BEFORE THE AFRICAN COMMISSION FOR HUMAN & PEOPLES' RIGHTS

49th ORDINARY SESSION: APRIL-MAY 2011

COMMUNICATION NO. 383/2010

In the matter between:

MOHAMMED ABDULLAH SALEH AL-ASAD

and

DJIBOUTI

ARGUMENTS ON ADMISSIBILITY

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I. INTRODUCTION

1. The Complainant, Mr. Mohammed Abdullah Saleh al-Asad, respectfully submits the following arguments on the admissibility of his communication to the African Commission on Human and Peoples' Rights ('the Commission' or 'the African Commission'). The original communication was submitted to the African Commission on 10 December 2009, and the Commission was seized of the communication at its 8th extra-ordinary session.

2. The State Party to the African Charter on Human and Peoples' Rights ('the Charter' or 'African Charter')[1] against which the communication is directed is The Republic of Djibouti. The Complainant alleges violations of his rights under articles 1, 2, 3, 4, 5, 6, 7(1), 12(4), 14 and 18 of the Charter.

3. Article 56 of the African Charter governs the admissibility of communications brought pursuant to Article 55. For the reasons set out below, the Complainant submits that this communication fulfills all of the requirements stipulated in Article 56 of the Charter and should therefore be declared admissible by the African Commission.

II. SUMMARY OF FACTUAL SUBMISSIONS

4. This section summarizes the extensive factual submissions annexed to this brief, which include declarations from Mr. al-Asad and his wife, a summary of publicly available information relevant to the case, supporting documentary evidence, and numerous reports and articles.[2] This evidence supports the Complainant's arguments on admissibility. The factual submissions also provide context for the alleged violations of the Charter.

5. Mr. al-Asad is a 51-year-old Yemeni businessman currently living in Al-Mahra Governorate, Yemen. From 1985 until late 2003, he lived in Tanzania, where he set up a successful business. He married a Tanzanian woman, established a family, and became a respected member of his community. In order to purchase land and conduct business during his time in Tanzania, Mr. al-Asad acquired a forged Tanzanian birth certificate and passport.

6. On 26 December 2003, Mr. al-Asad was apprehended at his home, transported to a flat in Dar es Salaam, and questioned for several hours. In the early morning hours of 27 December 2003, Mr. al-Asad was bound, blindfolded, loaded onto a small plane, and flown to an undisclosed location. Upon landing—still handcuffed and blindfolded—Mr. al-Asad was pushed into a car and driven to a secret detention facility.

7. At first, after these secret and disorienting transfers, Mr. al-Asad had no idea where he was. Based on his own experience, information acquired through investigation by his attorneys and others, and documentation provided by the

[1] Organization of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[2] For ease of reading, citations to these sources have been omitted in this summary.

government of Tanzania,[3] he learned that he had been held in Djibouti. Mr. al-Asad's detention in Djibouti marked his entrance into the United States-led extraordinary rendition and secret detention program.[4]

8. For his first week of detention in Djibouti, Mr. al-Asad was not told why he was being held and was left in complete isolation. During the second week, Mr. al-Asad was interrogated several times by a white woman who identified herself as an American. She was accompanied by an Arabic-language interpreter and a third man who appeared to be from the Horn of Africa. During these sessions, Mr. al-Asad was questioned about terrorist-related activities. In response, Mr. al-Asad consistently explained that he had no involvement in terrorist offenses. At one point, the interpreter threatened Mr. al-Asad with his death, and the death of his pregnant wife.

9. Mr. al-Asad was never informed of any charges against him, nor was he presented before a court or tribunal in Djibouti. He was never allowed to see a judge to determine the legality of his detention or to challenge his subsequent transfer from Djibouti into further sites of the U.S. extraordinary rendition and secret detention program. Mr. al-Asad was completely isolated from the outside world—he was not allowed to communicate with his family, his friends, the Embassy of Yemen, or any human rights organization.

10. After about two weeks in detention, Mr. al-Asad was blindfolded, bound, and driven from the secret prison to an airport by local personnel. There, he was pulled from the car, lifted off the ground and stripped of his blindfold. He could make out about five individuals clad in black whose faces were concealed. These men tore off all of his clothing, shoved a finger into his rectum, and photographed him naked. They diapered him and dressed him in a western-style outfit. They plugged his ears with cotton, placed headphones and a hood over his head, and tightly applied tape around his head. They chained his hands, waist, and feet, and several men carried him onto a waiting plane.[5]

11. Although he did not know it at the time, Mr. al-Asad had just experienced the standard operating procedure of the U.S. rendition team, a process that has been described by other former secret prisoners, acknowledged and analyzed in U.S. government documents discussing the legal basis for the program, and denounced by human rights bodies.[6] The precise methods used—from the black clothing and face coverings worn by the rendition agents to the rectal assault, nude

[3] *See* The United Republic of Tanzania Departure Declaration Card, 27 December 2003 [Exhibit A].

[4] The CIA-led secret prison program was ordered closed in January 2009 by U.S. President Barack Obama through a series of executive orders. Before and after President Obama's directives, numerous reports from United Nations, regional, and other human rights bodies have established that abusive interrogation techniques and conditions of detention amounting to cruel, inhuman and degrading treatment and torture were commonly used against those held in the program. For a collection of publicly available information about this program—including information revealed by the U.S. government itself—see Center for Human Rights and Global Justice at NYU School of Law, *On the Record: U.S. Disclosures on Rendition, Secret Detention, and Coercive Interrogation*, 2008 [Exhibit B].

[5] All of these practices are well known and documented characteristics of the extraordinary rendition program. *See id.* at pp. 14-15.

[6] *See* Factual Summary of Publicly Available Information on the U.S. Government's Extraordinary Rendition, Secret Detention, and Interrogation Program and Djibouti's Role in the Program, Paragraphs 2,9,11-12,16-19.

photographs, and use of diapers—are evidence that Mr. al-Asad was being transferred into secret U.S. custody.

12. After his forced transfer from Djibouti, the United States held Mr. al-Asad in three different secret and *incommunicado* detention facilities, two in Afghanistan and a third in an unknown location. During this entire time, he was never once given access to the International Committee of the Red Cross, his family, or legal counsel. While in U.S. secret detention, Mr. al-Asad was subjected to abusive conditions, including extreme isolation and absence of human contact, constant loud music and artificial light twenty-four hours a day, exposure to cold, and dietary manipulation. In addition, he was repeatedly subjected to the abusive and degrading procedure first used by the rendition team on his transfer out of Djibouti. His initial experience in Djibouti, the conditions in which he was held, the repeated transfers, and his total inability to communicate with the outside world all combined to profoundly damage Mr. al-Asad psychologically and emotionally.

13. While Mr. al-Asad was detained, his wife, Zahra Ahmed Mohamed, and her brother-in-law searched frantically for Mr. al-Asad in Tanzania. Mr. al-Asad's father, Abdullah al-Asad, searched in Yemen for his son, and when it became apparent that he was not there, he joined Zahra Ahmed Mohamed's search in Tanzania. Abdullah al-Asad and Zahra Ahmed Mohamed devoted more than a year to their search for Mohammed al-Asad. By the time Abdullah al-Asad learned that his son had been sent to Djibouti, Mr. al-Asad had already been extraordinarily rendered to Afghanistan.

14. On 5 May 2005, Mr. al-Asad was transferred by the U.S. government to Yemen. On 13 February 2006, he was tried in Yemen for forging travel documents, a charge based on Mr. al-Asad's own admission to Yemeni prosecutors that he had used unauthorized documentation in Tanzania. Mr. al-Asad pled guilty to this charge and was sentenced to time served, before finally being released on 14 March 2006. He was never charged with any terrorism-related offense.

15. Mr. al-Asad has suffered immensely as a result of his secret and *incommunicado* detention.[7] During detention, he was separated from his family and prevented from communicating with them. He was subjected to torture and cruel, inhuman and degrading treatment from which he continues to suffer emotionally and physically. He has been unable to recover the business and property lost during his detention, and his reputation has been damaged irreparably.

16. By virtue of the participation of agents of the government of Djibouti in Mr. al-Asad's detention and rendition, the Respondent State's awareness of the alleged violations must be presumed. Furthermore, in a letter to the Attorney General submitted on behalf of Mr. al-Asad on 31 March 2009, the Respondent State was given explicit notice by the Complainant of the facts of this case, including the conditions of Mr. al-Asad's arbitrary and illegal detention and deportation.[8] Yet there has been no indication of an investigation being initiated to discover additional information, no charges were brought against those responsible, and no remedy has been provided to Mr. al-Asad. In light of his experiences there, Mr.

[7] *See* Mohammed Abdullah Saleh al-Asad Declaration, Paragraphs 54-58.
[8] *See* Letter to the Attorney General of Djibouti, 31 March 2009 [Exhibit C].

al-Asad has a well founded fear of returning to Djibouti to pursue his case in person.

III. THE COMMUNICATION COMPLIES WITH THE REQUIREMENTS OF ARTICLE 56 OF THE AFRICAN CHARTER

A. THE COMMUNICATION COMPLIES WITH SUBSECTIONS 1, 2, 3, 4, AND 7 OF ARTICLE 56

17. Subsections 1, 2, 3, 4, and 7 of Article 56 are plainly satisfied. The author of the communication has been identified as Mohammed Abdullah Saleh al-Asad. He is represented by the Global Justice Clinic (formerly the International Human Rights Clinic), part of the Center for Human Rights and Global Justice at New York University School of Law and by the International Centre for the Legal Protection of Human Rights. The communication is compatible with the Charter as it alleges serious violations of the rights the Charter seeks to protect and is directed against Djibouti, a State Party to the Charter since 1991. It is presented in a polite and respectful manner, without using language that is disparaging or insulting. The allegations are based on information provided from a variety of sources, including the testimony of the victim, and not exclusively on news disseminated through the mass media. The communication does not concern a case which has been dealt with by any other United Nations or African Union body, or settled by any other procedure of international investigation or adjudication.[9]

B. THE COMMUNICATION COMPLIES WITH THE EXHAUSTION OF LOCAL REMEDIES REQUIREMENT OF SUBSECTION 5 OF ARTICLE 56

1. Domestic remedies were unavailable during the commission of the violations by the Respondent State

a. *Local remedies to end the Complainant's secret and incommunicado detention were unavailable*

18. The Commission has found no local remedy to be available where significant practical barriers have prevented claimants from accessing the courts. In cases of arbitrary detention, such as that of Mr. al-Asad, the Commission has held that the normal remedy is a writ of *habeas corpus*, which could require state authorities to produce an individual and justify imprisonment.[10] Where the state prevents a detained person from accessing the courts through secret and *incommunicado* detention, the remedy of *habeas corpus* has been obstructed and is not available.[11]

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[9] Mr. al-Asad's detention in Yemen was considered by the Working Group on Arbitrary Detention; however, the claim was submitted against Yemen seeking release of Mr. al-Asad from allegedly unlawful detention in Yemen following his release from U.S. custody. *See* "Revised Methods of Work," Paragraph 17(a), *Mr. Muhammad Abdullah Salah al-Assad v. Yemen*, Working Group on Arbitrary Detention, Opinion No. 7/2006, U.N. Doc. A/HRC/4/40/Add.1 (11 May 2006), p. 53.

[10] *See Constitutional Rights Project v. Nigeria*, ACHPR No. 153/96 (1999), Paragraph 8.

[11] In *N.H., G.H. and R.A. v. Turkey*, the European Commission of Human Rights found complaints concerning *incommunicado* detention admissible after noting the state's failure to suggest any domestic

In such cases, it has been held that recourse to a remedy has been made impossible, and thus, exhaustion does not apply.[12]

19. While Mr. al-Asad was detained in Djibouti from 27 December 2003 to mid-January 2004, his ability to file a writ of *habeas corpus* with Djiboutian authorities was fully obstructed. In Djibouti, the Complainant was deprived of the opportunity to communicate with any person other than his guards and captors; he was denied access to an attorney or to his family; and at no point was he brought before a tribunal to adjudicate the legality of his detention.[13]

20. In order to file a *habeas corpus* application, the Complainant, his family or a representative needed notice of where, at least in a general sense, he was being held. Mr. al-Asad's family was entirely unaware of his fate or whereabouts during his detention in Djibouti, including even the country where he was detained, making it impossible for them to file a *habeas corpus* application in Djibouti. The secret actions of Djibouti kept his family ignorant of which government was holding him and how they might seek his release. Djibouti never informed Mr. al-Asad's family of his location. Given that Mr. al-Asad had neither traveled to Djibouti nor had any dealings with the country prior to his detention, his family had no reason to believe that he was in custody there during the time he was being held.

21. Despite being deprived of information about his detention, Mr. al-Asad's family took every reasonable measure to locate him, including the filing of a *habeas corpus* petition in Tanzania. This petition was filed by Mr. al-Asad's father in Tanzania, Mr. al-Asad's last known location.[14] By the time he became aware that his son had been sent to Djibouti, it was already too late to act on this information, as Djibouti had transferred Mr. al-Asad into the U.S. network of secret, "black site" prisons long before.[15]

22. It is not surprising that representatives of Mr. al-Asad were unable to file a *habeas corpus* petition in Djibouti in this case. The effect of secret and *incommunicado*

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remedy capable of remedying the situation. *See N.H., G.H. and R.A. v. Turkey*, ECHR Nos. 16311/90, 16312/90 and 16313/90 (11 October 1991) (Admissibility). Similarly, in *Vélez Loor v. Panama*, the Inter-American Commission found that an individual was not required to take additional steps toward exhaustion when "the State did not allow Mr. Vélez Loor access to remedies under domestic law to challenge the alleged arbitrary detention and the mistreatment and torture that he purportedly suffered. The Commission concludes that Mr. Vélez Loor was prevented from exhausting these remedies because he was arrested and then forbidden to use the telephone or have any other contact with the world outside his prison." *Jesús Tranquilino Vélez Loor v. Panama*, IACHR No. 92-04 (23 October 2006) (Admissibility), Paragraph 43. The United Nations Joint Study on Secret Detention notes, "Secret detention without contact with the outside world entails de facto that the detainees do not enjoy the right enshrined in article 9, paragraph 4 of the Covenant, namely the possibility to institute *habeas corpus, amparo,* or similar proceedings, personally or on their behalf, challenging the lawfulness of detention before a court of law that is competent to order their release in the event that the detention is found to be unlawful." United Nations Human Rights Council, 13th Session, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, U.N. Doc. A/HRC/13/42 (19 February 2010), Paragraph 19 [Exhibit D].

[12] *See Article 19 v. Eritrea*, ACHPR No. 275/03 (2007), Paragraph 72.

[13] *See* Mohammed Abdullah Saleh al-Asad Declaration.

[14] *See Republic v. Director of Immigration Services, ex parte Mohammed al-Asad*, (*Habeas Corpus* petition), High Court of Tanzania, 17 June 2004 [Exhibit E]; Zahra Ahmed Mohamed Declaration, Paragraph 3.

[15] *See* Zahra Ahmed Mohamed Declaration, Paragraph 17.

detention, in combination with an international program aimed at depriving individuals of the ability to access the outside world, is precisely to make recourse to remedies like *habeas corpus* impossible. It would be contrary to the spirit and letter of the case law of the African Commission—and indeed nonsensical—to fault a victim of secret and *incommunicado* detention for his failure to exhaust the very remedies that were withheld from him as part of the abuse he suffered.[16]

b. *Local remedies to prevent the Complainant's illegal deportation were unavailable*

23. Article 12(4) of the African Charter states that a decision to expel a non-national must be taken "in accordance with the law." The Commission has interpreted this provision to require that deportations occur "in a manner consistent with due process."[17] According to the Commission, the remedy to a pending irregular or illegal expulsion is for affected individuals to "be allowed to challenge the order/decision to expel them before competent authorities, or have their cases reviewed, and have access to legal counsel."[18]

24. In Mr. al-Asad's case, remedies to address the decision of the Djiboutian government to remove him were "as a practical matter not available"[19] prior to or at the moment of his removal. He was not able to access a court to at least challenge, if not prevent, his expulsion. Like the victims in *Rencontre Africaine pour la Defence des Droits de l'Homme/Zambia*,[20] he was detained without any formal charges, denied access to legal representation and communication with his family, and summarily expelled, without the opportunity to dispute the legality of these actions. On multiple occasions, the Commission has found that such circumstances preclude a deportee from accessing local remedies, thereby preventing him from exhausting them.[21] For this reason, in *Rencontre Africaine pour la Defence des Droits de l'Homme v. Zambia*, *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v. Angola* and *Institute for Human Rights and Development in Africa v. Angola*, the African Commission found the communications admissible.

c. *Local remedies to prevent the Complainant's refoulement were unavailable*

25. Mr. al-Asad's inability to access a court during his detention also impeded any remedy that would have prevented his *refoulement* by Djibouti. In the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa, the African Commission identified the principle of *non-refoulement* as a critical element of states' obligations under Article 5 of the Charter: "States should ensure

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[16] *See Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia*, ACHPR No. 71/92 (1996), Paragraph 14.
[17] *Institute for Human Rights and Development in Africa v. Angola*, ACHPR No. 292/04 (2008), Paragraph 63-65.
[18] *Institute for Human Rights and Development in Africa v. Angola*, at Paragraph 84.
[19] *Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia*, at Paragraph 14.
[20] *Id*.
[21] *See id. See also Union Interafricaine des Droits de l'Homme and Others v. Angola*, ACHPR No. 159/96 (1997), Paragraph 12; *Institute for Human Rights and Development in Africa v. Angola*, at Paragraph 40.

no one is expelled or extradited to a country where he or she is at risk of being subjected to torture."[22] According to the Commission in *Institute for Human Rights and Development in Africa v. Angola*, "procedural safeguards" are necessary to ensure that non-nationals "are not sent back/deported/expelled to countries or places where they are likely to suffer from torture, inhuman or degrading treatment."[23] The Committee Against Torture has held that in order to comply with the principle of *non-refoulement*, a state must provide an "effective, independent and impartial review of the decision to expel or remove,"[24] which offers a person facing expulsion the opportunity to present the incompatibility of expulsion with his right to be free from torture. Such a pre-transfer remedy was never made available to Mr. al-Asad.

26. The need for an adequate initial procedure to guarantee effective protection from *refoulement* has been confirmed and reiterated by international and regional human rights bodies.[25] In *Alzery v. Sweden*, the Human Rights Committee stated that:

> [b]y the nature of *refoulement*, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual …[26]

27. In *Mamatkulov and Azkarov v. Turkey*, involving complainants suspected of terrorist activities in Uzbekistan, the European Court of Human Rights emphasized that a person awaiting expulsion must be given the "right to sufficient time and necessary facilities in which to prepare his or her case."[27] The European Court of Human Rights has also affirmed that even if the means to challenge an illegal expulsion are available, they can only be considered effective if they have an "automatic suspensive effect to prevent his or her removal from the [sending] state."[28] The Committee Against Torture has consistently relied on the identical rule, starting with *Josu Arkauz Arana v. France*.[29]

28. At the time of his transfer, there was a manifest risk that Mr. al-Asad would be tortured, of which the government of Djibouti cannot reasonably argue it was unaware.[30] Despite this risk, Djiboutian authorities did not make available a pre-

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[22] Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), ACHPR Resolution, 32th Session, 17-23 October 2002.

[23] *Institute for Human Rights and Development in Africa v. Angola*, at Paragraph 84

[24] *Agiza v. Sweden*, Committee Against Torture, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (24 May 2005), Paragraph 13.7.

[25] *See* Kees Wouters, International Legal Standards for the Protection from Refoulement, p. 573 (Intersentia, 2009).

[26] *Alzery v. Sweden*, Human Rights Committee, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (10 November 2006), Paragraph 11.8.

[27] *Mamatkulov and Azkarov v. Turkey*, ECtHR Nos. 46827/99 and 46951/99 (6 February 2003), Paragraph 96.

[28] *Abdolkhani and Karimnia v. Turkey*, ECtHR No. 0471/08 (1 March 2010), Paragraph 58; *See also Čonka v. Belgium*, ECtHR No. 51564/99 (5 February 2002), Paragraph 79; *Gebremedhin [Gaberamadhien] v. France*, ECtHR No. 25389/05 (26 April 2007), Paragraph 66.

[29] *See Josu Arkauz Arana v. France*, Committee Against Torture, Communication No. 63/1997, U.N. Doc. CAT/C/23/D/63/1997 (9 November 1999), Paragraph 6.1.

[30] *See* Factual Summary of Publicly Available Information on the U.S. Government's Extraordinary Rendition, Secret Detention, and Interrogation Program and Djibouti's Role in the Program, Paragraphs 20-22, 23-26.

transfer remedy against *refoulement*. Mr. al-Asad never had the possibility to challenge the decision or to establish to the Djiboutian authorities his fear of torture and ill-treatment upon transfer. From Djibouti, Mr. al-Asad was in fact disappeared into the system of secret "black site" prisons, where he was a victim of torture and cruel, inhuman and degrading treatment, first in Afghanistan and then in an unknown country, for more than a year.

2. Post-facto local remedies to provide redress are unavailable, ineffective or insufficient

a. *Djibouti has failed in its duty to initiate criminal investigations and prosecutions*

29. The principal post-facto remedy for the type of actions perpetrated against Mr. al-Asad while he was in Djibouti is criminal prosecution of those responsible. According to the African Commission, it is the obligation of the state to investigate, prosecute and punish criminal violations of a victim's rights of which it is deemed to be aware, and of which it has been informed. The Commission set out this principle in *Malawi African Association and Others v. Mauritania*,[31] *Amnesty International and Others v. Sudan*,[32] and most recently in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*,[33] where the Commission held that:

> the primary responsibility for the protection of human rights in a country lies with the government of that country… The responsibility of maintaining law and order in any country lies with the state specifically with the police force of that state. As such, it is the duty of the state to ensure through its police force that where there is a breakdown of law and order, the perpetrators are arrested and brought before the domestic courts of that country. Therefore any criminal processes that flow from this action, including undertaking investigations to make the case for the prosecution are the responsibility of the state concerned and the state cannot abdicate that duty.[34]

30. This principle is fundamental to the protection of rights under the Charter. In *Article 19 v. Eritrea*, the Commission determined 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.[35]

This dictum referred to a case in which the complainants were the accused persons, and the state was failing to bring them to trial while holding them in detention. However, read with the *Zimbabwe Human Rights NGO Forum* case, it should be interpreted to mean that where serious criminal violations of an individual's rights occur, especially where perpetrated by state agents, and the state fails to investigate, prosecute and punish the perpetrators of the crime, there

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[31] In this case, the African Commission instructed Mauritania to launch an independent inquiry in order to clarify the fates of disappeared and to "identify and bring to book the authors of the violations perpetrated." *Malawi African Association and Others v. Mauritania*, ACHPR Nos.54/91, 61/91, 98/93, 164/97-196/97, 210/98 (2000), Paragraph 142.

[32] *See Amnesty International and Others v. Sudan*, ACHPR Nos. 48/90, 50/91, 52/91, 89/93 (1999), Paragraph 51.

[33] *See Zimbabwe Human Rights NGO Forum v. Zimbabwe*, ACHPR No. 245/02 (2006), Paragraphs 68-70.

[34] *Id.* at Paragraph 69-70.

[35] *Article 19 v. Eritrea*, at Paragraph 72.

are no domestic remedies available for the individual to exhaust. In the *Article 19 v. Eritrea* case the Commission held that:

> the fact that the state … has not taken any action means that domestic remedies are either not available or if they are, not effective or sufficient to redress the violations alleged.[36]

31. The U.N. Human Rights Committee has stated that where investigations reveal violations of rights under the ICCPR, those responsible must be brought to justice.[37] These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture or similar cruel, inhuman or degrading treatment and enforced disappearance.[38] While individuals do not have the right to demand of a state the criminal prosecution of another person, the state party is duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish the culprits.[39]

32. The African Commission has elaborated on the nature of a state's duty to investigate, requiring that investigations be sufficiently thorough: "Investigations must be carried out by entirely independent individuals, provided with the necessary resources, and their findings should be made public and prosecutions initiated in accordance with the information uncovered."[40] The European Court of Human Rights, similarly held in *Selmouni v. France* that the burden lies on the government to conduct an "investigation capable of leading to the identification and punishment of those responsible."[41] It found that the complainant had satisfied the requirement of exhaustion of local remedies since the government had failed to conduct such an investigation.[42]

33. One of the primary purposes of the requirement of exhaustion is to ensure that governments have notice before "being called to account by an international tribunal."[43] Yet the State, "as the guardian of law and order and protector of human rights in the country," is presumed to be aware of the situation in its country, and as such, is required to address the situation.[44] Under this approach, adopted by the Commission in *Zimbabwe Human Rights NGO Forum*, the Commission must presume that Djibouti was aware of the criminal activities taking place on its territory. Djibouti's awareness of the facts of this case should also be inferred from its own involvement in the activities in question. Djiboutian

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[36] *Article 19 v. Eritrea*, at Paragraph 77.
[37] *See* Human Rights Committee, General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), Paragraph 18.
[38] *Id.*
[39] *See Madoui v. Algeria*, Human Rights Committee, Communication No. 1495/2006, U.N. Doc. CCPR/C/94/D/1495/2006 (1 December 2008), Paragraph 9.
[40] *Amnesty International and Others v. Sudan*, at Paragraph 51.
[41] *Selmouni v. France*, ECtHR No. 25803/94 (28 July 1999), Paragraph 79.
[42] *Id.* at Paragraphs 80-81.
[43] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, ACHPR No. 155/96 (2001), Paragraph 38.
[44] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, at Paragraph 70. The European Court of Human Rights has similarly held that "whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority" is not a decisive factor – the State itself has the responsibility to act where it is aware of the criminal incident in question. *See Ergi v. Turkey*, ECtHR No. 2381/94 (28 July 1998), Paragraph 82.

agents were directly involved in the Complainant's detention and interrogation in Djibouti; they facilitated and witnessed his rendition from there.[45] Between 27 December 2003, when Mr. al-Asad was taken to Djibouti, and 10 December 2009, when a communication was sent to the African Commission, Djibouti had six years during which it could have initiated an investigation. Moreover, in addition to its independent duty to initiate investigations into activities of which it is presumed to be aware, Djibouti was directly informed of the specific facts of this case in a letter to the Attorney General submitted on Mr. al-Asad's behalf on 31 March 2009.[46] The Respondent State has failed to take any action, meaning that domestic remedies are unavailable, ineffective or insufficient.[47]

34. Where the state fails to institute criminal actions, the victim is under no obligation to bring a private prosecution. Exhaustion of domestic remedies in situations where the violations constitute serious criminal offences may be satisfied by bringing the allegations of ill treatment to the notice of the authorities responsible, if the authorities fail to adequately investigate the complaint.[48] As noted above, the Complainant's representatives wrote to the Attorney General of Djibouti in March 2009. While this letter did not specifically request an investigation it provided the Respondent State with sufficient information to engage their responsibility to investigate the alleged criminal acts.

35. In any event, where there are widespread violations or where the violations were committed by agents of the state, the state has an obligation to investigate and prosecute, whether or not complaints have been made to the prosecuting authorities. In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the Commission stated:

> To expect victims of violations to undertake private prosecutions where the state has not instituted criminal action against perpetrators of crimes or even follow up with the Attorney-General what course of action has been taken by the state as the respondent state seems to suggest in this matter would be tantamount to the state relinquishing its duty to the very citizens it is supposed to protect. Thus, even if the victims of the criminal acts did not institute any domestic judicial action…the respondent state…holds the ultimate responsibility of harnessing the situation and correcting the wrongs complained of.[49]

According to the Commission in *Article 19 v. Eritrea*, "when it is up to the State to investigate the facts and bring the accused persons to court," then "one cannot demand that the Complainants, or the victims or their family members assume the task of exhausting domestic remedies."[50]

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[45] *See* Mohammed Abdullah Saleh al-Asad Declaration. The involvement of Djibouti in the extraordinary rendition program has been reported in a number of credible international sources. *See also* Factual Summary of Publicly Available Information on the U.S. Government's Extraordinary Rendition, Secret Detention, and Interrogation Program and Djibouti's Role in the Program, Paragraphs 27-31.

[46] *See* Letter to the Attorney General of Djibouti, 31 March 2009 [Exhibit C].

[47] *See Article 19 v. Eritrea*, at Paragraph 46.

[48] In *Gok and Guler v. Turkey*, the Court states that, "the applicants' allegations of ill-treatment were not effectively investigated by the domestic authorities as required by Article 3 of the Convention…. In view of the above, the Court dismisses the Government's objections for failure to exhaust domestic remedies." *Gok and Guler v. Turkey*, ECtHR No.74307/01 (28 October 2009), Paragraphs 40-41.

[49] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, at Paragraphs 69 and 70.

[50] *Article 19 v. Eritrea*, at Paragraph 72.

36. Even if he were required to do so, it is noted that Mr. al-Asad would be unable to bring a private prosecution because there are no criminal remedies under Djiboutian law that he can pursue as an individual. According to Article 21 of the Criminal Code of Djibouti, the State cannot be held criminally liable in any circumstance.[51] While the individual agents of Djibouti who were involved in the violations of his rights could in theory be held criminally responsible, their identities are unknown to Mr. al-Asad, so he therefore cannot bring a criminal complaint against them. Any prospect of criminal remedies would require, in the least, for Djibouti to be forthcoming in carrying out an investigation, which they have proved unwilling to do.

b. *Civil remedies are unavailable, ineffective and insufficient*

37. There is no substitute for criminal investigation, prosecution and punishment by State of Djibouti. In the absence of criminal remedies, civil or administrative remedies are ineffective and insufficient redress for the violations suffered by the Complainant. Furthermore, they are impossible to realize in the absence of a full criminal investigation by the Respondent State. Mr. al-Asad was subjected to disappearance, secret and *incommunicado* detention, cruel, inhuman, and degrading treatment, and torture. Civil remedies cannot suffice in relation to these severe abuses.

38. The case law of other regional human rights courts confirms the insufficiency of civil and administrative remedies in cases of serious criminal violations. In *Assenov and Others v. Bulgaria*, the European Court of Human Rights found that "the applicant was not required, in the absence of a criminal prosecution in connection with his complaints, to embark on another attempt to obtain redress by bringing a civil action for damages," and quoted the European Commission, which had held that, "civil compensation could not be deemed fully to rectify a breach [of the prohibition against torture]."[52] The European Court has also held that civil remedies of monetary damages are insufficient in violations of the right to life, as this would negate the obligation on the state to investigate and prosecute:

> … a Contracting State's obligation [regarding the right to life and the right to a remedy] to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if…an applicant would be required to exhaust an action leading only to an award of damages….In the light of the above the Court finds that the applicants were not obliged to pursue the civil remedies suggested by the Government in order to exhaust domestic remedies.[53]

[51] *See* Code Penal de Djibouti, 1995.

[52] *Assenov and Others v. Bulgaria*, ECtHR No. 90/1997/874/1086 (28 October 1998), Paragraphs 84-86.

[53] *Khashiyev and Akayeva v. Russia*, ECtHR Nos. 5794/00 and 57945/00 (24 February 2005), Paragraphs 121-122. *See also Yaşa v. Turkey*, ECtHR No. 63/1997/847/1054 (2 September 1998), Paragraph 74. In *Zubayrayev v. Russia*, the court notes that, "even assuming that the applicant had brought such proceedings and succeeded in recovering civil damages from a State body, it would still not have resolved the issue of effective remedies in the context of claims brought under Article 2 of the Convention. The civil courts are unable to conduct an independent investigation and are incapable, without the benefit of the conclusions of a criminal investigation, of making any meaningful findings

39. Mr. al-Asad alleges, *inter alia*, violations of his right to life (Article 4), his right to dignity and freedom from torture, cruel and inhuman treatment (Article 5) and his right to be free from arbitrary arrest and detention (Article 6). These claims must be read with the complaint that he was prevented from accessing the legal system and receiving a fair trial as protected under Article 7 of the Charter. Considering these allegations together, it is evident that the facts complained of constitute serious violations of the Charter and that the incidence of such violations triggered the Respondent State's obligation of due diligence to investigate, prosecute and punish.[54] Applying the principle in *Assenov and Others v. Bulgaria* and *Khashiyev and Akayeva v. Russia*, civil remedies would not be sufficient to remedy the alleged rights violations, and therefore such remedies, to the extent that they may exist, would be insufficient.

40. Given the Respondent State's duty to investigate and prosecute, described above, a civil action is insufficient because it involves neither the conduct of a criminal investigation, nor the bringing of perpetrators to justice. Along with criminal accountability, criminal investigations themselves serve a critical purpose for victims of rights violations, that cannot be substituted by civil remedies. In relation to enforced disappearances, the Inter-American Commission on Human Rights has emphasized that failure to investigate and punish "encourages the chronic repetition of human rights violations."[55] In *Bámaca Velásquez v. Guatemala*, the Inter-American Commission highlighted the role of investigations in bringing to light the truth:

> The right to truth indeed requires the investigation by the State of the wrongful facts . . . As the State is under the duty to cease the violations of human rights, the prevalence of the right to truth is essential to the struggle against impunity, and is ineluctably linked to the very *realization* of justice, and to the guarantee of non-repetition of those violations.[56]

41. Civil remedies are particularly ineffective in cases involving secret, illegal and *incommunicado* detention and abuse by state officers because in the absence of a criminal investigation the complainant will not have sufficient access to the relevant information to bring a civil case. In *Sangariyeva and others v. Russia*, the European Court of Human Rights noted that a

> civil court is unable to pursue any independent investigation and is incapable, without the benefit of the conclusions of a criminal investigation, of making any meaningful findings regarding the identity of the perpetrators of fatal assaults or disappearances, still less of establishing their responsibility.[57]

Similarly, in *Akdivar v. Turkey*, the European Court of Human Rights found an administrative court remedy to be insufficient because that channel does not

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regarding the identity of the perpetrators of fatal assaults, still less to establish their responsibility." *See Zubayrayev v. Russia*, ECtHR No. 67797/01 (10 January 2008), Paragraph 63.

[54] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Paragraph 63-72.

[55] *Juan Humberto Sánchez v. Honduras*, IACtHR, Ser. C No. 99 (7 June 2003) (Merits), Paragraph 185.

[56] *Bámaca Velásquez v. Guatemala*, IACtHR, Ser. C No. 70 (25 November 2000) (Reasoning of Judge A.A. Cançado Trindade), Paragraph 32.

[57] *Sangariyeva and Others v. Russia*, ECtHR No. 1839/04 (1 December 2008), Paragraph 55. In *Ilhan v. Turkey*, the Court held that in the absence of a criminal investigation, "it is not apparent that there was any basis on which (the victim) could have pursued a civil claim with any reasonable prospect of success." *Ilhan v. Turkey*, ECtHR No. 22277/93 (27 June 2000), Paragraphs 60-64.

provide for adequate investigation where government forces have been involved in violations.[58]

42. In the present communication, therefore, civil remedies for damages are unavailable and ineffective because the Complainant does not have access to information necessary for a successful suit, which would only be available after a criminal investigation. They are insufficient because civil remedies cannot adequately redress serious violations such as torture, cruel, inhuman and degrading treatment and *refoulement*.

3. Alternatively the case falls within an exception to the exhaustion of domestic remedies rule

43. Assuming, although not conceding, that there are effective civil remedies available in Djibouti, the case falls under an exception to the rule requiring exhaustion of domestic remedies. The rule of exhaustion of local remedies would not apply to Mr. al-Asad, as he was clearly illegally and forcibly removed from Djiboutian jurisdiction. Further, his treatment while there has given him reason to fear for his life if he returns to Djibouti to exhaust potential remedies. In his current situation, it would be unreasonable and impractical to require him to attempt redress in Djibouti.

a. *Exhaustion is not required because the Complainant could not return to Djibouti due to fear for his life*

44. The Commission has held that the mere fact that a Complainant is physically outside the Respondent State provides no exception, in itself, to the requirement that local remedies be exhausted.[59] However, the Commission has consistently held, starting with *Jawara v. The Gambia*, that local remedies are unavailable if the complainant cannot return to the state to pursue them "because of generalised fear for his life."[60] The same principle was confirmed by the Commission in *Rights International v. Nigeria*, where the victim, who fled Nigeria after he had been tortured in a Nigerian military camp, was "unable to pursue any domestic remedy following his flight for fear of his life."[61] In *Alhassan Abubakar v. Ghana*[62] and *Ouko v. Kenya*,[63] the departure of the applicants due to their fear of becoming political detainees was recognized as a sufficient ground for the Commission to deem local remedies unavailable. In *African Institute for Human Rights and Development v. Guinea*, the Commission held that victims of persecution are not necessarily required to return to the place where they suffered persecution to exhaust local remedies.[64] In *Gabriel Shumba v. Zimbabwe*, the Commission held that fear of return had clearly been established since the victim had been hooded, driven to an unknown location, stripped naked, put into stress

[58] *See Akdivar v. Turkey*, ECtHR No. 21893/93 (16 September 1996), Paragraph 72.
[59] *See Legal Defence Centre v. The Gambia*, ACHPR No. 219/98 (2000), Paragraph 17.
[60] *Dawda K. Jawara v. The Gambia*, ACHPR Nos. 147/95-147/96 (2000), Paragraph 35.
[61] *Rights International v. Nigeria*, ACHPR No. 215/98 (1999), Paragraph 24.
[62] *See Alhassan Abubakar v. Ghana*, ACHPR No. 103/93 (1996), Paragraph 6.
[63] *See John D. Ouko v. Kenya*, ACHPR No. 232/99 (2000), Paragraph 19.
[64] *See African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, ACHPR No. 249/02 (2004), Paragraph 35.

positions, questioned and threatened with death.[65] These facts are strikingly similar to those in the instant case.

45. In Djibouti, Mr. al-Asad was held *incommunicado* and in an unknown location, subjected to inhumane conditions, interrogated and threatened with his own death and the death of his pregnant wife. Before being clandestinely flown to another secret site, his clothes were torn off; he was physically assaulted, including when a finger was shoved into his anus; he was diapered and hooded; his hands, waist, and feet were chained so that he could not move; and he was carried aboard a waiting plane. The natural and intended result of this treatment in Djibouti was a high level of fear and distress. As the Commission noted in *Jawara v. The Gambia*, "it would be an affront to common sense and logic to require the complainant to return to [the respondent] country to exhaust local remedies."[66]

46. A rule that recognizes a victim's inability to pursue local remedies due to fear for his life, as established in *Jawara v. The Gambia case* and subsequent practice of the Commission, is consistently reflected in the jurisprudence of other human rights judicial and quasi-judicial bodies. The Committee Against Torture,[67] the European Court of Human Rights[68] and the Inter-American Commission and Court of Human Rights all follow such a rule.[69] This approach is also supported in doctrine.[70]

b. *Exhaustion is not required because the Respondent State illegally removed the Applicant from its jurisdiction and he is unable to return; and/or it would be impractical and unrealistic for the Applicant to seek a remedy in Djibouti*

47. The Commission has held that "[e]xhaustion of local remedies does not mean that the complainants are required to exhaust any local remedy, which may be impractical or even unrealistic."[71] This principle signifies that an applicant who has been detained and removed from the Respondent State without the protections of due process, in circumstances where he is unable to return or it would be

[65] *See Obert Chinhamo v. Zimbabwe*, ACHPR No. 307/05 (2007), Paragraphs 70-72, citing *Gabriel Shumba v. Zimbabwe*, ACHPR No. 288/04.
[66] *Dawda K. Jawara v. The Gambia*, at Paragraph 36.
[67] *See Phillip v. Trinidad and Tobago*, Human Rights Committee, Communication No. 594/1992, U.N. Doc. CCPR/C/56/D/594/1992 (15 March 1996), Paragraphs 3.4. and 6.6.
[68] *See Akdivar v. Turkey*, at Paragraph 74.
[69] *See Plan de Sánchez Massacre v. Guatamala*, IACHR No. 11.763 (11 March 1999), Paragraph 27; *Velásquez Rodríguez Case*, IACtHR, 29 July 1988, Ser. C No. 4 (1988), Paragraph 66.
[70] E.g. Frans Viljoen, "Communications under the African Charter: Procedure and Admissibility," in *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*, p.121-123 (Cambridge University Press, 2008); Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 American Journal of International Law 1, 25-26 (2003).
[71] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, at Paragraph 65. Further, in *Dawda K. Jawara v. The Gambia*, the Commission held: "Therefore, if the applicant cannot turn to the judiciary of his country because of generalised fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him. The complainant in this case had been overthrown by the military, he was tried in absentia, former Ministers and Members of Parliament of his government have been detained and there was terror and fear for lives in the country. It would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies." *Dawda K. Jawara v. The Gambia*, Paragraphs 35-36.

impractical to require the applicant to return, is not required to exhaust local remedies. In such cases the Commission and other international bodies have held that domestic remedies have been constructively exhausted.[72]

48. In *Institute for Human Rights and Development in Africa v. Angola* the Commission noted that there were no domestic remedies available to the victims during their detention and expulsion from Angola, that the complainants were no longer in Angola and that they were unable to return to Angola to seek redress. In light of these factors, the Commission held that domestic remedies had been constructively exhausted. Although this was a case involving mass deportations, the Commission's reasoning on admissibility did not focus on that element, but instead emphasized the fact that the complainants were no longer on the territory of the respondent state.[73]

49. In *Amnesty International v. Zambia* the Commission held that a communication brought by an individual who was allegedly arbitrarily removed from Zambia and prevented from returning by threats of imprisonment by the Zambian authorities was admissible. He was deemed to have been prevented from exhausting domestic remedies.[74]

50. In *Jesús Tranquilino Vélez Loor v. Panama* the Inter-American Commission on Human Rights considered the admissibility of a complaint made by an individual who alleged that he had been detained for ten months, during which time he was tortured and then deported without access to legal remedies that would have guaranteed his right to justice.[75] In that case it was held that "[i]n previous cases, the Commission has declared admissible petitions of individuals who were deported and not permitted to re-enter the State which allegedly violated their rights, to enable them to challenge the human rights violations they have allegedly endured."[76] The IACHR determined that:

> with regard to the first argument presented by the petitioner, the State did not allow Mr. Vélez Loor access to remedies under domestic law to challenge the alleged arbitrary detention and the mistreatment and torture that he purportedly suffered. The Commission concludes that Mr. Vélez Loor was prevented from exhausting these remedies because he was arrested and then forbidden to use the telephone or have any other contact with the world outside his prison. Consequently, the requirement of exhaustion of remedies under domestic law is not applicable to the petitioner in accordance with the exception enshrined in Article 46.2.b of the American Convention.[77]

51. The complainant further argued that he lacked the means to pay for a lawyer to take the case to the Panamanian courts during his time in detention. The IACHR concluded: "particularly taking into account the fact that Mr. Vélez Loor was unable to exhaust domestic remedies as he was deprived of liberty and was

[72] *See Institute for Human Rights and Development in Africa v. Angola*, at Paragraph 41; *Jesús Tranquilino Vélez Loor v. Panama*, at Paragraphs 40-43. *See also Rights International v. Nigeria*, at Paragraph 24; and *Union Interafricaine des Droits de l'Homme and Others v. Angola*, at Paragraph 12.
[73] *See Institute for Human Rights and Development in Africa v. Angola*, at Paragraphs 39-41.
[74] *See Amnesty International v. Zambia*, ACHPR No. 212/98 (1999), Paragraphs 5 and 29.
[75] *See Jesús Tranquilino Vélez Loor v. Panama*, at Paragraph 2.
[76] *Id*. at Pargraph 40.
[77] *Id*. at Pargraph 43.

without legal counsel, the IACHR finds in favour of applying the exception provided for in Article 46.2.b of the American Convention."[78]

52. In the present case the Complainant was held in *incommunicado* and secret detention, was never brought before a court or allowed access to a lawyer, and was illegally and secretly rendered (deported or transferred from Djibouti). This experience was characterised by fear, involuntariness, the absence of due process, and the denial of human rights. The Complainant was detained in and removed from Djibouti, and mistreated, by agents of Djibouti without the protections of the rule of law. Requiring the Complainant to return would be to require a victim to return to the place where he suffered torture, and cruel, inhuman, and degrading treatment. Further, given his treatment by, and subsequent removal from Djibouti it is highly likely that any attempt to return to exhaust domestic remedies against the State would be obstructed. Djibouti's apathy towards Mr. al-Asad and its refusal to recognize his situation is evidenced from its lack of acknowledgment and response to the letter sent on his behalf.[79]

53. The Complainant is a national and resident of Yemen, not of Djibouti. He cannot, in the particular context of this case, including his mistreatment in Djibouti and his lack of resources within Djibouti, be expected to do more to exhaust domestic remedies in this foreign country than he has already done. By writing to the government of the State concerned and alerting it to the criminal acts to which he was subjected, the Complainant has provided notice and opportunity for the State to carry out its duties to investigate and remedy the violations. His only connection to Djibouti is his *incommunicado* and secret detention there, and subsequent unlawful transfer from Djibouti to Afghanistan.

54. In addition, assuming but not conceding that the Complainant did not have a real and well founded fear of persecution in Djibouti, he has no resources to fund a "return" to Djibouti to exhaust any domestic remedies.[80] He has no *pro bono* representation for any such legal action in Djibouti. Legal aid in the Respondent State is available to nationals of the Respondent State only. The Complainant's financial means are insufficient to retain private legal counsel in a case against the government of Djibouti, which would no doubt be an extensive and expensive proceeding. The Complainant's legal skills are insufficient to represent himself.

55. It would be impractical and unrealistic to require the Complainant to return to Djibouti to seek to exhaust domestic remedies in this case. All available domestic remedies have therefore been constructively exhausted.

c. *Exhaustion is not required because the Complainant cannot exhaust domestic remedies from outside Djibouti*

56. It is clear from the above arguments, that it would not be possible for the Complainant to physically return to Djibouti to exhaust remedies. Though it may be argued that a local remedy could be pursued without the physical presence of

[78] *Id.* at Pargraph 46.
[79] *See* Letter to the Attorney General of Djibouti, 31 March 2009 [Exhibit C].
[80] *See* Mohammed Abdullah Saleh al-Asad Declaration, Paragraph 56.

the Complainant,[81] this would be unrealistic in the circumstances of this case[82] and any such remedies would as a practical matter be unavailable.[83] For any successful prosecution of a claim for civil damages, the claim would rest on oral testimony by the Complainant of illegal, incommunicado detention and mistreatment, making it necessary that the Complainant be present to testify.[84] The present case should be distinguished from the *Chinhamo* decision and other similar cases allowing pursuit of local remedies in his absence, as it would not be practical in the circumstances to expect the Complainant to attempt to seek potential remedies from outside Djibouti. As set out above, the Complainant does not have the financial resources to institute a civil claim or engage a lawyer, whether from within or from outside Djibouti. Without legal representation it would be particularly impractical and unrealistic to require the Complainant to initiate civil proceedings in Djibouti from Yemen to seek potential remedies. All available domestic remedies have therefore been constructively exhausted.

C. THE COMMUNICATION COMPLIES WITH THE REASONABLE TIME PERIOD REQUIREMENT OF SUBSECTION 6 OF ARTICLE 56

1. The timeliness requirement is not applicable as domestic remedies are not available

57. The purpose of the timeliness requirement is to prevent legal decisions within a jurisdiction being subject to challenge long after they are delivered, in the interests of legal stability and certainty.[85] In a case in which local legal process can be understood to be unavailable, however, it is logical that the timeliness requirement should not apply.[86] In *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Eritrea & Ethiopia*, the Commission held that the reasonable time requirement was "rendered inapplicable" by its finding that there were no domestic remedies available to the victims.[87] The implication of this decision is that where the complainant is not required to exhaust domestic remedies, either because an exception applies or where domestic remedies are unavailable, ineffective, or insufficient, the reasonable time limit is inapplicable. These are the circumstances in the present case.

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[81] *See Obert Chinhamo v. Zimbabwe*.
[82] *Zimbabwe Human Rights NGO Forum v. Zimbabwe.*
[83] *Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia.*
[84] The presence of the litigant would be a crucial factor in determining whether there has been a fair trial, and therefore whether an effective remedy has been available to the applicant. *See* International Covenant on Civil and Political Rights, Article 14(3)(d), 16 December 1966, 14668 U.N.T.S. 171; *See also, Steel and Morris v. The United Kingdom*, ECtHR No.68416/01 (15 February 2005), Paragraph 59 where the European Court stated "It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side."; In *De Haes and Gijsels v. Belgium*, ECtHR No. 19983/92 (24 February 1997), Paragraph 53, the European Court reiterated that "the principle of equality of arms - a component of the broader concept of a fair trial - requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage."
[85] *See Plan de Sanchez Massacre v. Guatamala*, at Paragragh 29.
[86] *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Eritrea & Ethiopia*, ACHPR Nos. 233/99 and 234/99 (2003), Paragraph 39. *See also Plan de Sanchez Massacre v. Guatamala*, at Paragragh 29.
[87] *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Eritrea & Ethiopia*, at Paragraph 39.

2. Alternatively, the communication has been submitted within a reasonable time period

58. In *Tsikata v. Ghana* the Commission stated that it "estimates the timeliness of a communication from the date that the last available local remedy is exhausted by the complainant. In the case of unavailability or prolongation of local remedies, it will be from the date of the complainant's notice thereof."[88] Therefore, it is submitted in the alternative that the communication was submitted within a reasonable time from the Complainant's notice of the unavailability of domestic remedies. The complaint in this communication was submitted six months after a letter to the Attorney General of Djibouti was submitted on Mr. al-Asad's behalf on 31 March 2009, during which time the Respondent State apparently failed to take any action to investigate the allegations or even acknowledge their existence.

3. The clandestine nature of the violations in question makes the period of time reasonable

59. The Commission has held that "the Charter does not provide for what constitutes 'a reasonable period of time,' and neither has it defined reasonable time. For this reason, the African Commission would therefore treat each case on its own merits."[89] The Commission has further noted that the purpose of the timeliness requirement is:

> to discourage tardiness from prospective complainants. However, where there is a good and compelling reason why a complainant does not submit his complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a complainant an opportunity to be heard.[90]

60. Previous cases have accepted extended delays in cases involving expulsion across borders. In *Chinhamo v. Zimbabwe*, the Commission applied the reasoning set out above to an individual who had fled his country, ruling that the reasonable period might be extended when the complainant finds himself in another country. In *Alzery v. Sweden*, the Human Rights Committee similarly accepted a delay, concluding:

> In view of the complexities of the case, including the scarcity of detail known about his treatment, general condition and willingness to proceed with a complaint, [the] period [elapsed] could not be viewed as undue . . . the Committee was not persuaded that the lapse of time was sufficiently egregious or otherwise defined by extraordinary circumstances.[91]

61. In *Agiza v. Sweden*, the Committee Against Torture explained that delay may be accepted following removal when "the State party had had ready access to the relevant factual submissions and necessary argumentation," such that "consideration of the present complaint could not be said to have been made unduly difficult."[92] Like the instant case, both *Alzery* and *Agiza* concerned expulsions by a defendant state into the U.S. extraordinary rendition and secret

[88] *Tsikata v. Ghana*, ACHPR No. 322/06 (2006), Paragraph 37.
[89] *Darfur Relief and Documentation Centre v. Sudan*, ACHPR No. 310/05 (2009), Paragraph 75, citing *Majuru v. Zimbabwe*, ACHPR No. 308/05 (2008).
[90] *Darfur Relief and Documentation Centre v. Sudan*, at Paragraph 79.
[91] *Alzery v. Sweden*, at Paragraph 8.2.
[92] *Agiza v. Sweden*, at Paragraph 9.3.

detention program. Both the Human Rights Committee and the Committee Against Torture accepted the need for a flexible application of the timeliness requirement in this context.

62. Similarly, previous cases of the European Court of Human Rights have accepted delays in cases involving secret and *incommunicado* detention. In *Varnava v. Turkey*, the European Court of Human Rights held that:

> In disappearance cases, where there is a state of ignorance and uncertainty and, by definition, a failure to account for what has happened, if not an appearance of deliberate concealment and obstruction on the part of some authorities, the situation is less clear-cut. It is more difficult for the relatives of the missing to assess what is happening, or what can be expected to happen. Allowances must be made for the uncertainty and confusion which frequently mark the aftermath of a disappearance.[93]

63. In similar circumstances, the Inter-American Commission on Human Rights has accepted, for example, a communication filed 20 years after the initial disappearance.[94] In that case, the Inter-American Commission was also influenced by the fact that the government had placed the burden of investigation on the victim and his family;[95] the same logic pertains in this case.[96]

64. Previous cases have therefore recognized the need for flexible application of the timeliness requirement in instances of expulsion or other trans-border movements, in cases of secret and *incommunicado* detention, and in cases where the burden of investigation has been ignored by the State. The case at hand presents a combination of all three of these factors. One of the central aims of the extraordinary rendition and secret detention program was to render those abducted as far from judicial process as possible.[97] The successes of the program in abducting and detaining individuals have often been mirrored by successes in

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[93] *Varnava and Others v. Turkey*, ECtHR Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (18 September 2009), Paragraph 162. The Court continues by noting that international law suggests a long time period for the potential prosecution of disappearance cases: "The International Convention for the Protection of All Persons from Enforced Disappearance stipulates that any time-limit on the prosecution of disappearance offences should be of long duration proportionate to the seriousness of the offence, while the Rome Statute of the International Criminal Court excludes any statute of limitations as regards the prosecution of international crimes against humanity, which includes enforced disappearances. Bearing in mind therefore the consensus that it should be possible to prosecute the perpetrators of such crimes even many years after the events, the Court considers that the serious nature of disappearances is such that the standard of expedition expected of the relatives cannot be rendered too rigorous in the context of Convention protection." *Id*. at Paragraph 163.

[94] *See Santos Ernesto Salinas v. El Salvador*, IACHR No. 733-03 (5 March 2008) (Admissibility).

[95] *See id.* at Paragraph 27, describing how El Salvador offered no proof of its efforts to locate the disappeared when the *habeas* was filed, and instead required relatives to prove forced disappearance had indeed occurred.

[96] Note that the burden of investigation was particularly steep in the *Salinas* case, in so far as the victim never reemerged, and was presumably killed. While fortunately this is not true in this case, it should also be noted that in *Salinas* the plaintiffs were not obliged to undertake an investigation into the identity of the country which perpetrated the offenses. Unfortunately, this is precisely the burden the extraordinary rendition system has imposed.

[97] "Rendition, like 'disappearance,' is designed to evade public and judicial scrutiny, to hide the identity of the perpetrators and the fate of the victims." Amnesty International, *United States of America: Below the radar- Secret flights to torture and 'disappearance,'* 5 April 2006, p. 3 [Exhibit F].

avoiding judicial process.[98] In response to such systems, human rights bodies have stressed the importance of allowing cases dealing with aspects of these systems to be heard despite delay.[99]

65. The African Commission requires that the offending state be named and that documentary proof of the alleged violation be submitted.[100] In order to meet this burden, the victim and his representatives have used the time since his release to investigate and uncover evidence confirming the detention of Mr. al-Asad in Djibouti. The collection of such evidence has been extraordinarily difficult and protracted, in particular in regard to the rendition system's operations in Africa.[101]

66. As noted above, the primary responsibility is on the state to investigate cases of criminal violations.[102] In this case, however, due to lack of state investigative action, and the calculated and intentional confusion imposed on Mr. al-Asad concerning the identity of the state responsible, investigation has had to be conducted by Mr. al-Asad, his family and his legal representatives. The European Court of Human Rights has specifically held that "[w]here there are initiatives being pursued in regard to a disappearance situation, complainants may reasonably await developments which could resolve crucial factual or legal issues."[103] Where a complex disappearance situation is involved—a fair characterization of the case at hand—and where some sort of investigation is occurring, the European Court has suggested at least ten years as a reasonable standard.[104]

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[98] The Center for Human Rights and Global Justice has been engaged for four years in Freedom of Information Act requests and litigation in the United States attempting to obtain information concerning the abduction and detention of Mr. al-Asad, and concerning the involvement of foreign governments in the extraordinary rendition system. Unfortunately, the United States government has not been forthcoming, arguing that it cannot be compelled to release information that is properly classified. Litigation in this area continues.

[99] Amnesty International issued statements calling for the reopening of investigations into the CIA secret prisons in Lithuania, despite the fact that the statute of limitations period for filing for such investigation had expired. Amnesty International, *Lithuania must reopen CIA secret prison investigation*, 18 January 2011, available at http://www.amnesty.org/en/news-and-updates/lithuania-must-reopen-cia-secret-prison-investigation-2011-01-18.

[100] See ACHPR Information Sheet No. 2: Guidelines on the Submission of Communications, Standard Format for the Submission of Communications, B(2) and (8).

[101] *See* Factual Summary of Publicly Available Information on the U.S. Government's Extraordinary Rendition, Secret Detention, and Interrogation Program and Djibouti's Role in the Program, Paragraphs 22, 27-31.

[102] In addition, state responsibility to investigate disappearances is supported at the international level by, for example, the International Covenant for the Protection of All Persons from Enforced Disappearance, Article 3: "Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice." *See* U.N. General Assembly, *Resolution 61/177 Adopted by the General Assembly: International Convention for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. A/RES/61/177 (12 January 2007).

[103] *Varnava and Others v. Turkey*, at Paragraph 165. The Court continues, "Indeed, as long as there is…some indication, or realistic possibility, of progress in investigative measures, considerations of undue delay will not generally arise."

[104] "In a complex disappearance situation such as the present, arising in a situation of international conflict, where it is alleged that there is a complete absence of any investigation or meaningful contact with the authorities, it may be expected that the relatives bring the case within, at most, several years of the incident. If there is an investigation of sorts, even if sporadic and plagued by problems, the relatives may reasonably wait some years longer until hope of progress being made has effectively evaporated.

67. The rule allowing for the extension of the temporal requirement in cases of disappearance is reasonable wherever investigation is a crucial part of the road to justice. Such an extension is even more reasonable in a case in which not only state non-compliance, but the identity of the State itself is in question. To hold otherwise would be to reward the Respondent State for its abrogation of its responsibilities. It would also represent the victory of extraordinary rendition and secret detention over due process of law.

4. The repercussions of the nature of the Complainant's disappearance and detention make the period of time reasonable

68. Having been subjected to secret and *incommunicado* detention, rendition, torture, and cruel, inhuman, and degrading treatment over an extended period, the Complainant has suffered significant psychological problems which persist to this day. They have impaired his ability to apprise himself of potential legal remedies, including the work of the Commission. Despite his Yemeni nationality, the Complainant had resided in Tanzania from 1985 until his apprehension, detention and transfer to the Respondent State in December 2003. He was ultimately released from a Yemeni prison in March 2006. After release, he was unable to resettle in Tanzania and so had to relocate to Yemen, despite his entire household and business being in Tanzania. The process of relocation and shifting his family to Yemen was arduous, compounded with the fact that his financial state was in a ruin as a result of his disappearance and detention.[105] In assessing the passage of time, the Commission should recognize the time required for the Complainant and his family to settle into Yemen in considering what constitutes a reasonable period in this case. This would be consistent with its decision in *Chinhamo*.[106]

69. In *Lecraft v. Spain* the U.N. Human Rights Committee took note of the author's difficulties in securing free legal assistance in holding that a delay of six years before submitting a communication was not unreasonable.[107] The same logic applies to the present case. The Complainant is in financial difficulties due to his treatment at the hands of Djibouti and as stated above was only able to secure *pro bono* international legal advice in 2006, after which attempts to assist him in identifying the country of his initial secret detention and transfer began.

70. In light of all the above reasons, it is submitted that the communication to the ACHPR was made within a reasonable time period.

Where more than ten years has elapsed, the applicants would generally have to show convincingly that there was some ongoing, and concrete, advance being achieved to justify further delay in coming to Strasbourg. Stricter expectations would apply in cases where the applicants have direct domestic access to the investigative authorities." *Id*. at Paragraph 166.

[105] *See* Mohamed Abdullah Saleh al-Asad Declaration, Paragraphs 56-57; Zahra Ahmed Mohamed Declaration, Paragraphs 29-30.

[106] *See Obert Chinhamo v. Zimbabwe*, at Paragraph 89.

[107] *See Lecraft v. Spain*, Human Rights Committee, Communication No. 1493/2006, U.N. Doc. A/64/40 (Vol. II), pp. 296-302 (27 July 2009), Paragraph 6.3.

IV. CONCLUSION

71. Djibouti was, for Mr. al-Asad, the first stop in and the gateway into the depths of the extraordinary rendition and secret detention system. The violations endured by Mr. al-Asad in this system were extremely serious: he was taken from his home, transferred repeatedly across borders, mistreated, and secretly detained without being informed of any charges facing him, or even where he was. At no point was he given an opportunity to contact those dearest to him or legal representation or consular services of any kind. While in Djibouti, he was neither afforded the opportunity, nor was it possible, to challenge his detention there. Djibouti also did not provide him an opportunity to challenge or prevent his subsequent transfer on to the further detentions, and the abuses he was to face in the extraordinary rendition system. Since being released from the extraordinary rendition and secret detention program, he has struggled and continues to struggle to put his life back together, and to obtain a modicum of recognition and justice. Despite this, at no time has the legal system of Djibouti taken any steps to investigate the abuse Mr. al-Asad suffered on its territory.

72. As has been observed throughout, as well as constituting an egregious international human rights violation, the extraordinary rendition and secret detention system was precisely designed to make recourse to the ordinary channels of justice impossible. It was a system designed to inspire fear in those abducted, and those left behind, to avoid scrutiny through secrecy and to avoid traditional territorial legal systems through international transfer. Djibouti, through its conduct, has perpetuated these aims.

73. For all of the reasons set forth above, the Complainant respectfully requests that the African Commission declare his case admissible.

ON BEHALF OF MOHAMMED ABDULLAH SALEH AL-ASAD

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