

UGANDA / JUDGMENT

Ibrahim v Sudan (Communication 386/10)

[2013] ACHPR 121 (25 February 2013)

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COURT

African Commission on Human and Peoples Rights

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Communication 386/10

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Communication 386/10 - Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan

Summary of facts:

- 1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Communication on 13 May 2010 from REDRESS (the Complainant), representing Dr. Farouk Mohamed Ibrahim (the Victim).
- 2. The Communication is submitted against the Republic of Sudan, State Party to the African Charter on Human and Peoples' Rights (the African Charter) and hereafter referred to as the Respondent State or Sudan.¹
- 3. The Complainant submits that, the Victim is a Sudanese national who took up his position as Associate Professor at the Faculty of Science, University of Khartoum in 1986. He was assigned to teach Microbiology, Plant Pathology, Genetics, Systematics and Evolution.
- 4. The Complainant submits that, on 30 June 1989, a group of Military Officers seized power in Sudan, and in the following months, members of the opposition movements were reportedly targeted by the National Intelligence Security Service (NISS).
- 5. The Complainant alleges that on 30 November 1989, the Victim was detained by members of the security forces, not informed of the reasons for his arrest and no charges brought against him. The Victim was detained with eighteen (18) other detainees, blindfolded and taken to Ghost House No.1,² where he was kept until 12 December 1989 without any contact with his lawyer or family members.

- 6. The Complainant submits that, the Victim was subjected to interrogations about courses he was teaching and about his colleagues by high-ranking members of the security services, including General Bakri Hassan salih,³ and Dr. Nafie Ali Nafie.⁴

\$\mathbf{1}\$ Sudan ratified the African Charter on 18 February 1986

\$\overline{2}\$ The Ghost House was located in the premises of the former Election Commission

\$\,3\,\$ The then Security President

\$\overline{4}\$ The then Security Director

- 7. The Complainant submits that on 2 December 1989, General Bakri told the Victim that: the content of some of the courses he was teaching such as Theory and Evolution were objectionable; he was carrying out activities against the ruling regime, and was being justly punished for those crimes. General Bakri also sought to know where certain opposition leaders were presumed to be hiding.
- 8. The Complainant alleges that, the Victim was subjected to repeated kicking and beating; prolonged bath in ice water; threatened with rape, death; and deprived of sleep for up to three days.
- 9. The Complainant alleges that the Victim was detained in a small and dirty 1 metre by 1.6 metre toilet room flooded with water for three days before being transferred to another bathroom where he was kept with five other detainees for nine days.
- 10. The Complainant submits that the Victim was transferred to Kober prison on 12 December 1989, where he was examined by a Doctor who wrote a detailed report about his condition. The Doctor allegedly documented bruises and other ailments consistent with the reported allegations of torture.
- 11. The Complainant submits that on 23 February 1990, the Victim was released and continued staying in Sudan, however, he stopped lecturing before leaving the country in June 1991 for fear of his safety, and the University where he formerly lectured, failed to look into the matter.
- 12. The Complainant submits Affidavits of the Victim, Court Judgements and other documents to support the Complaint.

Articles alleged to have been violated

13. The Complainant alleges that Articles 1, 5, 6, 7, 8 and 9 of the African Charter have been violated by the Respondent State.

Procedure

- 14. The Communication was received by the Secretariat on 6 May 2010 and on 21 May 2010, the Secretariat acknowledged receipt of the Communication to the Complainant.

- 15. At its 47th Ordinary Session, the African Commission on Human and Peoples' Rights (the Commission) was seized of the Communication. Both

Parties were informed on 23 June 2010 and requested to submit arguments on Admissibility within three (3) months.

- 16. On 22 September 2010, the Secretariat received the Complainant's submission on Admissibility, acknowledged receipt and forwarded the submissions to the Respondent State on 5 October 2010.
- 17. The decision on Admissibility was deferred during the 48th and 49th Ordinary Sessions pending submissions from the Respondent State.
- 18. During the 50th Ordinary Session, the Respondent State made its submissions which were sent for translation and forwarded to the Complainant on 14 November 2011.
- 19. The Complainant made additional submissions on 8 April 2012 which were forwarded to the Respondent State on 18 May 2012. On 18 June 2012, the Respondent State also made additional submissions which were forwarded to the Complainant on 10 July 2012.
- 20. The decision on Admissibility was deferred during the 51st and 52nd Ordinary Sessions.
- 21. During its 13th Extra-Ordinary Session held from 19 to 25 February 2013, the Commission took a decision on the Admissibility of the Communication and the Parties were duly notified.

The Law on Admissibility

Submissions of the Complainant

- 22. The Complainant submits that the Communication complies with Article 56 of the African Charter. In relation to Article 56 (5), the Complainant avers that local remedies have been exhausted. It outlines the following, which includes measures taken by the Victim regarding his Complaint:
 - i. While in prison, the Victim lodged a Complaint on 29 January 1990 to the Chairman of the Revolutionary Command Council, Oumar Hassan El-Bashir with copies to the Attorney-General, the Chief Justice, the Vice-Chancellor of the Khartoum University (for attention of the University Senate) and other concerned Government Officials. The Victim requested to be

released, and asked the Government to carry out a full investigation in order to hold the perpetrators accountable for the crimes committed against him. No investigation was opened despite medical evidences, and the Vice-Chancellor did not submit the Victim's request to the Senate;

- ii. In June 1991, the Victim left Sudan to settle in Cairo for fear of his safety and in the mid-nineties, he received advice from his lawyer not to return to Khartoum in search of justice due to the political situation;
- iii. In October 1998, the Victim and other opposition leaders were invited by the Government of Sudan to take part in a Conference on the Constitution of Sudan. In response, the Victim demanded that the Government investigate the acts of torture he was subjected to whilst in prison as a condition for his participation;
- The Victim could not approach the courts at the time because iv. his arrest and detention were based on Decree No. 2 of June 1989 which introduced a state of emergency in Sudan and permitted the detention of anyone suspected of being a threat to political or economic security. According to the said Decree, no reasons of such arrest needed to be given; detainees have no right to contact family members or access to a lawyer of their choice, and no right to challenge the legality of the detention before a judicial body or the validity of the Decree itself. The Decree was subsequently replaced by a legislation governing the security services and emergency regulations that equally provide for broad powers of arrest and detention.⁵
- Further, at the time of the Victim's Complaint, neither the $\mathbf{V}$. criminal offence of hurt,⁶ and extorting confessions under

The Complainant refers to, in particular, Articles 30 & 31 of the National Security Act of 1999 and Article 50 of the National Security Act of 2010.

⁶ Clarification from the Complainant on the 'Criminal Offence of Hurt': At the time the alleged crimes were committed (from 30 November to 12 December 1989), Sudanese Criminal law did not provide for the crime of torture. The applicable offences in *lieu* of a specific definition of torture were the Criminal Offence of Hurt under Article 271 of the 1983 Criminal Act and the offence of extorting confessions under Article 282 of the 1983 Criminal Act.

According to Article 142 (1) of the 1991 CPA, the Offence of Hurt is deemed to have been committed by anyone who causes any pain or disease to another person and shall be punished with imprisonment for a

Articles 271 and Article 282 of the 1983 Criminal Code, nor other relevant criminal offences were subject to any statute of limitations. Subsequently, with the adoption of the Criminal Procedure Act (CPA) in 1991, the criminal offence of torture retroactively became subject to a limitation period of two years, and/or, the offence of hurt for a maximum period of five years. $\frac{1}{2}$ This means, according to the Complainant, that the alleged perpetrators could no longer be prosecuted since the statutory limitation period expired in 1994 notwithstanding the fact that the Victim's complaint was brought in 1990.

- vi. On 13 November 2000, the Victim sent an appeal to the President of the Sudan requesting that steps be taken concerning his Complaint which went unheeded. The appeal requested for: Truth, apology, and mutual reconciliation; prosecution before national courts; and

resort to international human rights courts. He also requested his lawyer in Khartoum to file a petition to the courts on his behalf. However, on 28 January 2001, he received advice from his lawyer to the effect that such measures were untimely. Following the political relaxation associated with peace negotiations to end Sudan's civil war, the Victim returned to Khartoum in August 2002.

- vii. Due to lack of response to the Victim's repeated Complaints, and following the peace negotiations to end the civil war as well as the reestablishment of the Constitutional Court in 2005, the Victim's lawyer made a direct appeal to the Constitutional Court in 2006. The appeal challenged the legality of the immunity of members of the NISS and the statutes of limitation by which cases are dropped, hindering investigations and prosecutions in the Victim's case. This is to the effect that NISS members enjoy immunity on account of their official position. Under Sudanese law, a criminal offence committed by an official can only be investigated and prosecuted if the head of

term not exceeding six months, fine or both. Article 142 (2) of the same Act provides: "Where hurt has occurred by dangerous means, such as poison, or intoxicating drugs, or where hurt is caused with the intention of drawing a confession from another, or compelling that other to do an act contrary to the law, the offender shall be punished, with imprisonment, for a term, not exceeding two years, and may also be *punished with fine.*"

the relevant authority grants approval and lifts immunity,⁷ which has not happened in the present case;

- As part of the process of filing a constitutional petition in 2006, viii. the Victim's lawyer wrote to the Minister of Justice, requesting him to undertake a criminal investigation and provide compensation.
- The Constitutional Court dismissed the Victim's case on 6 November 2008, holding that the provisions in the Sudanese law pertaining to statutory limitations and to immunities were not unconstitutional. This final decision was communicated to the Victim on 8 January 2009.
- 23. From the above, the Complainant states that the remedies were ineffective and there were no other remedies available to the Victim which could compel a full investigation of his case without the approval of the police and/or to seek other forms of reparation. $\frac{1}{2}$

The Respondent State's submissions on Admissibility

- 24. The Respondent State submits that the Communication should be declared inadmissible because it does not meet the requirements stipulated in Article 56(4), 56(5) and 56(6) of the African Charter.

- 25. With respect to Article 56(4), the Respondent State submits that the Communication is based on information from the media.
- 26. Regarding Article 56(5), the Respondent State submits that all local remedies have not been exhausted in light of the fact that amongst all the remedies provided by the Complainant, there is no mention of any legal action that the Victim or his lawyer took to bring the perpetrators of the allegations to justice.
- 27. The Respondent State further submits that the action through the Constitutional Court centered on challenging the constitutionality of the articles on immunity in the National Security Act and those relating to the statute of limitation, even though remedies and justice are enshrined in the Sudanese legal system and are effective when it comes to

7 The Complainant mentions the Sudanese National Security Acts of 1990 (Article 41), 1994 (Article 38), 1999 (Article 33) and 2010 (Article 52).

accountability and redress. The Respondent State specifically underlines the following:

- Article 34(1) of the 1991 CPA stipulates that "A complaint" $\triangle \mathbf{i}$ could be lodged by the person against whom a crime was committed or within the scope of his responsibility or whoever represents him." In this regard, the Victim or his legal representative has the right to resort to the Prosecution for taking action against those who violated his rights.
- ii. The National Security Act of 2010 permits a person arrested or detained to be treated in a manner that ensures respect for his human dignity and requires that such a person should not be subjected to any physical or mental harm.
- iii. Article 51(8) of the National Security Act of 2010 provides that "The Prosecution is responsible for monitoring the prison guards constantly to ensure that rules governing detention and receiving complaints from prisoners, are respected"
- Article 54(1) (2) of the National Security Act of 2010 iv. stipulates that:

If any member of the security service commits any crime in violation of the provisions of the law and this crime happens to be an offence in view of the provisions of the Criminal Act in force, he/she shall be penalized according to the provisions of the said Act. The Director, for objective reasons, shall produce him/her for trial by a competent court.

Concerning immunity of members of the NISS, Article 35 of the CPA stipulates that "Any person against whom criminal proceedings are directed and he/she enjoys immunity, a petition should be addressed to the Prosecutor for the Director of Security Service to waive his/her immunity". It is the Respondent State's contention that these are procedural immunities and are not absolute, noting that there are many examples of members of the security service who have been held accountable after committing crimes in the Respondent State.

- 28. The Respondent State submits that there are other modes of litigation which were not used by the Victim or his lawyer: The Supreme Court; Court of Appeal; General Criminal Court; Criminal Court of the First Instance; Criminal Court of the Second Instance; Common Criminal Court; and any Special Criminal Court that the Chief Justice may establish under the 1986 Judiciary Act or any other Act.
- 29. The Respondent State also provides other mechanisms for redress and justice in Sudan as follows: The Civic Judiciary System; Complaints within the National Security Services; The Grievances Committee within the National Advisory Council; The National Commission on Human Rights; and Office of the Ombudsman. It states that these mechanisms play a pivotal role as mechanisms to which Complainants could resort for local remedy without forfeiting the right to resort to the Courts. The Respondent State submits that these mechanisms have played a remarkable role in complaints dealing with violations of human rights.
- 30. Furthermore, the Respondent State cites *Rafaat Makawi v. Sudan*,⁸ a Constitutional Court case in relation to the death sentence passed on Najm El-Deen Gassam El-Seed for committing the crime of cold blood murder when he was below the age of eighteen (18). A petition was submitted to the Constitutional Court which issued a verdict supporting Najm El-Deen Gassam El-Seed's conviction, but at the same time imposed an alternative punishment because the accused was below the age of eighteen (18). The Respondent State submits that this case confirms the existence of an effective judiciary.
- 31. The Respondent State stresses that the rule of law prevails in Sudan and applicable to all, including members of the NISS.⁹ The Respondent State submits that when the Victim's lawyer advised him not to go back to Sudan to file a Complaint, he could have filed on behalf of the Victim without the latter's physical presence in the Sudan in accordance with Article 34 (2) of the CPA which stipulates that a "Complaint is lodged by the person against whom a crime is committed or by his representative."
- 32. The Respondent State submits that resort by the Complainant to the Constitutional Court cannot be considered an act of exhausting all local

⁸ Communication 311/2005- *Rafaat Makawi v. Sudan.*

⁹ The Respondent makes reference to two cases where perpetrators of murder were convicted by the Khartoum North Court of Criminal Justice in 1998 and sentenced to death under the relevant provision of Article 130 of the 1991 Criminal Act. The State notes that these sentences were passed at the time when the Complainant claimed that there was no justice mechanisms to which one could resort for redress.

remedies or a final decision from the highest judicial body, for the following reasons:

- Constitutional appeal is about the unconstitutionality of Articles relating to immunity as stipulated in the National Security Act and statute of limitation by virtue of which a criminal suit is dropped under the CPA and Article 58 on the Powers of the Minister of Justice for stopping a criminal law suit. The Respondent State submits that all these have nothing to do with the subject of the Victim's Complaint.
- Even though the Complainant has raised the question of being ¹⁰denied the right to litigation for the fact that his claim was dropped due to the statute of limitation, this text did not deprive him of his right to litigation. It only limited the period of its validity.
- 33. The Respondent State submits further that the Communication does not comply with the requirement under Article 56(6) because it was not submitted within a reasonable period of time, since it mentions allegations dating back to 1989.

Complainant's supplementary submissions on Admissibility

- 34. In the Complainant's additional submissions, it submits that all available remedies have been exhausted, and that the remedies referred to by the Respondent State are not effective. The Complainant cites *Sir Dawda Jawara v The Gambia* (the Jawara case) where the Commission held that a remedy is deemed effective "If it offers a prospect of success, and it is capable of redressing the complaint."¹⁰
- 35. The Complainant avers that the Respondent State does not identify any remedies that offer a prospect of success that would redress the wrong alleged. According to the Complainant, this would require a procedure that will compel the Respondent State to carry out an effective investigation into the alleged torture and other violations so as to establish the facts, hold the perpetrators accountable, and provide adequate compensation to the Victim.
- 36. The Complainant highlights measures taken by the Victim regarding his Complaint when legal avenues were not available to him and subsequent

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Communication 147/95 and 149/96 *Sir Dawda Jawara v The Gambia* (ACHPR 2000) para 32.

resort to the Constitutional Court after it was established in 2005. The Complainant further reiterates that the Victim had to leave the country out of fear for his safety in 1991, but pursued his Complaint as soon as the circumstances appeared to be more conducive.

- 37. The Complainant states that taking the matter to the Constitutional Court was the last domestic opportunity for the Victim as it constituted an adequate remedy given that the Court has the power, under Article 15(1)(d) of the Constitutional Court Act of 2005, to declare a legislation unconstitutional, and to compel the authorities to take action to protect fundamental rights. According to the Complainant, domestic remedies were exhausted in 2009 when the Constitutional Court's ruling was communicated to the Victim.

- 38. Concerning Article 56(6), the Complainant states that the Communication was submitted within a reasonable period and that the material date for the exhaustion of local remedies was 2009, not 1989 as argued by the Respondent State. It submits that the Victim's initial Complaint of February 1990 had been pending for several years during which no remedies were available to challenge the failure of the authorities to investigate. This situation only changed in 2005 with the adoption of a new Constitution which enabled the Victim to raise the legal issues surrounding the lack of effective remedies by way of a constitutional challenge in 2006.

The Commission's Analysis on Admissibility

- 39. The Admissibility of Communications within the Commission is governed by the requirements of Article 56 of the African Charter which provides for seven requirements to be met before a Communication can be declared Admissible. If any of the requirements set out in this Article are not met, the Commission declares the Communication Inadmissible.
- 40. The Complainant argues that all the requirements under Article 56 have been met. The Respondent State on the other hand, contends that the Complainant has not fulfilled the requirements under sub-Articles 4, 5 and 6, and as such, the Commission should declare the Communication Inadmissible.
- 41. The Commission is convinced that the other sub-articles which are not disputed have been complied with and would thus proceed to analyze the contended sub-articles based on the submissions of both Parties.
- 42. Article 56(4) of the African Charter states that "Communications relating to *human and Peoples' Rights... shall be considered if they are not based exclusively* on news disseminated through the mass media." The Complainant does not respond to the Respondent State's contention that the Communication is based on information from the media. However, based on the facts before the Commission, there is no evidence indicating that the allegations contained in the Communication are based exclusively on news disseminated through the mass media as argued by the Respondent State. Furthermore, the Victim's affidavit and Court judgments are attached to the Communication. For these reasons, the Commission holds that the requirements of Article 56(4) have been fulfilled.
- 43. Article 56(5) of the African Charter states that "Communications relating to *human and Peoples' Rights... shall be considered if they are sent after exhausting* local remedies, if any, unless it is obvious that this procedure is unduly *prolonged.*" The jurisprudence of the Commission affirms that Complainants are required to exhaust local remedies only if they 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." Exhausting local remedies gives the State notice of events occurring within its territory, with an opportunity to deal with the allegations using its own judicial and administrative

procedures, before being called before an international body.¹²

- 44. The Commission will now analyze the arguments of both Parties to ascertain whether the Respondent State was aware of the allegations made by the Victim and whether it took steps to investigate them. Particularly because allegations of torture against public officials impose an immediate duty on the State to initiate a prompt, impartial and effective investigation and bring the perpetrators to justice if the allegations are founded.¹³ The Commission will also ascertain whether local remedies were indeed available and effective to the Victim and whether the Victim exhausted them.

¹¹ n above.

¹² See Communication 25/89,47/90,56/91,100/93 World Organization Against Torture v Zaire (ACHPR 1996) para 36; Communication 25/89, 47/90, 56/91, 100/93- Free Legal Assistance Group and Others v Zaire (ACHPR 1995) para 36; Communication 71/92 - Recontre Africaine pour la *Defense des Droits de l'Homme v Zambia* (ACHPR 1997) para 10.

See Articles \$17 - 19\$ of the Resolution and Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, adopted by the African Commission at its 32nd Ordinary Session.

- 45. The Complainant asserts that local remedies were not initially available to the Victim due to the civil war in the Sudan, and legislations that impeded his access to the local courts. It states that local remedies were exhausted in 2006 when the matter was taken to the Constitutional Court after it was reestablished. It also outlines various measures taken by the Victim to obtain redress for allegations of torture against the NISS personnel,¹⁴ all of which went unheeded. The Complainant avers that the Respondent State does not identify any remedies that offer a prospect of success that would redress the wrong alleged, including carrying out effective investigation into the alleged torture and other violations.
- 46. The Respondent State on the other hand challenges the fact that local remedies have been exhausted on the grounds that amongst all the remedies provided, there is no mention of any legal action that the Victim or his legal representative took to bring the perpetrators to justice.
- 47. In **Article 19 v Eritrea**,¹⁵ the Commission ruled 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.

48. The facts in the instant Communication show that the Respondent State was aware of the allegations. This is justified by the numerous Complaints made by the Victim to various authorities. His Complaints went unheeded and while the Respondent State does not rebut the allegation of not instituting an investigation, there is no evidence of measures it took to investigate the allegations even though it had ample notice of the same. This in itself, made any local remedies that theoretically existed, ineffective.¹⁶ This view was also expressed by the Commission in Article 19 \$v\$ Eritrea where eighteen (18) journalists were detained **incommunicado** for allegedly posing a threat to national security, and were imprisoned for several 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."¹⁷ In this

\$14\$ See paragraph 22 in the submissions of the Complainant above.

\$15\$ Communication 275/03 – Article 19 v Eritrea (ACHPR 2007) para 72.

\$16\$ See also Communication 48/90, 50/91/52/91, 89/93- Amnesty International and Others v Sudan (ACHPR 1999) para 33.

¹⁷ n 15 above, para 77 & 78.

light, the Respondent State by failing to take measures to investigate the allegations in spite of being notified has forfeited its prerogative to deal with the matter domestically.

- 49. The Complainant also states that the Victim's lawyer made a direct appeal to the Constitutional Court in 2006 which dismissed the matter on 6 November 2008, holding that the provisions in the Sudanese law pertaining to statutory limitations and to immunities were not unconstitutional. The Respondent State however contends that the Complainant's resort to the Constitutional Court cannot be considered an act of exhausting all local remedies or a final decision from the highest judicial body.
- 50. The Commission notes that the Constitutional Court in Sudan is established according to Section 119 (1) of Sudan's Interim National Constitution of 2005. According to Section 122 (1) of the same Constitution, its decisions are final and binding. It is mandated under Section \$122(1)\$ (d) amongst other things, to protect human rights and fundamental freedoms. Furthermore, under Article \$15(1)\$ (d) of the Constitutional Court Act of 2005, the Court has the jurisdiction to declare legislation unconstitutional, and to compel the authorities to take action to protect fundamental rights. In this sense, the Respondent State cannot argue that the Complainant's resort to the Constitutional Court is not an act of exhausting local remedies or a final decision from the highest judicial body.
- 51. Additionally, citing the Constitutional Court case of **Rafaat Makawi v**. **Sudan**,¹⁸ the Respondent State submits: "... This case confirms the existence of an effective judiciary," which contradicts its argument that approaching the Court "Cannot be considered an act of exhausting local remedies or a final decision from the highest judicial body." According to the Commission, the Respondent State's submission reaffirms

the Complainant's position that the Victim's case to the Constitutional Court was appropriate, even though it did not yield positive results.

- 52. The Respondent State further argues that remedies are enshrined in the Sudanese legal system which are effective when it comes to accountability and redress, referring to the courts and mechanisms that exist in Sudan.¹⁹ It mentions laws such as the 1991 CPA and the National Security Act of

n 8 above. This case was declared Admissible by the Commission during its 48th Ordinary Session. Subsequently, the Complainant requested that the file be closed because the subject matter of the Complaint had already been dealt with by the Constitutional Court.

See Paragraphs 28 and 29 above.

2010. The Respondent State particularly refers to Article 35 of the CPA which governs immunities of members of the NISS and gives the Director of Security Service the ultimate power and discretion to decide whether to waive immunity or not.

- 53. The Complainant on the other hand, argues that the Victim could not approach the courts mentioned by the Respondent State for the following reasons:
 - Decree No. 2 of June 1989²⁰ i.
 - The prevailing political situation in Sudan in the 90s; ii.
 - The CPA of 1991²¹ iii
- 54. Having regard to the foregoing, the Commission concurs with the Complainant's argument that the political situation in Sudan and Decree No. 2 of June 1989 impeded the Victim's approach to the courts mentioned by the Respondent State due to the restrictions imposed by the Decree, especially the state of emergency. This was also the Commission's position in *The Law Office of Ghazi Suleiman v Sudan*,²² where it reasoned that the political situation at the time did not permit the Victim to exhaust local remedies because application of law was made difficult due to the state of emergency. According to the Commission in the said case, "It is reasonable to assume that not only will the procedure of local remedies be unduly prolonged, but also that it will yield no results."
- 55. In *Article 19 v Eritrea*, the Commission also ruled that an exception will apply where the domestic situation of the State does not afford due process of law for the protection of the rights.²³ It follows therefore that the Victim could not approach the courts in Sudan at the time due to the circumstances aforementioned and particularly because of the ouster clauses in the Decree which rendered local remedies non-existent and ineffective.²⁴

²⁰ See paragraph 22 (v) above.

²¹ See Paragraph 22 (iv) above.

²² Communication 228/99 *The Law Office of Ghazi Suleiman v Sudan* (ACHPR 2002), para 36

²³ n 15 above, para 78.

See Communication 105/98, 128/94, 130/94, 152/96 -Media Rights Agenda, Constitutional 24 Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria (ACHPR 1998), para 50.

- 56. With respect to the mechanisms referred to by the Respondent State as remedies,²⁵ it is the Commission's view that they do not fall under the category of judicial remedies which should be sought by Victims. This is because remedies referred to in Article 56(5) entail remedies sought from the courts of a judicial nature.²⁶
- 57. Concerning the other remedies in the form of laws, the Commission notes that the National Security Act was adopted in 2010, while the violations occurred in 1989. In this regard, the Respondent State cannot cite a law that was not applicable at the time the alleged violations were committed or could be used to approach the courts. The above notwithstanding, it is the view of the Commission that the National Security Act of 2010 does not safeguard the interest of the Victim in the instant Communication. The reason being that even though the Act has provisions under Article 54(1)\$ (2) which penalizes members of the NISS who commit crimes contrary to the Act, it also maintains the immunity of NISS members from prosecution and disciplinary action which can only be waived by the NISS Director after preliminary investigations have been initiated. This is an impediment in itself because the Victim cannot prosecute under such circumstances, especially because no preliminary investigations have been initiated in the instant case.
- 58. Regarding Article 35 of the CPA, the Commission considers that the concept of immunity under this Act²⁷ equally has the tendency of shielding government officials from lawsuits by private citizens and unless these are absent or waived by the concerned officials, courts will not entertain suits by private individuals against them. This unreasonably limits the opportunity to deal with violations in courts and consequently lack of redress to victims of human rights violations.
- 59. Furthermore, the remedy provided under Article 35 of the CPA has been described in the Commission's jurisprudence as discretionary extraordinary remedy of a non judicial nature and therefore not effective. It has also been seen as a remedy not contemplated by Article 56(5)\$,²⁸ because it is an impediment to the exhaustion of local remedies. In a similar case, Monim Elgak, Osman Hummeida and Amir Suliman (represented

²⁵ Namely, the Civic Judiciary System; Complaints within the National Security Services; The Grievances Committee within the National Advisory Council; The National Commission on Human Rights; and Office of the Ombudsman.

²⁶ Communication 221/98 - *Alfred B. Cudjoe v Ghana* (1999) para 14.

²⁷ As is the case with the National Security Act of 2010.

²⁸ Communication 60/91 - Constitutional Rights Project (in respect of Wahab Akamu, G. Adegbe and Others) v Nigeria* (ACHPR 1994) para 10.

by FIDH and OMCT) v Sudan,²⁹ where the Respondent State claimed the availability of other remedies (referring to Article 34(2) of the CPA, as well as Articles 54(1) and 59 of the National Security Act of 2010), the Commission ruled that this kind of remedy is purely discretionary, not subject to judicial oversight and hence final.

- 60. The Commission also took this position in *Constitutional Rights Project (in* respect of Zamani Lakwot and 6 Others) v Nigeria,³⁰ where it reasoned that "... 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." In this regard, the Commission finds that the CPA cannot provide an effective remedy to the Victim.
- 61. The third argument of the Complainant raises the issue of the retroactive application of the 1991 CPA which made it difficult for the Victim to exhaust local remedies at the time. The violations alleged commenced on 30 June 1989 during which period Decree No. 2 of June 1989 applied. When the Act was adopted in 1991, it had a retroactive effect in the sense that, the criminal offence of torture which was the essence of the Victim's Complaint retroactively became subject to a limitation period of two (2) years, expiring in 1994. In this connection, the Victim or his lawyer could not bring the matter before any courts at the time because as a matter of fact, they were time barred and consequently, access to courts was denied by virtue of the Act.
- 62. Even though the Respondent State contends that other cases were entertained by the courts during that period,³¹ the Commission notes that the cases referred relate to murder, while the subject matter of the Victim's Complaint is torture which was statute barred. In this regard, the Commission finds that remedies were not available to the Victim at the time.
- 63. The questions that may arise at this point is *why the Victim did not approach the courts after the limitation period expired in 1994, and why he took the matter* directly to the Constitutional Court in 2006 without approaching the other *courts?*

²⁹ Communication 379/09 – Monim Elgak, Osman Hummeida and Amir Suliman (represented by *FIDH and OMCT) v Sudan*, para 68.

Communication 87/93 *Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v Nigeria* (ACHPR 94) para 8. 31

\$n\$ 9 above.

- 64. In response to these questions: Firstly, it is worth reiterating that the Victim left the country for fear of persecution in 1991 and only returned in 2002.³² On this ground, the Commission's jurisprudence has shown that fear of persecution is one of the

exceptions used to waive the requirement to exhaust local remedies. In the *Jawara Case*,³³ the Commission ruled 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. Therefore, if the applicant cannot turn to the judiciary of his country because of generalized fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him." Accordingly, the Victim could not be required to approach the courts at the time.

- 65. Secondly, other laws such as the 1991 CPA and the National Security Act were adopted which hindered litigation before Sudanese courts, especially against NISS members who are the alleged perpetrators of the violations in the instant Communication.
- 66. Thirdly, as already discussed above, there are substantial grounds to believe that the political situation and state of emergency at the time hindered the Victim's access to the courts. When the political situation improved, the Victim could not approach the courts to prosecute the alleged perpetrators due to the immunity they enjoyed under the CPA and the National Security Act. It was practical for the matter to be taken directly to the Constitutional Court for the latter to rule on the unconstitutionality of the Acts. Thus, since the Respondent State forfeited its prerogative to deal with the matter domestically, the Commission considers that the requirement to exhaust 'all' local remedies must be dispensed with.
- 67. Based on the above reasoning, the Commission holds that all local remedies could not be exhausted in the present Communication because they were not available, adequate and effective. Hence, the Complainant has constructively exhausted local remedies pursuant to Article 56(5) of the African Charter.

³² In addition to the fact that his Lawyer advised him in the mid-nineties "Not to return to *Khartoum* in search of justice due to the political situation."

³³ n 10 above, para 35, See also *Communication 215/98 - Rights International v Nigeria*, where the Commission found that the Victim" Was unable to pursue any domestic remedy following his *flight for fear of his life to the Republic of Benin...*" Para 24.

- 68. The last issue in contention is the requirement under Article 56(6) of the African Charter which provides that "Communications received by the *Commission* will be considered if they are submitted within a reasonable period* from the time local remedies are exhausted, or from the date the Commission is *seized with the matter...*"
- 69. The Respondent State submits that the Communication does not comply with the requirement under Article 56(6) because it was not submitted within a reasonable period of time, since it mentions allegations dating back to 1989.
- 70. The Complainant contends that Article 56(6) has been complied with because the material date for exhaustion of local remedies was 2009, not 1989. It avers that the Victim's initial Complaint of February 1990 had been pending for several years during which no

remedies were available to challenge the failure of the authorities to investigate. This situation only changed in 2005 with the adoption of a new Constitution which enabled the Victim to raise the legal issues surrounding the lack of effective remedies by way of a constitutional challenge in 2006.

- 71. Before the Commission proceeds to analyze whether the Communication was submitted within a reasonable period of time, it is important to underline the fact that reasonable time does not pertain to the period when the allegations were committed as submitted by the Respondent State. It is computed from the time when the Communication was submitted to the Commission after exhaustion of local remedies, or when the Complainant immediately realizes that local remedies are not available, sufficient or effective.
- 72. As opposed to the Inter-American and European Human Rights Systems which prescribe 6 months as a reasonable time period, the African Charter does not have provisions or definition with respect to reasonable time. In the absence of this, the Commission has been flexible, treating each case based on its context and characteristics. Ascertaining the notion of reasonable time therefore within the Commission, depends on the circumstances of every case.
- 73. According to the facts before the Commission, the Communication was brought in May 2010 after the decision of the Constitutional Court was communicated to the Victim in January 2009. A period of fifteen \$(15)\$ months elapsed between the time when the Constitutional Court ruled on the matter, (counting from the time when the decision was communicated

to the Victim), and when the Communication was submitted to the Commission.

- 74. At this point, the Commission would proceed to determine whether fifteen \$(15)\$ months can be seen as a reasonable period of time.
- 75. In **Michael Majuru v Zimbabwe**, the Commission ruled that, ..."Where there is good and compelling reason why a Complainant could not submit his/her Complaint for consideration on time, the Commission may examine the Complaint to ensure fairness and justice".³⁴ In that Communication, the Complainant submitted his Complaint twenty-two (22) months after fleeing the country, explaining that, he needed time to settle, was undergoing psycho-therapy and was concerned for the safety of his family. The Commission held that the arguments advanced by the Complainant as impediments for the late submission do not appear convincing, and that twenty two (22) months after fleeing the country is clearly beyond a reasonable man's understanding of reasonable period of \$time\$.³⁵
- 76. Similarly, in **Darfur Relief and Documentation Centre v Sudan**,³⁶ a period of twenty-nine \$(29)\$ months \$(2\$ years and 5 months) elapsed between the time the matter was brought to the Commission after exhausting local remedies. The Commission held that the Communication was submitted "Way beyond a time which could be considered

reasonable." ³⁷ The Commission also reasoned that "There is no sufficient reason given as to why the Communication could not be submitted within a reasonable period," ³⁸ and therefore declared the Communication inadmissible.

- 77. Relying on the above jurisprudence, the Commission holds that, fifteen (15) months of delay in the present Communication cannot be considered as reasonable time, as the explanation given by the Complainant justifying the delay is not compelling.
- 78. In this regard, the Communication does not fulfill the **proviso** of Article 56(6) of the African Charter.

³⁴ Communication ^{308/07} – **Michael Majuru v Zimbabwe** (ACHPR 2008) para 109.

³⁵ n above, para 110.

³⁶ Communication 310/10- **Darfur Relief and Documentation Centre v Sudan**, (ACHPR 2009).*

³⁷ n above, para 78.

³⁸ n above, para 80.

Decision of the Commission on Admissibility

- 79. In view of the above, the African Commission on Human and Peoples' Rights:
- $\mathbf{i}.$ Declares this Communication Inadmissible in accordance with Article 56 of the African Charter:
- Decides to notify the Parties and attach the decision to its ii. Activity Report in accordance with Rule 107(3) of its Rules of Procedure.

Done in Banjul, The Gambia, at the th Extra-Ordinary Session of the **Commission held from 19 to 25 February 2013**

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