

**Address for correspondence**

REDRESS  
c/o Jürgen Schurr  
87, Vauxhall Walk  
SE11 5HJ London  
United Kingdom  
Tel.: +44 (0) 20 7793 1777  
E-mail: [juergen@redress.org](mailto:juergen@redress.org)

To:

Dr Mary Maboreke, Executive Secretary  
African Commission on Human and Peoples' Rights  
31 Bijilo Annex Layout, Kombo North District  
Western Region  
P.O. Box 673  
Banjul  
The Gambia  
Email: [au-banjul@africa-union.org](mailto:au-banjul@africa-union.org) / [africancommission@yahoo.com](mailto:africancommission@yahoo.com)

**BY EMAIL**

Cc:

Commission Chairperson Zainabo Sylvie Kayitesi, Chairperson of the Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary killings in Africa;  
Commissioner Mohamed Bechir Khalfallah, Vice-Chairperson of the Commission  
Commissioner Reine Alapini-Gansou, Special Rapporteur on Human Rights Defenders;  
Commissioner Lawrence Mute, Commissioner in charge of monitoring human rights in Sudan;  
Commissioner Med S.K. Kaggwa, Special Rapporteur on Prisons and Conditions of Detention

**20 February 2015**

Dear honourable Commissioners, dear Dr Maboreke,

**RE: Introduction of a complaint and request for provisional measures in the case of Dr Amin Mekki Medani and Mr Farouq Abu Eissa**

Pursuant to Articles 55 and 56 of the African Charter on Human and Peoples' Rights (the 'African Charter'), read in conjunction with Rule 93 of the Rules of the Procedure of the African Commission on Human and Peoples' Rights (the 'Commission'), this submission is presented as the introduction of a complaint on behalf of Dr. Amin Mekki Medani ('the first Complainant') and Mr Farouq Abu Eissa ('the second Complainant') (together 'Complainants') against Sudan. The Complainants are represented by the African Centre for Justice and Peace Studies (ACJPS), The Redress Trust (REDRESS), and the International

Federation for Human Rights (FIDH) (together, 'the Organisations'). The Organisations request that the Commission recognise this submission as the initiation of a complaint for the purposes of seizure pursuant to Rule 93 of the Rules of Procedure. The Organisations furthermore request the Commission to adopt provisional measures in the case pursuant to Rule 98 of the Rules of Procedure to prevent irreparable harm to the Complainants. Both requests will be set out in turn.

As will be outlined below, the Organisations submit that both Complainants are currently detained in Kober Prison, Khartoum, Sudan, and at high risk of irreparable harm as a result of further detention, with an adverse impact on their health. This concern is aggravated by the prospects of an unfair trial for offences that carry the death penalty, and which is scheduled to start on **23 February 2015**. The Organisations therefore urge the Commission to consider this Complaint for seizure during its currently ongoing 17th Extra-Ordinary Session so as to be in a position to adopt Provisional Measures in this case. Specifically, we urge the African Commission to call on the Government of Sudan to:

- Immediately and unconditionally release Dr Amin Mekki Medani and Mr Farouq Abu Eissa;
- In the alternative, to immediately release Dr Amin Mekki Medani and Mr Farouq Abu Eissa on bail;

Pending the Complainants' release:

- Guarantee that the Complainants have regular and unhindered access to adequate medical care, including care provided through the Complainants' families;
- Ensure that the Complainants' lawyers have regular and unhindered access to their clients;
- Guarantee that if the Complainants are put on trial, they will be tried before the Criminal Court and in line with the Respondent State's obligations under Article 7 and 26 of the African Charter, be transparent and open for monitoring by international organisations, institutions and others.

Yours sincerely,

Carla Ferstman  
Director, REDRESS

Katherine Perks  
Program Director, ACJPS

Antoine Bernard,  
CEO, FIDH

Gerald Staberock  
Secretary General, OMCT

## I. Complaint

### I.1. Conditions for seizure of the complaint pursuant to Rule 93 (2):

1. The complaint is submitted by the Organisations on behalf of Dr. Amin Mekki Medani and Mr Farouq Abu Eissa against the Republic of Sudan (the 'Respondent State'), which ratified the African Charter on 11 March 1986. The Organisations do not request the Commission to withhold the Complainants' identity from the Respondent State. As will be outlined further below, it alleges a range of violations of the African Charter. The Organisations confirm that pursuant to Article 56 (7) of the Charter, they have not submitted this complaint to any other procedure of international investigation or settlement.<sup>1</sup>
2. The Organisations submit below that this complaint also meets the other criteria for seizure as set out in Rule 93 (i) and Rule 93 (h).

### I.2. Summary of the facts of the case<sup>2</sup>

#### Background

3. The first Complainant, Dr Amin Mekki Medani, is 75 years of age. He is a prominent Sudanese human rights defender and lawyer.<sup>3</sup> He was previously the Chairperson of the Sudanese Human Rights Monitor (SHRM), a non-governmental organisation (NGO) that is also a member of the FIDH in Sudan.<sup>4</sup> Dr Medani is currently the president of Sudan's Confederation of Civil Society Organisations and an Executive Board member of six human rights NGOs and legal associations, including SHRM and ACJPS.<sup>5</sup> Dr Medani has also worked for various international organisations including as the head of the U.N. Office of the High Commissioner for Human Rights (OHCHR) in the West Bank, Gaza and Croatia and as a legal adviser to the Special Representative of the U.N. Secretary-General in Iraq and Afghanistan.<sup>6</sup> The first Complainant is suffering from diabetes and high blood pressure.<sup>7</sup>

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<sup>1</sup> On 19 December 2014, the Organisations, together with 10 other non-governmental organisations, sent an open letter to several Special Procedure mandate holders and working groups of the African Commission and the United Nations, urging the mandate holders to call upon the Respondent State to release the three men from custody in the absence of valid charges against them. The open letter does not fall within the provision of Article 56 (7) as it did not constitute a complaint and as the mechanisms are not "capable of granting declaratory or compensatory relief to victims," (see *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication 279/03-296/05, paras.104-105). The letter is available at <http://www.redress.org/downloads/open-letter-dr-amin-mekki-et-al.pdf>.

<sup>2</sup> The facts as outlined below are based on correspondence with the Complainants' defence team, families, human rights defenders following their case and reports of national and international organisations and institutions.

<sup>3</sup> On 12 December 2013, the first Complainant for instance was awarded the European Union Delegation's "Heroes for Human Rights Award 2013", see European Union Delegation to Sudan, 'Human Rights Day: Ambassador Tomas says Europe will continue to protect human rights defenders worldwide,' Europa, 12 December 2013, available at: [http://eeas.europa.eu/delegations/sudan/press\\_corner/all\\_news/news/2013/20131211\\_en.htm](http://eeas.europa.eu/delegations/sudan/press_corner/all_news/news/2013/20131211_en.htm); he has also received the Human Rights Watch Award for Human Rights Monitoring in 1991, the American Bar Association Human Rights Award on behalf of the Sudan Bar Association in 1991; for an overview of the Dr Medani's human rights activities, see [http://dspcf.org/index\\_files/Page3468.htm](http://dspcf.org/index_files/Page3468.htm).

<sup>4</sup> Source Watch, 'Sudan Human Rights Organization', 23 August 2007, available at: [http://www.sourcewatch.org/index.php/Sudan\\_Human\\_Rights\\_Organization](http://www.sourcewatch.org/index.php/Sudan_Human_Rights_Organization).

<sup>5</sup> The Guardian, 'We are the victims of our own corrupt government,' 22 January 2015, available at: <http://www.theguardian.com/world/2015/jan/22/we-are-the-victims-of-our-own-corrupt-government-life-as-an-activist-in-sudan>.

<sup>6</sup> A curriculum vitae of Dr Amin Mekki Medani is available here: [http://dspcf.org/index\\_files/Page3468.htm](http://dspcf.org/index_files/Page3468.htm).

<sup>7</sup>The Guardian, 'We are the victims of our own corrupt government,' above, n.5.

4. The second Complainant, Mr Farouq Abu Eissa, is 81 years of age. He is a well-known political activist and currently the Chairperson of the National Consensus Forces, an umbrella of political opposition groups in Sudan.<sup>8</sup> He has been one of the most preeminent voices in calls by Sudan's opposition parties for democratic transformation in Sudan. He is the former Secretary General of the Arab Lawyers' Union and the Co-President of the National Democratic Alliance.<sup>9</sup> Mr Abu Issa is diabetic and suffering from a heart condition and cyanosis.<sup>10</sup>
5. Immediately prior to their arrest on 6 December 2014 (see following paragraphs), both Complainants participated in political negotiations held in Addis Ababa, Ethiopia, between Sudanese political and armed opposition groups and civil society that led to the adoption, on 3 December 2014, of the "Sudan Call: A Political Declaration on the Establishment of a State of Citizenship and Democracy."<sup>11</sup> The "Sudan Call" represents the first agreement between political opposition parties, rebel movements and civil society and commits signatories to work towards the end of the conflicts raging in different regions of Sudan.<sup>12</sup> The document also pledges to work towards legal, institutional and economic reforms.<sup>13</sup> The First Complainant signed the document on behalf of a group of civil society actors and the Second Complainant signed on behalf of the Sudanese National Consensus Forces – an umbrella of political opposition parties – in his capacity as Chairperson of that group.<sup>14</sup>

#### **Arrest on 6 December 2014**

6. Following the Complainants' return from negotiations in Addis Ababa, a large number of personnel from the Respondent State's National Intelligence and Security Services (NISS) arrested the Complainants on Saturday, 6 December 2014, just before midnight, from their homes in Khartoum.<sup>15</sup> The NISS took the Complainants and another man, Dr Farah Ibrahim Mohamed Alagar,<sup>16</sup> to NISS offices in Khartoum Bahri without providing any reasons for their arrests.<sup>17</sup>
7. Family members present during the first Complainant's arrest reported that the NISS refused requests to take any medicine required to treat his diabetes.<sup>18</sup>

<sup>8</sup> The Guardian, 'Sudan is hungry for change, but who will take on Omar al-Bashir?', 8 December 2014, available at: <http://www.theguardian.com/world/2014/dec/08/-sp-sudan-revolution-bashir>.

<sup>9</sup> Sudan Tribune, 'Farouq Abu Eissa,' available at: <http://www.sudantribune.com/spip.php?mot1244>.

<sup>10</sup> UN High Commission for Human Rights, Press briefing notes on Sudan detentions, 12 December 2014, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15413&LangID=E> and Sudan Human Rights Network, Detainees January 2015, 2 January 2015, available at: <http://www.sudanhumanrights.org/wp-content/uploads/2015/01/DetaineesJanuary2015En.pdf>.

<sup>11</sup> Sudan Tribune, 'Opposition alignment in 'Sudan call' accord, 7 December 2014, at <http://www.sudantribune.com/spip.php?article53252>.

<sup>12</sup> Ibid; see here for a copy of the Sudan Call, <http://www.sudantribune.com/spip.php?article53263>.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid; see for further assessment of the Sudan Call in The Guardian, 'Sudan's political opposition unites under new call for democracy,' 11 December 2014 available at: <http://www.theguardian.com/world/2014/dec/11/sudan-call-political-opposition-bashir>.

<sup>15</sup> See for instance European Parliament Resolution of 18 December 2014 on Sudan: the case of Dr Amin Mekki Medani, Resolution 2014/3000/(RSP), adopted 18 December 2014, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2014-0108+0+DOC+XML+V0//EN&language=EN>; watch full debate here: <https://www.youtube.com/watch?v=xAv1BRg3bfA>.

<sup>16</sup> UN High Commission for Human Rights, Press briefing notes on Sudan detentions, 12 December 2014, above n.9; Dr Farah Ibrahim Mohamed Alagar had also attended the negotiations leading to the adoption of the 'Sudan Call.'

<sup>17</sup> The Guardian, 'Sudan is hungry for change, but who will take on Omar al-Bashir?', above, n.8.

<sup>18</sup> Sudan Tribune, 'Security apparatus arrests opposition leader and rights defender over Sudan Call,' 7 December 2014, available at: [http://www.sudantribune.com/spip.php?iframe&page=imprimable&id\\_article=53249](http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=53249); confirmed by the Complainants' defence team.

8. The NISS did not charge the three men upon arrest and held the Complainants incommunicado for sixteen days, until 21 December 2014, when they were transferred from NISS custody to Kober Prison in Khartoum. On 22 December 2014, the second Complainant for the first time since his arrest met with his lawyers. The same day, the second Complainant was briefly taken to Alamal Hospital, a hospital owned by the NISS, due to high blood pressure. His family was able to visit him while he was in hospital.<sup>19</sup> The first Complainant was not allowed to meet his lawyers before 23 December 2014, and was only granted his first family visit on 24 December. It was also on 24 December that the first Complainant's family was permitted for the first time since his arrest to bring him food that is compatible with his health needs as a diabetic to Kober Prison.<sup>20</sup>
9. On 19 December, prominent human rights lawyers who subsequently became the Complainants' representatives filed a case with the Respondent State's Constitutional Court based on the arbitrary arrest and detention of the Complainants, their lack of access to lawyers and family and detaining them incommunicado. The lawyers have yet to receive a response from the Constitutional Court.<sup>21</sup>
10. On 12 February 2015, the Complainants were both charged under Articles 50 (Undermining the constitutional system), 51 (Waging war against the State), 63 (Calling for opposition to public authority by use of violence or criminal force), 64 (Provoking hatred against or amongst sects) and 65 (Criminal and terrorist organizations) of the Criminal Act of 1991.<sup>22</sup> Both were additionally charged under Articles 5 and 6 of the Respondent State's Anti-terrorism Act of 2001 concerning incitement to terrorism.<sup>23</sup> Articles 50 and 51 of the 1991 Criminal Act and the crimes under the Anti-Terrorism Act are punishable with life imprisonment or the death penalty. On 10 February 2015, the prosecutor general passed the referral order, and the chief justice of Khartoum State referred the case to the competent court for trial of the anti-terrorist charges to start on 13 February. The Court subsequently fixed the 23 February as the start date of the trial.<sup>24</sup>
11. The Complainants' arrest on 6 December 2014 was widely condemned by international and regional human rights organisations and institutions. The UN High Commissioner of Human Rights on 12 December 2014 has called for the immediate release of the Complainants' or the prompt formulation of valid legal charges against them and their access to a fair trial.<sup>25</sup> The European Parliament on 18 December 2014

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<sup>19</sup> Sudan Tribune, Troika countries call for resumption of peace talks and release of political detainees, 24 December 2014, available at: <http://www.sudantribune.com/spip.php?article53451>.

<sup>20</sup> Correspondence with Complainants' defence team, 19 February 2015.

<sup>21</sup> See Annex 1, complaint filed on 19 December 2014 (in Arabic).

<sup>22</sup> Criminal Act 1991, English translation of the Act available at <http://www.pclrs.com/downloads/bills/Criminal%20Law/Criminal%20Act%201991%20English.pdf>.

<sup>23</sup> Anti-Terrorism Act 2001, available (in Arabic) at <http://www.pclrs.com/downloads/bills/Criminal%20Law/Anti%20Terorism%20Act%20Arabic.pdf>; an unofficial translation of Articles 5 and 6 of the Anti-Terrorism Act 2001: reads:

Article 5: whoever incites or attempts to do or facilitate by word or action or publication anyone to commit an act for the purpose of performing an act of terrorizing the state, or its social security or its nationals or its properties or its public or private facilities, to commit terrorist or political crime, shall be punished upon conviction with death penalty or life imprisonment.

Article 6: whoever runs or incites or attempts or participates in the management, or facilitates by word or action or publishes in organization management to commit any crime or terrorist offenses, whether the network is working inside Sudan or outside Sudan or in any state of Sudan, or city or village or in any specific area where a group are residing, whereas his act constitutes a danger to self or property or public tranquility, shall be deemed guilty of committing a terrorist offense and shall be punished upon conviction with death or life imprisonment.

<sup>24</sup> Correspondence with the Complainants' lawyers, 18 February 2015.

<sup>25</sup> Un High Commission for Human Rights, Press briefing notes on Sudan detentions, 12 December 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15413&LangID=E>.

adopted a resolution strongly condemning the arbitrary arrest and detention of the Complainants and calling for their immediate and unconditional release.<sup>26</sup> The Delegation of the European Union to the Republic of Sudan on 7 February 2015 stressed the need for an immediate release of the Complainants or their access to due judicial process and fair trial.<sup>27</sup> Fourteen human rights organisations have denounced the arbitrary arrest and the incommunicado detention of the Complainant's in an Open Letter to the UN and African Commission Special Procedure mandate holders.<sup>28</sup>

### I.3. Exhaustion of Domestic Remedies

12. It is recognised in the Commission's jurisprudence that it is not necessary for complainants to exhaust domestic remedies where domestic legislation and practice fosters violations of the African Charter. In such instances, it is submitted, domestic proceedings are unavailable, futile or ineffective.<sup>29</sup> The Organisations submit that there are no effective and sufficient remedies available to the Complainants pursuant to Rule 93 (i) and Article 56 (5).

#### **(a) There are no effective remedies available to the Complainants in the present case**

13. In cases of arbitrary detention, such as in the present case, the Commission has held that the appropriate remedy is a writ of habeas corpus so that a "court may order the police to produce an individual and justify his imprisonment."<sup>30</sup> Where a remedy of habeas corpus does not exist in situations involving arbitrary detention, there "are no remedies for the victims to resort to."<sup>31</sup> The Commission's Fair Trial and Legal Assistance Guidelines provide that "[A]nyone concerned or interested in the well-being, safety or security of a person deprived of his or her liberty has the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of such a person and/or identifying the authority ordering or carrying out the deprivation of liberty."<sup>32</sup> According to the Guidelines, "[J]udicial bodies shall at all times hear and act upon petitions for habeas corpus, amparo or similar procedures."<sup>33</sup> In addition, the Commission considers that remedies are only deemed effective if they offer a prospect of success, which means that they must be available in practice and not a purely theoretical construct.<sup>34</sup> The Commission has noted that the seeking of internal remedies must also be applied concomitantly with Article 7, which establishes and protects the right to a fair trial.<sup>35</sup>

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<sup>26</sup> European Parliament Resolution of 18 December 2014 on Sudan: the case of Dr Amin Mekki Medan 2014/3000/(RSP), adopted 18 December 2014, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2014-0108+0+DOC+XML+V0//EN&language=EN>.

<sup>27</sup> European Union Delegation to the Republic of Sudan, European Union calls for immediate release of all political detainees, 07 February 2015, available at [http://eeas.europa.eu/delegations/sudan/documents/press\\_corner/20150207\\_immediate-release-of-all-political-detainees\\_en.pdf](http://eeas.europa.eu/delegations/sudan/documents/press_corner/20150207_immediate-release-of-all-political-detainees_en.pdf)

<sup>28</sup> The African Centre for Justice and Peace Studies, Bahrain Center for Human Rights, Cairo Institute for Human Rights Studies et al., Open letter concerning recent arbitrary arrests and incommunicado detentions of Dr Amin Mekki Medan, Mr Farouq Abu Eissa, and Dr Farah Ibrahim Mohamed Alagar by the Government of Sudan, available at <https://www.fidh.org/International-Federation-for-Human-Rights/Africa/sudan/16693-sudan-arbitrary-arrest-and-incommunicado-detentions-of-dr-amin-mekki>.

<sup>29</sup> See for example *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, Communication 368/09 (2013), particularly paras. 46-49; *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*, Communication 71/92, para.11. See also European Court of Human Rights, *Aksoy v Turkey*, Application no 21987/93, Judgment (Merits and Just Satisfaction), 18 December 1996, para.52.

<sup>30</sup> *Constitutional Rights Project v Nigeria*, Communication 153/96, para.8.

<sup>31</sup> *Ibid*, para.10.

<sup>32</sup> African Commission, Principles and Guidelines on the right to a Fair Trial and Legal Assistance in Africa, Principle M (5) (b).

<sup>33</sup> *Ibid*, principle M (5) (e).

<sup>34</sup> *Sir Dawda K. Jawara v The Gambia*, Communications 147/95 & 149/96, paras.31-32, 35, 38.

<sup>35</sup> *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of*

14. In the present case, the Complainants were held incommunicado for sixteen and seventeen days respectively. They did not have access to a lawyer, and at no point during their detention were they brought before a judge to decide on the legality of their detention. As will be outlined further below (see analysis of violation of Article 7 of the Charter), the legal basis for the Complainants' arrest and detention itself fails to conform to Article 7 of the Charter. Article 50 of the National Security Act 2010 permits the NISS to detain an individual for up to four and a half months without judicial review, depriving the detained individual of any judicial protection.<sup>36</sup>
15. The Complainant's lawyer filed a habeas corpus petition before the Constitutional Courts on 19 December, based on arbitrary arrest, denying access to lawyers and family and detaining them in unknown places without the right to appear before a judge or another legal officer. The Constitutional Court, as in several previous cases, has not responded to this petition to date, more than two months after it was brought.<sup>37</sup> As habeas corpus cases need to be dealt with promptly, the Constitutional Court's inaction means that it has failed to act as effective remedy in the present case.
16. The Organisations submit that therefore there are no effective remedies available to the Complainants in the present case.

**(b) Remedies for violations committed by the NISS are unavailable, ineffective and insufficient**

17. The Organisations submit that in any event there are no effective and sufficient remedies available to victims of NISS abuse. In the present case, the alleged violations were committed by NISS officials. The Respondent State's legal framework provides NISS officials with extremely broad powers of arrest and detention under articles 50, 51 and 52 of the National Security Act of 2010 that are not subject to judicial review.<sup>38</sup> In relation to the immunity enjoyed by members of the NISS, the Commission itself has considered that "it would be making a mockery of justice to expect that the victims would get justice from such a discretionary remedy"<sup>39</sup> and that remedies theoretically available in the Respondent State for victims of NISS crimes are "inadequate and ineffective."<sup>40</sup>
18. The Organisations submit that the Respondent State's legal framework and its authorities' systematic failure in addressing human rights violations committed by NISS officers render remedies in the Respondent State unavailable, ineffective and insufficient for victims of NISS abuse.

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*Members of the Episcopal Conference of East Africa v Sudan*, Communication 48/90-50-91-89/93 (1999), para.31; see further below, analysis of Article 7 violation.

<sup>36</sup> See for an English translation of the National Security Act:

<http://www.pclrs.com/downloads/bills/Institutional%20Law/National%20Security%20Act%202010%20UNMIS%20unofficial%20English%20%20Transaltion%20final%20version%202010-02-03%20single%20space.pdf>.

<sup>37</sup> REDRESS, 'Arrested Development: Sudan's Constitutional Court, Access to Justice and the Effective Protection of Human Rights, August 2012, at [http://www.redress.org/downloads/publications/1208arrested\\_development\\_sudan.pdf](http://www.redress.org/downloads/publications/1208arrested_development_sudan.pdf).

<sup>38</sup> Above, n.36.

<sup>39</sup> *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, para.67.

<sup>40</sup> *Ibid*, para.70.

## **The Complaint is submitted within a reasonable time in accordance with Article 56 (6) of the Charter and Rule 93 (h)**

19. The Organisations submit that the introduction of this complaint is brought within a reasonable time. The violations alleged further below are ongoing and both Complainants continue being detained arbitrarily. The Organisations submit that this complaint cannot therefore be untimely.

### **I.4. Alleged violations of the African Charter**

#### **Article 9 (2): Violation of the Complainants' right to freedom of expression**

20. The Commission has held that freedom of expression as enshrined in Article 9 of the Charter is a basic human right, vital to an individual's personal development and political consciousness, and to his or her participation in the conduct of public affairs in his country. Under the African Charter, this right comprises the right to receive information and to express one's opinion.<sup>41</sup> The importance of the right to freedom of expression for the promotion and protection of human rights has been recognised in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms adopted by the United Nations General Assembly:

Everyone has the right, individually and in association with others:

- (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
- (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;
- (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.<sup>42</sup>

21. The importance of the right to freedom of expression is reflected in the Commission's appointment of a Special Rapporteur on the Freedom of Expression and Access to Information in 2004, and a Special Rapporteur on human rights defenders in Africa in 2004.<sup>43</sup> It is also reflected in its jurisprudence on the activities of human rights organisations and the ability of human rights activists to work "together towards respect for human rights through organised programmes". In this regard, the Commission held that measures that undermine the ability of human rights defenders and human rights organisations to function amounted to an infringement of Article 9 of the Charter.<sup>44</sup>

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<sup>41</sup> *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, Communications 140/94-141/94-145/95, para.36.

<sup>42</sup> Article 6, UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, 8 March 1999.

<sup>43</sup> See also the Commission's Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, at <http://www.achpr.org/sessions/32nd/resolutions/62/>.

<sup>44</sup> *Huri Laws v Nigeria*, Communication 225/98, para 48.



22. In the present case, the Complainants were arrested, detained and subsequently charged with various crimes under the 1991 Criminal Code and the Anti-Terrorist Act of 2001 for participating in negotiations and signing the “Sudan Call.” This is evident from the charges against the two Complainants as well as the circumstances of their arrest. Both Complainants were arrested and detained shortly after their return from the negotiations in Addis Ababa resulting in the adoption of the “Sudan Call.”<sup>45</sup> The NISS also arrested and detained others who had participated in the negotiations in Addis Ababa.<sup>46</sup> The President of the Respondent State, Mr Omar Hassan al-Bashir, has reportedly accused the signatories of the Sudan Call “of being agents to foreign powers and warned them from returning to the country.”<sup>47</sup>
23. The Sudan Call is a political document entitled “Political Declaration on the Establishment of a State of Citizenship and Democracy” and that falls within the scope of freedom of expression.<sup>48</sup> It is aimed at fundamental reforms and a peaceful change in regime. While it calls for daily popular struggle and popular uprising, it does not use the word “armed” or “violent” and it is clear that “the Call” does not propagate violence. On the contrary, it repeatedly calls for an end to violence and war, for peace and the creation of “a state founded on equal citizenship” so as to “enjoy well-rooted democracy, just peace, and balanced development.” The declaration was adopted against the backdrop of the political dialogue, a government initiative that called for a comprehensive political solution.<sup>49</sup> The language used throughout and the fact that it was signed by two political actors, one member of the Sudan Revolutionary Front and one civil society representative shows that the declaration sets out a shared political vision. It is clear that it does not constitute a call to arms or a call to the use of unlawful means. Indeed, signatories, such as the First Complainant, are well-known human rights defenders with an established track-record of seeking to “promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels”.<sup>50</sup>
24. Arresting and detaining, or punishing individuals for the legitimate exercise of freedom of expression constitutes a violation of article 9 of the Charter. Both complainants were arrested and detained on the basis of the National Security Act of 2010. The law permitting arrest and detention of the two Complainants lack fundamental safeguards, and therefore lack the necessary quality of being predictable and foreseeable. The offences with which the two complainants have been charged are overly broad. The provisions of the anti-terrorism Act have been the subject of repeated concerns over the abuse of “offences against the state” and the use of “anti-terrorism laws”, which carry the punishments up to life imprisonment and the death

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<sup>45</sup> See above, para. 6.

<sup>46</sup> The NISS for instance also arrested Mr Farah Ibrahim Mohamed Alagar, who had attended the Sudan Call negotiations in Addis Ababa, but had not signed the resulting document, at <http://www.redress.org/downloads/open-letter-dr-amin-mekki-mr-farouq-abu-eissa-and-dr-farah-ibrahim-mohamed-ala.pdf>.

<sup>47</sup> Sudan Tribune, ‘Sudan’s detained opposition leader remains “steadfast” in prison: spokesperson’, 4 January 2015, available at <http://sudantribune.com/spip.php?article53537>.

<sup>48</sup> See above, n.12.

<sup>49</sup> See Sudan Dialogue Parties demand release of political detainees, Sudan Tribune, 4 February 2015, <http://www.sudantribune.com/spip.php?article53887>.

<sup>50</sup> UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, 8 March 1999, Article 1, at <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>.

penalty, to stifle freedom of expression and political opposition in Sudan.<sup>51</sup> These laws are not formulated with sufficient precision and are therefore open to abuse.

25. There are no grounds, such as national security, to restrict freedom of expression in the circumstances. As outlined above, the Sudan Call does not propagate violence and instead pledges for the end of war and establishment of peace. As the African Commission made clear in *Article 19 v. Eritrea*:

No political situation justifies the wholesale violation of human rights; indeed general restrictions on rights such as the right to free expression and to freedom from arbitrary arrest and detention serve only to undermine public confidence in the rule of law and will often increase, rather than prevent, agitation within a State. The Commission draws on the findings of the UN Human Rights Committee: the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights.<sup>52</sup>

26. The Organisations therefore submit the Complainants' arrest and detention for their participation in negotiations and their signing of the "Sudan Call" are in violation of Article 9 (2) of the Charter.

#### **Article 10: Violation of the Complainants' right to freedom of association**

27. The right to freedom of association is the individual right to come together with other individuals and collectively express, promote, pursue and defend common interests. Numerous international and regional instruments protect the right to freedom of association, particularly Article 10 (1) of the Charter, which echoes Article 22 of the International Covenant on Civil and Political Rights (ICCPR), and Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

28. In giving effect to freedom of association, states are expected not only to enact laws that facilitate the enjoyment of free association, but also to abstain from any action capable of interfering with the exercise of this right. It is in this vein that the Commission in *Lawyers for Human Rights v Swaziland*, referring to its Resolution on the Right to Freedom of Association, called upon African States not to "enact provisions which would limit the exercise of this Freedom".<sup>53</sup> The Commission also stated that any action or regulation on the exercise of freedom of association "should be consistent with States' obligations under the African Charter."<sup>54</sup> The right to freedom of association is also recognised throughout the UN Declaration on Human Rights Defenders, highlighting its role as essential prerequisite for the effective promotion and protection of human rights.

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<sup>51</sup> See for instance Report of the UN Special Rapporteur on the situation of human rights in the Sudan, Sima Samar, UN Doc. A/HRC/11/14, 14 June 2009, para.30; see also REDRESS, Sudan Human Rights Monitor, 'Comments to Sudan's 4<sup>th</sup> and 5<sup>th</sup> 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, at

<http://www.redress.org/downloads/publications/1204%20Comments%20to%20Sudans%20Report%20-%20Legislative%20Reforms.pdf>; REDRESS, 'Extraordinary Measures, Predictable Consequences: Security Legislation and the prohibition of torture,' September 2012, pp.17-19, at [http://www.redress.org/downloads/publications/1209security\\_report.pdf](http://www.redress.org/downloads/publications/1209security_report.pdf).

<sup>52</sup> *Article 19 v Nigeria*, Communication 275/03, para.108.

<sup>53</sup> *Lawyers for Human Rights v Swaziland*, Communication 251/2002, para.34.

<sup>54</sup> *Ibid.*

29. The Organisations submit that the NISS deliberately undermined the rights of the two Complainants to peacefully engage with others in political forums concerning the political environment in Sudan. The arbitrary arrests and detentions of the Complainants are designed to intimidate them and others from further participation in human rights activism and political processes in opposition to the current government of the Respondent State. This is further demonstrated by the NISS' raid of the offices of the Sudanese Human Rights Monitor (SHRM), founded by the first Complainant, on 21 December 2014. Seven NISS officers entered the premises of the SHRM, put an end to a workshop on the Universal Periodic Review of Sudan, and ordered participants to leave. The NISS officers temporarily detained one of the participants, Mr Mohamed Al Fateh Hima, and confiscated a number of laptops and documents.<sup>55</sup>
30. In the case of *Huri-Laws v. Nigeria*<sup>56</sup> which concerned the harassment and persecution of members of a human rights organisation in Nigeria, the Commission found that “the [mere] persecution of its employees and raids of its offices in an attempt to undermine its ability to function in this regard” amounted to a violation of both the right to freedom of expression and the right to freedom of association as guaranteed by articles 9 and 10 of the African Charter.” In the present case, the respondent State not only targeted SHRM, but also undermined its existence and ability to carry out its activities. It is part of an organised campaign of the NISS against individuals and organisations it believes are associated with or linked to the Sudan Call.

## **Article 6: Violation of the Complainants' right to personal liberty and protection from arbitrary arrest and detention**

### **(1) Prohibition of arbitrary arrest and detention**

31. In *Article 19 v. Eritrea*, the Commission elaborated on the prohibition of arbitrary detention with reference to the decision of the UN Human Rights Committee in the *Albert Mukong v. Cameroon* case:

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 all the circumstances...remand in custody must also be necessary in all the circumstances.<sup>57</sup>

The Commission further elaborated that:

[A]n arrest or detention may be legal according to the letter of domestic law, but arbitrary and therefore illegal by reason of its inappropriate, unjust or unpredictable nature.<sup>58</sup>

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<sup>55</sup> Sudan Tribune, ‘Sudan’s Security Services raid and order closure of Mahmoud Mohamed Taha Cultural Centre, 24 January 2015, at <http://www.sudantribune.com/spip.php?article53743>.

<sup>56</sup> *Huri Laws v Nigeria*, Communication 225/98, para 48.

<sup>57</sup> *Article 19 v. Eritrea*, Communication 275/03, para 93, citing Human Rights Committee, Communication 458/1991, *Albert Mukong v. Cameroon*, 10 August 1994, para 9.8.

<sup>58</sup> *Ibid.*

32. The African Commission also found that arrest and detention is arbitrary if used in response to the exercise of other rights guaranteed under the African Charter, such as freedom of expression and association.<sup>59</sup> This has also been recognised by the UN Human Rights Committee, according to which arrest and detention is arbitrary if used “as punishment for the legitimate exercise of the rights as guaranteed by the Covenant ..., including freedom of opinion and expression (article 19), freedom of assembly (article 21), freedom of association (article 22), freedom of religion (article 18), and the right to privacy (article 17).”<sup>60</sup>
33. In its 2012 Concluding Observations and Recommendations on the Periodic Report submitted by the Respondent State, the ACHPR denounced the fact 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.” The Commission called upon Sudan to “ensure that the conditions of arrest, preliminary interrogation and detention of suspects comply with the principles of the Robben Island Guidelines”.<sup>61</sup>
34. In the present case, as outlined above (see analysis of Articles 9 (2) and 10) the two Complainants were ostensibly arrested and detained, and subsequently charged, for having signed the “Sudan Call”. As set out above (see analysis of violation of Article 9 (2)) this Declaration constituted a legitimate exercise of the freedom of expression of its signatories. Their arrest and detention, as well as the bringing of subsequent charges, in direct response to the participation in political negotiations and the signing of the “Sudan Call”, therefore constituted unjustified punishment that rendered their deprivation of liberty arbitrary in violation of Article 6.

(2) Arrest and detention not based on “law”

35. The Organisations submit further that the Complainants’ arrest and detention are unlawful. Their arrest and detention is based on article 50 of the National Security Act (NSA) 2010, which fails to adequately set out the grounds for arrest and detention and does not provide for procedural safeguards. Article 50 (e)-(h) of the NSA 2010 gives NISS members wide powers to arrest and detain a person on vague grounds for an initial period of up to thirty days (45 days upon renewal) and a possible total of four and a half months without the possibility of judicial review.<sup>62</sup> In addition, Article 50 (i) NSA suggests that the NSA may arrest a person even if there is no evidence of any crime available against that person. This runs contrary to recognised standards, as also highlighted in the Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa:

States must ensure that no one shall be subject to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons

<sup>59</sup> *Sir Jawara v Gambia*, Communications 147/95 & 149/96, Article 19 v Eritrea.

<sup>60</sup> UN Human Rights Committee, General Comment No.35, Article 9: Liberty and security of person, para.17 (footnotes omitted).

<sup>61</sup> ACHPR ‘Concluding Observations and Recommendations on the 4<sup>th</sup> and 5<sup>th</sup> Periodic Report of the Republic of Sudan’, 29 July to 4 August 2012, para.26.

<sup>62</sup> See for an English translation of the National Security Act:

<http://www.pclrs.com/downloads/bills/Institutional%20Law/National%20Security%20Act%202010%20UNMIS%20unofficial%20English%20%20Transaltion%20final%20version%202010-02-03%20single%20space.pdf>.

authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause.<sup>63</sup>

### (3) Failure to adhere to rights of Complainants relating to arrest and detention

36. The arrest and continued detention of the two Complainants also failed to guarantee rights set out in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, which form part of the state's obligation under article 6 of the African Charter. In its Resolution on the Right to Recourse Procedure and Fair Trial, the African Commission stated that "persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them."<sup>64</sup> Similarly, the Commission's Robben Island Guidelines expressly provide that authorities should ensure that "all detained persons are informed immediately of the reasons for their detention" and "of any charges against them."<sup>65</sup>
37. In the present case, the NISS failed to show an arrest warrant at the time of arrest, and subsequently detained the Complainants without charge from 6 December 2014 to 12 February 2015. They had not been previously informed of any charges against them, or shown an arrest warrant. The NISS denied the Complainants access to their family members for the first 15 days of detention, until 21 December. The right of access to family members is recognised in article 51(2) of the NSA, yet only in a qualified form that essentially makes their exercise subject to the discretion of the authorities that is not subject to any judicial control.<sup>66</sup> This provision and its application in the present case violate the state's obligation under article 6 of the Charter.

### **Article 7: Violation of the Complainants' right to fair trial**

38. Article 7 was violated in the present case on a number of counts including (a) the denial of *habeas corpus*, (b) the failure to provide information on the reasons for arrest and any charges brought, and (c) the denial of access to a lawyer.

#### (a) Judicial review of the lawfulness of detention (habeas corpus)<sup>67</sup>

39. Article 7 (1) (d) of the African Charter provides that every individual has "the right to be tried within a reasonable time by an impartial court or tribunal." The Commission has expanded upon this provision in its Resolution on the Right to Recourse and Fair Trial, which states that:

Persons 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.<sup>68</sup>

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<sup>63</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, M. 1 (b).

<sup>64</sup> The African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial, Adopted at the Eleventh Ordinary Session, 2-9 March 1992. This principle was cited in *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v. Angola*, Communication 292/04, para 54-5, where the Commission found a violation of Article 6 in a case where the victims had not been shown any warrant or other document relating to the charges under which the arrests were being carried out.

<sup>65</sup> Robben Island Guidelines, paras.25- 26.

<sup>66</sup> Article 51 (2) reads in relevant part: "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.*" (emphasis added).

<sup>67</sup> See also further above, analysis of exhaustion of domestic remedies, point 1.3.

40. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa set out 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 that judicial body may decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful.<sup>69</sup>

Judicial bodies shall at all times hear and act upon petitions for habeas corpus, amparo or similar procedures. No circumstances whatever must be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures.<sup>70</sup>

41. The Commission has not defined the meaning of “reasonable time” or “promptness” with regards to the right judicial oversight of the lawfulness of detention. In the case of *Article 19 v Eritrea* the Commission set out that “[t]he question of what is reasonable cannot be expressed in terms of a blanket time limit which will apply in all cases, but rather must depend on the circumstances. This approach has also been espoused by the European Court of Human Rights, which has held that the reasonableness of the length of proceedings is to be assessed in accordance with all the circumstances of a case.”<sup>71</sup> The jurisprudence of the Commission appears to be based on the ordinary meaning of the word “prompt” as immediately or without undue delay. The UN Human Rights Committee has provided some guidance in its General Comment No. 35 concerning Article 9 of the International Covenant on Civil and Political Rights (Right to Liberty and Security of Persons), stating that “[W]hile the exact meaning of “promptly” may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest.”<sup>72</sup>(emphasis added).
42. The Commission has repeatedly held that the denial of *habeas corpus* constitutes a violation of Article 7(1)(d), such as in *Abdel Hadi, Ali Radi and Others v. Republic of Sudan*.<sup>73</sup>
43. As outlined above, applicable domestic legislation, namely the NSA 2010 itself fails to conform to the Respondent State’s obligations under the Charter, including Article 7. Article 50 of the NSA 2010 permits the NISS to detain an individual for up to four and a half months without judicial review, depriving the individual of any judicial protection. This clearly falls outside the scope of prompt or speedy review, which should be a matter of days, not weeks, let alone months. In *International PEN et al. (on behalf of Ken-Saro Wiwa Jnr.) v. Nigeria*, the Commission held that a Decree that permitted the authorities to detain people without charge for as long as three months without the opportunity for the detainees to challenge their arrest and detention before a court of

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<sup>68</sup> 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.

<sup>69</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001, M (4).

<sup>70</sup> Ibid, M( 5) (a) and (e); see also the Commission’s Robben Island Guidelines, providing that States shall “[E]nsure that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice,” para.27, at <http://www.achpr.org/mechanisms/cpta/robben-island-guidelines/>.

<sup>71</sup> *Article 19 v Eritrea*, Communication 275/03, para. 97.

<sup>72</sup> UN Human Rights Committee, General Comment No.35, Article 9: Liberty and security of person, para.33 (footnotes omitted).

<sup>73</sup> *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, Communication 368/09, para. 88. See also *Huri-Laws v Nigeria*, Communication 225/98 (2000), para.46.

law presented a *prima facie* violation of the right not to be arbitrarily arrested or detained under Article 6.<sup>74</sup>

44. The Complainants were detained for sixty-eight days without being charged. More than two months after their arrest, they have yet to be brought before a judge or prosecutor for review of the legality of their detention. The Organisations submit that this amounts to a violation of Article 7 (1) (d).

(b) Denial of access to a lawyer

45. Article 7 (1) (c) of the Charter stipulates that “[E]very individual shall have ... the right to defense, including the right to be defended by counsel of his choice. 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.<sup>75</sup>

46. The applicable national legislation, article 51(2) of the NSA 2010 provides:

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.* (emphasis added)

47. The right to communicate with a lawyer is thus conditional upon the NISS determining that it does not prejudice the investigation. This determination is not subject to judicial review and the NISS officials have unfettered discretion in assessing whether to allow detainees to communicate with the outside world. The law therefore fails to provide adequate safeguards. In the present case, the Complainants were denied access to a lawyer for the first fifteen days of their detention by the NISS in violation of the prompt access requirement under article 7(1) (c) of the Charter.

(c) Trial before anti-terrorism court

48. The Commission set out the guiding standards and principles on special tribunals in *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, underlining in particular what should be required for an independent and impartial tribunal.<sup>76</sup> Where the composition of ‘special tribunals’ are at the discretion of the government, the Commission has found a violation of Article 7 (1) (d).<sup>77</sup>

49. Under Sudan’s anti-terrorism act of 2001, “special courts” are established by the Chief Justice. The rules of procedure for these courts are established by the Chief Justice “in consultation with the Minister of Justice”. Further, the Chief Justice may establish a “Special Court of Appeal”, which is authorised to confirm the death penalty and life

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<sup>74</sup> *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria*, Communication 137/94-139/94-154/96-161/97, para. 83.

<sup>75</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. M (2)(f)..

<sup>76</sup> *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, paras.196-198.

<sup>77</sup> *Ibid.*

imprisonment. The rules of procedure of trial courts formulated by the Chief Justice restrict a series of rights guaranteed under Sudan's Code of Criminal Procedure of 1991, including allowing trials in absentia, restricting the period for appeals from two weeks to one week, restricting the appeal procedure for the confirmation of sentences and allowing the courts to enter convictions on the basis of confessions made during investigations. These provisions were challenged before Sudan's Constitutional Court, which, though admitting their flawed nature, upheld their constitutionality on the grounds that extraordinary times require extraordinary measures.<sup>78</sup>

50. Special tribunals like those constituted under Sudan's anti-terrorism law are incompatible with article 7 (1) (d) and the fair trial standards developed by the African Commission.

## **Article 5: Violation of the Complainants' right to freedom from torture and ill-treatment**

### **(a) Incommunicado Detention**

51. The Commission has considered that "holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family whether the individual is being held and his whereabouts is inhuman treatment of both, the detainee and the family concerned."<sup>79</sup> The Commission's Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa ('Robben Island Guidelines') provide that detainees should have a "right that a relative of other appropriate third person is notified of the detention"<sup>80</sup> and expressly prohibit "the use of incommunicado detention."<sup>81</sup>
52. The Commission has also emphasised that "[I]ncommunicado detention is a gross human rights violation that can lead to other violations such as torture or ill-treatment...[O]f itself, prolonged incommunicado detention and/ or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment."<sup>82</sup> The UN Human Rights Committee considered that secret/ incommunicado detention for two weeks constitutes a violation of a detainee's right to be treated with humanity and "respect for the inherent dignity of the human person."<sup>83</sup>
53. In the present case, the NISS did not allow the Complainants to contact their family (nor anyone else) and dismissed their family's requests to see the Complainant.<sup>84</sup> From 6 December 2014 to 22 December (second Complainant) and 23 December (first

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<sup>78</sup> See *Kamal Mohammed Saboon v Sudan Government*. CS (Constitutional Court) (60) of 2009. See for a further detailed analysis, Amin M. Medani, 'A Legacy of Institutionalised Repression: Criminal Law and Justice in Sudan', in Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Farnham: Ashgate, 2011), 67-88, at 79-82.

<sup>79</sup> *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, Communication 48/90-50/91-52/91-89/93, para. 54 *Liesbeth Zegveld and Mussie Ephrem v Eritrea*, Communication 250/02, para.55.

<sup>80</sup> African Commission, 'Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa', para.20 (a).

<sup>81</sup> *Ibid*, para.24; see also UN Human Rights Committee, *General Comment Number 20 on Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, para.11.

<sup>82</sup> *Liesbeth Zegveld and Mussie Ephrem v Eritrea*, Communication 250/02, para.55.

<sup>83</sup> UN Human Rights Committee, *Karina Arutyunyan v Uzbekistan*, Communication No.917/2000, para.6.1.

<sup>84</sup> See African Centre for Justice and Peace Studies and East and Horn of Africa Human Rights Defenders Project (EHAHRDP), 'Sudan: Release Human Rights Defenders Abdulmonim Adam and Gazi Alrayah Al-Sanhouri', 17 March 2014, at <http://www.acjps.org/sudan-release-human-rights-defenders-abdulmonim-adam-and-gazi-alrayah-al-sanهوري/>.



Complainant) respectively, the NISS held the Complainants incommunicado.<sup>85</sup> The incommunicado detention in the present case has been aggravated by the NISS' refusal to allow the first Complainant's family members to provide the Complainants with necessary medicine and food required of their diabetes.

(b) Denial of medical treatment as violation of the prohibition of torture and ill-treatment

54. 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 person<sup>86</sup> [and] must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her ...doctor...<sup>87</sup>

55. The African Commission's Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) set out that the right to an independent medical examination is a basic procedural safeguard for the prevention of torture<sup>88</sup> and that states should "[e]nsure that all persons deprived of their liberty have access to .. medical services and assistance".<sup>89</sup>

56. Both, the first and second Complainants have specific medical needs as diabetics.<sup>90</sup> The first Complainant has high blood pressure and the NISS prevented him from taking his medication with him upon his arrest. The second complainant suffers from cyanosis. The family of the first applicant made repeated requests to deliver prescribed medication to him but were not permitted to do so until their first family visit was granted on 24 December 2014.<sup>91</sup>

57. The circumstances of their arrest and the continued denial of relevant care in particular during the Complainants' incommunicado detention furthermore aggravated concerns for the Complainants' health. The second Complainant had to be taken for treatment to hospital at least on two occasions since his arrest, yet the present circumstances do not allow for a full assessment on the quality of the treatment received. The Organisations consider that the prolonged denial of access to a medical doctor and medication breached of Article 5 of the Charter.

(c) Imposition of the death penalty or life imprisonment following an unfair trial

58. It is recognised that the imposition of the death penalty following an unfair trial constitutes a violation of the right to life.<sup>92</sup> The European Court of Human Rights held in *Öcalan v Turkey* that:

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<sup>85</sup> See above, para. 8.

<sup>86</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (xxx) 247 (2001), M (7) (a).

<sup>87</sup> *Ibid.* M (2) (e).

<sup>88</sup> Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), Part II: Prevention of Torture, Article 20 (b).

<sup>89</sup> The Robben Island Guidelines, Part II: Prevention of Torture, Article 31.

<sup>90</sup> See above, paras. 3-4.

<sup>91</sup> *Ibid.*, para. 8.

<sup>92</sup> UN Human Rights Committee, General Comment No 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial, para.59.

the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3 of the Convention.<sup>93</sup>

59. The complainants face a trial before a specially constituted court for crimes which carry the death penalty.<sup>94</sup> The very prospect of being subjected to an unfair trial before a tribunal that does not conform to minimum standards of impartiality and procedural fairness is therefore bound to be inhuman treatment in as much as it makes the two complainants the object of arbitrary proceedings and exposes them to uncertainty and anxiety about their future liberty and well-being.

## **Article 16: Right to Health**

60. Article 16 (1) of the Charter provides that every individual shall have the right to enjoy the best attainable state of physical and mental health. The Commission has previously held that the State's obligation to respect the right to health in detention "is even more evident to the extent that detention centres are its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities."<sup>95</sup>
61. 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.<sup>96</sup> It is generally recognised that torture and ill-treatment cause severe mental and physical trauma on the victim, 'a trauma that can be long lasting and may never fully disappear'.<sup>97</sup> The resulting ill-health as a consequence of torture can be attributed to the 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.<sup>98</sup> Put differently, the right to health contains freedoms, including the right to be free from torture and other ill-treatment.<sup>99</sup>
62. In the present case, the Organisations submit above that NISS officers subjected the Complainants to ill-treatment resulting in severe pain and suffering. The Organisations therefore submit that the Respondent State is responsible for a violation of the Complainants' health contrary to Article 16.

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<sup>93</sup> See European Court of Human Rights, Case of Öcalan v Turkey, application no.46221/99m, Judgment (Grand Chamber), 12 May 2005, para.175.

<sup>94</sup> See Articles 50 and 51 of the 1991 Criminal Code.

<sup>95</sup> *Malawi Africa 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*, Communication Nos. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97, 210/98 (2000), para. 122.

<sup>96</sup> 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)", at <http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En>.

<sup>97</sup> 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, at [http://www2.ohchr.org/english/bodies/cescr/docs/ngos/CAPS-IRCT\\_Peru48.pdf](http://www2.ohchr.org/english/bodies/cescr/docs/ngos/CAPS-IRCT_Peru48.pdf).

<sup>98</sup> See also World Health Organisation, 'Linkages Between Health and Human Rights, for human rights violations that result in ill-health,

<sup>99</sup> Office of the High Commissioner for Human Rights, 'The Right to Health, Factsheet 31, June 2008, at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>.

**Article 1: Violation of the Respondent State’s positive obligation to recognise the rights, duties and freedoms [enshrined in the Charter] and to adopt legislative or other measures to give effect to them.**

63. The Commission has recognised in *Zimbabwe Human Rights NGO Forum v Zimbabwe* that “[H]uman rights standards do not contain merely limitations on State’s authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights..”<sup>100</sup>
64. The State has a duty to respect, protect, promote and fulfill the rights contained in the Charter.<sup>101</sup> This entails that the State exercises due diligence in adopting legislation, conducting investigations and providing effective remedies so as to comply with its obligations.<sup>102</sup>
65. As was outlined further above in the analysis of the violations of Articles 5, 6, 7 (1) (c), 9 (2), 12 and 16, members of the NISS as agents of the Respondent State were directly responsible for engaging in conduct in violation of the relevant Articles of the Charter. The Respondent State furthermore failed to put in place a legal framework to provide the Complainant with access to adequate redress. The Organisations submit that following the Commission’s previous decisions, “a violation of any provision of the Charter automatically means a violation of Article 1. If a State party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article.”<sup>103</sup>
66. In light of the foregoing, the Organisations submit that the Respondent State is also in violation of Article 1 of the Charter.

**Conclusion**

67. The Organisations submit this complaint for the purposes of seizure, and without prejudice to the submission of additional facts, documents and legal arguments under the Charter once the Commission has been seized of the complaint. The Organisations will then also set out the requested remedies.
68. The Organisations submit that this complaint meets the requirements of Rule 93 for seizure by the Commission for the purposes of examination by the Commission.

**II Request for Provisional Measures**

**Risk of irreparable harm**

69. The Complainants are at grave risk of suffering irreparable harm as stipulated in Rule 98 of the Rules of Procedure of the African Commission. In *Interights (on behalf of Jose Domingos Sikunda) v. Namibia*,<sup>104</sup> the Commission stated that

“in circumstances where . . . it is alleged that irreparable damage may be caused to the victim, the Commission will act expeditiously appealing to the Responding

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<sup>100</sup> *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/2002, para.143.

<sup>101</sup> *Ibid*, para.152.

<sup>102</sup> *Ibid*, para.159.

<sup>103</sup> *Sir Dawda K. Jawara v. The Gambia*, Communications 147/95 and 149/96, para. 46

<sup>104</sup> *Interights (on behalf of Jose Domingos Sikunda) v. Namibia*, Communication No. 239/2001.

State to desist from taking any action that may cause irreparable damage until after the Commission has had the opportunity to examine the matter fully.”

70. There is a high risk that the Complainants will be subjected to further arbitrary detention, with an adverse impact on their physical and psychological health. This is aggravated by the prospects of being subjected to an unfair trial for offences that carry the death penalty, which amounts to a violation of Article 5 of the Charter. The Organisations submit that unless the Respondent State is requested to take urgent measures to address these concerns, the Complainants will suffer irreparable harm.

### **Requested provisional measures**

71. The Complainants urge the Commission to request the Respondent State to:

- Immediately and unconditionally release Dr Amin Mekki Medani and Mr Farouq Abu Eissa;
- In the alternative, to immediately release Dr Amin Mekki Medani and Mr Farouq Abu Eissa on bail;

Pending the Complainants' release:

- Guarantee that the Complainants have regular and unhindered access to adequate medical care, including care provided through the Complainants' families;
- Ensure that the Complainants' lawyers have regular and unhindered access to their clients;
- Guarantee that if the Complainants are put on trial, they will be tried before the Criminal Court and in line with the Respondent State's obligations under Article 7 and 26 of the African Charter, be transparent and open for monitoring by international organisations, institutions and others.

**Annex 1:** Petition to the Constitutional Court, 19 December 2014