



COMMUNICATION 424/12

Samira Ibrahim Mahmoud and Rasha Ali Abdel-Rahman (Represented by the Egyptian Initiative for Personal Rights (EIPR) & Interights)

V

The Arab Republic of Egypt

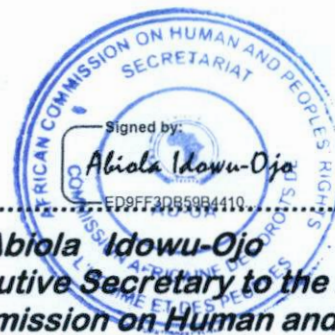
Adopted by the:

African Commission on Human and Peoples' Rights

*During the 75th Ordinary Session, held in Banjul, from 3rd to 23rd May 2023,
Banjul, The Gambia*



Hon. Commissioner Rémy Ngoy Lumbu
Chairperson to the African Commission
on Human and Peoples' Rights



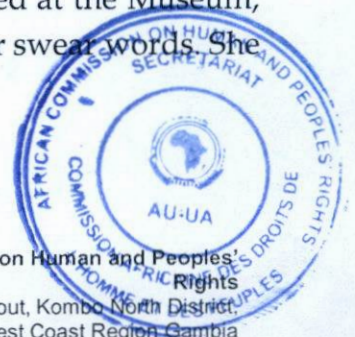
Ms. Abiola Idowu-Ojo
Executive Secretary to the African
Commission on Human and Peoples' Rights



Communication 424/12 Samira Ibrahim Mahmoud and Rasha Ali Abdel-Rahman (Represented by the Egyptian Initiative for Personal Rights (EIPR) & Interights) vs. The Arab Republic of Egypt

Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples Rights (the Secretariat), received a complaint on 11 September 2012 from the Egyptian Initiative for Personal Rights and Interights (the Complainants), acting on behalf of Samira Ibrahim Mohamed Mahmoud (the First Victim) and Rasha Abdel-Rahman (the Second Victim).
2. The complaint is submitted against the Arab Republic of Egypt, State Party to the African Charter on Human and Peoples' Rights (African Charter).
3. It is alleged that the first and the second victim were arrested after they participated in a sit-in at Tahrir Square in central Cairo in which they demanded amongst other things, the writing of a new Constitution and protested the military's brutality against peaceful demonstrators. It is further alleged that the victims and other detainees were transported to a military prison where they were subjected to beatings and electrocution as well as being subjected to a forced genital examination in prison.
4. Concerning the case of Ms. Samira Ibrahim Mahmoud in particular, it is alleged that a 25-year-old, female student from Sohag in the South of Egypt, was arrested by an officer in military uniform at a nearby pavement after leaving Tahir square, following a dispersal of demonstrations at the Square by the military on 9 March 2011.
5. She was dragged by her headscarf to the Egyptian Museum on the square's western side, where she encountered other detainees. While she was detained at the Museum, soldiers and officers constantly called her a prostitute and used other swear words. She





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

was bound by her hands and legs, sprayed with water, and electrocuted with a Taser (an electroshock weapon). She was not notified of any charges against her.¹

6. The Complainants describe in detail various forms of abuse and humiliating treatment, to which Samira Ibrahim Mahmoud was subjected during the period of her detention, including forced searches; being ordered to undress completely in a room open to the view of male soldiers who verbally abused her and took pictures of her, using cell phones; electrocution, and being forced by a military doctor to undress, lie on her back, lift her legs, and the doctor using his hands to examine her genitals for purposes of determining her virginity. She was also forced by the military doctor to sign a prepared statement stating that she was unmarried, that she was a virgin and that her hymen was intact. No explanation was given for the forced genital examination.
7. It is alleged that on the evening of 10 March, Samira Ibrahim Mahmoud and other detainees were brought before the prosecutor in a small hallway before the prison where charges, consisting of destroying cars, attempted assault on military officers while performing duty, manufacturing weapons and Molotov cocktails, etc. were read to her. She was then taken to a larger room within the prison where she faced a judge and where two lawyers assigned by the military were present but did not speak during the hearing.²
8. It is alleged that All 17 female detainees including Mahmoud were sentenced to one year of suspended sentences before being released on 11 March 2011. During the hearing, it is contended that she was not allowed to plead her case by prison guards who prevented her from speaking and forced her away from the judge.
9. Regarding the case of Rasha Ali Abdel-Rahman, it is alleged that she was arrested by a soldier on 9 March 2011, and taken to the Egyptian museum where along with, other female detainees, was subjected to swearwords, electrocution and beating by soldiers. Abdel-Rahman alleged to have been assaulted by a military policeman in the toilet, and subjected to forced genital examination in a hallway, between two open rooms open to the view of many soldiers and officers.³

¹ See, Facts in Paragraph 3 to 23 based on written and recorded testimonies of the Applicants, records of investigation from the military prosecutor, as well as decisions by the Administrative Court and the Military Court of Justice. See Annexes 1-20

² Captured in Paragraph 19 of the Complainant Submission on Merit

³ Captured in Paragraph 8





10. The Complainants assert that on 10 March, Abdel-Rahman and the rest of the detainees were interrogated and charged with manufacturing weapons and Molotov cocktails, possessing knives, and sabotaging public and private property.⁴
11. On the same day, Abdel-Rahman and the other detainees faced a judge in the presence of two lawyers who were assigned to them. They repeatedly asked to speak to their families but were refused. On 11 March at around 10 pm, Abdel-Rahman was released from the military prison along with the other detainees.

ARTICLES ALLEGED TO HAVE BEEN VIOLATED

12. The Complainants allege the violation of Articles 1, 2, 3, 5, 9(2), 11, (3) and 26 of the African Charter.

PRAYERS

13. The Complainants request the Commission to examine their case and specifically seek:

- (a) *Recognition by the Commission of violations of these articles of the Charter;*
- (b) *recognition by the Supreme Council for the Armed Forces of the occurrence of forced genital examinations against the Applicants and an undertaking that such examinations will not be repeated;*
- (c) *prosecution of the perpetrators of the violations;*
- (d) *reforming the military prison procedures code so as to include strict guarantees for respecting the bodily integrity and privacy rights of prisoners during searches, medical check-ups and during their detention;*
- (e) *reforming the Military Justice Code for the civil prosecutor and civil courts to have exclusive jurisdiction to investigate and adjudicate allegations of violations by military personnel against civilians; and*
- (f) *provision of compensation to the Applicants.*

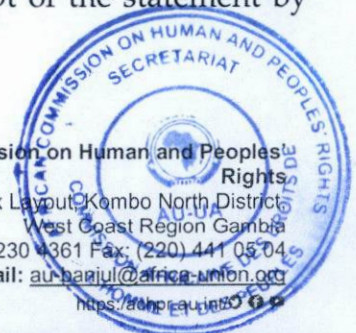
⁴ Ibid, para 10





PROCEDURE

14. The Secretariat received the complaint on 11 September 2012. The Commission was seized of the Communication during its 52nd Ordinary Session. The parties were informed of the fact of seizure and the complaint was transmitted to the Respondent State by correspondence dated 1 November 2012. The Complainants were also requested on the same date to submit observations on Admissibility.
15. On 7 January 2013, the Complainants' submissions on admissibility were received at the Secretariat and transmitted to the Respondent State by correspondence dated 7 January 2013. The Respondent State was in the same correspondence requested to submit its observations on the Victim's submissions on Admissibility.
16. The Communication was deferred from the 53rd Ordinary Session due to the Respondent State's failure to submit its observations. Following this, correspondence dated 15 May was sent to the Respondent State requesting the latter to submit its observations; otherwise, the Commission would proceed to examine the admissibility of the Communication based on the information before it. The Respondent State never submitted its observation on the admissibility of the Communication.
17. The Communication was during the 54th Ordinary Session of the African Commission on Human and Peoples' Rights from 22 October – 05 November 2013 decided to be admissible and the parties were fully notified of the decision and advised to submit their observations on the merits of the complaint by the letter dated 22nd November 2013.
18. The Complainants by the letters dated 29th December 2013 and 8th January 2014 did request for extension of time to present their written submission on merits and were granted.
19. The Complainants' submission on merits was received at the secretariat from the extended time on 27th February 2014 and was acknowledged on 6th March 2014 and the same date, the submissions were forwarded to the Respondent State for its observations under Rule 108 of the Commission's Rules of Procedure.
20. The Secretariat received an expert statement on Virginty Testing from the Independence Forensic Expert Group from the International Council for Rehabilitation of Torture Victims (IRTC). The Secretariat acknowledged receipt of the statement by letter dated 26th February 2015.





21. On the 14th of May, the Secretariat sent a request to the Respondent State to furnish proof of transmittal of its *Note Verbale*, in which the respondent State had alleged that it filed an objection on the admissibility of the Communication at hand.
22. On 30th June 2015 (after one and half a month) the Secretariat advised the Respondent State to submit on merits given that the latter had failed to submit the proof of transmittal of the *Norte Verable* in which it claimed to have filed an objection on Admissibility of this Communication. The Respondent State was given 30 days within which to file its submission from the date of notification, something that they never heeded.
23. The Commission deferred consideration of this Communication between the 56th and 59th Ordinary Sessions of the Commission to later dates for various reasons; notifying the Parties.

THE LAW ON ADMISSIBILITY

The Complainant's Submissions on Admissibility

24. The Complainants submitted that the requirements under sub-articles 1, 2, 3, 4, 6 and 7 of Article 56 have been complied with.
25. Regarding Article 56(5), the Complainants indicated that on 23 June 2011, the First Victim filed a complaint with the public military prosecutor about the violations she had suffered in the military prison who ordered a military investigation into her claims. Proceedings were initiated at the Supreme Military Court against Dr El-Mogy who was charged with indecency and insubordination. The Complainants state that Dr El-Mogy was tried and acquitted of all charges on 11 March 2012.
26. The Complainants submitted that on 17 July 2011, a case was filed on behalf of the First Victim and others, before the Administrative Court by a coalition of rights groups demanding the immediate cessation of the virginity testing policy in military prisons. The Court ruled that the forced genital examinations carried out on the detainees were illegal and that any further occurrence of such would be illegal.
27. According to the Complainants, the above decision only provided protection against future abuses through the practice of virginity testing but does not afford any vindication to the individual victim nor does it lead to the prosecution or punishment of the perpetrators. It is contended that following the ruling of the Administrative Court, the head of the military stated that the ruling was inapplicable because there





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

were no military laws that allow for the practice of forced genital examination and virginity testing in the first place.

28. The Complainants submitted that following this decision, there were no further remedies to exhaust, given that the decision of the Supreme Military Court which acquitted Dr El-Mogy of all charges could only be appealed before the Supreme Court of Military Appeals, which only receive and entertain appeals by the military prosecutor or the convicted person, but not the victims.
29. The Complainants further submitted that an appeal needed to be made within 60 days of the ratification of the decision of the Supreme Military Court. The Complainants point out that the decision of the Supreme Military Court in the First Victim's case was ratified by General al-Rowaini on 1 April 2012 and that the military prosecutor choose not to appeal the decision of the supreme military Court.
30. The Complainants contended that Article 49 of the Code of Military Justice prohibited Complainants from advancing civil claims before military courts or attaching civil claims to cases being considered by military courts. The Complainants further stated that the code also prohibits Complainants from filing claims before an ordinary court with criminal proceedings being considered by the military court until the military court has issued its decision on the criminal aspect of the claim. They contended that since the military court acquitted Dr El-Mogy (their alleged assailant) of all charges, neither the First Victim nor any other victim could bring any civil claim before any court, military or ordinary.
31. The Complainants, therefore, concluded that all available local remedies were exhausted in respect of the First Victim.
32. Concerning the Second Victim, the Complainants aver that local remedies have been unduly prolonged on one hand and unavailable, ineffective and insufficient on the other. The Complainants explained that the Second Victim filed a claim with the ordinary public prosecutor on 4 July 2011, in which she described the abuses she suffered in the military prison. In compliance with the provisions of the Code of Military Justice which vests exclusive jurisdiction over complaints against members of the military on the military justice system, the ordinary prosecutor transferred the matter to the military prosecutor on 5 September 2011.
33. The Complainants point out that at the time of submitting the Communication to the Commission, that is, 17 months after the complaint was filed, no investigation has been



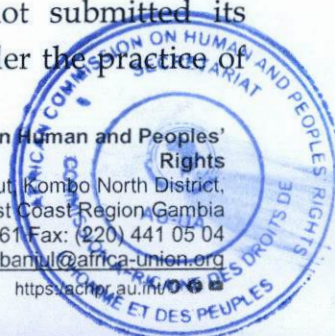


undertaken and the Second Victim has not been asked to testify and has not been informed of any action based on her complaint.

34. It was also claimed by the Complainants that this period was unduly prolonged as the state has had notice of the alleged violations for 17 months without taking any action. The Complainants, therefore, contended that domestic remedies were either unavailable or if not, then they were ineffective or insufficient in the Second Victim's circumstances.
35. The Complainants explained further that the rule against double jeopardy which applies in the Egyptian military justice system is a bar for criminal proceedings in the Second Victim's case. They explain further that Article 454 and 455 of the Criminal Procedure Code prohibits courts from reconsidering criminal proceedings in which a final decision has been made, even if new evidence is produced.
36. According to the Complainants, the Second Victim had no real chance of vindication through the military justice system given that the final decision of the Supreme Military Court finding Dr El-Mogy innocent of all charges bars any court, ordinary or military from subsequently reconsidering the allegations against him even if these allegations are made by a different victim.
37. The Complainants also contended that the trial by a military court of military personnel accused of human rights abuses could not be considered as an available, effective and enough remedy for purposes of exhausting local remedies since the military justice system in Egypt lacks the necessary impartiality and independence and the prospects of success, in this case, are slim or non-existent.
38. On the strength of the above observations and authorities submitted supporting their case, the Complainants urge the Commission to declare the Communication admissible.

ANALYSIS OF THE COMMISSION ON ADMISSIBILITY

39. The Admissibility of Communications submitted to the African Commission on Human and Peoples Rights (the Commission) is governed by the requirements contained in Article 56 of the African Charter. Article 56 sets out seven requirements which must be cumulatively complied with for a Communication to be admissible. The Complainants submitted that all these requirements have been met.
40. As indicated above on procedure, the Respondent State has not submitted its observations on admissibility. In the present circumstances and under the practice of the Commission as enunciated in the case of





ACHPR

African Commission on
Human and Peoples' Rights

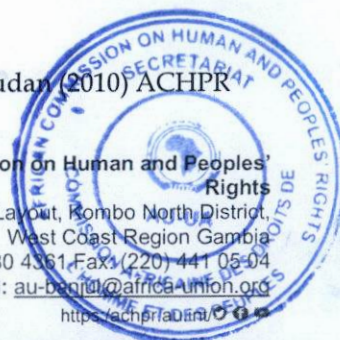
Human Rights our
Collective Responsibility

*Institute for Human Rights and Development in Africa v. Republic of Angola: "in the face of the state's failure to address itself to the complaint filed against it, the African Commission has no option but to proceed with its consideration of the Communication following its Rules of Procedure."*⁵ In the same decision, the Commission re-affirmed its position by holding that "... it would proceed to consider Communications on the basis of the submission of the Complainants and information at its disposal, even if the State fails to submit." Consequently, the Commission must give due weight to the Complainants' allegations insofar as these have been adequately substantiated.

41. The Commission notes from the complainant's submissions and the facts of the Communication, that the requirements under subsections (1) (2) (3) (4) (6) and (7) of Article 56 raise no contentious issues and require no further examination. The Commission considers that the Communication meets these requirements and will assess further, the conformity of the Communication with the requirement under Article 56 (5) of the Charter.
42. Article 56(5) allows the Commission to consider a Communication after the Victim has exhausted local remedies, if any, unless, it is obvious that this procedure is unduly prolonged. The rationale of this rule has been clarified in the Commission's jurisprudence as a means of giving the state notice and affording it the opportunity of remedying a violation that has occurred in its territory, using its local mechanisms, before its international responsibility can be called into question at the level of regional or international mechanisms.⁶
43. Regarding the First Victim, the Complainants explained, as outlined above, that her case was heard by the Supreme Military Court which acquitted the accused of all charges. It has also been explained that the decision acquitting the accused was not appealed by the Military Prosecutor even though that possibility existed and that the Code of Military Justice prohibits the lodgement of civil claims before military courts or attaching civil claims to cases being considered by the military courts. It has further been explained that the acquittal of the accused by the military court bars any other court, criminal or civil from considering a civil claim on the matter.

⁵ Communication 292/04 para. 34; See also, Communication 155/96 Social and Economic Rights Action Center, Center for Economic and Social Rights v. Federal Republic of Nigeria, and 159/96 Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v. Republic of Angola.

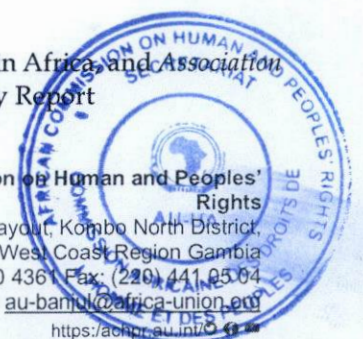
⁶ See Communication 296/05 Centre for Housing Rights and Evictions (COHRE) v. Sudan (2010) ACHPR





44. It was submitted according to the Commission's jurisprudence, that the generally accepted meaning of local remedies, which must be exhausted before any Communication/Complaint procedure before the Commission, is the ordinary remedies of common law that exist in jurisdictions and are normally accessible to people seeking justice.⁷
45. As outlined above, it is apparent that the ordinary remedies that were available to the First Victim were duly exhausted by the legislation, which barred the victim from accessing any other remedies that were ordinarily available. Without any argument from the Respondent State to the contrary, the Commission considers that the First victim duly exhausted local remedies.
46. Regarding the Second Victim, the Complainants have pointed out that the outcome of the First Complainants case, declaring the accused innocent of all the charges directly affects the ability of the Second Victim to exhaust local remedies because this has rendered the remedies unavailable or ineffective on the one hand and unduly prolonged on the other.
47. The Commission notes that the Second Victim brought a complaint before the ordinary prosecutor on 4 July 2011, describing the abuses to which she was subjected while in detention. The Commission notes further that this complaint was brought less than one month after the First Victim initiated proceedings against Dr El Mogy. However, while the trial of the accused in the First Complainants case commenced on 20 December 2011 and was concluded on 11 March 2012, the case of the Second Victim saw no further progress following the transfer of the case from the ordinary prosecutor to the military prosecutor.
48. It is evident from the above that the State had ample notice of the violation but failed to take any measures to remedy same. While the case of the First Victim was expeditiously dealt with, not even an investigation was initiated following the Second Victim's complaint despite the seriousness of the allegations. The Commission observes that where allegations of serious wrongdoing, such as the infliction of torture or cruel, inhuman or degrading treatment or punishment have been brought to the attention of the State, it is under an obligation to initiate a prompt, impartial and effective investigation to establish responsibility for the wrongdoing.

⁷ Communication No 242/01 Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme/ Islamic Republic of Mauritania 17th Annual Activity Report at para 27.





49. The Commission considers that Seventeen months of inaction on the part of the State following the introduction of a complaint by the Second Victim is an unduly prolonged period. The Commission notes also that Articles 454 and 455 of the Egyptian Criminal Procedure Code prohibit courts from reconsidering criminal proceedings in which a final decision has been made, even if new evidence is produced. The Commission considers that for the Victim to exhaust local remedies, these remedies must exist not only in theory but also in practice. The Victim must be able to pursue the remedies without difficulties or impediments and must be able to use the remedies in the circumstances of his/her case.⁸
50. In the present Communication, the Complainants have amply demonstrated that because of the acquittal of the accused in the First Victim's case, the remedies that would otherwise have been available to the Second Victim, have been rendered inexistent by the legislation in force, which bars any court from subsequently reconsidering the allegations against the accused, even if these allegations are made by a different victim. It is therefore apparent that the Second Victim could not have had unimpeded access to the local remedy.
51. From the above, the Commission considers that the remedies that were ordinarily available to the Second Victim were unduly prolonged on the one hand and insufficient to redress the violations complained of on the other.

THE DECISION OF THE COMMISSION ON ADMISSIBILITY

52. Because of the above reasons, the Commission declared this Communication Admissible in accordance with Article 56 of the African Charter.

MERITS

53. In the merits of this Communication, the Commission is called upon to determine whether the alleged acts or omissions by State or its agents are a violation of rights under the African Charter; specifically, Articles 1, 2, 3, 5, 9, 11, 18(3) and 26.

PARTIES' SUBMISSIONS ON MERITS

54. Despite several reminders to the Respondent State to file submissions on the merits, the latter has failed to do so. The communication is, therefore, considered *ex-parte*, based on

⁸ Citing *Dawda Jawara v. The Gambia*, Comm. Nos. 147/95 and 149/96, para 46





the submission by the Complainants. The Commission remains guided by its positions in the *Institute for Human Rights and Development in Africa v. Republic of Angola* and the analogous decisions of the Commission cited in paragraph 40 (above).

Complainants' Submissions

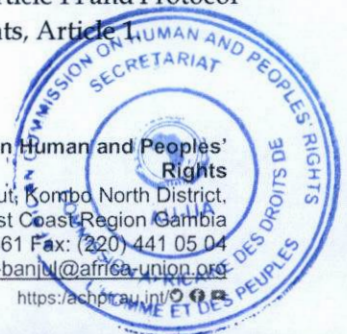
55. In a nutshell, the Complainants submitted that the Respondent State violated the rights under the Charter in **Article 2** (the right to freedom from discrimination) and **Article 18(3)** (elimination of discrimination against women); **Article 5** (prohibition of torture, cruel, inhuman and degrading treatment); **Article 26** (right to equality before the law and equal protection of the law); and **Article 3** (duty to guarantee the independence of the courts).
56. The Complainants, further analysed the violation of **Articles 9 and 11**, showing that the Respondent State in arresting, detaining and subjecting the victims to torture and other ill-treatment did violate their right to freedom of opinion, and freedom of assembly, before finally analysing how all constituted the breach of the State's obligation in **Article 1** (obligations of member states).

On Alleged violation of Article 2 and Article 18(3)

57. The Complainants submitted that the victims were subjected to violence, based on their sex, political opinion, and subjected to gender stereotypes. They also submitted that the State failed to adequately investigate their claims of violence and prosecute the perpetrators, something that constituted secondary victimization.
58. Substantiating these, the Complainants submitted that the State must ensure that individuals enjoy identified rights and freedoms under the African Charter without distinction based on sex or gender among others. Citing provisions of international and regional human rights instruments,⁹ the Complainants submitted that the nature of obligation attracted to the principle of non-discrimination is both positive and negative and is widely accepted internationally.
59. The Complainants cited the Commission in *Kenneth Good v Republic of Botswana*,¹⁰ approving the Protocol to the African Charter on the Rights of Women in Africa (the Maputo Protocol), that the principle of non-discrimination arises when: a) equal cases are treated differently; b) a difference in treatment does not have an objective and

⁹ See UDHR, Articles 1, 2 and 7; ICCPR, Articles 2(1), 3 and 26; ICESCR, Article 2; ECHR, Article 14 and Protocol 12; UU Charter of Fundamental Rights, Article 21; American Convention on Human Rights, Article 1.

¹⁰ Communication No. 313/05, (2010), para. 219.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

reasonable justification; and c) if there is no proportionality between the aim sought and the means employed.

60. As to what constitutes discrimination, they cited the expansive definition of Discrimination under the provisions of Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹¹ and provided the analogous obligation of States Parties to condemn discrimination against women in—all its forms and to refer to appropriate measures to contain all its manifestation, direct or indirect in Articles 2 and 3 of the same Convention. They cited the Commission's position in the *Association Mauritanienne des Droits de l'Homme v Mauritania*,¹² which approved the above-mentioned positions in CEDAW.
61. The Complainants citing *EIPR and INTERIGHTS v Egypt*¹³ submitted further that violence against women constitutes discrimination based on sex. Against this, to describe what violence against women entails, they armed their position with the provision of Article 1 of the Maputo Protocol and argued that all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life constitutes violence against women.
62. In the same vein they cited *General Comment No. 19* by the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee)¹⁴ which provides that violence against women is a human rights issue and that it is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. Also, the position that it is violence that is directed against a woman because she is a woman or that affects women disproportionately and what is otherwise termed gender-based violence.¹⁵
63. Elaborating on the level of recognition of gender-based violence as a *bad vice*, the Complainant cited the *General Assembly Resolution 67/144 on Intensification of efforts to*

¹¹ The Respondent State ratified CEDAW on 18 September 1981

¹² Communication No.210/ 98, (2000), para. 11

¹³ Communication No. 323/2006, (2013), para. 165.

¹⁴ CEDAW Committee, General Recommendation 19, para 1.

¹⁵ Ibid, para 6.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

*eliminate all forms of violence against women;*¹⁶ the CEDAW Committee, General Comment No. 19¹⁷ and the Commission decision in *EIPR and INTERIGHTS v Egypt*,¹⁸ which all accept that Gender-Based Violence seriously inhibits women's rights to enjoy rights and freedoms on a basis of equality with men.

64. The Complainants submitted, therefore that it is the obligation incumbent on States to take steps to eliminate discrimination based on sex, including violence against women. In determining the State obligation in regard, the Complainant cited the CEDAW Committee, General Recommendation No. 28,¹⁹ and submitted that States Parties must *respect, protect and fulfil* women's rights to non-discrimination and the enjoyment of equality.
65. Expounding on the obligation to respect, the Complainants submitted that it requires that States, through their State agents or apparatus, refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights.²⁰
66. And the obligation to promote and fulfil women's rights to non-discrimination and the enjoyment of equality encompasses States, at least, need to develop a national plan or strategy for addressing violence against women; adequate funding and the creation of appropriate national machinery to implement the national plan or strategy; and steps are taken to identify the causes and consequences of violence against women, through the generation and dissemination of gender-disaggregated data.²¹

¹⁶ 20 December 2012, para 2

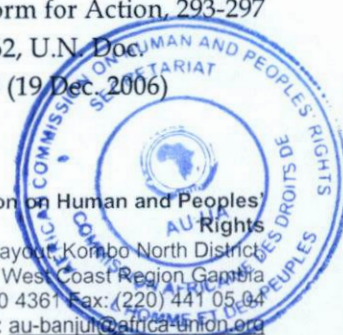
¹⁷ See, Para 7

¹⁸ Communication No. 323/2006, (2013), para. 165

¹⁹ Para 9

²⁰ The Complainant recognizing that such obligations are set out quite several legal instruments, cited the Maputo Protocol, Article 4(c), (d); CEDAW, Article 5(a); Beijing Declaration and Platform for Action, 293-297 (1995); Secretary-General, *In-depth study on all forms of violence against women*, 52 and 262, U.N. Doc A/61/122/Add.1 (6 July 2006); G.A. Res. 61/143, 8 and 383, U.N. Doc A/RES/61/143 (19 Dec. 2006)

²¹ See, para 24-49 of the Complainant Submission on Merits





67. The Complainant also submitted that this obligation also extends to raising public awareness about the issue of gender-based violence²² and taking steps to transform social and cultural norms regulating the relations of power between women and men.²³
68. Submitting on the obligation to non-discrimination based on political opinion, the Complainants submitted that it is a negative obligation. i.e., the States must not discriminate based on a person's political belief.
69. They armed this position by citing the UN Special Rapporteur on the rights to freedom of assembly and association,²⁴ submitting that—the ability to hold peaceful assemblies is a fundamental and integral component of the multifaceted right to freedom of peaceful assembly, which must be enjoyed by everyone, and more relevant for groups most at risk of violations and discrimination, such as women. Hence, states must ensure that those who violate and/or abuse the rights of individuals to freedom of association and peaceful assembly are held fully accountable by an independent and democratic oversight body and by the courts of law.²⁵
70. Associating with the facts, the Complainants stated that on 10 March 2011, along with 15 other female detainees and 157 male, they were transported to a military prison where the State agents segregated them based on sex. The female detainees were further segregated based on marital status and, following identification of the seven unmarried female detainees in the group, they were later subjected to beating, electroshocks, and forced genital examinations by a male military doctor, one at a time.
71. The Complainants accounted for verbal and physical coercion through electroshocks, while naked and completely in view of the male military doctor, a female prison guard,

²²Citing, Special Rapporteur on Violence Against Women, 1999, para 25; Conclusions and recommendations of the Committee on the Elimination of All Forms of Discrimination against Women, Cameroon, U.N. Doc. CEDAW/C/CMR/CO/3 (2009), para 27; Committee on the Elimination of Discrimination Against Women, Spain, U.N. Doc. A/59/38 (SUPP) paras. 323-355 (2004), para 335.

²³Citing Special Rapporteur on Violence Against Women, 1999, para 25; Conclusions and recommendations of the Committee on the Elimination of All Forms of Discrimination against Women, Cameroon, U.N. Doc. CEDAW/C/CMR/CO/3 (2009), para 27; Committee on the Elimination of Discrimination Against Women, Spain, U.N. Doc. A/59/38 (SUPP) paras. 323-355 (2004), para 335

²⁴ Citing the Report of the UN Special Rapporteur on the rights to freedom of assembly and association, 43, delivered to the Human Rights Council, U.N. Doc. A/HRC/23/39 (24 April 2013).

²⁵ Ibid, 81. Citing also the additional recommendations in Report of the UN Special Rapporteur on the rights to freedom of assembly and association, 84, delivered to the Human Rights Council, U.N. Doc. A/HRC/20/27 (21 May 2012).





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

and other male officers and soldiers.²⁶ They added that military doctor one Dr El-Mogy conducted forced genital examinations using his bare hands, an examination which lasted for approximately five minutes without their consent, and after which, they were ordered to sign a prepared statement saying that they were unmarried, virgins and that their hymen was intact.²⁷

72. The Complainants reiterated that at no time did any State official or other person inform the victims of any lawful purpose for the genital examination or the statement they were ordered to sign, only to be informed when the Second Victim inquired from the officer in charge of the prison it was so that no girl (who is not a girl) goes out and says we attacked her.²⁸ The same logic is also to be found in the justifications of forced genital examinations made by members of the Supreme Council of the Armed Forces (SCAF), the Complainants added.
73. The Complainants faulted the practice and procedure of genital examination as unjustified and a weapon used to discriminate against women and a tool to suppress their exercise of the right to political opinion. They stated that such acts had severe physical, mental and social impacts on the victims, both at the time of doing it, the manner it was done, and afterwards.
74. In terms of its physical impact, the Complainants submitted that they suffered pain through rough handling, beating, electroshocks and the forceful nature of genital examinations. In terms of mental suffering and social impact, the complainants, reading from the first victim's recorded testimony, submitted that she felt humiliated, and went through physical, psychological and mental damage to the extent that she wished for death.²⁹ She subsequently lost her job due to the emotional impact. The second victim testified that she felt that the soldiers enjoyed beating and humiliating them.
75. On the failure of the state to adequately investigate the victims' claims of violence and prosecution of the perpetrators, the Complainants submitted that during the detention and trial against their aggressors, they were refused an opportunity to give a proper

²⁶ See paragraph 60-65 of the Submission on Merits

²⁷ See, paragraph 61 *ibid*

²⁸ See Annex 18, also pictured in Para 61 of the Submission

²⁹ See, First Applicant video testimony (transcribed and translated), p4. See Annex 20 Para 62





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

account to the prosecutor and judge of the abuse they suffered;³⁰ To this effect, the First Victim stated her first attempt to complain before the military public prosecutor about the violations she had suffered in the military prison was denied, only to be accepted later on and the accused military doctor charged with an only public act of indecency under Article 278 of the Penal Code (as well as insubordination), an offence associated with a maximum prison sentence of one year.

76. Apart from alleged inadequacy in the law, the Complainants also submitted that the investigation and trial taking place under the Code of Military Justice, prevented the First Victim from pursuing a civil remedy before the military tribunal and was relegated to being a mere witness in the case. She was therefore also prevented from appealing the subsequent decision by the Supreme Military Tribunal to the Supreme Court of Military Appeals, as Article 43 of the Code allows only the military prosecutor or the defendant to appeal the decision.³¹
77. She further submitted that she experienced a substantial delay in her attempt to access justice in response to the forced genital examination and other abuse with her two lawsuits getting postponed as the Government never wanted to investigate not to raise the issue of virginity tests. And worse still, she was subjected to threatening phone calls following her attempts to access justice in response to the abuse, and she notes that the criminal justice system of the Respondent State was unable to offer adequate protection for her safety.³²
78. Concerning sexual violence, the Complainants submitted that the Egyptian criminal justice system in practice completely prevented the Victims from pursuing justice. This is because the forced genital examinations of the seven female detainees were considered in court as one criminal act, even though multiple Complainants were involved, for the apparent purpose of seeking to protect the accused from double jeopardy and to prevent the possibility of conflicting judgments on the same allegations. The Second Victim was precluded from pursuing a case against the military doctor as he had been acquitted in the trial ensuing from the First Victim's claim, and this decision had not been repealed.

³⁰ See paragraph 68 of the Submission.

³¹ See, para 70 of the Victim submission on merit

³² Ibid para 77-8





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

79. Regards to State's inactions in response to the Victim's allegations of violence as secondary victimisation, the complainants cast the focus on among other things, the acts of victim-blaming attitudes, behaviours and practices engaged in by officers, the prosecutor and judges, which resulted in additional trauma for the Complainants separate to the initial violations. The Complainants alleged that many of the questions put by the authorities to them during their detention and trial were of seeming irrelevance and based on gender stereotypes of the activity expected of a young woman in Egypt.³³
80. Finally, the Complainants faulting various provisions of the Egyptian Penal Code³⁴ on the nature of offences and penalties, submitted that the State has failed to enact appropriate legislation to protect women from violence.³⁵ They faulted various provisions including the provisions Article 267 which prohibits anyone from lying with a woman without her consent (with a sentence of death or life imprisonment), the provision that the Court of Cassation, (the highest court of the Egyptian judicial system) clarified that means nothing less than full vaginal intercourse using a penis.³⁶ They also faulted Article 268 which prohibits indecent assault and punishes it with hard labour for three to seven years.³⁷ The Complainants submitted that the Instances of anal rape or rape using parts of the body or objects other than male genitals are treated as indecent assault. They also faulted Article 278, which prohibits public acts of indecency (with a penalty of detention up to one year or a fine); and Article 279, which prohibits immoral acts against women, whether carried out in public or private (with a penalty of detention up to one year or a fine).³⁸
81. Accordingly, the Complainants submitted that they were precluded from accessing appropriate remedies given the restricted legislative framework, leading to feelings of disempowerment. They submitted that in the absence of a comprehensive rape definition, the Respondent State sends a clear message to Egyptian society that certain

³³ See, Para 80 of the Complainants 'Submission on Merit

³⁴ Penal Code, Law 58 for the Year 1937 (as amended). See Annex 13 for relevant extracts from the Arabic and English versions

³⁵ Para 80

³⁶ *ibid*

³⁷ See, para 81 of the Complainants' submission on Merit

³⁸ *Ibid*





forms of rape are either acceptable or not as significant as the narrowly defined form of rape.

On Alleged violation of Article 5

82. The Complainants submitted that the authorities violated their right to dignity, firstly by engaging in acts amounting to cruel, inhuman and degrading treatment (ill-treatment) and torture; Secondly, by failing to adequately investigate and prosecute those responsibly and thirdly, by failing to provide redress to the Complainants, as a separate violation of Article 5.
83. Substantiating these, the Complainants armed their position following the Commission decisions in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*³⁹; *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*,⁴⁰ *Egyptian Initiative for Personal Rights & Interights v Egypt*;⁴¹ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*,⁴² which recognized that the acts of rape, and the failure to prevent and respond to its orchestration by a State, amount to a violation of Article 5 of the Charter.⁴³
84. The Complainants called upon the Commission in the present case to spell out its position on the relationship between Article 5 and sexual violence generally, i.e. sexual violence and rape (and forced genital examinations or virginity tests specifically) as a distinct form of torture.⁴⁴
85. To support their argument, the Complainants cited the report of the *UN Special Rapporteur on Contemporary Forms of Slavery, Systematic rape, sexual slavery and slavery-*

³⁹ Communication Nos. 279/03-296/05, 2009, para.157

⁴⁰ Communication Nos. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97, 210/98, para.118;

⁴¹ Communication 323/06, paras.201-202

⁴² Communication No. 249/02

⁴³ See, Paragraph 87 of the complainant Submission on Merit

⁴⁴ See, Para 88 *ibid*





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

like practices during armed conflict⁴⁵ and the UN Security Council⁴⁶ Confirming that sexual violence and rape by officials can constitute a form of torture.

86. They added that in many cases, the discrimination prong of the definition of torture in the UN Torture Convention provides an additional basis for prosecuting rape and sexual violence as torture.
87. On elements of the offence of rape, while faulting the definition under the Egyptian law, the Complainants cited *the Prosecutor v Anto Furundžija* by the International Criminal Tribunal for the former Yugoslavia (ICTY) that found that rape is constituted not only by sexual penetration, *however slight* of the vagina of the victim by the penis but also any other object used by the perpetrator and by coercion or force or threat of force against the victim or a third person.⁴⁷
88. The Complainants also submitted along the International Criminal Court's Elements of Crimes⁴⁸ and the position adopted in the Inter-American Court in the *Miguel Castro-Castro Prison v Peru*⁴⁹ that rape is constituted with conduct resulting in penetration, *however slight*, any part of the body of the victim or the perpetrator with a sexual organ or of the anal or genital opening of the victim with *any object* or any other part of the body.⁵⁰
89. The Complainants also submitted along with *Miguel Castro-Castro* (cited above), in which the Inter-American Court considering the circumstances of the case, agreed that finger-vaginal examination of the inmate constituted rape and torture.⁵¹ They further added that rape among sexual violence meets the severity threshold for torture under international law.⁵²

⁴⁵ E/CN.4/Sub.2/1998/13, 22 June 1998, para.55.

⁴⁶ UN Security Council, S/RES/2106 (2013), adopted at 6984th meeting, 24 June 2013, para.2; S/RES/1829 (2008), adopted at 5916th meeting, 19 June 2008, Para.4.

⁴⁷ Citing, the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Anto Furundžija*, Case No IT95-17/1-T, Trial Chamber Judgment of 16 November 1998, para.185.

⁴⁸ Citing, the International Criminal Court, Elements of Crimes, Article 8(2) (b) (xxii)-1, at <http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>

⁴⁹ IACtHR, *Case of the Miguel Castro-Castro Prison v Peru*, Judgment of 25 November 2006 (Merits, Reparations and Costs), Series C No 160, para.310 (*Castro-Castro Prison Case*)

⁵⁰ See Paragraph 90-1 of the Complainants' Submission on Merit

⁵¹ Ibid, para.312.

⁵² See para 95 of the Complainants' Submission on Merit





90. The Complainants backed up this by *the United Nations Human Rights Committee's position in General Comment No. 28*, which recognized that rape may amount to a violation of Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (prohibition of torture),⁵³ the position that is widely reflected in the jurisprudence of courts and human rights treaty bodies, which recognise that the pain and suffering caused by an act of rape, both physical and psychological, is so severe as to constitute torture. The Complainants cited *Mejia v Peru*,⁵⁴ *Aydin v Turkey*,⁵⁵ *C.T. and K.M. v. Sweden*,⁵⁶ and *Miguel Castro Castro Prison v Peru*⁵⁷ the decisions that on different occasions but common on detainees, suggested that rape committed against detainees will always amount to torture.
91. Giving facts around all these, the Complainants reiterated the facts around what happened when the victims were in the detention centre. In particular, they submitted that they were forced to undress and lie on their backs, and electroshocked. The Second Victim was threatened to be beaten, raped and subjected to electroshocks if she resisted the examination and had their genital parts forcefully examined.⁵⁸
92. Considering the foregoing, they submitted that the forced genital examination constituted vaginal penetration of the First Victim and sexual violence committed against both Complainants. They added that it was carried out with the use of force and threat of force and under the coercive circumstances of detention, this treatment regarding the First Victim amounted to rape and regarding both Complainants to sexual violence amounted to torture under international human rights law. and that the nature of the forced genital examinations and the circumstances under which they took place met the severity threshold for torture.⁵⁹
93. Concerning discrimination on the grounds of gender and political opinion, in addition to the narrated ill-treatment, those sorts of sexually demeaning terms such as prostitute,

⁵³ Citing, the Human Rights Committee, General Comment No.28: Equality of rights between men and women (Article 3), CCPR/c/21/Rev.1/Add.10, 29 March 2000, para. 11.

⁵⁴ Inter-American Commission on Human Rights (IACmHR'), *Raquel Marti de Mejia v Peru* (1996), Case 10.970, Report No. 5/96, Judgment of 1 March 1996.

⁵⁵ ECtHR, *Aydin v Turkey* (1997) Application No. 57/1996/676/866, Judgment of 25 September 1997.

⁵⁶ Committee against Torture (CAT), *C. T. and K. M. v. Sweden*, Communication No. 279/2005, 17 November 2006, para. 7.5.

⁵⁷ IACtHR, *Castro-Castro Prison Case*

⁵⁸ See Annex 11 and 12

⁵⁹ See, Paragraph 116 of the Complainant Submission on Merit





bitch and —slut used when referring to them, the complainant specifically stated that out of all protesters arrested and who were taken to the military prison on 10 March 2011, they were the only who were subjected to forced genital examinations together with other five, identified as unmarried.⁶⁰

94. The Complainants submitted that the sexual humiliation manifesting repeated verbal abuse, electroshocks and beatings, dragging the Complainants by their headscarf, threats of beatings, electroshocks, and strip searches in full view of others, (which qualify the acts to be torturous) against them was deliberate to send a message to other women engaged in protests that they risk suffering the same fate if they engage in activities related to the protest movement. This included.⁶¹
95. The Complainant also cited *Curtis Francis Doebller v Sudan*⁶² and *African Commission, Media Rights Agenda v Nigeria*⁶³ and argued that the Commission does not explicitly distinguish between torture and ill-treatment in interpreting the scope of Article 5, but calls for as widely as possible interpretation to encompass the widest possible array of physical and mental abuses. They also cited *Gabriel Shumba v Zimbabwe*⁶⁴, and *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*,⁶⁵ with the position that Article 5 is aimed at the protection of both the dignity of the human person and the physical and mental integrity of the individual subject to Article 1 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN Torture Convention).⁶⁶
96. The Complainants submitted that the treatment inflicted on the Victims resulted in physical injuries and psychological trauma.⁶⁷ The First Victim testified that following the ill-treatment at the museum and military prison she came —out as a wreck—psychologically, physically and emotionally and that her entire body had marks from

⁶⁰ See, Section D: Analysis of Articles 2 and 18 (3) Violations on the complainant Submission on Merit

⁶¹ See, Paragraph 124 of the Submission on Merits

⁶² Communication 236/00, para.37

⁶³ Communication No. 224/98, para 71

⁶⁴ Communication 288/04, para.143

⁶⁵ Communications 279/03-296/05 para.156

⁶⁶ See, Paragraph 124 and the referred notes thereat.

⁶⁷ See First Victim's testimony to the military prosecutor on 28 June 2011. Annex 9; First Applicant video testimony (transcribed and translated). See Annex 20; Written Testimony of Second Applicant. See Annex 18





the electroshocks.⁶⁸ The Second Victim testified how the authorities' ill-treatment, including threats of rape, beatings and electroshocks, verbal abuse and forced nudity in front of others, left her in fear and shock.⁶⁹

97. The Complainants also added that under such circumstances the burden shifts to the Respondent State to convince the Commission that the allegations of torture raised by the Complainants are unfounded. The context of the Complainants' *incommunicado* detention and interrogation is such that available evidence is necessarily limited. However, the allegations of torture and ill-treatment are supported by the victim's independent testimonies of similar ill-treatment.⁷⁰ The Complainants, therefore, submitted that the different forms of ill-treatment as outlined above singly amounted at least to ill-treatment, and taken together, to torture, contrary to Article 5 of the Charter.
98. Concerning the State's obligations to safeguard the right to dignity, the Complainants submitted that the authorities violated their right to dignity contrary to Article 5. Substantiating this the complainants cited *Purohit and Moore v The Gambia*,⁷¹ with the Commission holding that exposing an individual to personal suffering and indignity violates the right to dignity that can take many forms and will depend on the circumstance of each case.⁷²
99. As to what constitutes a violation of the right to dignity, the Complainants referred to Commission in *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*, (cited above) at para 200 referring to the judgment of the European Court of Human Rights position in *Campbell and Cosans v UK*,⁷³ that treatment is degrading when the person concerned has undergone humiliation or debasement in the eyes of others attaining a minimum level of severity assessed regarding the circumstances of the case. And specifically, about the treatment of a sexual nature citing *Iwanczuk v Poland*,⁷⁴ where the European Court of Human Rights held that the prison's guards' verbal abuses and

⁶⁸ First Victim's video testimony (transcribed and translated). See Annex 20

⁶⁹ Written Testimony of Second Complainant. See Annex 18

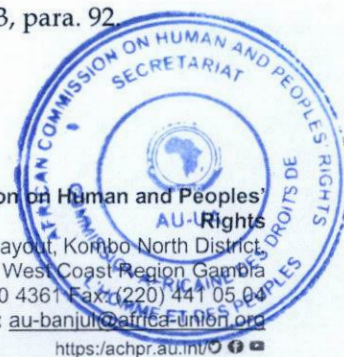
⁷⁰ Ibid., para.169

⁷¹ Communication 241/01, para. 57

⁷² Ibid, para.58; African Commission, *John K. Modise v Botswana*, Communication 97/93, para. 92.

⁷³ Application no.7511/76; 7743/76, Judgment, 25 February 1982, para.28

⁷⁴ Application no. 25196/94, Judgment of 15 November 2001, para 59





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

ridicule of the Victim were considered intentional to cause the Victim's feelings of humiliation and inferiority.

100. Specifically, regarding the practice of forced gynaecological or genital examinations of women, the Complainants cited the *CEDAW Committee view in the Concluding Comments against Turkey*⁷⁵ that forced genital examination of women, including those in custodies is such coercive, degrading, discriminatory, unsafe and constituted a violation by state authorities of the right to bodily integrity of a person and dignity of women.
101. About the use of abusive terms against them while in custody, the Complainants cited the *Egyptian Initiative for Personal Rights & Interights v Egypt*, (cited above)⁷⁶ holding that such treatment which included fondling of the Complainant's breasts and other body parts and tearing off the Complainant's clothes amounted to discrimination as well as physical and emotional trauma contrary to Article 5.⁷⁷
102. The Complainants submitted that in the present case, the authorities aimed specifically at degrading the Victim's dignity and intended to humiliate them. Citing multiple occasions where they were called prostitutes' and sluts' to insult them,⁷⁸ the First Victim testified that upon her arrest, the military officers, in addition to verbally insulting her, spat on and slapped her in the face with a shoe. She added that she was forced to strip naked in full view of male soldiers, who laughed at and took photos of her with their mobile phones. The Second Victim testified that a military police officer sexually assaulted her by trying to kiss her and preventing her from leaving, saying, he had not seen his wife in 38 days;⁷⁹ They submitted that the forced genital examination of both Complainants took place with both Complainants lying on their backs with their legs up and in the presence and full view of male soldiers and officers.⁸⁰
103. As to the failure of the Respondent State to adequately investigate and punish the perpetrators to constitutes a separate violation of Article 5 of the African Charter, the Complainants submitted that indeed the State must carry out an effective investigation,

⁷⁵ Combined second and third periodic report, 13-31 January 1997, para.172.

⁷⁶ Particularly at Para 197, 201-202

⁷⁷ See, paragraph 138 of the Complainant's submission on Merit

⁷⁸ Written Testimony of Second Victim transcribed in Para 140

⁷⁹ See, Paragraph 140 of the Complainant Submission on merit citing Annexure 20

⁸⁰ Ibid Para 140





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

citing *Hawa Abdallah (represented by the African Centre for Justice and Peace Studies) v Sudan*⁸¹ and the *Amnesty International and others v. Sudan*.⁸²

104. The Complainant reckoned that the obligations to investigate, prosecute and punish the perpetrators of the crime of Torture, are in line with standards contained in several international and regional treaties, and soft laws, naming for instance, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;⁸³ the Maputo Protocol;⁸⁴ the UN Report of the Special Rapporteur on Torture;⁸⁵ as well as in instruments such as the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment,⁸⁶ the Standard Minimum Rules for the Treatment of Prisoners.⁸⁷
105. In the present case, as set out, the complainants submitted that the investigation of the First Victim's complaint regarding her ill-treatment and torture by military officials fell short of these standards. The investigation was continuously delayed and was carried out by military officials in a partial fashion as is also evident from the military prosecutor's biased questioning of the First Victim.
106. They added that no diligent attempts were made to hold anyone accountable for the violations. The military doctor accused of the forced genital examination was charged with a public act of indecency an offence associated with a maximum prison sentence of one year, which does not reflect the gravity of the First Victim's complaint. The First Victim received several threatening phone calls following her attempts to obtain justice.⁸⁸

⁸¹ Communication 401/11, para.57 (Admissibility)

⁸² African Commission, *Amnesty International and Others v Sudan*, Communications 48/90, 50/91, 52/91, 89/93, para.56.

⁸³ See, Article 13 of the Convention against Torture

⁸⁴ Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa, Article 4 (e)

⁸⁵ Report of the Special Rapporteur on Torture, E/CN.4/2004/56, 23 December 2003, para. 39 and General Recommendations of the Special Rapporteur on Torture, E/CN.4/2003/68, 17 December 2002, para. 26(i).

⁸⁶ Principle 33 (4): —Every request or complaint shall be promptly dealt with and replied to without undue delay.

⁸⁷ Rule 36 (4): —Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay

⁸⁸ Transcript of First Applicant's Video Testimony. See Annex 20 ¹⁸³
Admissibility Decision of 22 November 2013, para.38.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

107. As to the question that the Respondent State's failure to provide redress to the Complainants also constitutes a separate violation of Article 5, the Complainants submitted that it is a must obligation. The Complainants armed their position by citing the Commission's recognition of a right to an effective remedy and violations of the Charter, including Article 5, in the *Gabriel Shumba v Zimbabwe*,⁸⁹ *Egyptian Initiative for Personal Rights and Interights v Egypt*,⁹⁰ *Curtis Francis Doebbler v Sudan*,⁹¹ *Malawi African Association and others v Mauritania*.⁹²
108. In the same understanding, the Complainants also cited the *Commission's Resolution on the Right to Recourse and Fair Trial*,⁹³ the *Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (Fair Trial Principles), and the *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (Robben Island Guidelines) and submitted along their provisions that person whose rights or freedoms are violated is entitled to have an effective remedy.⁹⁴
109. The Complainant submitted that this right entails that an individual whose rights have been violated can bring his or her claim before a competent judicial body that has jurisdiction and powers to afford adequate reparation for the harm suffered and adjudicates on the claim within a reasonable period. The Complainants submitted further that States must ensure that women Complainants can file criminal complaints and to obtain redress for the proper investigation of the violence suffered, to obtain restitution or reparation and to prevent further violence;⁹⁵ and that States must ensure that all Complainants of torture and their dependents are offered appropriate medical care, have access to appropriate social and medical rehabilitation and are provided with appropriate levels of compensation and support.⁹⁶

⁸⁹ Communication 288/04

⁹⁰ Communication 334/06 (cited above)

⁹¹ Communication 236/00

⁹² Communications 54/91-61/91-96/93-264/97-296/97-210/98

⁹³ Adopted in its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992

⁹⁴ See, Paragraph 150 and 150 of the Complainant Submission on Merit

⁹⁵ African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle N (e).

⁹⁶ African Commission, Robben Island Guidelines, para.50.





110. The Complainants also cited the UN Committee Against Torture in its General Comment No 3 on States' obligations under Article 14 of the UN Convention against Torture (*the right to redress*) and submitted that in addition to the procedural obligations under Article 14, State parties to the Convention must ensure that Complainants of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.⁹⁷
111. Specifically, concerning the right of Complainants to a remedy of sexual violence and reparation thereof, the complainant submitted citing the African Commission, *Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence* ⁹⁸ which calls on states to put in place efficient and accessible reparation programmes that ensure information, rehabilitation and compensation for Complainants of sexual violence; and ensure that Complainants of sexual violence have access to medical assistance and psychological support.
112. Finally, the Complainants stated that they could not be able to pursue their complaints effectively, and could not claim adequate reparation, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetitional- for the violations they have suffered. Besides the lack of effective investigations as outlined above, the Complainants furthermore did not obtain any other form of reparation, including compensation for the material and moral harm suffered, rehabilitation, or guarantees of non-repetition.
113. The Complainants, therefore, submit that the Respondent State's failure to provide adequate redress, including an effective remedy and adequate reparation, constituted a separate violation of Article 5.

On Alleged violations of Article 26

114. The Complainants submitted that the Egyptian military justice system does not satisfy the criteria of independence, impartiality and appropriateness to give effect to the rights guaranteed by the Charter, especially so in cases, which involve allegations of gross violations of human rights by military personnel, which is a violation of this article of the charter.

⁹⁷ Cited in paragraph 152 of the Complainant's submission on Merit

⁹⁸ Adopted during the 42nd Ordinary Session held in Brazzaville, Republic of Congo, from 15-28 November 2007





115. In support of this, concerning independence, the Complainants submitted that the Egyptian Military Justice System is neither Independent nor Impartial, citing the *Commission's Principles of Fair Trial*, the complainant submitted that there are clear criteria as to what constitutes an independent court, i.e. that [t]here shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentence by competent authorities, under the law.⁹⁹
116. They also submit along the requirement that —[a]ll judicial bodies shall be independent of the executive branch.¹⁰⁰
117. The Complainants' cited *Marcel Wetsh'okonda Koso and others v. DRC* and stated the Commission's reaffirmed position that —the independence of a court refers to the independence of the court *vis-à-vis* the Executive. This implies the consideration of the mode of designation of its members, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence.¹⁰¹
118. The Complainant reiterated the Commission's positioning that considers that *the selection of active military officers to play the role of judges to violates the provisions of paragraph 10 of the fundamental principles on the independence of the judiciary*, which stipulates that Individuals selected to carry out the functions of judges should be persons of integrity and competence, with adequate legal training and qualifications.¹⁰²
119. The Complainants provided a comparison with other human rights bodies, such as the Inter-American Court and the European Court that have criticised the use of the military justice system to try human rights abuses as lacking such procedural guarantee.
120. Citing for example the case of *La Cantuta v. Perú*,¹⁰³ where the Inter-American Court stated that —military courts do not guarantee the necessary independence and impartiality to try cases involving members of the Armed Forces. The Court noted that the characteristics like hierarchical subordination and the fact that military judges are on active duty, make it impossible to regard military courts as a true judicial system.

⁹⁹ Principle A.4(f).

¹⁰⁰ Ibid, Principle A.4(g).

¹⁰¹ African Commission, *Marcel Wetsh'okonda Koso and others v. DRC*, Comm. No. 281/03, para. 79.

¹⁰² Para. 66, citing African Commission, *Media Rights Agenda v. Nigeria*, Comm. No. 224/98, para. 60.

¹⁰³ IACtHR, *La Cantuta v. Perú*, Ser. C No. 162, Judgment dated Nov. 29, 2006, para. 130(g).





Furthermore, in *Pueblo Massacre v. Colombia*, the same Court pointed to several procedural flaws, including the fact that the military justice system was not within the formal judicial branch and that its judges were active military officials as reasons why the Colombian military justice system simply could not be independent or impartial in trying military officials for human rights abuses.¹⁰⁴

121. Whereas the European Court emphasised that judicial proceedings must not only be independent and impartial but must also *appear* to be independent and impartial in *Incal v. Turkey*.¹⁰⁵ In this case, the Court found that in the trial of a civilian in which one of three judges was a member of the Military Legal Service, the military Judge's active military status, the possibility of military discipline for this judge, and the short duration of this judge's term appeared to have rendered concerns about independence and impartiality of the trial objectively.¹⁰⁶
122. The Complainants also cited the International Commission of Jurists' concerns of partiality and lack of independence of military judges and prosecutors as active members of the military have made military courts particularly vulnerable to allegations of impunity and lack of independence and impartiality, stating that, the independence and impartiality of military courts are often particularly questionable, as these courts exist as part of the executive hierarchy, thus failing to achieve separation of powers. Officials in military courts answer to their superiors and are subject to hierarchical subordination, raising concerns about the actual independence and impartiality of the judges in these courts.¹⁰⁷
123. In regard, the Complainants faulted the Egyptian military justice system to be falling precisely within this framework, with subordination to the executive, and the Minister of Défense.¹⁰⁸ They stated in the cases involving civilians, military courts do not satisfy the requirement of impartiality, subject to various legal formulations with the Commission among others. To support this the Complainants cited the *Commissions'*

¹⁰⁴ IACtHR, *Pueblo Bello Massacre v. Colombia*, (ser. C) No. 140, Judgment dated Jan. 31, 2006

¹⁰⁵ ECtHR, *Incal v. Turkey*, App. No. 22678/93, Judgment dated Jun 9, 1998, paras. 65-73.

¹⁰⁶ *ibid*

¹⁰⁷ Int'l Comm'n of Jurists, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations* 9 (2004), available at http://www.ecoi.net/file_upload/87_1184764886_trib-mil-eng-parthhttp://www.ecoi.net/file_upload/87_1184764886_trib-mil-eng-part-i.pdf, p 10.

¹⁰⁸ See paragraph 163





Principles of Fair Trial, (for example Principle No.A.5(a)); and the European Court on Human Rights tests to determine impartiality in the case of *Incal v. Turkey*.¹⁰⁹

124. The complainants cited the Commission on *Law Office of Ghazi Suleiman v. Sudan*,¹¹⁰ that the composition of [such] military court alone is evidence of impartiality. Civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violate the fundamental principles of fair trial.
125. The Complainants submitted that the impartiality of courts is important both for civilians being tried, as well as for the protection of other human rights, and for the State's fulfilment of its duty to investigate, prosecute and punish. They added that the *Commission's Fair Trial Principles* (referred to above) are therefore applicable both for violations of Article 7 and Article 26.
126. Citing *Amnesty International and Others v. Sudan*,¹¹¹ in which the Commission reacting on the law providing for the composition of the courts, created an impression of a lack of impartiality, and violation of Article 7(1)(d) of the Charter, the Complainants submitted that the government must provide the structures necessary for the exercise of this right since failing to guarantee the impartiality of Courts in the settings, blatantly violate Article 26.
127. The Complainants submitted that the Egyptian military justice system is not independent or impartial. In regards, they cited structural and systemic defects; Incidents that show the lack of independence and impartiality; and the effects of its Expansive Jurisdiction that violates Article 26.
128. Submitting on Structural and Systemic Defects of the Egyptian Military Justice System, the Complainants submitted that the military justice system in Egypt, including military prosecutors and judges, lacks independence and impartiality for they are active military personnel. The Complainant submitted an example during the trial of Dr ElMogy's (the complainant's assailant) that all judges were active members of the military.¹¹²

¹⁰⁹ *Incal v. Turkey*, para 65

¹¹⁰ Communication Nos. 222/98 and 229/99, para.64.

¹¹¹ African Commission, *Amnesty International (and others) v. Sudan*, Communication Nos. 48/90-50/91-52/91-89/93, para 68.

¹¹² See, Paragraph 171 of the Complainants Submission





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

129. The Complainants backed this submission citing the provisions of Article 2 of the Code of Military Justice, the law guiding the eligibility of judges to be determined by the *Code for the Conditions of Service and Promotion of Officers of the Armed Forces* (Law 232/1959 or —*Code of Military Services*), which only applies to members of the military,¹¹³ means that judges sitting in military courts must be active members of the armed forces. They argued that the judges are selected by the head of the military justice system and are appointed by the Minister of Défense, a member of the executive.¹¹⁴
130. The Complainants added that their selection process and the judges' tenure are also not guaranteed as it remains at the behest of the executive, citing provisions of Articles 110, 112 NS 134 of the *Code of Military Services*, which lists several disciplining measures (including forced retirement) determined solely by a committee of officers of the armed forces.¹¹⁵
131. The Complainant continued to fault the justice system, submitting that being active members of the armed forces, military prosecutors and judges report to higher-ranking officers, stating that if a judge of the military court is ruling on a case that implicates – legally or politically- higher ranked military officers, he would effectively be issuing a judgment regarding individuals that he is obliged to report to and to follow orders from. They submitted that according to Article 101 of the *Code of Services*, all officers must take an oath of allegiance to a person or entity determined by the President of the Republic (the head of the executive branch) before commencing their service.¹¹⁶ To this effect, they stated that the judges therefore must make decisions within a framework that does not provide structural independence from the executive branch.¹¹⁷
132. Associating it with the facts at hand, the complainant submitted that the First Victim's legal action before the military court, the prosecutors and the judges had to deal with a

¹¹³ *Code of Military Justice*, Law 25/1966 (as amended), published in the Official Gazette on Jun 1, 1966, Article 2. (hereinafter —*Code of Military Justice*"), see relevant Articles in Annex 15. ²⁰⁷ *Code of Military Justice*, Arts. 1, 54, see relevant Articles in Annex 15.

¹¹⁴ *Code of Military Justice*, Arts. 1, 54, see relevant Articles in Annex 15

¹¹⁵ *Code for the Conditions of Service and Promotion of Officers of the Armed Forces*, Law 232/1959, Articles 110, 112, 134, see relevant Articles in Annex 16.

¹¹⁶ *Code for the Conditions of Service and Promotion of Officers of the Armed Forces*, Art. 101, see relevant Articles in Annex 16.

¹¹⁷ See, Paragraph 173





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

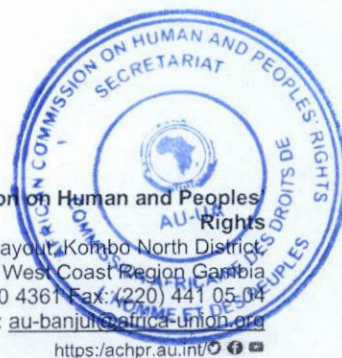
case that implicated at least four generals from the Supreme Council of Armed Forces, namely, Generals Etman, Assar, Sisi and Roweini, who had admitted that virginity tests or forced genital examinations were a routine practice. At the same time, General Adel Morsy, the head of the military judiciary and the direct superior of the judge sitting in the military court in question, had completely denied in December 2012 that such practices take place, stating that there —was no decision in the first place to conduct virginity tests and no provision for such a procedure in the regulations of military prisons.¹¹⁸

133. The complainant noting the significance of General Morsy's comments cites the Human Rights Watch observation in regard that given the status in the military hierarchy and authority over the military judge in the trial, such a statement effectively prejudged certain aspects of the trial, precluding an examination of whether the military ordered the virginity tests or had a policy of carrying them out.
134. The Complainant further submitted that the same structural and systemic flaws that call into question the independence of the Egyptian military justice system also raise serious concerns regarding its impartiality. In the case at hand, submitting that an active member of the military (the judge) was tasked with deciding on a case that involves a defendant who is another active member of the military. In short, a member of one institution, the army, which by its very nature highlights values of cohesion and comradery, must decide whether one or more members of the same institution have committed a crime against someone who does not belong to the same institution.
135. Showing the incidents that show the lack of independence and impartiality of the Military Justice System, the complainant submitted that the military prosecutor chose to charge Dr El-Mogy with public indecency and insubordination, the latter charge negating the possibility that the alleged abuse could have been ordered by higher-ranking officers in the purview of section 268 of the Egyptian *Penal Code*,¹¹⁹ They submitted that the First Victim's lawyer tried several times to have the charges amended from public indecency to sexual assault, but his request was denied.¹²⁰
136. The Complainants moreover submitted that the military prosecutor ignored several criminal acts that the First Victim had reported, such as the beating, verbal abuse and the use of an electroshock device by military personnel during the dispersal of the

¹¹⁸ See Annex 11.

¹¹⁹ see relevant Articles in Annex 13.

¹²⁰ See, Paragraph 177 of the Submission on Merit





March 9th protest and at the preliminary place of detention at the Egyptian Museum. They stated that the military prosecutor ignored such acts despite the presence of ample evidence.¹²¹

137. The Complainants submitted further that the Military Prosecutor also failed to present to the Military Court, a record of witness statements and other evidence for the prosecution contrary to Section 214/2 of the Code of Criminal Procedures.¹²² They added that the military prosecutor presented inconsistent statements of the witnesses for the defence, never cross-examine them or present any witnesses for the prosecution. They stated that the four witnesses for the prosecution were presented only after the First Victim's lawyers asked the judge for permission to bring witnesses. Moreover, they added that the military prosecutor chose not to appeal the Court's acquittal of Dr El Mogy, a decision that could not be appealed by the victim as per Article 43 (*bis*) and 117 of the *Code of Military Justice*.¹²³
138. The Complainants also faulted the court's ruling and reasoning which considered the testimony of prosecution witnesses who were not members of the military, which contradicted the testimony of the other military members who appeared as prosecution witnesses as hearsay.¹²⁴ The Complainants questioned this judgment for what appeared that it relies on military personnel testimonies exclusively while dismissing the only civilian testimonies available. In addition, the Complainants submitted that military judges rejected the request by the First Victim's lawyers to call the three relevant military officials of SCAF who had told the above-mentioned witnesses that forced genital examinations were a normal cautionary procedure.¹²⁵
139. As to the Expansive Jurisdiction of the Egyptian Military Justice System to violate Article 26 of the African Charter, the complainant submitted that there is a growing international trend to reject military courts as a platform for dealing with cases involving allegations of human rights abuses by military personnel against civilians. The Complainants submitted calling for the Commission to further clarify and solidify its position on the use of military jurisdiction in cases involving human rights violations by military personnel.

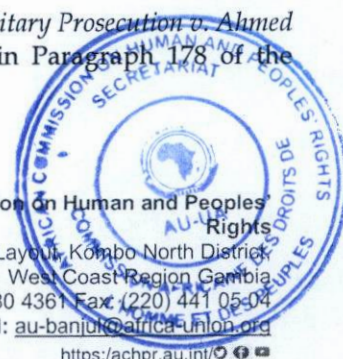
¹²¹ see Annex14.

¹²² See Annex 11

¹²³ See, paragraph 181 of the Submission in Merit

¹²⁴ See Annex 5 and 6. Court of Military Justice (Egypt), Felonies/ East Cairo Court, *Military Prosecution v. Ahmed Adel ElMogy*, Case no. 918/2011, Judgment dated 11 March 2012, and the facts in Paragraph 178 of the complainants' Submission on Merit

¹²⁵ *ibid*





140. They armed this position by citing the Fair Trial Principles of the African Commission that Military Courts shall be deemed to determine offences of a purely military nature committed by military personnell and that they —should not try offences which fall within the jurisdiction of regular courts.¹²⁶
141. The Complainants also cited the position under the United Nations Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, which states that —the jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, *to the exclusion of human rights violations*.¹²⁷ In the same vein, they cited the Principle 9 of the *Draft Principles on Military Justice* adopted by the former UN Human Rights Commission that, "[i]n all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes."¹²⁸
142. Associating with the facts, the complainant argued that the Egyptian Code of Military Justice gives the military prosecutor and courts an expansive jurisdiction and wide discretion that violates the principles enunciated above. Articles 4, 5 and 7 of the *Code of Military Justice* give the military justice system jurisdiction over complaints against members of the military, especially when the alleged abuses take place in a military institution.¹²⁹ This jurisdiction is not limited to crimes of a —purely military nature and does not exclude —offences which fall within the jurisdiction of regular courts as required by the Fair Trial Principles. Moreover, under Articles 1 and 48 of the *Code of Military Justice* the only entity that may decide on whether a matter falls within the jurisdiction of the criminal justice system is the military court itself.¹³⁰
143. Based on the above, the Complainants submitted that the military justice system in the present case did not provide guarantees of impartiality and independence of the judges or the prosecution. It cannot be considered —independent or —appropriatel and the Respondent State is hence in violation of Article 26 of the Charter.

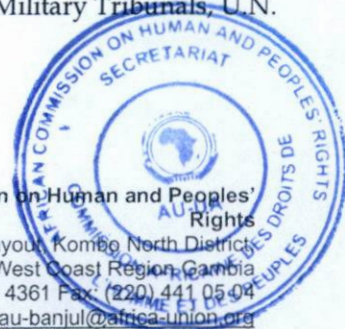
¹²⁶ *Fair Trial Principles*, Principle L.1;3

¹²⁷ United Nations, Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 08/02/2005

¹²⁸ United Nations, *Draft Principles Governing the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 at 4, (2006), Principle 9.

¹²⁹ *Code of Military Justice*, Articles 1, 4, 5, 7 and 48, Annex 15.

¹³⁰ *Code of Military Justice*, Article 48, Annex 15.





On Alleged violation of Article 3

144. The Complainants submitted that their rights to *equality before the law* and equal protection of the law were violated thereby offending Article 3 of the African Charter.
145. Submitting on how their right to equality before the law was violated, the Complainants submitted cited *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe*¹³¹ where the Commission stated—the right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement. It means that judges and administrative officials may not act arbitrarily in enforcing laws. The complainants also stated that while in military detention, were subjected to acts of discrimination, torture and other ill-treatment and were tried by an institution that is neither impartial nor independent, hence, they did not enjoy—the rights available to other citizens and the Respondent state has violated their rights under Article 3(1).
146. About to allegation that they did not enjoy equal protection of the law as other similarly situated persons enjoy it, the Complainants submitted along *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe* (cited above) that equal protection of the law under Article 3(2) (...) means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons and that—it simply means that similarly situated persons must receive similar treatment under the law.¹³²
147. The Complainants referred to the Commission's position on the tests of unequal treatments, namely that the Complainants did not receive the same treatment as other male and female (married) detainees who were arrested in the same events; and that the Complainants did not receive the same treatment accorded to other individuals being tried by a civilian court.¹³³
148. Regarding the first test, the complainants' averred being subjected to verbal and physical sexual violence in detention also violates Article 3, since it was a clear situation in which they did not receive—the same treatment accorded to others. As already

¹³¹ Comm. No. 294/04, para. 96

¹³² Ibid, para 100.

¹³³ See, complainant submission on Merits Para 200





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

argued above, this was a clear act of discrimination in the administrative and legal procedures.¹³⁴

149. They cited the *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt* the Commission stated that equality and non-discrimination are core principles in international human rights law. Consequently, the premise under Article 3 of the African Charter is that the law shall prohibit any form of discrimination and guarantee to all individuals equal and effective protection against discrimination on any ground, regardless of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or another status.
150. As to the second test, the complainants submitted that they did *not receive the same treatment accorded to other individuals being tried by a civilian court*. They submitted further that if they had been subjected to the same abuses by an individual who was not a member of the military, they would have had access to a legal system (ordinary courts) which provide more rights and guarantees, including the right to request an appropriate remedy, to join the case as a civil party and to have the case heard before an independent and impartial court. Because the alleged perpetrator happened to be a member of the military, the Complainants were forced to seek a remedy through a military justice system which lacked impartiality and independence and were therefore deprived of their right to equal protection of the law.
151. Therefore, the Complainants submitted that the mere fact that the military doctor was tried before a military tribunal never offered them the same level of protection that is guaranteed before a civil court. The trial of the doctor before a military court deprived the Complainants of their right to remedy and truth.¹³⁵
152. The Complainants submitted along with the Commission position in *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt* (cited above) that equality before the law also entails equality in the administration of justice. In this regard, all individuals should be subject to the same criminal and investigative procedures in the same manner by law enforcement and the courts.
153. Associating it with the case at hand, they submitted that the Complainants were not subjected to the same criminal and investigative procedures they would have been

¹³⁴ Ibid, para 201

¹³⁵ See, Paragraph 203 of the Complainant Submission on Merit





subjected to had they been tried before civil courts. Accordingly, they submit that the Respondent state has violated their right to equal protection of the law under Article 3(2) of the Charter.

Violation of Articles 9 (2) and 11

154. The Complainants submitted that the Victims were merely participating in a political demonstration/sit-in at Tahrir Square, not a full month after mass demonstrations led to the removal of Egypt's long-time ruling president Hosni Mubarak. The demonstration the Complainants took part in called for specific political objectives, such as creating a new post-revolution constitution and the removal of Prime Minister Ahmed Shafik, who was appointed to his post by Mubarak only to be destructed on 9 March 2011, by the Egyptian military tanks and soldiers, together with individuals dressed in civilian clothes who marched onto Tahrir Square, burned tents belonging to individuals who participated in the sit-in and arrested 18 female-protesters, victims inclusive.¹³⁶

155. The Complainants added that the activities through which the Complainants expressed their political opinions fell within the recognised scope of the freedom of expression and freedom of assembly. The arrest, detention, and subsequent ill-treatment and torture of the Complainants were in response to the Complainants' exercise of their freedom of expression and assembly.

156. As is evident from the context of the violations that took place, the nature of the questions put to the Complainants and other demonstrators and the accusations levelled against them. The authorities' measures were designed to punish and intimidate the Victims and aimed at discouraging them from exercising their freedom of expression and assembly. The measures were unnecessary to preserve national security and disproportionate and therefore amounted to a violation of Articles 9(2) and 11 of the Charter.

On the Alleged Violation of Article 1

157. Complainants submitted along *The Social and Economic Rights Action Center (SERAC) v. Nigeria*¹³⁷ that compliance with the Charter entails both negative and positive obligations on the part of the State, stating further that the Charter recognises four levels

¹³⁶ See, Paragraph 215

¹³⁷ Comm. No. 155/96





of duties for a State to abide by, namely, to respect, protect, promote, and fulfil the rights of the Charter.

158. Unpacking the *obligation to respect*, the Complainant submitted that it entails that the State should refrain from interfering in the enjoyment of all fundamental rights. The Complainant further cited the Inter-American Court in *Velasquez Rodriguez v Honduras*¹³⁸ that —any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms outlined in the Convention.
159. The Complainants stated that the conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority and that under international law, a State is responsible for the acts of its agents undertaken in its official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.¹³⁹
160. As to the obligations to *protect, promote and fulfil*, the Complainants citing the *International Commission of Jurists, Military Jurisdiction and International Law*,¹⁴⁰ submitted that State needs not only to refrain from directly violating the concerned rights but also to take appropriate positive steps to ensure the framework to prevent and address violations. They noted that the significant component of such obligation is the State's procedural duty to investigate a human rights violation and prosecute the perpetrator(s) to be demanding prompt, thorough, impartial and independent investigations.
161. The Complainants also submitted along the Commission's *Robben Island Guidelines*,¹⁴¹ that State Parties are under the obligation to ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment; [Ensure that] [i]nvestigations into all allegations of torture or ill-treatment, are conducted promptly, impartially and effectively, guided by the UN Manual on the Effective Investigation.¹⁴²

¹³⁸ IACtHR, Series C, No.4, Judgment of July 29, 1988, para 169

¹³⁹ Ibid, para 170

¹⁴⁰ P.33

¹⁴¹ Adopted in October 2002, Article 17.

¹⁴² Ibid, Article 19.





162. Associating with the facts, the Complainants submitted that the Respondent State breached its duty to give effect to the rights guaranteed in the Charter as set out in the analysis of the violations regarding Articles 2, 3, 5, 9(2), 11, 18(3) and 26 above. They alleged that the agents of the State were directly responsible for engaging in discrimination and torture against the victims, subjecting them to violence, including sexual violence, and failing to undertake an adequate investigation into, or prosecution of the violations, therefore preventing the Complainants from accessing an appropriate remedy and that the criminal laws of the Respondent State failed to protect the Complainants.¹⁴³
163. The Complainants also citing *Dawda Jawara v. The Gambia*,¹⁴⁴ submitted that as Commission consistently concluded in several of its decisions that a violation of any provision of the Charter automatically means a violation of Article 1, hence, if a State Party to the Charter fails to recognise the provisions of the same, there is no doubt that it violates this Article.

THE COMMISSION'S ANALYSIS OF THE MERITS

164. In this Communication, the Commission is called upon to determine whether the Respondent's State alleged failure to protect the Victims from the alleged acts or omissions is a violation of their rights under the African Charter; specifically Articles 1, 2, 3, 5, 9(2), 11, 18(3) and 26.
165. In determining this issue as per each allegation, Articles 2 and 18(3) will be considered together, given that both address an element of discrimination. Article 1 of the African Charter will be dealt with after all the other Articles have been analysed since a violation of Article 1 can only be established if other Articles in the Charter have been violated, quite a usual drift in the Commission's practices.

Violation of Article 2: The Right Against Discrimination, and Article 18(3): The Right of Non-discrimination Against Women

166. Article 2 provides that *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or another status."*

¹⁴³ See, Paragraph 223 of the Complainants written Submission on Merits

¹⁴⁴ Comm. Nos. 147/95 and 149/96, para 46





167. And Article 18(3) provides that *"The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions."*
168. In addressing whether these Articles have been violated, the Commission remains guided by the path it took in *Egyptian Initiative for Personal Rights (EIPR) & INTERIGHTS v Egypt*¹⁴⁵ and under Article 60 of the African Charter, considers it necessary to describe what constitutes discrimination and its relationship with gender-based violence as alleged from several instruments. This is because the African Charter does not expressly define discrimination.
169. In the first instance, it is pertinent to note that, while Article 2 of the African Charter provides for a right and principle against discrimination, the Protocol to the African Charter on the Rights of Women in Africa (the Maputo Protocol) specifically defines discrimination against women as: *"Any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women [...] of human rights and fundamental freedoms in all spheres of life."* The same Protocol defines violence against women as *"All acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public Life..."*¹⁴⁶
170. Not far away from these, on the other hand, the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**) in Article 1 defines Discrimination against women as *[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*
171. Relevant to the settings of the Complaint, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) in its General Recommendation No. 19, establishes the correlation between discrimination against women and gender-

¹⁴⁵ Decision on Merit, Para 120

¹⁴⁶ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol Text). African Union; 2003





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

based violence, stating that the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately, including inflicting physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.¹⁴⁷

172. Along with these definitions, the Commission reiterates its understanding in the *Association Mauritanienne des Droits de l'Homme v Mauritania*,¹⁴⁸ that discrimination in the context of Article 2 of the African Charter manifests into two types, namely, direct and indirect discrimination. Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences, whereas indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral as it relates to women and men, but has a discriminatory effect in practice on women.¹⁴⁹

173. The Commission further holds that discrimination against women is a *vice* that not only needs to be tolerated by any civilized States but also needs to be prohibited at the roots of the laws and practices. In this regards, it echoes its positions in *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*.¹⁵⁰

174. It also echoes and re-states its position in *Mauritanienne des Droits de l'Homme v Mauritania* (cited above) that violence against women amounts to a form of discrimination and irrespective of its manifestation, whether direct or indirect, it is prohibited with the States assuming their obligation under the African Charter and in other human rights instruments, internationally and regionally¹⁵¹ hence, States must therefore take positive steps to eliminate all its aspects, including violence against women.

175. In determining the State obligation in regard, quite analogous to the obligation in Article 1 of the African Charter, but so close to an obligation in this context, the Commission notes from the CEDAW Committee General Recommendation No. 28,

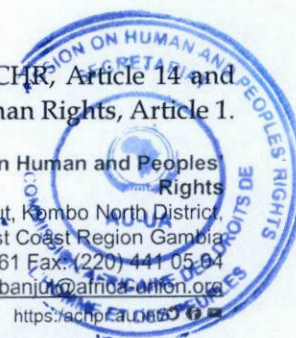
¹⁴⁷ See, The United Nations Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (1992), para. 6

¹⁴⁸ Communication No.210/ 98, (2000), Para. 11

¹⁴⁹ See, CEDAW Committee, General Recommendation 28, Para 16.

¹⁵⁰ Communication No. 323/2006, (2013), para. 165

¹⁵¹ See UDHR, Articles 1, 2 and 7; ICCPR, Articles 2(1), 3 and 26; ICESCR, Article 2; ECHR, Article 14 and Protocol 12; UU Charter of Fundamental Rights, Article 21; American Convention on Human Rights, Article 1.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

para 9¹⁵² that States Parties must *respect, protect and fulfil* women's rights to non-discrimination and the enjoyment of equality.

176. In applying a framework to deal with violence against women, the Commission stresses the following palpable obligations that States must observe, specifically at least; -

- a. First, to enact laws prohibiting all forms of violence against women and ensure that existing legislation is amended as necessary, and monitored through adequate functioning of legal processes;
- b. Secondly, enforce existing legislation, including through effective investigation, prosecution of perpetrators, reparation and support/rehabilitation services for victims; and
- c. Thirdly, to take specific measures to ensure gender-sensitive investigations and prevent gender stereotyping and secondary victimization.

177. In the Communication at hand, the Commission remains guided by its decision that violence against women constitutes discrimination.¹⁵³ Now, in determining discrimination under Article 2, the Commission follows the tests of discrimination in its decision in *Kenneth Good v Republic of Botswana*,¹⁵⁴ that a violation of the principle of non-discrimination arises if: i) equal cases are treated differently; ii) a difference in treatment does not have an objective and reasonable justification; and iii) if there is no proportionality between the aim sought and the means employed.

178. Aligning with these tests, the following incidental questions are imminent to establish the violation, namely, (i) whether women and male protesters had similar treatment; and (ii) whether the treatment was 'fair and just', given that all women and men in the scene were under the same circumstances, that is, exercising their political rights.

¹⁵²UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, available at: <https://www.refworld.org/docid/4d467ea72.html> [accessed 9 April 2023]

¹⁵³ See, Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt (cited in para 170 above)

¹⁵⁴ Cited above, para. 219





ACHPR

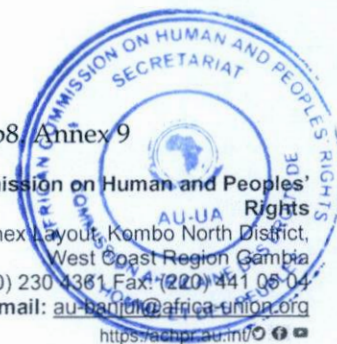
African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

179. In finding answers to these questions, paragraphs 3 to 11 of this Communication under 'Summary of the Complaint' read together with the Complainant's submission on the merits, paragraph 9 to 15 is crucial to the sexual nature of the violations purported to have been committed against the Victims.
180. The Complainants referred to the events which took place on 10 March 2011, where the Victims (along with 15 other female detainees and 157 male detainees) were transported to a military prison, questioned on their marital status and, following identification of the seven unmarried female detainees in the group, subjected to beating, electroshocks, and forced genital examinations by a male military doctor. The Complainants submitted that the Victims were coerced and subjected to verbal intimidation and abuses by State agents. They were forced to undress completely in the presence of the male military doctor, a female prison guard, and other male officers and soldiers.¹⁵⁵
181. They submitted further that the military doctor then conducted forced genital examinations using his hand, an examination, which lasted for approximately five minutes without their consent to such procedure. The First Victim testified that the humiliation and physical, psychological and mental damage she experienced was to such an extent that.¹⁵⁶
182. Several conclusions are obvious from the submissions of the statements made by the Victims, namely, (i) they were exclusively women; (ii) the demonstrations were political activity in which the victims participated, (iii) they were not protected from the perpetrators and other unidentified actors during the demonstrations, after demonstrations in custody and during the purported Virginité test, the justifications of which the Commission interrogating what appeared to be its justification from the facts, we are of the firm view that it constituted a case for *"two wrongs which never make it right"*; and (iv) the violations were perpetrated on the Victims because of their gender.
183. Having said this, the burden of proof could, therefore, shift on the Respondent State, to prove that the Victims were indeed protected by the law and that there was no differential treatment given to both male and female protesters on the scene, and justify whichever took place based on the established tests. However, for what is considered in the record and all attempts, the Respondent state never submitted on merit, and there

¹⁵⁵ See, Paragraph 60 also Annex 18

¹⁵⁶ First Applicant testimony to military prosecution on 28 June 2011 (translated), p8, Annex 9





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

is no evidence to contrary, the Commission finds a violation of Article 2 of the African Charter.

184. In addressing the violations of Article 18(3) of the Charter, the Complainants submitted that the victims were subject to gender stereotypes and that the State failed to adequately investigate their claims of violence and to prosecute the perpetrator; and that the State's inactions owing to the underlying criminal justice system constituted their secondary victimisation.
185. Analysing the testimonies provided by the Complainants to establish whether the allegations were indeed gender-specific, and discriminatory, primarily based on gender and political opinion together, the Commission consider characteristics of violence commonly committed against women and men to differ. It affirms that only by analysing the nature of the violence that the Commission can effectively draw its conclusions as follows; -

- a. Firstly, considering the sexually demeaning terms or verbal assaults used against the Victims, such as prostitute, bitch and slut,¹⁵⁷ the Commission is of the firm opinion that these words are usually meant to degrade and rip off the integrity of women who refuse to abide by traditional religious and even social norms.

The Commission recall its position in *EIPR and INTERIGHTS v Egypt*¹⁵⁸ in which it considered that the use of terms such as "whore" and "slut" amounted to sexual humiliation, in combination with sexual molestation.

- b. Secondly, the physical assaults spearheaded by the virginity test, described above are gender-specific in the sense that the Victims were subjected to acts of sexual harassment and physical violence that can only be directed at women. For instance, breasts fondling and touching or attempting to touch 'private and sensitive parts and the Virginity test. The Commission finds no doubt that the Victims were targeted in this manner due to their gender.

¹⁵⁷ See, Paragraph 120

¹⁵⁸ See, para 143





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

- c. Thirdly, the alleged threats against the Victims accused of practising prostitution for participation in the protest can also be classified as being gender-specific.

186. To determine whether discrimination took place, the Commission recalls and repeats the respective positions adopted by the *Inter-American Court* in its *Advisory Opinion on the proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*¹⁵⁹ and the *UN Human Rights Committee* in its *General Comment No. 18*¹⁶⁰ that: -

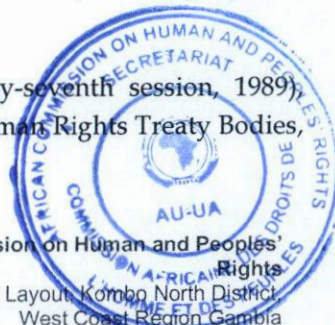
- a. no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things; and
- b. not every differentiation of treatment will constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant;"

187. Now, posing a rhetorical question on the differentiation of treatment of the Victims in the present Communication, can it be classified as reasonable and legitimate as expressed by the UN Human Rights Committee? The Commission finds negative. The treatment was neither legitimate nor justifiable because there is no reasonable cause behind the discrimination that was inflicted upon the Victims.

188. The Commission further considers that the alleged incidents took place in the form of systematic sexual violence targeted at the women at the scene who appear to have participated in the demonstration. Furthermore, as previously held in *Egyptian Initiative for Personal Rights (EIPR)* and *INTERRIGHTS v Egypt*, the perpetrators of the assaults seemed to be aware of the context of Egyptian society; an Arab Muslim society where a woman's virtue is measured by keeping herself physically and sexually unexposed except to her husband. The perpetrators were aware of the consequences of such acts on the Victims, both to themselves and their families, but still perpetrated the acts as a

¹⁵⁹ Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion Oc-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984) para 57.

¹⁶⁰ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/ Rev.1 at 26 (1994). Para 13





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

means of punishing and silencing them from expressing their political opinions. Therefore, on the strength of the analysis of the statements from the Victims.¹⁶¹

189. The Commission finds that the type of violence used against the victims in detention was perpetrated based solely on their sex. In other words, the violence was gender-specific and discriminatory by extension.
190. As to the question that the Respondent State failed to protect the Victims from the violations of rights they faced, it goes without saying that the State has fallen short of its obligations under 18(3) of the African Charter.
191. The Commission considering the circumstances of the case is restating its position in *Egyptian Initiative for Personal Rights (EIPR) and INTERIGHTS v Egypt*¹⁶² that the concept of human rights is based on a typical recognition that every human being is equal and recognizes the inherent dignity and worth of every human being. It accordingly, holds that when women are targeted for whatever reason for the mere fact of being women and are not assured the necessary level of protection by the State in the face of violence, a range of their fundamental human rights are at stake, including their right to sexual equality. The State, therefore, must investigate such acts of violence against, whether committed by state or non-state actors and must bring the perpetrators to book.
192. In the present Communication, it is evident that the State failed in its legal obligation to protect the Victims against discrimination and take measures to thoroughly investigate, prosecute, and punish in cases where discrimination occurs by leaving the perpetrators unpunished.¹⁶³ The Commission reiterates its approval of the Inter-American Commission position in *Maria da Penha and Maia Fernandes v. Brazil*¹⁶⁴ that "Ineffective judicial action, impunity, and the inability of victims to obtain compensation provide, an example of the lack of commitment to take appropriate measures.
193. Further, noting that the effects of the violations perpetrated on the Victims were palpable physically, and even from the medical grounds (deploring that the practice for genital examination has "no scientific or clinical basis" and that "there is no examination

¹⁶¹ Statements in Annexure 9, and 20 also captured in paragraphs 60 to 64 of the Submissions

¹⁶² Para 155

¹⁶³ See Paragraph 68 of the Submission

¹⁶⁴ *Maria da Penha v. Brazil* (2001) IACHR para.57





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

that can prove a girl or woman has had sex”, as the “appearance of girl’s or woman hymen cannot prove whether they have had sexual intercourse or are sexually active or not”),¹⁶⁵ the Commission views that the choice of the state through the Criminal-Statutes fell short of the required standards.

194. As to the question of secondary victimization, the Commission considers and remains guided by the European Committee of Ministers in its Recommendation (also cited by the Complainants) that Secondary victimisation occurs not as a direct result of the criminal act, but through subsequent victim-blaming attitudes, behaviours and practices of State institutions responding to the complainant.¹⁶⁶
195. In the case at hand, the Commission particularly finds in the responses of institutions and individuals to the victims including many of the questions put by the authorities during their detention and trial.¹⁶⁷
196. The Commission takes examples from questions asked to the first Victim captured in Paragraph 66 of the Complainants’ Submissions on Merits and from the English translation of the testimony of Samira Ibrahim Mahmoud before the military prosecutor:

*—What is your social [and professional] status?, —Why did you work in a company in Cairo province while you don’t live there and you are not married? —Why did you choose to live [in the stated address] even though it is very far from where you used to work? —What were you wearing at the time of your arrest?*¹⁶⁸

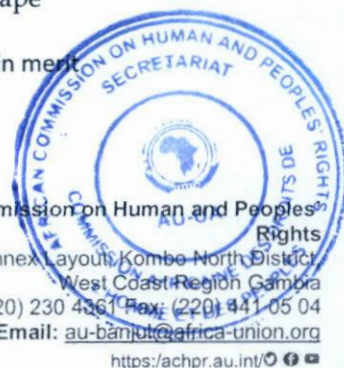
Being the questions asked to a victim of sexual violence by the prosecutor, a person she expected to be on her side, to bring her assailants to book, remains in the mystery of mockery and constitutes secondary victimization;

¹⁶⁵ Commission noting, UN-Eliminating Virginity Testing: An Interagency Statement. Geneva: World Health Organization; 2018. Licence: CC BYNC-SA 3.0 IGO, available at <http://apps.who.int/iris/bitstream/handle/10665/275451/WHO-RHR-18.15-eng.pdf?ua=1> (Last accessed on 14th April 2023)

¹⁶⁶ European Committee of Ministers in its Recommendation Rec(2006)8 on assistance to crime victims, para. 1.3. See also Rebecca Campbell, What Really Happened? A Validation Study of Rape

¹⁶⁷ See, for instance facts submitted in paragraph 66 of the Complainant submission in merit

¹⁶⁸ Ibid





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

197. These questions also suggest negative and gender stereotypes of women protesters, which assign them a subservient position in society, devalue their role and voices, and (when the message is absorbed by both women and society in general), contribute to women adopting and being assigned a passive role in society.
198. To sum up, it is clear that the sexual assaults against the Victims which occurred on the 10th of March 2011 were acts of gender-based violence, perpetrated by state actors, that went unpunished. For these reasons, based on the above analysis, the African Commission finds the Respondent State in violation of Articles 2 and Article 18 (3) of the African Charter.

Violation of Article 5: Prohibition of Torture and Cruel, Inhuman and Degrading Treatment

199. Article 5 of the African Charter states that: *"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status; All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel and inhuman or degrading punishment and treatment shall be prohibited."*
200. In the present communication, the Complainants submitted that the authorities violated their right to dignity, firstly by engaging in acts amounting to cruel, inhuman and degrading treatment (ill-treatment) and torture; Secondly, by failing to adequately investigate and prosecute those responsibly; and thirdly, by failing to provide redress to the Complainants, as a separate violation of Article 5.¹⁶⁹
201. The Commission is also called upon in the present Communication to spell out its position on the relationship between Article 5 and sexual violence generally, i.e. sexual violence and rape (and forced genital examinations or virginity tests specifically) as a distinct form of torture.
202. In the first instance, in determining whether the alleged acts inflicted on the Victims amounted to inhuman and degrading treatment (ill-treatment) in the scope of Article 5, the Commission reiterates its holding in *International Pen and Others v. Nigeria*¹⁷⁰ that Article 5 of the African Charter prohibits not only torture but cruel, inhuman or degrading treatment.

¹⁶⁹See, Paragraph 87 of the Written Statement on Merit

¹⁷⁰Communications 137/94, 139/94, 154/96 & 161/97





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

203. The Commission also remain guided by its position in *Curtis Doebbler v Sudan*,¹⁷¹ that determination of whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case and that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.
204. As to the obligation of states, the Commission considers Article 16(1) of the UN Convention against torture, which calls on States to Undertake to prevent in any territory under its jurisdiction other acts of cruel inhuman or degrading treatment or punishment, which amount to torture as defined in article I, regardless of who is the perpetrator, with official capacity or with no capacity.
205. The Commission also considers Article 16(2) of the same Convention and adds that the provisions are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment and holds along the view it took in *Egyptian Initiative for Personal Rights and Interights v. Egypt*¹⁷² that the spirit of the UN Convention Against Torture shall apply even in the context of the African Charter.
206. In the same line of reflection, as to what constitutes ill-treatment, the Commission also take the path it took in the *Egyptian Initiative for Personal Rights and Interights v. Egypt* in particular, considering the European Court position in *Ireland v UK*¹⁷³ underscoring that an act will qualify as 'ill-treatment,' when it attain a minimum level of severity in terms of (i) the duration of the treatment; (ii) the physical effects of the treatment; (iii) the mental effects of the treatment; and (iv) the sex, age and state of health of the victim involved.
207. On the question of what constitutes "inhuman degrading treatment," the Commission again takes its view in *Egyptian Initiative for Personal Rights and Interights v. Egypt*, citing

¹⁷¹Communication 236/2000, see also Communication 225/98 Huri-Laws v Nigeria and UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

¹⁷² See, Paragraph 191-2

¹⁷³ (1978) ECHR (Series A) para 162





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

the combined *Greek Cases*¹⁷⁴ by the European Commission, the Commission considers that the notion of inhuman degrading treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation, is unjustifiable, and that for an act to be degrading, there must be some form of 'gross humiliation.'

208. In the Overall, the Commission echoes the positions respectively adopted by itself and the European Court on Human Rights in *John K. Modise v Botswana*¹⁷⁵ and *Campbell and Cosans v UK*¹⁷⁶ (also cited by the complainants) that the acts of inhuman and degrading treatment "not only cause serious physical or psychological suffering but also humiliate the individual while exposes them to personal suffering and indignity and can be interpreted to extend to the widest possible protection against abuses, whether physical or mental."
209. Now, interrogating the circumstances of the case at hand to establish cruel, inhuman and degrading treatment (ill-treatment) and torture, the Commission recalls the facts in paragraphs 69 to 75 (above), facts also capture in Paragraphs 3 to 11 on the summary of the complaint and several annexes. The Commission finds that the treatment against the Victims amounts to physical and emotional trauma. It is the Commission's view that the acts were cruel, inhuman and degrading treatment (ill-treatment) in the scope of Article 5 of the African Charter.
210. As to the question of forced genital examination or virginity test, as distinct torture, the Commission finds a crux of the matter in the definition of rape to be constituted by more than just sexual penetration by a male sexual organ into a female organ, the vagina.
211. The Commission draws inspiration from the holding in the cases of *the Prosecutor v Anto Furundžija*¹⁷⁷ and *Miguel Castro-Castro Prison v Peru*¹⁷⁸ respectively (also cited by the Complainants), that rape is constituted not only by sexual penetration, *however slight* of

¹⁷⁴ Consists of Denmark vs. Greece, Norway vs. Greece, Sweden vs. Greece, Netherlands vs. Greece (1969) Yearbook: Eur.Conv.

on HR 12 page 186

¹⁷⁵ Communication 97/93 Para 71

¹⁷⁶ (1982) ECHR, para 28.

¹⁷⁷ IT95-17/1-T, Trial Chamber Judgment of 16 November 1998, para.185.

¹⁷⁸ IACtHR, *Case of the Miguel Castro-Castro Prison v Peru*, Judgment of 25 November 2006 (Merits, Reparations and Costs), Series C No 160, para.310 (*Castro-Castro Prison Case*)





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

the vagina of the victim by the penis, but also by any other object or by body organs used by the perpetrator. The Commission notes and agrees in particular, to the position in *Miguel Castro-Castro* (cited above), in which the Inter-American Court considering the circumstances of the case, agreed that finger-vaginal examination of the inmate constituted rape and torture.¹⁷⁹

212. The Commission is further guided by the position by *the United Nations Human Rights Committee's position in General Comment No. 28*, and recognizes that rape may amount to a violation of Article 7 of the International Covenant on Civil and Political Rights (ICCPR), the provision, which is relevantly a prohibition of torture).¹⁸⁰
213. And Considering the circumstances involving inmates, the Commission Considerers *Report by the Special Rapporteur, Mr P Kooijmans*,¹⁸¹ and too agrees with the view that where such sexual violence is committed against women held in detention, it is a —particularly ignominious violation of the inherent dignity and right to the physical integrity of the human being and accordingly constitutes an act of torture.
214. The Commission also agrees with the observations of the *UN Special Rapporteur on Contemporary Forms of Slavery, Systematic rape, sexual slavery and slavery-like practices during armed conflict*¹ and *UN Security Council*¹ (both cited by the Complainants) that sexual violence and rape by officials can constitute a form of torture.
215. Interrogating the forced genital examination in the context of this case, from the victims' testimonies, submission and legal-medical facts available, the Commission finds no legitimate justification for the conduct of the virginity test. The test was illegal, torturous, inhuman and degrading. Taking scripts from the complainants' testimonies, it appears that the test was done in fear of what female victims "might say upon their release". The Commission posse rhetoric as to whether such has any legal backup and finds negative.
216. In the end, the Commission Considers the joint statement by the UN Human Rights Office (OHCHR), The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and the World Health Organization (WHO) there that no scientific or clinical basis and that no examination can prove a girl or

¹⁷⁹ Ibid, para.312.

¹⁸⁰ Citing, the Human Rights Committee, General Comment No.28: Equality of rights between men and women (Article 3), CCPR/c/21/Rev.1/Add.10, 29 March 2000, para. 11.

¹⁸¹ UN Doc. E/CN.4/1986/15, 19 February 1998, Para.35.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

woman has had sex, as the appearance of a girl's or a woman's hymen cannot prove whether they have had sexual intercourse, or are sexually active or not. It is therefore a position that Virginity testing reinforces stereotypes and gender inequality. In addition, the Commission finds that it is a violation of the rights of girls and women, which can be detrimental to their physical, psychological, and social well-being, to leave alone, the painful, humiliating and traumatic notion it reinforces.

217. In the upshot, the acts accompanied by violence, threats and use of force, in the precinct of this case amounted to rape and torture.
218. On the issue of investigation, the Commission considers Articles 17 and 19 of the Guidelines and Measures for the Prohibition of Torture, Inhuman and Degrading Treatment or Punishment in Africa (the Robben Island Guidelines)¹⁸² and holds accordingly that States have respective obligations to ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment and to ensure that investigation of all allegations of torture or ill-treatment, is conducted promptly, impartially and effectively.
219. Furthermore, it considers Article 4(c) of the Declaration on the Elimination of Violence against Women, adopted by the General Assembly which provides that States should, "Exercise due diligence to prevent, investigate and, following national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."¹⁸³
220. Finding the illegal and unjustifiable acts in the present communication, it is Suffice to say that the Respondent State failed to conduct an effective investigation into the alleged acts of inhuman and degrading treatment and no diligent attempts were made to hold anyone accountable. The Commission would also like to accentuate the fact that, being a party to the African Charter, the Respondent State should prohibit inhuman and degrading treatment under Article 5 of the Charter. Furthermore, since the Respondent

¹⁸² Adopted by the African Commission during its 32nd Ordinary Session in 2002

¹⁸³ Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104 of 20 December 1993, UN Doc. A/12175/48/104, 23 February 1994





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

State has acceded to the Convention against Torture,¹⁸⁴ it has formally accepted the Convention and is therefore bound by it.

221. The Commission notes that the Respondent State is also a party to the ICCPR,¹⁸⁵ whose Article 7 provides that, "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment." The Commission notes that the Victims in the present Communication were not only subjected to ill-treatment but intimidated in several ways.
222. The Respondent State, therefore, owed an obligation to the Victims to effectively investigate the acts of ill-treatment that impacted their dignity and punish the perpetrators accordingly. Failing to do so only amounted to an infringement of the rights of the Victims under Article 5 of the African Charter and other international instruments that the Respondent State is a party to and is unfair.
223. From the foregoing, the African Commission concludes a violation of Article 5 of the African Charter by the Respondent State because the acts committed amounted to inhuman treatment and investigations were not conducted.
- Violation of Article 26: The Duty to Guarantee the Independence of the Courts (Judiciary)**
224. Article 26 of the Charter provides that "*State Parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.*"
225. The Commission notes that the guarantee of the independence of the Court or Judiciary is one of the strongholds of the right to a fair trial protected in Article 7 of the African Charter. In particular, the Commission consider that the adoption of Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (the *Principles of Fair Trial*)¹⁸⁶ support the assurance of this right. And to give effect to the provisions of Article 26, the Commission positions that States are under the obligation (i) to establish the judiciaries and (ii) to ensure their independence.

¹⁸⁴ The Respondent State Acceded to the Convention on 25 June 1986

¹⁸⁵ The Respondent State Egypt ratified the ICCPR on 14 January 1982

¹⁸⁶ Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa available at, <https://ihrda.uwazi.io/fr/entity/h3wcezev15p5sszv7g6z85mi?page=16> (Last accessed on 13 April 2023)





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

226. The Commission, recalls its *Principles of Fair Trial*, notably sections A4(a) and A4(g) which respectively goes that an independent court/judiciary exists only where there is no inappropriate or unwarranted interference with the judicial process nor decisions by judicial bodies, except only through judicial reviews by competent authorities, under the law; and that that —[a]ll judicial bodies must be independent of the executive branch.
227. As to the dimensions of this independence, the Commission reaffirms its position in *Marcel Wetsh'okonda Koso and others v. DRC*¹⁸⁷ that independence of Judiciary implies that the consideration of the mode of designation of its members, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence.
228. Specifically, on the use of military Courts of Judicature, the Commission notes a general trend in its jurisprudence, in other regions' systems and at the level of the United Nations discouraging it. To this effect, the Commission recalls its view in the *Law Office of Ghazi Suleiman v. Sudan*,¹⁸⁸ that Civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violate the fundamental principles of fair trial.
229. This similar view is also reflected in the *Principles of Fair Trial*, which provides categorically that Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies.¹⁸⁹ Moreover, it provides that the only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel and while exercising this function, Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.¹⁹⁰
230. The Commission notes a general *United Nations Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, which states that —the jurisdiction of military tribunals must be restricted solely to specifically military offences committed

¹⁸⁷ African Commission, *Marcel Wetsh'okonda Koso and others v. DRC*, Comm. No. 281/03, para. 79.

¹⁸⁸ Communication Nos. 222/98 and 229/99, para.64.

¹⁸⁹ See, section A4(e)

¹⁹⁰ Ibid, section L(a) and (c)





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

by military personnel, to the exclusion of human rights violations.¹⁹¹ In the same vein, the Commission notes Principle No. 9 of the *Draft Principles on Military Justice* adopted by the former UN Human Rights Commission that, "[i]n all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.¹⁹²

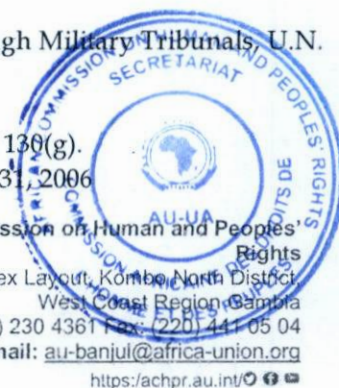
231. It also notes the Inter-American Court position in *Pueblo Bello Massacre v. Colombia* that adamantly rejected the appropriateness of trying military personnel accused of gross human rights violations before military courts stating that human rights abuses committed by military personnel do not fall in the category of cases to be tried by military courts and that military criminal jurisdiction should be limited to —only try military personnel for committing crimes or *misdemeanours* that, due to their very nature, harm the juridical interests of the military system.
232. In particular, the Commission drives position from *La Cantuta v. Perú*,¹⁹³ where the Inter-American Court stated that —military courts do not guarantee the necessary independence and impartiality to try cases involving members of the Armed Forces. The Court noted that the characteristics like hierarchical subordination and the fact that military judges are on active duty, make it impossible to regard military courts as a true judicial system.
233. Furthermore, in *Pueblo Massacre v. Colombia*,¹⁹⁴ also cited by the complainants, the court positioned that the military justice system is not within the formal judicial branch and that the military justice system simply could not be independent or impartial in trying military officials for human rights abuses
234. Interrogating the facts of this case, the Commission finds a sticking point as to whether the Egyptian Court system, composed of active military officials, qualifies to be

¹⁹¹ United Nations, Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 08/02/2005

¹⁹² United Nations, Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4, (2006), Principle 9.

¹⁹³ IACtHR, *La Cantuta v. Perú*, Ser. C No. 162, Judgment dated Nov. 29, 2006, para. 130(g).

¹⁹⁴ IACtHR, *Pueblo Bello Massacre v. Colombia*, (ser. C) No. 140, Judgment dated Jan. 31, 2006





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

independent in the scope of guarantees needed in Article 26 of the Charter; Also, whether the offences charged were military nature to be tried by the military courts.

235. Going through the account for the legal structure of the Egyptian Judicial architecture in records, provisions of Article 2 of the Code of Military Justice, the law guiding the eligibility of judges in Egypt, it is clear that it is determined by the *Code for the Conditions of Service and Promotion of Officers of the Armed Forces* (Law 232/1959 or —Code of Military Services), which only applies to members of the military¹⁹⁵ and indeed it means that judges sitting in military courts must be active members of the armed forces. Further, the judges are selected by the head of the military justice system and are appointed by the Minister of Défense, a member of the executive.¹⁹⁶ Their selection process and tenure are also not guaranteed as it remains at the behest of the executive, citing provisions of Articles 110, 112 NS 134 of the *Code of Military Services*, which lists several disciplining measures (including forced retirement) determined solely by a committee of officers of the armed forces;¹⁹⁷ Article 101 of the *Code of Services*, all officers must take an oath of allegiance to a person or entity determined by the President of the Republic (the head of the executive branch) before commencing their service.¹⁹⁸ Based on these facts, the Commission poses a rhetorical question, whether the court can be said to be impartial or independent in the circumstances.
236. The Complainant also narrated facts faulting the impartiality of the court in Paragraph 174 that the First Victim's legal action before the military court, the prosecutors and the judges had to deal with a case that implicated at least four generals from the Supreme Council of Armed Forces, who had admitted that virginity tests or forced genital examinations were a routine practice; the head of the military and judiciary and the direct superior of the judge sitting in the military court in question, who had completely denied in December 2012 that such practices take place, stating that there —was no decision in the first place to conduct virginity tests and no provision for such a procedure in the regulations of military prisons.¹⁹⁹ And to make things worse, the Complainants in paragraphs 177 to Paragraph 185 with supporting references, accounted for incidences that reasonably showed trends of favouritism and the military

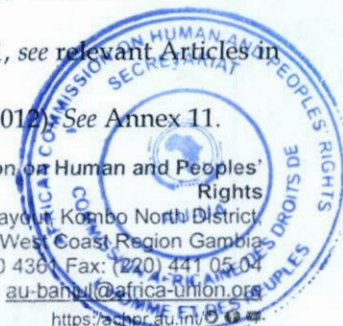
¹⁹⁵ *Code of Military Justice*, Law 25/1966 (as amended), published in the Official Gazette on Jun 1, 1966, Article 2. (hereinafter —*Code of Military Justice*"), see relevant Articles in Annex 15. ²⁰⁷ *Code of Military Justice*, Arts. 1, 54, see relevant Articles in Annex 15.

¹⁹⁶ *Code of Military Justice*, Arts. 1, 54, see relevant Articles in Annex 15

¹⁹⁷ *Code for the Conditions of Service and Promotion of Officers of the Armed Forces*, Law 232/1959, Articles 110, 112, 134, see relevant Articles in Annex 16.

¹⁹⁸ *Code for the Conditions of Service and Promotion of Officers of the Armed Forces*, Art. 101, see relevant Articles in Annex 16.

¹⁹⁹ Human Rights Watch, *Egypt: Military Impunity for Violence Against Women* (Apr. 7, 2012). See Annex 11.





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

justice system favouring their own ranging from the choice of minor offences to serious sexual offences, neglect to amend charges and to call prosecution witnesses, neglect of testimonies of the civilian witness for technical grounds, and choices not to appeal where only the prosecutor could.

237. In the upshot, the Commission considered that the composition and jurisdiction of the Military Courts, and the offences tried were not military-related and could be tried in civilian courts, the Commission agrees with the Complainants that the Egyptian Court did not satisfy the requirement of impartiality and independence, subject to various legal formulations by the Commission among others, and therefore, in the absence of proper guarantees, it finds the state in violation of Article 26.

Violation of Article 3: The Right to Equality Before the Law and Equal Protection of the Law.

238. Articles 3(1) and (2) of the African Charter provide that *"Every individual shall be equal before the law and that every individual shall be entitled to equal protection of the law."*

239. The Complainants submitted that their rights to equality before the law and equal protection of the law were violated, thereby offending Article 3 of the African Charter.

240. Conceptualizing the parameters of the right to equality before the law and the equal protection of the law, the Commission recall its position in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe*²⁰⁰ (also cited by the Complainants) and remains guided thereon, that the right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement. It means that judges and administrative officials may not act arbitrarily in enforcing laws. Further, on the equal protection of the law, that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons and that—it simply means that similarly situated persons must receive similar treatment under the law.

241. The Complainants submitted that while in military detention, they were subjected to acts of discrimination, torture and other ill-treatment and were tried by an institution that is neither impartial nor independent, hence, they did not enjoy—the rights available to other citizens and the Respondent State has violated their rights under Article 3(1).²⁰¹

²⁰⁰ Comm. No. 294/04, para. 96

²⁰¹ Complainant Submission on Merits, Para, 199





242. Now, the Commission considers it pertinent to consider two issues along with the tests of unequal treatments and unequal protection, namely, (i) whether the victims did not receive the same treatment as other male and female married detainees who were arrested in the same events; and (ii) whether the victims did not receive the same treatment accorded to other individuals being tried by a civilian court.
243. Regarding the first test, the complainants' averred being subjected to verbal and physical sexual violence in detention as affirmed in the analysis of Articles 2 and 18 above, also violates Article 3.
244. While as to the second test, the complainants submitted that they did *not receive the same treatment accorded to other individuals being tried by a civilian court*. They submitted further that if they had been subjected to the same abuses by an individual who was not a member of the military, they would have had access to a legal system by the ordinary courts, which apply the law and procedure that guarantee more rights, including the right to request an appropriate remedy, to join the case as a civil party, to appeal conviction or acquittal, and to have the case heard before an independent and impartial court. Because the alleged perpetrator happened to be a member of the military, the Complainants were forced to seek a remedy through a military justice system which lack impartiality and independence and were therefore deprived of their right to equal protection of the law.²⁰²
245. Considering this submission, the Commission echoes its position in *The Egyptian Initiative for Personal Rights & INTERIGHTS vs Egypt* (cited above), (that equality before the law also entails equality in the administration of justice) and the findings in violation of article 26 (above), in particular, the aspect associated with the use of Military Justice System with active military officers, is holding that all individuals should have been subject to the same criminal and investigative procedures in the same manner by law enforcement and the courts. The failure by the state to ensure this falls short of the test, and it is equally a violation of Article 3(2) of the Charter.
246. In the upshot, the Commission agrees that the Respondent state has violated the right to equal protection of the law under Article 3(2).

Violation of Article 9(2): Right to Freedom of Expression and Opinion; and Article 11: The Right to Freedom of Assembly

²⁰² See, Paragraph 203 of the Complainant Submission on Merit





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

247. Article 9(2) of the Charter provides that: *Every individual shall have the right to express and disseminate his opinion within the law.*
248. Article 11, on the other hand, stipulates that [E] *every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular, those enacted in the interest of national security, the safety, health, ethics, and rights and freedoms of others.*
249. Being two different articles and provisions, the Commission considers its decision in *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria*,²⁰³ for the underlined close relationship between the rights protected in article 9(2) and 11 to warrant a joint examination. The Commission also echoes its decision in *Law Offices of Ghazi Suleiman v Sudan*²⁰⁴ that the rights protected in Article 9(2) and Article 11 complement each other in the promotion of democracy on the continent.
250. In particular, the Commission reiterates its position in the *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*²⁰⁵ supported by the provisions of *UN Human Rights Committee, General Comment No.34, Article 19: Freedoms of opinion and expression*²⁰⁶ that freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and to their participation in the conduct of public affairs in their country, including the right to receive information and to express one's opinion in the African Charter.
251. Although the exercise of the rights in Articles 9(2) and 11 permits justifiable limitations in the law, as to the permissible restrictions, the Commission recalls its position in the case of *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa vs Sudan*²⁰⁷ that the —Charter contains no derogation clause, which can be an expression of the principle that the restriction of human rights is not a solution to national difficulties.

²⁰³ Communications 137/94-154/96-161/97, para.101

²⁰⁴ Communication 228/99, para. 53

²⁰⁵ Communications 140/94-141/94-145/95, para.36

²⁰⁶ CCPR/C/GC/34, 12 September 2011, Para.23

²⁰⁷ Communications 48/90-50/91-52/91-89/93, para.79





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

252. The Commission, concerning the limitation of Article 9, considers its Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002)²⁰⁸ and holds that any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary for a democratic society.
253. Associating these principles with the facts, the Complainants submitted that the Victims were merely participating in a political demonstration/sit-in at Tahrir Square, not a full month after mass demonstrations led to the removal of Egypt's long-time ruling president Hosni Mubarak. The demonstration the Complainants took part in called for specific political objectives, such as creating a new post-revolution constitution and the removal of Prime Minister Ahmed Shafik, who was appointed to his post by Mubarak, only to be destructed on 9 March 2011, by the Egyptian military tanks and soldiers, together with individuals dressed in civilian clothes, who marched onto Tahrir Square, burned tents belonging to individuals who participated in the sit-in and arrested 18 female protesters, victims inclusive.²⁰⁹
254. In the end, the Crux of the matter is whether the activities in which the Complainants expressed their political opinions fell within the recognised scope of limitation of the freedom of expression, assembly and freedom of opinion. The Commission finds it negative. It hence remains guided by its decision in *Kevin Mgwanga Gunme et al vs Cameroon*²¹⁰ that invocation of restrictions to the rights enshrined in Articles 9 (2) and 11 does not absolve the State from its duty to guarantee these rights. Preventing individuals from peacefully expressing their (political) opinion in public and from participating in peaceful protest through arrests, detention, and abuse, as in the present case, cannot be justified, as such disproportionate conduct amounts to a blanket restriction and hence a violation of the freedoms guaranteed in Articles 9 and 11.
255. The Commission holds that the arrest, detention, and subsequent ill-treatment and torture of the Victims were in response to the Complainants' exercise of their freedom of expression and assembly. As is evident from the context of the violations that took place, the nature of the questions put to the Victims and the accusations levelled against

²⁰⁸ African Commission, Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002)', Res.62(XXXII)02, at http://www.achpr.org/files/sessions/32nd/resolutions/62/achpr32_freedom_of_expression_eng.pdf. (Last accessed on 14th April 2023)

²⁰⁹ See, Paragraph 215

²¹⁰ Communication 266/03, para.137





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

them. A reasonable inference suggests that the authorities' measures were designed to punish, intimidate, and discourage the Victims from exercising their freedom of expression and assembly. The measures were unnecessary to preserve national security, disproportionate, and therefore amounted to a violation of Articles 9(2) and 11.

Violation of Article 1: Obligations of Member States

256. The Complainants allege that the Respondent State has violated Article 1 of the African Charter. Article 1 of the African Charter provides that, "*The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.*"
257. The Complainants submitted along *The Social and Economic Rights Action Center (SERAC) v. Nigeria*²¹¹ that compliance with the Charter entails both negative and positive obligations on the part of the State, stating further that the Charter recognises four levels of duties for a State to abide by, namely, to respect, protect, promote, and fulfil the rights of the Charter.
258. Unpacking the *obligation to respect*, the Complainant submitted that it entails that the State should refrain from interfering in the enjoyment of all fundamental rights. The Complainant further cited the Inter-American Court in *Velasquez Rodriguez v Honduras*²¹² that —any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms outlined in the Convention.²¹³
259. The Complainants stated that the conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority and that under international law, a State is responsible for the acts of its agents undertaken in its official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.²¹⁴

²¹¹Comm. No. 155/96

²¹²IACtHR, Series C, No.4, Judgment of July 29, 1988, para 169

²¹³ibid

²¹⁴Ibid, para 170





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

260. As to the obligations to *protect, promote and fulfil*, the Complainants citing the *International Commission of Jurists, Military Jurisdiction and International Law*,²¹⁵ submitted that State needs not only to refrain from directly violating the concerned rights but also to take appropriate positive steps to ensure the positive framework to prevent and address violations. They noted that the significant component of such obligation is the State's duty to investigate human rights violations and prosecute the perpetrator(s) to be demanding prompt, thorough, impartial and independent investigations.

261. The Complainants also submitted along the Commission's *Robben Island Guidelines*,²¹⁶ providing that State Parties are under the obligation to ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.²¹⁷

262. Associating with the facts, the Complainants submitted that the Respondent State breached its duty to give effect to the rights guaranteed in the Charter. As is set out in the analysis of the violations regarding Articles 2, 3, 5, 9(2), 11, 18(3) and 26 (above), its agents were directly responsible for engaging in discrimination and torture against the victims, subjecting them to violence, including sexual violence, and failing to undertake an adequate investigation into, or prosecution of the violations, therefore preventing the Complainants from accessing an appropriate remedy, and that the criminal laws of the Respondent State failed to provide sufficient protection against the crime of rape committed against the Complainants.²¹⁸

263. The Commission remains guided by its decision in *Dawda Jawara v. The Gambia*,²¹⁹ that a violation of any provision of the Charter automatically means a violation of Article 1, hence, if a State Party to the Charter fails to recognise the provisions of the same, there is no doubt that it violates this Article.

DECISION OF THE COMMISSION ON THE MERITS

264. For the foregoing reasons, the Commission: -

- (a) Finds that the Respondent State violated Articles 1, 3, 5, 7, 9(2), 11, 18(3) and 26 of the African Charter;

²¹⁵ P.33

²¹⁶ Adopted in October 2002, Article 17.

²¹⁷ Ibid, Article 19.

²¹⁸ See, Paragraph 223 of the Complainants written Submission on Merits

²¹⁹ Comm. Nos. 147/95 and 149/96, para 46





ACHPR

African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

- (b) Finds that the forced genital examination against the Victims was degrading inhuman and torturous, therefore, requests the Respondent State to desist and eradicate such practice of examinations;
- (c) Urges that the Respondent State prosecute the perpetrators of the sexual violations against the Victims in Courts with Competent jurisdiction for such violations;
- (d) Urges the Respondent State to reform the military prison procedures code to include strict guarantees for respecting the bodily integrity and privacy rights of prisoners during searches, medical check-ups and during their detention, and for the civil prosecutor and civil courts to have exclusive jurisdiction to investigate and adjudicate allegations of violations by military personnel against civilians;
- (e) Request the Respondent State to compensate each of the Victims in respect of the injuries they suffered from as a result of violations of their rights at the sum of 100,000 (one hundred thousand) Egyptian Pounds (at the present rate) as requested by the Complainant, for the physical and emotional damages/traumas they suffered; and
- (f) Urges the Respondent State to report on the steps it has taken to implement these decisions under Rule 112 (2) of its 2010 Rules of Procedure, within one hundred and eighty (180) days.

Done in Banjul, The Gambia during the 75th Ordinary Session of the African Commission on Human and Peoples' Rights, 3rd to 23rd May 2023.

