

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

**Summary of the Complaint:**

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 10 November 2009 from Mr. Monim Elgak, Mr. Osman Hummeida and Mr. Amir Suliman (the Complainants) represented by the International Federation for Human Rights (FIDH) and World Organization Against Torture (OMCT) against Sudan (the Respondent State).
2. The Complainants submit that they are prominent human rights defenders who have had a close working relationship with each other at the time of the incident. According to the Complainants, Mr. Osman Hummeida, a British national of Sudanese origin, was the Director of the Sudan Organization against Torture (SOAT) from 1996 to 2006. Since then, he worked as a human rights consultant and advocate. Monim Elgak has worked as a human rights researcher and advocate in the Middle East, Sudan and Uganda, while Mr. Amir Suliman worked for the Khartoum Centre for Human Rights and Environmental Development (KCHRED) until February 2009, when it was shut down by the Sudanese authorities.
3. The Complainants allege that on 24 November 2008, National Security and Intelligence Services (NISS) officers in Khartoum arrested Mr. Amir Suliman at KCHRED offices and took him to an area close to the Central Khartoum Police Station, where they arrested the other two.
4. The Complainants state that on the same day, they were taken to the NISS headquarters, a building near Khartoum North Bus Station (Shendi) (hereinafter NISS offices), where they were met by three NISS officers - Ismail Omar, who had led the arrest, and by another officer who introduced himself as Wad Al Nour, and by one other officer - who questioned them for about four hours about their political background, education and current employment. The Complainants state that after the questioning they were separated.
5. Later, according to the Complainants, the officers turned hostile when they denied any knowledge about the existence and whereabouts of two bags and two laptops that supposedly contained incriminating information about Mr. Osman Hummeida's and Mr. Monim Elgak's alleged cooperation with the International Criminal Court (ICC). Mr. Amir Suliman was questioned about his relationship with the two other Complainants and the work of the KCHRED whereas Mr. Monim Elgak was interrogated about his alleged involvement in ICC related work. Mr. Osman Hummeida was taken outside to search Mr. Monim Elgak's car

parked outside and after an unsuccessful search he was taken inside and was punched and forcibly grabbed by the neck by the three officers.

6. The Complainants aver that Mr. Amir Suliman and Mr. Monim Elgak were later released whilst Mr. Osman Hummeida was interrogated for about an hour, and after he denied having a working relationship with the prosecutor of the ICC, he was taken in a van with a grill and darkened windows to Block G of the Eastern Section of Kober Prison, where he had been held in the early 1990s, and was subjected to long hours of interrogation. The Complainants also claim that the security forces threatened to kill and rape him, and that he was denied access to medical attention although he was suffering from high blood pressure. They state that his request to contact the British Embassy was also denied.
7. The Complainants submit that Mr. Monim Elgak was summoned to the NISS offices on 26 November 2008 where he was severely beaten with plastic pipes and wooden canes by NISS officers until his face was swollen and he was not able to walk.
8. According to the Complainants, Mr. Amir Suliman had meanwhile been summoned to the NISS offices and was interrogated about the bags and laptops of the two other Complainants. The Complainants submit that the interrogation and harassment stopped only when they agreed to bring the bags, which resulted in the release of Mr. Monim Elgak and Mr. Amir Suliman.
9. The Complainants state that Mr. Amir Suliman returned with the bags and one laptop, as well as some documents and hence was allowed to leave after a thorough search and further questioning.
10. The Complainants aver that Mr. Osman Hummeida was driven to the headquarters of NISS where he was met by the then Director of Security, Salah Abdallah Mohamed Gosh, who told him that he had been arrested because of information that he had links with the Office of the Prosecutor of the ICC and had entered Sudan to gather further evidence. Mr. Osman Hummeida was released shortly after midnight on Friday, 28 November 2008.
11. They state that Mr. Osman Hummeida and Mr. Monim Elgak left the country shortly thereafter in the first days of December 2008 as they could not have remained in Sudan safely given the open-ended and serious nature of the accusations of spying that had been leveled against them, including in the Sudanese (pro-government) media,<sup>1</sup> and the real risk of being rearrested at any moment.

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<sup>1</sup> 'Sudan human rights activist released but charged with espionage', Sudan Tribune, 29 November 2008.

12. The Complainants also submit that in December 2008 and January 2009, Mr. Amir Suliman and the KCHRED, of which he was a Director, were subjected to a campaign of harassment and intimidation, and that the bank account of KCHRED was frozen in February 2009. They further submit that in light of the threats and the targeting of KCHRED, Mr. Amir Suliman decided to remain outside the country after having left Sudan for his own safety in early February 2009.

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

13. The Complainants allege that Articles 1, 5, 6, 7, 9, 10, 15 and 16 of the African Charter on Human and Peoples' Rights have been violated.

### **Procedure**

14. The Secretariat received the Communication by email dated 10 November 2009, and acknowledged receipt by letter dated 16 November 2009.
15. By Note Verbale and letter dated 30 November 2009 the Secretariat informed the parties that the Commission was seized of the Communication at its 46<sup>th</sup> Ordinary Session and forwarded a copy of the Complaint to the Respondent State. The Respondent State was also requested to make its submissions on Admissibility.
16. During the 47<sup>th</sup> Ordinary Session on 22 May 2010 the Secretariat received the Respondent State's submissions on Admissibility from the delegation of Sudan, and the Secretariat acknowledged receipt and forwarded the submissions to the Complainants by a Note Verbale and letter dated 16 June 2010.
17. On 23 September 2010 the Secretariat received additional submissions from the Complainant and on the same date the Secretariat acknowledged receipt, and forwarded the submissions to the Respondent State.
18. On 14 July 2011 the Complainants requested for an oral hearing, and the request was considered at the 50<sup>th</sup> Ordinary Session and a decision was reached to hear the parties at the 51<sup>st</sup> Ordinary Session. Accordingly, by Note Verbale and letter dated 2 March 2012 both parties were informed to send their representatives to the 51<sup>st</sup> Ordinary Session for the oral hearing.
19. During the 51<sup>st</sup> Ordinary Session the Complainants made their oral submissions in the absence of the State delegates as the latter did not appear.

### **The Law on Admissibility**

#### **Submission of the Complainants**

20. According to the Complainants they were not able to lodge Complaints personally inside Sudan as they had to flee the country out of a well-founded fear for their own safety. They further allege that human rights lawyers in Sudan or others who may have in other circumstances been able and willing to bring a complaint on behalf of their have been subject to intimidation<sup>2</sup> and would face a heightened risk to their personal safety if they were to take up such a high profile case closely related to the ICC.
21. The Complainants also state that Mr. Monim Elgak wrote an open letter to Salah Abdullah (Gosh), then Director General of the NISS, on 19 December 2008, which was widely published inside and outside Sudan, in which he gave an account of his arrest and torture, and referred to the arrest and torture of the other two applicants.
22. The Complainants aver that no investigations have been commenced in response to the open letter, or to the representations made by Embassy representatives, or others.
23. They submit that the Respondent State stated, in response to recommendations of the UN Expert Group on the Protection of Human Rights Defenders, that the Complainants had been arrested and detained and “kept at the premises of security services for hours for investigation.”<sup>3</sup>
24. The Complainants further submit that domestic remedies in the Respondent State are ineffective and unduly prolonged. They submit that neither the Criminal Procedure Act of 1991 (CPA) nor the National Security Forces Act of 1999 (NSFA), nor any other legislation for that matter, stipulate a duty on the part of the authorities to commence an investigation upon coming to hear about an allegation of torture or following a complaint of torture. There is no explicit right or established procedure or precedent of using mandamus or other remedies to compel the Sudanese authorities to commence an investigation. In addition, NISS members benefit from immunity by law that would need to be lifted for any investigation to proceed.<sup>4</sup>
25. According to the Complainants it is routine practice for the Director of the NISS not to lift the immunity of NISS members. They allege that given that the former Director himself, who is at present a Presidential Advisor, is implicated in the

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<sup>2</sup> Special Rapporteur, UN Doc. A/HRC/11/14, above n.3, para.10.

<sup>3</sup> Report prepared by the Special Rapporteur on the situation of human rights in the Sudan on status of implementation of the “Compilation of recommendations of the experts group to the Government of the Sudan for the implementation of Human Rights Council resolution 4/8”<sup>3</sup> pursuant to Human Rights Council resolutions 6/34 , 6/35, 7/16, and 9/17, UN Doc. A/HRC/11/14/Add.1, June 2009, Recommendations 1.6.1. and 2.1.4.

<sup>4</sup> Art 33 (b) NSFA.

case forming the subject of this communication, it is highly improbable that his immunity would be lifted, nor that of any of his subordinates for that matter. No transparent and effective remedies are available to challenge inaction or refusal to lift the immunity.<sup>5</sup>

26. They add that a private prosecution cannot be brought without the approval of the Director of the NISS who will need to lift the immunity of the individual officer(s) concerned<sup>6</sup> and that there is no prospect of any immunity being lifted in the present case.
27. The Complainants further argue that the local remedies are unduly prolonged as 10 months after Mr. Monim Elgak lodged his Complaint to the NISS authorities no action has been taken to investigate the substance of the allegation and to provide them with remedies. In cases of torture, the Complainants submit, international standards recognize that authorities should open an investigation promptly, as reflected in paragraph 19 of the Robben Island Guidelines.<sup>7</sup>
28. The Complainants conclude by stating that there are no effective remedies of which the Complainants could avail themselves to compel a full investigation without the approval of the security services and/or to seek other forms of reparation.

### **Submissions of the Respondent State**

29. The Respondent State states that the Complainants made no mention of any due legal procedure they have pursued to lodge their complaints against NISS members except the fact that their case was brought to the attention of Sudanese authorities by Embassy representatives and Amnesty International and an open letter was addressed to the Director General of NISS, which the Respondent State submits cannot be considered as legal proceedings requested for the purpose of satisfying the requirements of Article 56 of the African Charter as far as exhaustion of local remedies is concerned.
30. The Respondent State argues that it is untrue that the applicants "were not able to lodge complaints personally inside Sudan", and that the allegation that they "had to flee the country out of a well-founded fear for their safety" is baseless.

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<sup>5</sup> Concluding observations of the UN Human Rights Committee: Sudan, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para.9.

<sup>6</sup> Art 35 (c) CPA.

<sup>7</sup> Art 19 of the Robben Island Guidelines: "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)."

Acts of the NISS particularly with regards to detainees are closely monitored by the Supreme Court where a competent judge member of the Supreme Court receives complaints from persons detained by the NISS. The Respondent State claims that the Complainants did not provide any document substantiating the allegation that they or their representatives attempted to lodge complaints and they were denied such right.

31. According to the Respondent State there are available and effective legal remedies within the Sudanese legal system which the Complainants or their representatives could have pursued. The Respondent State submits that as per Article 34 (2) of the Criminal Procedure Act of 1991 the Complainants or their representatives should have approached the Prosecution attorney to initiate criminal cases against the NISS members.

32. The Respondent State also submits that Article 54 (1) and (2) of the NISS Act 2010 Article 40 (1) and (2) of the 1999 Act provide that:

(1) Where a member commits an offence, in contravention of this Act, and the offence committed is, at the same time, an offence in accordance with the provisions of the Criminal Act, 1991, the said member shall be tried, under the provisions of this Act, and the Director, for objective reasons, may commit him to be tried before criminal courts.

(2) Subject to the provisions of sub-section (1), the provisions of the Criminal Act shall apply to members, in case of commission thereby, of any offence, in contravention thereof, as may not be provided for in this Act.

33. The Respondent State further submits that Article 59 of NISS 2010 Act (Article 46 of 1999 Act) provides that:

There shall be punished, with imprisonment, for a term, not exceeding ten years, or with fine, or with both, every member, who abuses the exercise of the powers conferred upon him, under the provisions of this Act, or exploits his post, in the Organ, with intent to achieve material, or moral benefit, for himself, or others, or causes injury to others.

34. With regard to the immunity of NISS members, the Respondent State submits that Article 35 of the Criminal Procedures Act stipulates that if the person against whom the criminal suit is initiated enjoys immunity, then a petition has to be presented to the office of the Prosecutor General to proceed with Director of the NISS to lift the immunity of the alleged perpetrator after conducting a preliminary investigation into the allegation.

35. The Respondent State also avers that if directly approached, the Director of the NISS can lift immunity of any member of the NISS in case there is a *prima facie* evidence of a crime committed by the member. The Respondent State notes that the Director of the NISS issued on 12 August 2007 Directives instructing the NISS members to strictly abide by the national laws and the international human rights standards in the performance of their duties, particularly with regard to the rights of detainees. As for the immunities the Directives state that in case a member of the NISS commits a crime in violation to any of the laws in force and there is a *prima facie* evidence that justifies the filing of a charge, the NISS will refer this member to the [ordinary] court or to the non-summary court of the NISS as the law may decide.
36. Accordingly, the Respondent State is of the position that the Complainants, in this Communication, neither approached any Prosecution Attorney Office to initiate a case against the alleged perpetrators from the NISS nor did they file a complaint to the Director of NISS through the prescribed channels. The Respondent State notes that there is complaints' office belonging to the NISS and directly affiliated to the Director General of the NISS established since 2007 and receives complaints and queries from the public for 24 hours. Many cases have been received through this office and actions were taken on them.
37. The Respondent State concludes by stating that the Complainants could also approach the Constitutional Court if they have been denied the right to litigation which is enshrined in Article 35 of the Interim National Constitution of the Sudan 2005 which provides that "the right to litigation shall be guaranteed for all persons; no person shall be denied the right to resort to justice".

### **Supplementary submission of the Complainants**

38. The Complainants submit that the Respondent State's claim that there is an effective complaints procedure before the Constitutional Court is not adduced by any evidence to show either the legal basis for the purported procedure and its effectiveness. Furthermore, they submit that in the instant case the judges of the Constitutional Court did not in fact monitor the detention of the applicants in terms of being available to receive complaints adding that there are no cases in which the Constitutional Court is known to have ordered complaints against NISS members to be investigated, and no known practice of investigations and prosecutions of NISS members upon the direction of the Court.
39. Regarding Article 51 (3) of the NISS Act (hereafter "NISS Act"), 2010, (Article 31 (3) of the NISS Act, 1999<sup>8</sup>), the Complainants aver that the existence of this law

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<sup>8</sup> The Complainants note that the Respondent State has made an error with respect to this reference intends to refer to article 32 (3) of the NISS Act 1999 and not article 31(3)) 1999 which deals with the power of arrest, search and detention of various entities.

does not mean that violations of its provisions do not occur, and that the Respondent State appears to assume that the existence of a law precludes any need to provide remedies for its violations with clear channel of accountability for erring officials and access to due remedies for victims.

40. As to the existence of a Directive from the Director of the NISS issued on 12<sup>th</sup> August 2007, the Complainants submit that there is no information available as to how this internal circular has been implemented and adherence to it monitored. The Complainants also aver that the Respondent State does not provide any evidence that the Prosecution Attorney was requested to review, or in fact reviewed, the conditions of custody of the applicants in the instant case.
41. The Complainants state that in order to lodge complaints against NISS officers the Prosecution attorney must request the lifting of immunities of NISS members from the NISS Director and the Director must accede to this request. According to the Complainants, it is only the Director of the NISS who can lift the immunities granted to NISS members under the NISS Acts, and that there are no procedures available before Sudanese courts which can compel the Director of the NISS to make a decision on such a request, order a review of a decision not to lift immunities, or direct him to respond in the affirmative. According to them, a decision by the Director of the NISS to lift the immunity is therefore an administrative or political decision not a judicial one, and that there is no provision in Sudanese law governing how it is exercised.
42. The Complainants claim that they are not aware of any prosecution – let alone conviction – of an NISS member for torture<sup>9</sup>, despite the numerous allegations of torture which have been documented, *inter alia*, by the United Nations and international and national human rights organizations<sup>10</sup>.
43. The Complainants submit that the primary role of the complaints office of the NISS is to receive applications to visit persons in NISS detention, and where complaints are lodged, the information is simply shared with other branches of the service: the office has no mandate to initiate investigations or legal action.

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<sup>9</sup> Remarks by the UN Human Rights Committee on Sudan in 2007, “[t]he Committee noted with concern reports suggesting that torture and cruel, inhuman and degrading treatment are widespread in the State Party, especially in prisons and is concerned that such abuse is carried out in particular by law-enforcement officers. Moreover, these law-enforcement officers and their accomplices reportedly very often go unpunished. The Committee regrets that there is no definition of torture in the Sudan’s Criminal Code”. (CCPR/C/SDN/CO/3/CRP.1 17 July 2007 at para 26.

<sup>10</sup> See the recently published, Amnesty International, Sudan: Agents of Fear: the National Security Service in Sudan (2010) <<http://www.amnesty.org/en/library/info/AFR54/010/2010/en>>.



44. In relation to the personal risk that the Complainants took when they made arrangements to leave the country, they aver that the official government media centre (the Sudanese Media Centre) issued a public statement in March alleging that the Complainants were “witnesses” for the ICC, and noting that the then State Minister at the Ministry of Humanitarian Affairs, Ahmed Haroun, had declared that the humanitarian organization which had allegedly assisted the three individuals to travel to the Hague as “witnesses” had transcended its mandate and engaged in activities harmful to the country’s security”<sup>11</sup>.

### **African Commission’s Analysis on Admissibility**

45. Article 56 of the Charter provides seven admissibility requirements which need to be cumulatively fulfilled before a Communication is declared Admissible. In the present Communication, the Respondent State contests the fulfillment of only one of the seven Admissibility requirements – exhaustion of local remedies. Accordingly, the assumption here is that the Respondent State agrees that the six other requirements have been fulfilled.

46. After carefully studying the submissions of the Complainants, the African Commission is also convinced that the Communication does meet the other six Admissibility requirements under Article 56 of the African Charter.

47. The Commission will therefore proceed to decide as to whether the Complainants have met the requirement of exhaustion of local remedies as provided under Article 56(5) of the Charter.

48. The Complainants contend that they were not able to exhaust local remedies because the domestic remedies were not available, effective and sufficient. It is in light of this submission that the African Commission will proceed to determine on the availability, effectiveness and sufficiency of Sudanese local remedies to the Complainants.

49. According to the well-established jurisprudence of the African 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 complaint”<sup>12</sup>.

50. In the present Communication, the Complainants contend that they were not able to pursue remedies in Sudan personally because they faced a genuine risk of

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<sup>11</sup> Statement by the Sudan Media Centre, 9 March 2009 translation by the Complainants.

<sup>12</sup> *Jawara v Gambia* para 32.

being subjected to further serious violations if they decided to return to Sudan, and that the same risk applies to anyone pursuing a complaint on their behalf. The Respondent State on the other hand denies the allegations as baseless as according to the State the Complainants could have taken their cases to the Supreme Court, which closely monitors the situation of detainees and also receives complaints from detainees. Moreover, the Respondent State contends that the Criminal Procedure Act of 1991, the NISS Act of 2012, and the Interim National Constitution of 2005 provide for additional available remedies for the Complainants.

51. The African Commission is of the view that for the Complainants to be able to file their complaint before the Supreme Court while they were in detention, they need to be in touch with their lawyers, but there is no indication that the Complainants had any contact with their lawyers or even families or had been afforded the opportunity to contact their lawyers. The Respondent State has not either produced any record or proof to show that the Supreme Court was closely monitoring their situation. If the Supreme Court had closely monitored the situation as it is supposed to then it should at least have a record of when, how, why and where they were detained, and the conditions under which they were detained, interrogated and treated. However, there is no proof adduced by the Respondent State to this effect. In the absence of this crucial information, it is only logical to conclude that the Supreme Court did not monitor the situation of the Complainants.
52. With regards to the remedies provided for under the CPA and NISS Act, it has been indicated that the three Complainants were allegedly tortured for working with the ICC in the indictment of the President of Sudan. Various credible UN and media reports have shown that individuals and organizations that have been suspected of working with the ICC have been subjected to harassment and intimidation and have also been expelled out of the country. From the various statements made and actions taken by the Government it is obvious that the issue is evidently a politically sensitive issue to the Government of Sudan, and is not tolerated by its officials and institutions. It is against this general background that the case of the three Complainants should be looked at.
53. The Complainants have adduced affidavits recounting the way they were arrested, interrogated, tortured and maltreated by NISS officers. They have also referred to reports by UN Rapporteurs, Amnesty International and other international and national NGOs as evidences attesting to the arrest and detention of the Complainants by NISS officers, and the threat and intimidation that individuals and organizations that are suspected of working or collaborating with the ICC face in Sudan. The Government has however not produced any evidence to rebut such strong allegations except merely pointing to laws in Sudan that victims of torture could use. As the Commission had stated in the

case of *Jawara v The Gambia (the Jawara case)*<sup>13</sup> a remedy “the availability of which is not evident cannot be invoked by a state to the detriment of the complainant”. In the same case the Commission went on to state that “the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness”.

54. The question here is not whether there are laws in Sudan that provide remedies to victims of torture. Rather the question is can the victims or their representatives utilize those avenues under the circumstances? The short answer is NO. In a situation where the victims or their representatives cannot resort to domestic remedies because of general fear of persecution, the Respondent State’s assertion that the Complainants could have used the remedies as provided in the CPA or NISS Act or the Interim National Constitution is unreasonable and impractical. In the *Jawara case*<sup>14</sup> the African Commission held that “a remedy is considered available only if the applicant can make use of it in the circumstances of his case”.
55. In the case at hand as the Complainants were subjected to intimidation, harassment and persecution, it would be irrational to ask them to go back to their country to pursue legal remedies. It would be equally repugnant to expect anyone within Sudan who sympathizes with the cause of the Complainants to file a complaint on their behalf before the relevant state organs. Therefore, for the aforementioned reasons and in line with its rulings in the *Jawara case*, *John D. Ouko v Kenya*<sup>15</sup> and *Rights International v Nigeria*<sup>16</sup>, the Commission finds that domestic remedies were not available for the victims and their representatives because of fear of persecution.
56. The Complainants also submit that the local remedies are not effective as the Government has failed to investigate and prosecute those responsible even though it was sufficiently aware of the allegations. They further claim that the relevant laws of the country do not impose a duty on the concerned authorities to commence an investigation upon coming to hear about an allegation of torture or following a complaint of torture. Moreover, they claim that to initiate a private investigation the Director General of the NISS has to first lift the immunity of the accused NISS officers and the decision is discretionary and is not subject to judicial oversight.
57. In response to the above allegations the Respondent State submits that the application by the Embassy representative, the Urgent Action request by Amnesty International, the open letter by one of the Complainants to the

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<sup>13</sup> Jawara case paras 33 and 34.

<sup>14</sup> Jawara case para 33.

<sup>15</sup> Communication 232/99 – *John D. Ouko v Kenya* (2000) ACHPR para 19.

<sup>16</sup> Communication 215/98 – *Rights International v Nigeria* (1999) ACHPR para 24.

Director of NISS and media reports cannot be considered as legal proceedings required for the purpose of satisfying the requirements of Article 56(5) of the African Charter.

58. The Commission notes that Complainants are required to exhaust local judicial remedies in accordance with the laws of the country concerned. The laws of the country include laws that govern procedural matters. However, the requirement of exhaustion of local remedies is not an absolute rule, it has exceptions put in place to ensure that complainants will not be hindered from bringing potential human rights violations before the Commission as a result of procedural impediments emanating from unjust laws or practices.
59. In fact the Commission has in several cases made it clear that the rationale behind the exhaustion of local remedies is to give states a chance to remedy human rights violations through their own mechanisms and institutions. This is based on the assumption that the state was not aware of the alleged human rights violations.
60. In the case at hand, the Respondent State does not contest that the Government received application from the British Embassy representative regarding the unlawful arrest and detention of the Complainants, and an open letter was sent by one of them to the General Director of NISS informing him of the human rights violations that they allegedly suffered in the hands of NISS officers, which was widely published inside and outside of Sudan. The Respondent State does not also deny that the Government received an Urgent Action request from Amnesty International in connection with the situation of the three Complainants, and that there was wide media coverage about them. The defense of the Respondent State is rather that all these do not amount to legal proceeding as envisaged under Article 56(5) of the Charter.
61. The Government therefore was not unaware of the situation; rather it wanted a formal legal complaint to be filed. In the case of *Amnesty International and Others v Sudan* wherein lawyers, human rights activists and members of opposition group were arbitrarily arrested, tortured and killed and where there were reports by the media and UN organs about these violations, the Commission found that “even where no legal action has been brought by the alleged victims at the domestic level, the government has been sufficiently aware to the extent that it can be presumed to know the situation within its own territory as well as the content of its international obligations”<sup>17</sup>.
62. In a similar case against Eritrea where 18 journalists were detained incommunicado for allegedly posing a threat to national security, and were

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<sup>17</sup> Communication 48/90, 50/91, 52/91, 89/93 - *Amnesty International and Others v Sudan* (1999) ACHPR para 33.

imprisoned for years, the Commission found that “the State has had ample notice and time within which to remedy the situation,.....and is expected to have taken appropriate steps to remedy the violations alleged”<sup>18</sup>. The Commission further went on to rule that “whenever there is a crime that can be investigated and prosecuted by the state on its own initiative, the state has the obligation to move the criminal process forward to its ultimate conclusion. In such cases one cannot demand that the Complainants, or the victims or their family members assume the task of exhausting domestic remedies when it is up to the state to investigate the facts and bring the accused persons to court in accordance with both domestic and international fair trial standards”<sup>19</sup>

63. Accordingly, in the present case the Government had ample notice about the alleged human rights violations, and should have accordingly taken the necessary steps to investigate the matter particularly since it has admitted that the Complainants were under the custody of the NISS for some time, and that it had enough information and notice to initiate investigation into the alleged violations.
64. However, the Respondent State in its submissions has not shown that to date it has taken any measures to investigate into the matter and bring those responsible to justice. Based on this the Commission finds that the fact that the Government has not taken any action means that domestic remedies are either not effective or sufficient to redress the violations alleged<sup>20</sup>.
65. The Respondent State also contends that there were other remedies available for the Complainants. The State submits that the Complainants or their representatives could have approached the Prosecutor to initiate a criminal case pursuant to Article 34(2) of the CPA of 1991, or file a complaint against the NISS members in accordance with Article 54(1) and Article 59 of the NISS Act of 2010. The Respondent State further submits that if the accused NISS members enjoy immunity the Complainants could approach the Director of NISS directly or through the Prosecutor General to lift the immunity of the alleged perpetrator(s).
66. According to these laws, to press criminal charges against members of the NISS, the Director should first lift the immunity of the accused members. When the accusations are lodged against the Director himself and people working under him, it would be implausible to think that the Director would lift the immunities, including that of his own. This is a case where the Director would become a

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<sup>18</sup> Communication 275/03 – *Article 19 v Eritrea*, ACHPR para 77.

<sup>19</sup> Communication 275/03 – *Article 19 v Eritrea*, para 72.

<sup>20</sup> Similarly in *Article 19 v Eritrea* the Commission held that “the fact that the State of Eritrea has not taken any action means that domestic remedies are either not available or if they are, not effective or sufficient to redress the violations alleged”.

judge in his own case, and it would be making mockery of justice to expect that the Complainants would get justice from such discretionary remedy.

67. This kind of remedy is purely discretionary and even worse is not subject to judicial oversight and hence is final. In several instances, the Commission has made its position clear that when a remedy is discretionary, extraordinary remedy of a non-judicial nature, then the Complainants are not required to pursue it as part of the requirement of exhaustion of local remedies.
68. For instance in two cases against Nigeria, the Commission ruled that when the remedy is discretionary extraordinary remedy of a nonjudicial nature "It would be improper to insist on the Complainant seeking remedies from a source which does not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective"<sup>21</sup>.
69. In line with the above reasoning, the Commission finds that the remedies that the Respondent State claims to be available to the Complainants under the NISS Act and Criminal Act of 1991 are inadequate and ineffective.
70. Having found that domestic remedies were not accessible to the Complainants or their representatives, and that local remedies were not adequate and effective, it would be an affront to justice to expect them or anyone else for that matter to approach the Constitutional Court for the later to protect their right to litigation as enshrined under Article 35 of the 2005 Interim National Constitution of Sudan.
71. The African Commission therefore holds that in the present Communication the local remedies in Sudan were not available, effective and sufficient to the complainants and hence the Complainants have constructively exhausted local remedies pursuant to Article 56(5) of the African Charter.

### **Decision of the African Commission on Admissibility**

72. In view of the above, the African Commission on Human and Peoples' Rights declares this Communication Admissible in accordance with Article 56 of the African Charter.

## **Merits**

### **The Complainants' Submissions on the Merits**

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<sup>21</sup> Communication 87/93 – *Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v Nigeria* (1994) ACHOR para 8 and Communication 60/91 – *Constitutional Rights Project (in respect of Wahab Akamu, G. Atega and Others) v Nigeria* (1994) ACHPR para 10.

73. The Complainants submit that the facts of the Communication reveal violations of a number of human rights guaranteed in the African Charter, namely: the right to dignity and to freedom from torture and ill-treatment (Article 5); the right to liberty and security (Article 6); the right to a fair trial (Article 7); the right to freedom of information and freedom of expression (Article 9); the right to freedom of association (Article 10); the right to freedom of movement (Article 12 (1), (2)); the right to work (Article 15); the right to health (Article 16); and the right to legal protection of the rights guaranteed in the African Charter (Article 1).

### **Alleged Violation of Article 5**

74. The complainants submit that they were subjected to a series of acts that, singly and in combination, caused severe physical and mental pain and suffering inflicted by officials with the purpose of extracting information and inflicting punishment, which amounted to torture.

75. It is submitted that Mr. Amir Monim Elgak and Mr. Osman Hummeida were subjected to sustained and severe beatings. The Complainants describe various acts to which they were subjected, including being punched and hit with a pipe and wooden cane on their feet and soles. Mr. Osman Hummeida in particular was allegedly subjected to sleep deprivation and denied access to medical treatment. It is submitted that Mr. Elgak's lower lip was split open as a result of the beatings while Mr. Osman had severe pain and difficulties in walking.

76. It is also submitted that all three Complainants were subjected to credible threats and a pervasive climate of fear that caused anxiety in them. Monim Elgak was for example threatened with rape and putting out a cigarette in his eye; Osman Hummeida was threatened with execution, having a gun pointed at his head, as well as being exposed to torture instruments. He was also subjected to death threats and made to witness the torture of his colleague and friend. Amir Suliman was threatened with torture, his glasses were removed, the room darkened and the interrogating officers brandished sticks and hoses known to be used for purposes of torture. The Complainants submit that the pervasive nature of the threats was both real and serious and the circumstances in which they found themselves were so serious that they caused them severe mental pain and suffering.

77. The Complainants contend that the acts described above were committed intentionally by individuals acting on the instructions of a named NISS leader and the acts were aimed at extracting information/confessions about the

whereabouts of laptops and bags purportedly containing information about the alleged crime of spying or colluding with the ICC.

78. The Complainants submit that these acts contravene Article 5 of the Charter as well as other principles recognized by the Commission.

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

79. The Complainants submit that they were neither formally arrested nor were any specific charges brought against them. It is pointed out that they had simply been 'invited' by the NISS to attend a 'meeting' and were not asked whether they wanted to attend the meeting. According to the Complainant, it was clear that their attendance was expected and not voluntary; taking into consideration the nature of the questions posed in the formal interrogation that followed.

80. It is submitted that it is not clear whether some of the Complainants were interrogated as suspects or witnesses. The Complainants submit that the facts that the questioning related to activities that could have resulted in charges being brought and that they were remanded involuntarily indicate that their status was more akin to that of suspects under arrest than witnesses subjected to questioning. These circumstances according to the Complainants demonstrate the arbitrary nature of the deprivation of liberty. The complainants also state that the arrests and detention were arbitrary because they were not based on a reasonable suspicion.

81. In addition, it is submitted that custodial safeguards were violated in respect of Mr. Osman Hummeida given that he was not informed of his right to communicate with his Embassy nor was he allowed to do so on request. This, according to the Complainants, violated his right to liberty guaranteed under Article 6 of the Charter.

### **Alleged Violation of Article 7**

82. It is submitted that Mr. Osman Hummeida was in detention for three and a half days without being brought before a judicial authority. It is submitted further that the relevant domestic law, namely Article 30 and 31 of the National Security Forces Act of 1999, permits detention for a period of four months and three days or six months (depending on the nature of the suspected offense) without any



judicial review of the legality of the detention. The Complainants claim that Mr. Osman's detention and the aforementioned legislation is incompatible with Sudan's obligation under the Charter.

83. The Complainants also point out that they were not informed about the reasons for their arrest; on the contrary, they were taken into custody on 24 November 2008 under the pretext of attending a meeting. They cite the Resolution on the Right to Recourse and Fair Trial which provides that, it is not sufficient for the persons who are arrested to be able to guess why they have been arrested but they must be told by way of official notification.

84. It is also submitted that all three Complainants were not allowed access to a lawyer during their interrogation. The Complainants maintain that all these constitute a violation of the right to a fair trial.

#### **Alleged Violation of Article 9**

85. The Complainants submit that at the time of their arrest, they were widely known in and outside Sudan for their work on human rights in Sudan. The Complainants claim that they were arrested and interrogated on account of their human rights work. They state that the purpose of their arrest, detention, interrogation and subsequent torture and ill-treatment by NISS officers was to intimidate them and to hinder if not altogether prevent them from fulfilling their work as human rights activists. The Complainants state that measures taken by the NISS were aimed at preventing them from obtaining and disseminating information about human rights in Sudan and this constituted an unjustified infringement of their right to freedom of information and expression and amounted to a violation of Article 9 of the Charter.

#### **Alleged Violation of Article 10**

86. It is contended that in December 2008 and January 2009, Mr. Amir Suliman and the KCHRED, of which he was a Director, were subjected to a campaign of harassment and intimidation, which manifestly violated the Respondent State's obligations under Article 10 of the Charter. It is submitted that KCHRED also had its bank accounts frozen in February 2009 and its licence revoked in early March 2009 by the Government of Sudan. According to the Complainants, the closing of KCHRED and its bank accounts is clearly a deliberate action by the Respondent State aimed at destabilizing the work of the Mr. Amir Suliman and his organisation which was accused of cooperating with the ICC Prosecutor's

Office, in breach of the right to freedom of association as protected by Article 10 of the Charter.

### **Alleged violation of Article 12 (1) (2)**

87. The Complainants submit that they were arrested, tortured and detained on account of their human rights work which was subsequently followed by a campaign of harassment and intimidation by the authorities, eventually leading to the shutdown of KCHRED. It is submitted further that the open ended and serious nature of the accusations of spying that had been levelled against them, and the real risk of being rearrested at any moment, forced Mr. Osman Hummeida and Mr. Monim Elgak to flee the country in early December 2008 and Mr. Amir Suliman to do so in early February 2009.
88. The Complainants point out that their continued human rights work including their outspoken criticism of the government of Sudan, in combination with the complete impunity with which the authorities perpetrated the violations against them, has prevented them from returning to Sudan for fear of further persecution by state authorities, in particular the NISS. The Complainants cite the Commission's decision in **John D. Ouko v Kenya**<sup>22</sup> in which the Commission found a violation of Article 12 of the Charter where a human rights defender was forced to flee the country on account of his human rights work.

### **Alleged violation of Article 15**

89. It is submitted that Mr. Amir Suliman's right to work was directly interfered with by the Respondent State following the closure of KCHRED which prevented the organization from carrying out any of the work from which he was earning his living. The Complainant cites the Commission's decision in **Institute for Human Rights and Development in Africa v. Angola**<sup>23</sup>, in which the Commission agreed that the Respondent State's actions of arbitrary arrest, detention and subsequent deportation resulting in persons who were lawfully working in Angola losing their jobs, was a violation of Article 15 of the Charter. It is the Complainants' contention that the respondent State's action to close KCHRED's offices and bank accounts was the main reason behind Mr. Amir's

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<sup>22</sup> Communication 232/99.

<sup>23</sup> Communication 294/2004.

loss of employment and opportunity and constitutes a breach of Article 15 of the Charter.

### **Alleged violation of Article 16**

90. The Complainants submit that the right to health includes the right to be free from torture and a positive obligation to provide access to adequate medical treatment in detention. It is the Complainants' contention that the treatment to which they were subjected, which caused physical and psychological harm, violated their right to enjoy the best attainable standard of physical and mental health.

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

91. The Complainants submit that the Respondent State has failed in its positive obligations to recognise the rights, freedoms and duties enshrined in the Charter and to adopt legislative or other measures to give effect to them. It is also submitted that the state failed to in upholding its positive obligation to provide effective remedies as required by Article 1 read in conjunction with Articles 5, 6, 7, 9, 10, 12, 15 and 16 of the Charter.

92. It is further submitted that the Respondent State has failed in its positive obligation to carry out an effective investigation, as required by article 1, particularly if read in conjunction with article 5 of the Charter. The state authorities have not taken any investigative measures more than four years after the violations took place and almost four years after Mr. Monim Elgak published his open letter and complaint on 18 December 2008. Sudanese legislation does not provide sanctions and effective remedies in cases of breaches such as arbitrary arrest and detention and torture. The offence of unlawful detention carries the inadequate punishment of one year, or, in aggravated circumstances, three years imprisonment.

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

93. The Commission is called upon to determine whether the actions of the Respondent State as described above constitute a violation of Articles 1, 5, 6, 7, 9, 10, 12, 15 and 16 of the African Charter as alleged by the Complainants.

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95. The Commission notes with concern that following its decision on admissibility, the Respondent State has failed to provide information on the merits of the Communication. In the light of the failure of the Respondent State to engage with the Commission on the matter before it, due weight must be given to the allegations as submitted by the Complainants to the extent that these have been adequately substantiated.

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

96. The Complainants allege that the conduct of the Respondent State's agents described above violates Article 5 of the Charter. Article 5 of the Charter provides as follows:

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

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

98. The Commission recalls its decision in Sudan **Human Rights Organization and Center for Housing Rights and Evictions v Sudan**,<sup>24</sup> in which it set out the principal elements that constitute torture under the Charter, namely, that severe pain or suffering has to have been inflicted; for a specific purpose, such as to obtain information, as punishment or to intimidate, or for any reason based on discrimination; by or at the instigation of or with the consent or acquiescence of state authorities. The Commission has also in its interpretation of Article 5 of the Charter, adopted the definition of torture contained in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>25</sup>

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

<sup>25</sup> See Article 4 of the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) adopted by the Commission in October 2002.

99. The Commission notes the description of the treatment described above to which the Complainants were subjected while in NISS detention. The Commission also notes that these acts, characterized amongst other things by severe beatings, credible threats and sleep deprivation, resulted in severe physical and mental pain and suffering on the three complainants. The Commission also observes that these acts were intentionally inflicted by public officials (NISS officials) for the purpose of punishing the Complainants and obtaining information about laptops and bags purportedly containing evidence of their collusion with the ICC.

100. The Commission observes that the Complainants have adduced evidence in the form of a medical certificate<sup>26</sup> and sworn testimonies<sup>27</sup> to prove these facts. These facts have also not been contested by the Respondent State. The Commission recalls that States are under an obligation not only to make sure that torture is absolutely prohibited in their legislation, but also in practical terms. Where torture is allegedly inflicted and this is brought to the attention of the State, it is also under an obligation to initiate a prompt, impartial and effective investigation in order to determine the veracity of the allegations and to bring the perpetrators to justice if the allegations are founded, as well as to afford redress to the victims.<sup>28</sup>

101. The Commission observes that it has already been established that the allegations of torture in the present Communication were duly brought to the attention of the authorities of the Respondent State. However, there is no indication that the Respondent State took any measures to investigate the allegations and bring the perpetrators to justice. In the circumstances, the Commission considers that the Complainants rights under Article 5 of the Charter were violated.

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

102. The Complainants contend that their deprivation of liberty is contrary to Article 6 of the Charter. Article 6 of the Charter provides that "every individual shall have the right to liberty and to the security of the person. No one may be

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<sup>26</sup> In the respect of Mr. Osman Hummeida

<sup>27</sup> In respect of Mr. Amir Suliman and Mr. Monim Elgak

<sup>28</sup> See the Commission's Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, paras 18 & 19.

deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

103. The Commission observes that not all actions that constrain an individual’s physical freedom can amount to a deprivation of liberty in terms of Article 6 of the Charter. However, a deprivation of liberty that falls outside the strict confines of the law, or for reasons that are not acceptable or simply arbitrary, will amount to a violation of Article 6 of the Charter.

104. The Complainants have explained that they were invited for a meeting by the NISS and subsequently detained. They were not formally arrested with a warrant nor were any charges brought against them in the course of their detention. It has not been shown that their arrest was based on any reasonable suspicion that they had committed an offense. During their detention, they were not informed of their right to access a lawyer and in the case of Mr. Hummeida, was denied access to consular assistance on request. It is also evident that the arrest and detention of the Complainants had no basis in Sudanese law.

105. The Commission has established in the **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**, regarding the right to liberty and security of the person, that:

*States must ensure that no one shall be subject to arbitrary arrest or detention and arrest, detention or imprisonment shall only be carried out strictly in accordance with the law...pursuant to a warrant, on reasonable suspicion or for probable cause.*<sup>29</sup>

106. The Commission observes that the fact that the Complainants were invited for a meeting from which they were not allowed to leave voluntarily and were subsequently detained and not given reasons for the detention is arbitrary. The Commission also observes that no charges were brought against the Complainants while in detention and that procedural safeguards relating to their arrest and detention in terms of being informed of their right to access a lawyer

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<sup>29</sup> See the Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; see also the Communication 27/89, 46/91, 49/91, 99/93 Organisation Mondiale Contre La Torture and Association Internationale des juristes Democrates) Commission Internationale des Juristes (C.I.J) Union Interfricaine des Droits de l'Homme/Rwanda

and consular assistance in respect of Mr. Hummeida, was not respected.<sup>30</sup> The Commission notes also that the acts of the NISS were not in conformity with Sudanese law.

107. The Commission therefore considers these acts were not only arbitrary, but also illegal and constitute a violation of Article 6 of the Charter.

### **Alleged Violation of Article 7**

108. The Complainants contend that their right to a fair trial under Article 7 of the Charter was violated by the Respondent State. Article 7 of the Charter provides that "every individual shall have the right to have his cause heard. This comprises:

- a) The Right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions...;
- b) The right to be presumed innocent until proven guilty;
- c) The right to defence, including the right to be defended by counsel of one's choice;
- d) The right to be tried within a reasonable time by an impartial court or tribunal".

109. The Complainants have submitted that there was no judicial review of the lawfulness of their detention; that they were not allowed access to a lawyer and were not informed of the reasons for their arrest. It has also been submitted that Article 30 and 31 of the National Security Act of Sudan is incompatible with Sudan's obligations under the Charter.

110. The Commission notes that after their arrest and detention, which has already been determined to have violated the provisions of Article 6 of the Charter, the Complainants were all released within three days. The Commission also notes that no formal charges were brought against the Complainants. The Commission consequently considers that a violation of Article 7 of the Charter cannot be sustained on the basis of the facts adduced by the Complainants.

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<sup>30</sup>See views of the Human Rights Committee in *Fongum Gorji-Dinka v. Cameroon*, Communication No. 1134/2002, U.N. Doc. CCPR/C/83/D/1134/2002 (2005), para 5.1, in which a violation of the right to liberty was found on similar facts.

111. Regarding the incompatibility of some of the provisions of the National Security Act with Sudan's obligations under the Charter, the Commission observes that it has not been shown that the Complainants were detained in application of this law. The Compatibility of the law with Sudan's obligation under the Charter cannot therefore be called into question in the present Communication.

### **Alleged violation of Article 9**

112. It is the Complainants' contention that their right to freedom of expression under Article 9 of the Charter was violated through the conduct of the Respondent State. Article 9 of the Charter provides that:

*"every individual shall have the right to receive information"<sup>31</sup> and "the right to express and disseminate his opinions within the law"<sup>32</sup>.*

113. The Commission notes the Complainants submission that they were arrested on account of their human rights work, specifically because of their perceived links with the office of the prosecutor of the ICC. The Commission also notes that the interrogation of the Complainants by NISS officials was essentially based on their links with the ICC and their human rights work. The Commission notes further that the measures taken against the Complainants were aimed at preventing them from obtaining and disseminating information about the situation of human rights in Sudan.

114. The Commission recalls that according to its **Declaration of Principles on Freedom of Expression in Africa**, freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.<sup>33</sup> The Commission recognises that the exercise of this right carries with it special duties and responsibilities, which therefore in general allow for certain restrictions or

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<sup>31</sup> Article 9 (1)

<sup>32</sup> Article 9 (2)

<sup>33</sup> See also Communications 105/93, 128/94, 130/94 and 152/96) - Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria.



limitations on the right. The Commission considers that any restrictions on freedom of expression must be provided by law, serve a legitimate interest and be necessary in a democratic society.

115. The Commission observes that in the present Communication, the only reason for which the Complainants were prevented from exercising this right was due to their perceived links with the ICC. It has not been shown that the Complainants' links with the ICC, if any, endangered the lives of others, national security, morality, common interest or caused any other legitimate prejudice. The Commission considers that there was therefore no justifiable reason to limit or interfere with the right to freedom of expression and finds as a consequence, a violation of Article 9 (1) and (2) of the Charter.

### **Alleged violation of Article 10**

116. The Complainants contend that the campaign of harassment and intimidation to which Mr. Amir Suliman and the KCHRED of which he was a Director, the closure of the latter and the freezing of its bank accounts constitute a violation of Article 10 of the Charter.

117. Article 10 of the Charter provides that "every individual shall have the right to free association provided that he abides by the law...".

118. The Commission notes that the right to freedom of association is both an individual and collective right which allows individuals to join together to pursue and further collective interests in groups, such as NGOs, political parties and trade unions. This right comprises the right to form and join associations freely; any interference with this right must be prescribed by law and meet the conditions prescribed under Article 27 of the Charter, namely the protection of the rights and freedoms of others, collective security, morality and collective interests. The Commission considers, recalling its decisions in **Huri Laws v Nigeria**<sup>34</sup> and **Amnesty International v Zambia**,<sup>35</sup> that any interference with this right that is not proportionate and cannot be justified under Article 27 of the Charter will be considered to be arbitrary.

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<sup>34</sup> Communication 225/98 – Huri Laws v Nigeria, (2001) ACHPR, 14<sup>th</sup> Activity Report.

<sup>35</sup> Communication 212/98 - Amnesty International v Zambia (1999) ACHPR, 12<sup>th</sup> Activity Report.

119. In the present Communication, it appears that the only reason that KCHRED and its director were targeted was on account of their perceived links with the ICC. The Respondent State has not provided any information showing that the activities of the organization endangered national security, morality, or the rights of other people in Sudan. In the circumstances, the Commission considers that the State's interference with the activities of the organization and its staff was unjustifiable and arbitrary and finds a violation of Article 10 of the Charter.

### **Alleged violation of Article 12 (1) and (2)**

120. The Complainants submit that the fact that they were forced to flee the country as a result of the harassment and intimidation to which they were subjected as well as their apprehensions about what awaited them should they return to Sudan, is a violation of their rights under Article 12 (1) and (2) of the Charter.

121. Article 12 (1) of the Charter provides that "every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law".

122. The Commission recalls its decisions **John D Ouko v Kenya**,<sup>36</sup> and in **Sudan Human Rights Organization and Center on Housing Rights and Evictions v Sudan**,<sup>37</sup> in which the Commission found a violation of Article 12 (1) of the Charter in circumstances where the complainants were forced to flee their country of residence because of persecution by the authorities.

123. The Commission notes that it has already been established in the present Communication that the Complainants had a well-founded fear of the risk of further persecution should they have stayed in Sudan considering the treatment to which they were previously subjected and the nature of their jobs. The Commission considers that the fact that they were prevented by such fear of persecution from residing in Sudan constitutes a violation of Article 12 (1) of the Charter.

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<sup>36</sup> Communication 232/99 – John D ouko v Kenya (2001) ACHPR, 14<sup>th</sup> Activity Report.

<sup>37</sup> Communication 279/05 – 296/05 – Sudan Human Rights Organization and Center on Housing Rights and Evictions v Sudan (2010) ACHPR, 28<sup>th</sup> Activity Report

124. Article 12 (2) of the Charter provides that “every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subjected to restrictions provided for by law for the protection of national security, law and order, public health or morality.
125. The Complainants have submitted that their continued human rights work, coupled with the complete impunity with which the authorities perpetrated the violations against them, has prevented them from returning to Sudan.
126. As Sudanese nationals, the Commission considers that Mr. Monim Elgak and Mr. Amir Osman have a right of return to their country except if it can be shown that their return will be a danger to national security, law and order or public health or morality. This not being the case in the present Communication and without any information from the Respondent State to the contrary, the Commission considers that their apprehension of a well-founded fear of persecution by the authorities should they return, is a violation of Article 12 (2) of the Charter in respect of Mr. Amir Suliman and Mr. Monim Elgak.

### **Alleged Violation of Article 15**

127. The Complainants submit that the Respondent State’s closure of KCHRED directly resulted in Mr. Amir Suliman and his staff losing their jobs and as a consequence violated Article 15 of the Charter.
128. Article 15 of the Charter provides that “every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”
129. The Commission has established in its **Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights** that the right to work should not be understood as an absolute and unconditional right to obtain employment. Rather, the State has the obligation to facilitate employment through the creation of an environment conducive to the full employment of individuals within society under conditions that ensure the realisation of the dignity of the individual.<sup>38</sup>

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<sup>38</sup> See para 58 of the Guidelines.

130. The Commission observes that the right to work, in a broad sense, implies the right to enter employment, and the right not to be deprived of employment unfairly. In that regard, the Commission recalls its decision in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*,<sup>39</sup> in which it found a violation of Article 15 of the Charter where the Respondent State had without just cause, closed down the Complainant's business premises.

131. The present Communication is no different. It has not been shown that the Respondent State had any legitimate reason for closing down KCHRED and freezing its bank account, which resulted to a loss of Mr. Amir's source of income. The Commission considers that such unjustified interference with Mr. Amir's employment was arbitrary and contravenes Article 15 of the Charter.

#### **Alleged Violation of Article 16**

132. It is submitted by the Complainants that their treatment under NISS detention resulted to physical and psychological harm, in violation of their right to enjoy the best attainable standards of physical and mental health, in violation of Article 16 of the Charter. It is also submitted that the denial of medical care to Mr. Osman Hummeida violated Article 16 of the Charter.

133. Article 16 of the Charter provides as follows:

*"Every individual shall have the right to enjoy the best attainable state of physical and mental health. State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical treatment when they are sick."*

134. The Commission observes that according to its **Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights**, the right to health includes the right to control one's health and body and the right to be free from interferences, such as the right to be free from torture and other forms of ill-treatment.<sup>40</sup>

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<sup>39</sup> Communication 284/03 – ZLHR & Associated Newspapers of Zimbabwe v Zimbabwe (2009) ACHPR

<sup>40</sup> See ECOSOC Guidelines paras 64 & 65.

135. The Commission notes, as established above, that the Complainants were subjected to torture and other forms of ill-treatment while in NISS detention which resulted to physical and psychological harm. The Commission considers that this was an unjustified interference with the Complainants' right to health.
136. With regards to the denial of medical care to Mr. Osman Hummeida, the Commission recalls that States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including detainees, to health services. The Commission recalls further its decision in **Media Rights Agenda and Constitutional Rights Project v Nigeria**, in which the Commission held that the State's responsibility in the event of detention is even more evident to the extent that detention centers are its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities.<sup>41</sup>
137. The Complainants have submitted that even though Mr. Hummeida suffered from high blood pressure, the medication given to him was not adequate to guarantee his health. The Commission notes that the treatment still left him in a situation which was both life threatening and jeopardized his health. The Commission considers that the State in this circumstance violated his right to health by failing to take the necessary measures to protect his health especially given that he was in the custody of State authorities.

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

138. The Complainants have submitted that by failing to take measures to protect them from the violations they suffered and to investigate the allegations of torture as well as having an inadequate legal framework that does not effectively guarantee some of the rights guaranteed under the Charter, the Respondent State violated provisions of Article 1 of the Charter.
139. Article 1 of the Charter stipulates that ...''parties to the Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall adopt legislative or other measures to give effect to them'.

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<sup>41</sup> Communication 105/93 - 128/94 - 130/94 - 152/96 - Media Rights Agenda & Constitutional Rights Project v Nigeria (1998) ACHPR, para 91

140. The Commission recalls its decision in **Sudan Human Rights Organization and Centre on Housing Rights and Eviction v Sudan** in which it held that a violation of any provision of the Charter by a State Party automatically engages its responsibility under Article 1.<sup>42</sup>

141. The Commission considers that if a State Party fails to respect, protect, promote or fulfill any of the rights guaranteed in the Charter, this constitutes a violation of Article 1 of the Charter. In the present Communication, the Commission has reached the conclusion that the Respondent State violated Articles 5, 6, 9, 10, 12, 15 and 16 of the Charter. As a consequence, the Commission considers that the Respondent State failed in upholding its obligation to take measures to give effect to the rights violated.

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

142. Based on the above, the African Commission on Human and Peoples':

i. Finds that the Republic of The Sudan has violated the rights of Mr. Amir Suliman in relation to Articles 1, 5, 6, 9, 10, 12 15 and 16; Mr. Monim Elgak in respect of Articles 1, 5, 6, 9, 10, 12 and 16 and Mr. Osman Hummeida in respect of Articles 1, 5, 6, 9, 10, 12(1) and 16of the African Charter on Human and Peoples' Right.

ii. **Finds that the Republic of The Sudan is not in violation of Article 7 of the Charter.**

iii. Requests the Republic of The Sudan to:

a) Pay adequate compensation to the Complainants named in the present Communication in accordance with the domestic law of The Sudan for the rights violated;

b)

Investigate and prosecute all those persons who participated in the illegal incarceration and torture of the Complainants; and

c) Reopen and unfreeze the bank accounts of KCHRED.

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<sup>42</sup> See Communication 279/03-296/05 - Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan (2010) ACHPR, para 227.

- iv. Inform the Commission, in accordance with Rule 112 (2) of the Commission's Rules of Procedure, within one hundred and eighty days of the notification of the present decision, of the measures taken to implement the present decision.

**Done in Banjul, The Gambia at the 14th Extra Ordinary Session of the African Commission on Human and Peoples' Rights held from 07 to 12 March 2014.**

AACHPR