access to a lawyer or family conditionally: access is only granted if it does not prejudice the progress of interrogation, enquiry and investigation. The NISS has apparently unfettered discretion to exclude access where it is deemed detrimental to the investigation. This is in conflict with Article 7(1)(c) of the African Charter, the *Resolution on the Right to Recourse and Fair Trial, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, and the Commission’s jurisprudence,¹⁵⁷ all of which guarantee unconditional access to a lawyer for defence purposes. It is also in conflict with all international standards on the right to access to a lawyer, which provide that the right can only be curtailed in exceptional circumstances and in a way that safeguards the right of the defence. Further, this provision also fails to guarantee *prompt* access to a lawyer in conflict Commission’s jurisprudence.¹⁵⁸

(ii) Right to be brought promptly before a judge

159. The Applicant was not brought before a judge throughout the 71 – 78 days of his detention.

160. Article 7 (1) (d) stipulates that:

¹⁵² Fair Trial Guidelines 2001, above n. 100, M(1)(e), Article (2)(f).

¹⁵³ *Ibid.*, G(b)

¹⁵⁴ *Ibid.*, Article 2(e)(i).

¹⁵⁵ *Ibid.*, N(2)(c)

¹⁵⁶ ACmHPR, *Article 19 v. Eritrea*, Communication No. 275/2003, paras. 99-100.

¹⁵⁷ ACmHPR, *Zegveld and Ephrem v. Eritrea*, Communication No. 250/2002, para. 55.; *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, paras. 55-56.

¹⁵⁸ *Ibid.*

every individual shall have the right ... to be tried within a reasonable time by an impartial court or tribunal.

161. The Commission has recognised in its *Resolution on the Right to Recourse and Fair Trial* that this provision entails that any individual:

arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released.¹⁵⁹

162. Further in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, it is stipulated that:

anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a judicial body, in order that the judicial body may decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful.¹⁶⁰

163. The Commission has not interpreted how many hours or days “promptly” consists of. However, the UN Human Rights Committee has noted that ‘delays must not exceed a few days’.¹⁶¹ The Human Rights Committee has recognised that 72 hours of detention without being brought before a judge is excessive and not in compliance with Article 9 of the ICCPR to which Sudan is a party.¹⁶²

164. Furthermore:

Judicial bodies shall at all times hear and act upon petitions for habeas corpus, amparo or similar procedures. No circumstances whatever must be involved as justification for denying the right to habeas corpus, amparo or similar procedures.

165. The denial of habeas corpus constitutes a violation of Articles 1 and 7, as held in *Constitutional Rights Project v. Nigeria, Achuthan and Another (on behalf of Banda and Others) v Malawi, Centre for Free Speech v Nigeria*, and *Huri-Laws v Nigeria*.¹⁶³

166. Sudanese officials repeatedly denied the Applicant’s requests to see a lawyer at every stage of his detention and *continued* to interrogate and threaten him without a lawyer present. This lack of access to a lawyer is a clear violation of the Applicant’s habeas corpus rights.

167. In addition,

States shall enact legislation, where it does not exist, to ensure the right to habeas corpus, amparo or similar procedures.¹⁶⁴

¹⁵⁹ See *Resolution on the Right to Recourse and Fair Trial*, above n. 134.

¹⁶⁰ Fair Trial Guidelines 2001, above n. 99, M (4).

¹⁶¹ UN HRC, General Comment No. 8, (Article 9 of the 1966 International Covenant on Civil and Political Rights), 30 July 1982, sec. 2-3.

¹⁶² UNHRC, Concluding observations on the second periodic report of Uzbekistan, UN Doc. CCPR/CO/83/UZB, 26 April 2005, sec. 14.

¹⁶³ ACmHPR, *Constitutional Rights Project v. Nigeria*, Communication No. 153/96(1999), para. 18; *Achuthan and Another (on behalf of Banda and Others) v Malawi*, Communications Nos 64/92, 68/92 and 78/92 (1995), para. 9; *Centre for Free Speech v Nigeria*, para. 18; *Hurri-Laws b Nigeria*, Communication No. 225/98 (2000), para. 46.

¹⁶⁴ *Ibid.*, M(5)(a) and (e).

168. The Applicant was not brought before a judge at any point during his period of detention of between 71 and 78 days. This is clearly incompatible with international law and an obvious violation of the African Charter.

169. Articles 50 and 51 of the NSA 2010 vest the NISS with the power of detaining an individual for an initial period of thirty days and a total period of four and a half months before a detainee has the right to have recourse to a court. These provisions are manifestly incompatible with the right to be brought before a judge promptly under the African Charter.

(iii) Right to adequately prepare his defence

170. Following his release from detention, the Applicant was charged with offences under the Informatic [sic] Offences (Combating) Act of 2007. The Applicant faced approximately six court appearances, over a period of eight months. For much of the trial, the Applicant did not understand the proceedings and an interpreter attended only once.

171. The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* stipulate that the right to fair trial includes: the right to have adequate time and facilities for the preparation of their defence.¹⁶⁵

172. That the Applicant was unable to understand much of the proceedings made it difficult for him to adequately prepare a defence, in violation of Article 7 of the African Charter.

4.5 Article 14: Right to Property
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173. The Applicant's property (which had been cleared for entry into Sudan by customs officials) was searched and seized. Some of the Applicant's property was not returned; other aspects of the Applicant's property was returned broken. The Applicant's property included clothing, standard electronics and books. The confiscation and damage to this property constituted a violation of Article 14.

174. Article 14 of the African Charter guarantees the right to property. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

175. The Applicant was not provided with evidence¹⁶⁶ that explained what public need or community interest justified the search and seizure of his property, nor their eventual destruction without reimbursement. As such the Applicant's right under Article 14 of the African Charter not to have property confiscated in absence of community interest and/or appropriate laws was violated.

¹⁶⁵ Fair Trial Guidelines 2001, above n. 99, G(b)

¹⁶⁶ ACmHPR, *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*; Communication No. 292/04, para 71-3; ACmHPR, *Huri Laws v Nigeria*, Communication No. 225/98, para. 53; ACmHPR, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, Communication No. 140/94-141/94-145/95, 5 November 1999, para. 53-4; *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*; 284/03, 3 April 2009; para. 179;

4.6 Article 16: Right to Health

176. The Applicant's treatment in detention violated his right to health under Article 16 of the African Charter.
177. Article 16 of the African Charter provides that:
1. [E]very individual shall have the right to enjoy the best attainable state of physical and mental health.
 2. State Parties should take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.
178. The UN Committee on Economic, Social and Cultural Rights (CESCR) held that the right to health is closely related to, and dependent upon, the realisation of other human rights, including the prohibition of torture.¹⁶⁷ It is generally recognised that torture and ill-treatment causes severe mental and physical trauma on the victim, "a trauma that can be long lasting and may never fully disappear".¹⁶⁸ The resulting ill-health as a consequence of torture can be attributed to the Respondent State as the author of the torture. Torture and ill treatment can thus be interpreted as a violation of the rights of individuals to enjoy the best attainable state of physical and mental health.¹⁶⁹ Put differently, the right to health contains freedoms, including the right to be free from torture and other ill-treatment.¹⁷⁰
179. The Commission has found that States should take the necessary measures to protect the health of their citizens.¹⁷¹ The Commission has made it clear that a State's responsibility in the event of detention is even more evident given that detention centres are its exclusive preserve. As such, in these circumstances, the physical integrity and welfare of detainees is the responsibility of the competent public authorities. In a case where the general state of health of the prisoners deteriorated due to the lack of sufficient food (they had neither blankets nor adequate hygiene), the Commission found that the responsible State was directly responsible and that there was a violation of Article 16. Failure to provide basic services such as safe drinking water and electricity and the shortage of medicine constitutes a violation of Article 16.¹⁷²

¹⁶⁷ See UN CESCR, General Comment No. 14 (2000), 'The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)', available at <http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En>.

¹⁶⁸ See further for the link between torture, ill treatment and the right to health, Centro de Atencion Psicosocial and the International Rehabilitation Council for Torture Victims, 'Torture and ill-treatment as a violation of Economic, Social and Cultural Rights in Peru, March 2012, available at: http://www2.ohchr.org/english/bodies/cescr/docs/ngos/CAPS-IRCT_Peru48.pdf.

¹⁶⁹ See also World Health Organisation, 'Linkages Between Health and Human Rights, for human rights violations that result in ill-health,

¹⁷⁰ See Office of the High Commissioner for Human Rights, 'The Right to Health, Factsheet 31, June 2008, available at: <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

¹⁷¹ ACmHPR, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interfricaine des Droits de l'Homme, Les Témoins de Jehovah v DRC*, Communication No. 25/89-47/90-56/91-100/93, para. 47.

¹⁷² ACmHPR, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*, Communications No. 54/91-61/91-96/93-98/93-164/97_196/97-210/98 (11 May 2000), para. 122; See also: *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*.

180. The Commission, albeit in a different context, has confirmed that violations of the right to health can occur through the direct action of States.¹⁷³ It is submitted that this obligation also extends to the duty to refrain from acts of torture and other ill-treatment, in light of the serious effects of torture and other ill-treatment on every individuals' right to health.
181. Further, while in detention, the Applicant was denied access the medical care and was injected with an unknown substance, thereby violating his right to enjoy the best attainable state of physical and mental health under Article 16.¹⁷⁴

4.7 Article 1: Violation of Respondent State's Obligation to Recognise the Rights Duties and Freedoms of the Charter and to Adopt Measures to Give Them Effect

182. The failure of the Respondent State to adequately protect and respond to the violation of the Applicant's rights constitutes a violation of Article 1 of the African Charter.
183. The Respondent State has a duty to respect, protect, promote and fulfil the rights contained in the Charter.¹⁷⁵ This entails that the Respondent State exercises due diligence in adopting legislation, conducting investigations and providing effective remedies so as to comply with its obligations.¹⁷⁶

Legislation

184. Sudanese legislation does not effectively repress and/or prevent human rights violations. The legislation in place fails to protect against arbitrary arrest and detention.¹⁷⁷ Equally, there are no adequate safeguards against torture and inhuman treatment.¹⁷⁸ The Criminal Procedure Code does not explicitly provide for a right to access a lawyer of one's choice at all stages of proceedings.¹⁷⁹ Neither does it stipulate an explicit right to consult a doctor.¹⁸⁰ In addition, the law does not grant the right to habeas corpus.
185. Sudanese legislation does not provide sanctions and effective remedies in cases of breach, such as arbitrary arrest and detention, and torture and other ill-treatment. The offence of unlawful detention carries inadequate punishments of one year, or, in aggravated circumstances, three years imprisonment.¹⁸¹ In addition, the offence does not cover arrest and detention by the NISS that would be

¹⁷³ ACmHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan*, Communications No. 279/03, 296, 2005, para. 112.

¹⁷⁴ See Annex A4.

¹⁷⁵ ACmHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/2002, para. 152.

¹⁷⁶ *Ibid.*, para. 159.

¹⁷⁷ *Report of the Special Rapporteur on the human rights situation in Sudan, Sima Samar*, UN Doc. A/HRC/9/13, 2 September 2008, paras. 27 et seq.

¹⁷⁸ Concluding observations of the UN HRC: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1,2, July 2007, para. 16.

¹⁷⁹ 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[...]"

¹⁸⁰ *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 thereof."

¹⁸¹ Criminal Act, 1991, Article 165.

considered arbitrary under international human rights law because the National Security Act vests the NISS with extremely broad powers of arrest and detention.

186. The offences relating to torture in the CPA 1991 fall short of the internationally recognised definition of torture and prescribe inadequate punishments for the offence.¹⁸² The NSA 2010 equally fails to adequately criminalise torture or other forms of ill-treatment or abuse.
187. Sudanese laws do not impose a clear obligation on the responsible authorities, namely the Prosecution Attorney, to commence an investigation into allegations of torture *ex officio* or following a complaint. A criminal suit against any NISS member may not be commenced unless the immunity granted by law has been lifted, which requires that the head of the forces authorises the criminal suit.¹⁸³ In practice, such authorisation is almost never granted, resulting in a lack of investigations and impunity in torture cases.¹⁸⁴ These provisions contravene the right to an effective remedy under international law and the Charter.¹⁸⁵
188. The Bill of Rights contained in the Sudanese Interim National Constitution stipulates a right to litigation.¹⁸⁶ This constitutional right has not been implemented in statutory law as victims of human rights violations have no express right to a judicial remedy or reparation. A victim of torture or arbitrary arrest and/or detention may bring a claim for reparation as a supplementary civil suit in the course of criminal proceedings¹⁸⁷ or for *diyya* (blood money) in case of bodily injuries.¹⁸⁸ In both instances, a victim will only be able to proceed with the case where a criminal investigation has been carried out against the alleged perpetrators. However, officials enjoy immunity from suit, which can only be lifted by the head of the forces concerned, with no clear judicial procedure in place for victims to challenge inaction or a refusal to lift immunity.¹⁸⁹
189. In civil proceedings, a torture victim or his or her relatives can claim damages for tort.¹⁹⁰ However, victims similarly face the challenge of immunity, which also applies to civil suit. As the State is vicariously liable, victims are frequently prevented from claiming compensation and other forms of reparation where immunity has not been lifted.

¹⁸² CPA 1991, Article 115 (2): "Every person who, having public authority, entices, or threatens, or tortures any witness, or accused, or opponent to give, or refrain from giving any information in any action, shall be punished, with imprisonment, for a term not exceeding three months, or with fine, or with both." Article 142 (2) of the Criminal Act: "...where hurt is caused with the intention of drawing a confession from another, or compelling that other to do an act contrary to the law, the offender shall be punished, with imprisonment, for a term not exceeding two years, and may also be punished with fine." See HRC, para .16 (d).

¹⁸³ NSA 2010.

¹⁸⁴ Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para. 16.

¹⁸⁵ See UN HRC, General Comment 31, The Nature of the General Legal Obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18 and Concluding observations of the UN HRC: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para. 9; General Set of Recommendations of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26 (k); and *Robben Island Guidelines*, above note 33, para. 16.

¹⁸⁶ Interim National Constitution, Article 35: "The right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to justice."

¹⁸⁷ CPA 1991, Article 204.

¹⁸⁸ Criminal Act 1991, Article 35.

¹⁸⁹ NSA 2010, Article 51 (b).

¹⁹⁰ Civil Transaction Act, 1984 (CTA 1984), Article 153 (1).

4.8 Violation of the right to a prompt, effective and impartial investigation of allegations of torture

190. The Respondent State has failed in its positive obligation to carry out an effective investigation, as required by Article 1 read in conjunction with Article 5 of the African Charter. It appears that the Respondent State has not taken any investigative measures more than twenty-one months since the violations had last taken place (in May 2011), and more than eighteen months since the UK FCO first raised the Applicant's allegations with the Sudanese Ministry of Foreign Affairs (9 February 2012).
191. There are no obvious reasons why the authorities have not commenced any investigation whatsoever notwithstanding the fact that they were fully aware of the allegations made. A substantial delay of over two years in opening an investigation violates the duty to investigate allegations of torture promptly, effectively and impartially, as held by human rights treaty bodies and courts in their jurisprudence on cases of delay in investigating torture.¹⁹¹
192. The *Robben Island Guidelines* stipulate an obligation of States to:
- (17) Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.
 - (18) Ensure that whenever persons who claimed to have been or who appear to have been tortured or ill-treated are brought before competent authorities an investigation shall be initiated.
 - (19) Investigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and effectively, guided by the *UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)*.
193. The Commission has recognised an obligation to investigate allegations of torture in *Amnesty International and others v. Sudan*, according to which there should be:
- ongoing investigations into allegations of torture and the State party must provide effective remedies under a transparent, independent and effective legal system.¹⁹²
194. These obligations are in line with international standards contained in Article 13 of the UN Torture Convention, and recognised and elaborated upon in a series of key judgments and decisions by international and regional human rights treaty bodies.¹⁹³
195. The duty to investigate allegations of torture promptly has also been recognised and underscored by the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment¹⁹⁴

¹⁹¹ See following cited cases

¹⁹² ACmHPR, *Amnesty International and others v. Sudan* Communications Nos. 48/90, 50/91, 52/91 and 89/93, para. 56.

¹⁹³ UNCAT, for example, *Radivoje Ristic v. Yugoslavia*, Communication No. 113/1998, UN Doc. CAT/C/26/D/113/1998; UNHRC *Rajapakse v. Sri Lanka*, Communication No. 1250/2004, UN Doc. CCPR/C/87/D/1250/2004; *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, UN Doc. CAT/C/20/D/59/1996; ECtHR *Mikheyev v. Russia*, Application No. 77617/01, Judgment of the European Court of Human Rights of 26 January 2006; IACTHR, *Cantoral Benavides v. Peru*, (Merits), Inter-American Court of Human Rights, Judgment of 18 August 2000, Series C No.69.

as well as in instruments such as the *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*,¹⁹⁵ the *UN Standard Minimum Rules*¹⁹⁶ and the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*.¹⁹⁷ The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* also affirm this important obligation.¹⁹⁸

196. As a general rule there is:

...an obligation on the authorities to proceed automatically to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture or ill-treatment has been committed, no special importance being attached to the ground of suspicion.¹⁹⁹

197. As held by the European Court of Human Rights in the case of *Bati and others v. Turkey*:

...whatever the method of investigation, the authorities must act as soon as an official complaint has been lodged. Even when strictly speaking no complaint has been made, an investigation must be started if there are sufficiently clear indications that torture or ill-treatment has been used.²⁰⁰

198. The use of the words “automatically” and the phrase “as soon as” implies that States must open investigations into credible allegations of torture as a matter of course upon receiving such information and within days and weeks rather than months.²⁰¹

199. The UN Committee against Torture, which monitors State compliance with the UN Torture Convention, found that delays in opening an investigation following a complaint about torture or other ill-treatment violated Articles 12 and 13 of the UN Torture Convention. The number of days of delay related to these findings was as follows: 14 days,²⁰² 10 months,²⁰³ and 15 months²⁰⁴ respectively; 34 months,²⁰⁵ and 7 years.²⁰⁶

¹⁹⁴ Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/2004/56, 23 December 2003, para. 39 and General Recommendations of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/2003/68, 17 December 2002, para. 26(i).

¹⁹⁵ UNGA Res 43/73 (9 December 1988) UN Doc A/RES/43/173, Principle 33 (4): “Every request or complaint shall be promptly dealt with and replied to without undue delay.”

¹⁹⁶ *UN Standard Minimum Rules*, above n. 81, Rule 36 (4): “Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.”

¹⁹⁷ UNGA Res 55/89 (22 February 2001) UN Doc A/RES/55/89, Annex, 4 December 2000, Principle 2.

¹⁹⁸ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147 (21 March 2006) UN Doc A/RES/60/147, Annex, 16 December 2005, Principle 3 (b).

¹⁹⁹ UNCAT *Dhau Belgacem Thabti v. Tunisia*, Communication No. 187/2001, UN Doc. CAT/C31/D/187/2001, para. 10.4. See also *Bouabdallah Ltaief v. Tunisia*, Communication No. 189/2001, UN Doc. CAT/C/31/D/189/2001, para. 10.4.

²⁰⁰ ECtHR, *Bati and others v Turkey*, Application Nos. 33087/96 and 57834/00, Judgment of 3 June 2004, para. 133.

²⁰¹ UNCAT, *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, UN Doc. CAT/C/20/D/59/1996, paras. 8.4, 8.5; *Khaled M'Barek v. Tunisia*, Communication No. 60/1996, UN Doc. CAT/C/23/D/60/1996, para. 11.5; *Qani Halimi-Nedzibi v. Austria*, Communication No. 8/1991, UN Doc. CAT/C/11/D/8/1991, para. 13.5; *Jovica Dimitrov v. Serbia and Montenegro*, UN Doc. CAT/C/34/D/171/2000, para. 7.2; *Ali Ben Salem v. Tunisia*, Communication No. 269/2005, UN Doc. CAT/C/39/D/269/2005, para. 16.7; *UNHRC Rajapakse v. Sri Lanka*, Communication No. 1250/2004, UN Doc. CCPR/C/87/D/1250/2004, para. 9.4.

²⁰² UNCAT, *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, UN Doc. CAT/C/20/D/59/1996, paras. 8.4, 8.5.

200. The UN Human Rights Committee declared in its General Comment 20 that:

complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.²⁰⁷

201. It has not specified the meaning of promptness but has dealt with it on an individual case-basis, finding (for example) that a delay of three months in opening an investigation failed to meet this obligation.²⁰⁸

202. The Inter-American Court of Human Rights, in the case *Cantoral Benavides v Peru*, referred to Article 8 of the Inter-American Convention to Prevent and Punish Torture, which

Clearly sets forth the obligation of the State to proceed as a matter of routine and immediately in cases such as the present case [which concerned a torture investigation], thus implying a literal meaning.²⁰⁹

203. In an important clarification of the scope of the obligation to promptly commence investigations ex officio, the Inter-American Court of Human rights held in the *Maritza Urrutia* case that:

Article 8 of the Inter-American Convention against Torture²¹⁰ establishes expressly the State's obligation to proceed, de officio, and immediately in such cases as this, regardless of the inactivity of the victim. In this respect, the Court has stated that 'in proceedings on human rights violation, the State's defense cannot rest on the impossibility of the plaintiff to produce evidence that, in many cases cannot be obtained without cooperation of the State.' In the instant case, the State did not act in accordance with these provisions.

204. The Respondent State has not taken any investigative measures more than twenty-one months since the violations last took place (May 2011), and more than eighteen months since the UK FCO first raised the Applicant's allegations with the Sudanese Ministry of Foreign Affairs (9 February 2012). The Respondent State has not provided any reasons for the delay and is fully aware of the allegations made. A substantial

²⁰³ UNCAT, *Khaled M'Barek v. Tunisia*, Communication No. 60/1996, UN Doc. CAT/C/23/D/60/1996, para. 11.5.

²⁰⁴ UNCAT, *Qani Halimi-Nedzibi v. Austria*, Communication No 8/1991, UN Doc. CAT/C/11/D/8/1991, para. 13.5

²⁰⁵ UNCAT, *Jovica Dimitrov v. Serbia and Montenegro*, UN Doc. CAT/C/34/D/171/2000, para. 7.2

²⁰⁶ UNCAT, *Ali Ben Salem v. Tunisia*, Communication No. 269/2005. UN Doc. CAT/C/39/D/269/2005, para. 9.4. 2000, Series C No. 69, para. 16.7

²⁰⁷ UN HRC, General Comment 20 Concerning Prohibition of Torture and Cruel Treatment of Punishment (Art.7), 10 March 1992, para. 14

²⁰⁸ UNHRC, *Rajapakse v. Sri Lanka*, Communication No. 1250/2004, UN Doc. CCPR/C/87/D1250/2004, para. 9.4.

²⁰⁹ IACtHR, *Cantoral Benavides v Peru*, (*Merits*), Inter-American Court of Human rights, Judgment of 18 August 2000, Series C No. 69, para. 189 and *Gutierrez-Soler v. Colombia* (*Merits, Reparations, and Costs*), Inter-American Court of Human Rights, Judgement of 12 September 2005, Series C No. 132, para. 54: "The Court considers that, in light of the general obligation of the State Parties to respect and guarantee the rights of all persons subject to its jurisdiction, contained in Article 1(1) of the American Convention, the State has the obligation to commence immediately an effective investigation that may allow the identification, the trial, and the punishment of those liable, wherever there is an accusation or well-grounded reason to believe that an act of torture has been committed in violation of Article 5 of the American Convention. Furthermore, this action is specifically regulated in Articles 1, 6 and 8 of the American Convention against Torture, which Articles bind the State Parties to take all steps that may be effective to prevent and punish all acts of torture within the scope of their jurisdiction as well as to guarantee that all torture cases be examined impartially."

²¹⁰ Article 8 of the Inter-American Convention to Prevent and Punish Torture stipulates that "...if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed ex officio and immediately to conduct an investigation into the case and to initiate, wherever appropriate, the corresponding criminal process."

delay in opening an investigation violates the duty to investigate allegations of torture promptly, effectively and impartially, as held by human rights treaty bodies and courts in their jurisprudence on cases of delay in investigating torture.²¹¹

4.9 Violation of the right to an effective remedy

205. The Respondent State has failed in its positive obligation to provide effective remedies, as required by Article 1 read in conjunction with Articles 5, 6, 7 of the African Charter. The Applicant has not been able to pursue complaints effectively as he does not have access to judicial remedies. Equally, there is no effective procedure to claim reparation for the violation of rights suffered by the Applicant.

206. The right to an effective remedy is at the core of Articles 1 and 7 and has been recognised by the Commission in its *Resolution on the Right to Recourse and Fair Trial*:

CONSIDERS THAT every person whose rights or freedoms are violated is entitled to have an effective remedy. This right entails that an individual whose rights have been violated is able to bring his or her claim before a competent judicial body that has jurisdiction and powers to afford adequate reparation for the harm suffered, and adjudicates on the claim within a reasonable period of time.²¹²

207. According to *the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, the right to an effective remedy include:

1. access to justice;
2. reparation for the harm suffered;
3. access to the factual information concerning the violations.²¹³

208. The right to an effective remedy and reparation is also recognised in major international human rights treaties.²¹⁴ It has been affirmed and elaborated upon by UN treaty bodies,²¹⁵ regional courts,²¹⁶ as well as in a series of declarative instruments, in particular the Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious

²¹¹ See, for example, UNHRC, *Encarnacion Blanco Abda v. Spain*, Communication No. 59/1996, para. 8.2; ECtHR, *Bati and others v Turkey*, Application Nos. 33097/96 and 57834/00, para. 136; see further REDRESS, 'Waiting for Justice- The Politics of Delay in the Administration of Justice in Torture Cases: Practice, Standards and Responses', May 2008, at

http://www.redress.org/downloads/publications/WAITING_FOR_JUSTICE_Mar%2008%20Fin%20_2_.pdf.

²¹² Resolution on the Right to Recourse and Fair Trial, above note 134, Article 1.

²¹³ Fair Trial Guidelines 2001, above n. 99, C.

²¹⁴ ICCPR, Articles 2(3), 9(5) and 14(6); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 2.; International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965), Article 6; Convention of the Rights of the Child (1989), Article 39; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984) Article 14, and the Rome Statute for an International Criminal Court (1998), Article 75. It has also figured in regional instruments, e.g. Articles 5(5), 13 and 41 of the European Convention on Human Rights and Articles 25, 63 (1) and 68 of the American Convention on Human Rights (1969).

²¹⁵ See, for example, UNHRC, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant 26/05/2004, (U.N. Doc. No. CCPR/C/21/Rev.1/Add.13. (General Comments)), at paras. 15-17; UNCAT, General Comment No. 2, Implementation of Article 2 by States Parties, (U.N. Doc. CAT/C/GC/2, 24 January 2008, para. 15.

²¹⁶ ACmHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/2002, para. 159, IACTHR, *Velasquez Rodriguez v. Honduras*, (Merits), Judgment of 29 July 1988, Series C No. 4 (1988), para. 174 and ECtHR, *Papamichalopoulos v. Greece*, Application no. 14556/89, Judgment of 31 October 1995, para. 36.

violations of international humanitarian law²¹⁷ and the *Robben Island Guidelines*.²¹⁸ According to these standards, the authorities should provide judicial and non-judicial avenues of redress, including effective complaints procedures, adequate reparation consisting of compensation, rehabilitation, satisfaction and guarantees of non-repetition.

209. The NSA 2010 provides for immunity from prosecution for NISS members and the success of any civil suits effectively depends on the outcome of criminal investigations. There is no reasonable prospect that the immunity of the NISS members concerned will be lifted because although the Respondent State has acknowledged that the Applicant was detained, it has not responded to claims that the Applicant was tortured. The continued immunity enjoyed by the individual officers in question frustrates any attempts to prosecute those responsible for torture and to seek reparation for the harm suffered. There are no effective remedies to challenge the failure to lift immunities, the constitutionality of which has recently been upheld by the Sudanese Constitutional Court.²¹⁹
210. The Respondent State has failed in its positive obligation to provide effective remedies, as required by Article 1 read in conjunction with Articles 5, 6, 7 of the African Charter.

4.10 Article 2: Right to Non Discrimination

211. The Applicant was referred to as a Jew in a derogatory manner, questioned about his ancestry and interrogated on the basis of his inability to speak Arabic, while he could speak Polish. Such discrimination constituted a violation of Article 2 of the African Charter.

212. Article 2 of the African Charter provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

213. The Respondent State is under an obligation to ensure equal protection of the law under article 26 of the ICCPR.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race,

²¹⁷ Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law: Human Rights Resolution, UNGA Resolution 60/147 (UN Doc. No. A/RES/60/147 (2006)). See also the UN 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,' adopted by General Assembly resolution 40/34 of 29 November 1985; and the Universal Declaration of Human Rights (1948) (Article 8).

²¹⁸ *Robben Island Guidelines*, above n. 32, para. 50; UN Committee against Torture Other Cruel, Inhuman or Degrading Treatment or Punishment, Implementation of article 14 (redress for victims of torture) by States parties, General Comment 3, CAT/C/GC/3, 13 December 2012

²¹⁹ See submission by REDRESS in *REDRESS (on behalf of Dr Farouk Mohamed Ibrahim) v Sudan*, Communication No. 386/10, 6 May 2010, currently pending before the African Commission, p. 4.

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.²²⁰

214. The UN Human Rights Committee has elaborated on the meaning of discrimination in its General Comment 18, which states:

...the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

215. At least some of the ill-treatment directed against the Applicant appears to have been based on his part Polish ethnicity, which had triggered a suspicion that the Applicant was Jewish (and either a British or Israeli spy). The Applicant was referred to negatively as a “Jew”. Upon discovering the Applicant spoke Polish, interrogators sought to find out whether he had Jewish heritage, and referred to him as ‘Jew’ in a derogatory tone and manner.²²¹ At the NISS headquarters, the Applicant was asked to provide information about how many times he had visited Poland, and why he spoke Polish and not Arabic.²²² Again, the Applicant was referred to as being Jewish. Also at the NISS headquarters, interrogations consisted of questions about the Applicant’s relationship with Poland and Israel and Jewish heritage, among other things.²²³

Remedies

216. In requesting the Commission to examine the case, the Applicant seeks the following remedies:

- a. Recognition of a violation of **Articles 1, 2, 5, 6, 7, 14 and 16** of the African Charter.
- b. The payment of adequate compensation for the violations of the rights enshrined in these Articles. The amount of compensation should reflect the following elements of damages in line with international standards set out in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*²²⁴ and the jurisprudence of international human rights treaty bodies and regional human rights courts.²²⁵ According to the Inter-American Court of Human Rights, a claim seeking reparation should ensure “complete redress of the wrongful injury”.²²⁶ This includes:
 - i. material damages, including costs for medical treatment, medical, psychological and social services, legal or other expert assistance;
 - ii. legal or other expert assistance;
 - iii. loss of earnings and loss of earning potential;

²²⁰ ICCPR, article 26.

²²¹ Witness Statement of Magdy el-Baghdady, Appendix 1, above n.3, para. 25.

²²² *Ibid.*, para. 37.

²²³ *Ibid.*, para. 39.

²²⁴ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, above note 198, Principle 20.

²²⁵ ECtHR, *Mikhejev v. The Russian Federation*, Application No. 77617/01, Judgment of 26 January 2006; IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru*, (Merits, Reparations and Costs), IACtHR, Judgment of 25 November 2006, Series C No. 160.

²²⁶ See IACtHR, Judgment of 25 November 2006, Series C No. 160, para. 151.

- iv. lost opportunities, including employment and education;²²⁷
- v. special damages in the form of moral damages / non-pecuniary damages.²²⁸ As held by the Inter-American Court of Human Rights there should be a “presumption according to which violations of human rights and a situation of impunity regarding those violations cause grief, anguish and sadness, both to the victims and to their next of kin.”²²⁹

The psychological report of the Applicant²³⁰ finds compelling evidence that the Applicant is suffering from post-traumatic stress disorder. On the basis of stated physical and psychological evidence, the report concludes that the Applicant is a torture survivor and that he has been deeply traumatised by his treatment.

The fact that arbitrary detention in itself gives rise to compensation for miscarriage of justice is well recognised in international law, and specifically laid down in Article 14(6) of the International Covenant on Civil and Political Rights. The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* stipulates that: “States shall ensure, including by the enactment of legal provisions and adoption of procedures, that anyone who has been the victim of unlawful arrest or detention is enabled to claim compensation.”²³¹ This principle was applied by the ECOWAS Community Court of Justice in *Chief Ebrimah Manneh v. The Republic of Gambia*. The Applicant has lost employment and employment opportunities as a result of his arbitrary detention and consequences of torture. He has also suffered pain and trauma, including long-term hard as a result of the torture inflicted upon him as specified above.

The Applicant will specify the amount of compensation sought in a later submission.

- c. Commencement of an effective and impartial investigation into the circumstances of arrest and detention and the subsequent torture and ill-treatment of the Applicant. Existing immunities should be lifted with regards to any officer suspected of being responsible for any of the violations. Adequate protection for witnesses, such as guaranteeing of anonymity, escorts and relocation, as necessary, should be provided in the course of the investigation and thereafter if needed. Where sufficient evidence of misconduct or criminal conduct is found, the suspected perpetrators should be tried and adequately punished if found guilty.
- d. Public acknowledgment and apology to the Applicant for the violations suffered.
- e. Amendment of legislation incompatible with the African Charter, in particular the NSA 2010, to: (i) provide protection, either by removing the powers of arrest and detention altogether or by granting a right to prompt access to a lawyer and a doctor and a right to *habeas corpus*; (ii) repress violations, such

²²⁷ These types of damages are sometimes referred to as ‘special damages’, see *Chief Ebrimah Manneh v the Republic of Gambia*, Suit No: ECW/CCI/APP/04/07, Judgment of 5 June 2008, para. 29: “Special damages are the enumerable or quantifiable monetary costs or losses suffered by the plaintiff. For example, medical costs, repair or replacement of damaged property, lost wages, lost earning potential, loss of business, loss of irreplaceable items, loss of support, etc.”

²²⁸ See *ibid.*, para. 30; see also IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru*, (Merits, Reparations and Costs), IACtHR, Judgment of 25 November 2006, Series C No.160, para. 50 e.

²²⁹ IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru* (Merits, Reparations and Costs), IACtHR, Judgment of 25 November 2006, Series C No. 160, para. 50 e.

²³⁰ Medico-Legal Report, Documented in Appendix 2; above n.10, 9 April 2013, p. 8., para. 42.

²³¹ Guidelines on Fair Trial 2001, above n. 99, M(1)(h).

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. This entails the repeal of immunity provisions and the provision of an explicit right to a remedy and reparation for victims of serious human rights violations, including torture and arbitrary arrest and detention.

- f.** Undertake institutional and practical reforms to ensure that anyone alleging to have been subjected to torture or other ill-treatment can effectively pursue complaints, which are subject of a prompt, impartial and effective discrimination. This entails ensuring the confidentiality of and protection of victims at the time of making a complaint, investigation and prosecution; the provision of adequate medical care and access to physicians able to produce medical reports in line with recognised international standards; designing and implementing policies for the confidential storage of medical records of torture victims in hospitals, and for the provision of such records to victims on request.
- g.** Training of members of the NISS on relevant standards concerning adherence to custodial safeguards and the prohibition of torture as well as any form of discrimination in the exercise of their functions.
- h.** Establishment of an independent complaints mechanism with powers to investigate actions and complaints against law enforcement personnel, including the NISS.
- i.** Improvements in the conditions of detention in terms of access to clean water, food, toilets, cell occupancy, and detainee treatment to bring detention standards in line with the requirements of international law.

Appendices

Magdy Moustafa El-Baghdady v Sudan

A. DOCUMENTS

Appendix 1: The Applicant's Witness Statement, 16 October 2013.

Appendix 2: Medico-Legal Report prepared by Freedom from Torture, Medical Foundation for the Care of Victims of Torture, 111 Isledon Road, London, N7 7JW, 9 April 2013.

Appendix 3: Letter from Dr. Peter Tibber, British Ambassador, Khartoum (Sudan) to REDRESS, 5 August 2013.