27 February 2014

Communication 424/12

In the matter between:

SAMIRA IBRAHIM MAHMOUD, RASHA ALI ABDEL-RAHMAN

(Represented by EIPR, INTERIGHTS and REDRESS)

v.

EGYPT

APPLICANTS' SUBMISSIONS ON MERITS

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TABLE OF CONTENTS

Page

EVIDENCE BRIEF

List of Annexes

Evidence Brief 1

1. Copy of the decision of the Administrative Court of Egypt, dated 27 December 2011, Case 45029 for the Judicial Year 65. (Arabic)
2. English translation of decision of the Administrative Court of Egypt, dated 27 December 2011, Case 45029 for the Judicial Year 65.
3. Letter by Amnesty International, dated 22 February 2012, confirming SCAF member's admission of virginity tests and promise to halt them. (Arabic)
4. Copy of transfer order, dated 5 September 2011 from civil prosecutor to the military prosecutor of complaint submitted by Rasha Abdel-Rahman. (Arabic)
5. Copy of decision of the Supreme Military Court of Egypt, dated 11 March 2012, in the matter of *Military Prosecution v. Dr. Ahmed Adel El-Mogy*. (Arabic)
6. English translation of decision of the Supreme Military Court of Egypt, dated 11 March 2012, in the matter of *Military Prosecution v. Dr. Ahmed Adel El-Mogy*.
7. Request to the Head of the Military Prosecution of East Cairo, dated 3 January 2012, to amend the charges against Dr. El-Mogy and to allow Samira's lawyers to attend as counsels for Samira. (Arabic).

Evidence Brief 2

8. Testimony of Samira Ibrahim Mahmoud before the military prosecutor, dated 28 June 2011.
9. English translation of testimony of Samira Ibrahim Mahmoud before the military prosecutor, dated 28 June 2011.
10. Human Rights Watch report "Egypt: Epidemic of Sexual Violence", dated 2 July 2013.
11. Human Rights Watch report "Egypt: Military Impunity for Violence Against Women", dated 7 April 2012.
12. Human Rights Watch report "Egypt: Military 'Virginity Test' Investigation a Sham", dated 9 November 2011.

13. Relevant sections of the Egyptian *Penal Code*.
14. Memo on 9th March arrest by head of Military Police, General Hamdi Badeen, dated April 2011.

Evidence Brief 3

15. Relevant articles of the Egyptian *Code of Military Justice* and their English translation.
16. Relevant articles of Law 232 for the Year 1959 - *Conditions of Service and Promotion of Officers of the Armed Forces* and English translation.
17. Rasha Abdel Rahman's testimony, handwritten, dated April 2012.
18. English translation of Rasha Abdel Rahman's testimony.
19. Transcript of Samira Ibrahim's testimony, dated November 2011.
20. English Translation of Samira Ibrahim's testimony.

A. INTRODUCTION

1. Samira Ibrahim Mohamed Mahmoud and Rasha Ali Abdel Rahman (together, the **Applicants**) respectfully submit the following observations on the merits of Communication 424/12 (**Communication**) to the African Commission on Human and Peoples' Rights (**Commission**). The original Communication was submitted to the Commission on 11 September 2012. The Commission was seized of the matter at its 52nd Ordinary Session and declared the case admissible during its 54th Ordinary Session. The Commission has requested the Applicants to present their submissions on the merits in accordance with Rule 108(1) of the Rules of Procedure of the African Commission.

2. The Communication is brought pursuant to Article 55 of the African Charter on Human and Peoples' Rights (**Charter** or **African Charter**). It alleges violations of the Applicants` rights under Articles 1, 2, 3, 5, 18 and 26 of the Charter and is submitted against Egypt, state party to the Charter (**Respondent State**).

B. SUMMARY OF FACTS[2]

3. Samira Ibrahim Mohamed Mahmoud (**First Applicant** or **Samira**) is an adult female Egyptian citizen residing at al-Mahmada al-Qebliyya, Sohag, Egypt. Rasha Ali Abdel-Rahman (**Second Applicant** or **Rasha**) is an adult female Egyptian citizen residing at Shobra al-Kheima, Qalyoubia, Egypt.

4. On 9 March 2011, Egyptian military forces arrested both Applicants after the latter's participation in a sit-in at Tahrir Square in central Cairo during which they demanded the writing of a new Constitution and the removal of the Prime Minister

[2] The below section (Facts) is 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.

and protested the military's brutal dispersion of a prior peaceful demonstration on 25 February 2011. The military had been performing internal security duties since 28 January 2011 and the Supreme Council of the Armed Forces (**SCAF**) had assumed power on 11 February 2011 after the abdication of Hosni Mubarak from the presidency.

5. Following their arrests, the Applicants (and other detainees) were transported to a military prison where they were subjected to beating and electroshocks. The Applicants, along with five other female detainees, were then subjected to a forced genital examination in prison by a military doctor, whom they identified as Dr. Ahmed Adel El-Mogy (**Dr. El-Mogy**). To date, the Applicants have been unable to obtain appropriate redress for the violations against them. Details in relation to each applicant are set out below.

(1) The First Applicant

6. The First Applicant is a 26-year old student from Sohag in the South of Egypt who was working for the Iman Cosmetics Company in Greater Cairo at the time of her arrest. Samira participated in the events of the 25 January 2011 revolution. After Mubarak's abdication, the First Applicant participated in a sit-in at Tahrir Square and in front of the seat of the Cabinet of Ministers to demand the removal of Prime Minister Ahmed Shafik, who was appointed to his post by Mubarak. On 25 February 2011, the sit-in was dispersed violently by the Military Police, a division of the Egyptian military forces. The following day, the SCAF issued a statement apologizing for the violent incidents. The First Applicant, along with other protestors, continued their sit-in at Tahrir Square, in which they demanded the writing of a new constitution in addition to the original demand of ousting Prime Minister Shafik.

7. This sit-in continued until 9 March 2011 when army tanks and soldiers entered Tahrir Square and forcefully dispersed the sit-in. Numerous protestors were injured and most of them were arrested by the military.

8. The First Applicant left the square after the attack of the army but decided to stand at a nearby pavement and hold a banner. An officer in military uniform grabbed her by the arm and called her a prostitute. He dragged her by her headscarf to the Egyptian Museum on the Western side of Tahrir Square, where she encountered a number of other detainees. While she was detained at the Museum, soldiers and officers constantly called Samira a prostitute and swore at her. An officer spat at her and slapped her in her face with a shoe. She was bound by her hands and legs, sprayed with water, and subjected to electroshocks with a Taser, an electroshock weapon. She was not notified of any charges against her.

9. On the morning of 10 March 2011, the First Applicant, Samira, was among 17 female protestors and 157 male protestors who were taken in a military vehicle and transported to the military prison. She was searched without being given an explanation as to the reasons for the search. She was brought into a room that was open to the view of male soldiers and was ordered to undress completely by a female prison guard by the name ‘Abeer’. Samira resisted the search and asked Abeer to close the door and windows but Abeer refused and called a soldier in, who subjected Samira to electroshocks in her stomach using an electric baton. The First Applicant was searched naked in view of officers and soldiers who stood just outside the room, laughing and using personal cell phones to take pictures of her. After the search, which took around ten minutes, she got dressed and left the room, again being verbally abused by soldiers.

10. Following the search, a military officer and a lower-ranking officer identified only as 'Ibrahim' came into the cell where the female detainees were being held and demanded that the female detainees split into unmarried (*banat* – which in Egypt is

a term also used to designate virgins) and married women. The female detainees were further subjected to name-calling and swearwords.

11. The seven unmarried detainees were taken out of the cell one by one. When Samira's turn came, she was brought out of the cell into a room that was open to the view of soldiers, where she found a military officer, later identified as Dr. El-Mogy, wearing an overcoat over his uniform, and the same female prison guard, Abeer, who had searched her previously. Abeer ordered her to undress completely. The First Applicant asked Abeer to allow her to undress in private, away from the view of the soldiers, upon which the officer named Ibrahim electroshocked Samira again in the stomach. After being forced to undress, Samira was ordered by Dr. El-Mogy to lie on her back and lift her legs. He then used his hand to examine her genitals. This examination was conducted against her will and within view of a group of officers and soldiers.

12. Dr El-Mogy ordered the First Applicant to sign a prepared statement saying that she was unmarried, that she was a virgin and that her hymen was intact. Samira signed the statement and then returned to her cell. At no point did any official in the prison explain to Samira the purpose of the forced genital examination or the statement she was ordered to sign. The military doctor did not conduct any other medical check-up despite the scars on Samira's and other detainees' bodies.[3]

13. On the evening of 10 March 2011, the First Applicant and other detainees were taken out of the cell and brought before the military prosecutor in a small hallway within the prison. The military prosecutor read the charges, which consisted of destroying cars, attempted assault on military officers while performing their duty, manufacturing weapons and Molotov cocktails, possessing knives, obstructing traffic and violating the curfew. Samira, as well as the Second Applicant and other detainees, denied everything.

[3] In a memo that was presented to the military prosecutor, General Hamdi Badeen, Director of the Military Police Department, states that the detainees suffered bruises after their detention by the soldiers in the courtyard of the Egyptian Museum; *see* Annex 14.

14. The First Applicant was then taken to a larger room within the prison where she faced a military judge. Two lawyers assigned by the military were present but did not speak during the hearing. Samira observed that some male detainees were lying on the ground with signs of beating and were unable to speak when they were called before the judge. The military judge selected a few of the detainees randomly and questioned them. Samira was called forward and the judge read the charges, which she denied. The judge proceeded to ask her why she had come to Cairo and why she went to Tahrir Square in the first place.

15. When she attempted to plead her case, Samira was forced away from the military judge by prison guards and was prevented from speaking.

16. All 17 female detainees, including the First Applicant, were given one year's suspended prison sentence. On 11 March 2011, military authorities took them in a bus to Ramses Square in downtown Cairo where they were released.

(2) The Second Applicant

17. The Second Applicant, Rasha, decided to join the sit-in at Tahrir Square on 25 February 2011. When the sit-in was forcibly cleared on 9 March 2011, she was arrested by a soldier and her personal belongings were stolen. She was taken to the Egyptian Museum and was subjected to swearwords by soldiers who called her and other female detainees prostitutes.

18. At the museum, a soldier went to the Second Applicant and other female detainees and started swearing at them, subjecting other female detainees to electroshocks, and beating them. A soldier asked Rasha if she was pregnant. When she replied that she was unmarried, he replied that they would soon know if she was unmarried or not. The soldiers then began asking who gave them money to be in Tahrir Square, saying that they were not really unmarried and that they were prostitutes. Rasha,

along with another detainee named Jihane Mahmoud, went to the toilet in the museum. A military policeman assaulted Rasha in the toilet, trying to kiss her, and when she protested he told her that he had not seen his wife in 36 days. She tried to leave but he prevented her and only let her go when another soldier came along.

19. On the morning of 10 March 2011, the Second Applicant was taken along with the other detainees to the military prison. The detainees were not allowed to make a phone call to their families or lawyers. The female detainees were searched in an open room, without any reasons being provided for the search. When Rasha's turn came, the female prison guard ordered her to undress completely. When Rasha told her that a woman's genitals should not be seen by anyone according to Islam, the female prison guard replied by shouting at her and saying that this was her job. During this process, soldiers in the prison took pictures of the Second Applicant and other detainees as they were fully naked and laughed about it.

20. After the initial search, the female detainees were divided into married and unmarried groups. The officer called Ibrahim informed detainees in the unmarried group that they will be subjected to a virginity test, a forced genital examination. When Rasha and a few other detainees objected, Ibrahim told them that this was an order, and that he would beat, electroshock and have sexual intercourse with any unmarried woman who turns out not to be a virgin. Against her will, the Second Applicant was then taken to a hallway between two rooms which was open to the view of others in the prison. **[REDACTED]**. The military doctor, Dr. El-Mogy, used his bare hands (without gloves) to examine the Second Applicant's genitals without her consent in the presence of the female prison guard and within view of a number of soldiers and officers. **[REDACTED]**. When he was done, Dr. El-Mogy ordered Rasha to sign a statement that she was a virgin and that her hymen was intact.

21. On the evening of 10 March 2011, at around 9 pm, the Second Applicant and the rest of the female detainees were interrogated by the military prosecutor on the

second floor of the prison. They were asked what they were doing in Tahrir Square and were charged with manufacturing weapons and Molotov cocktails, possessing knives, and sabotaging public and private property. She remembers there were around seven charges directed against them.

22. On the same day, Rasha and the other detainees faced a military judge in the presence of two lawyers who were assigned to them. They repeatedly asked to speak to their families, but were refused.

23. All 17 female detainees, including the Second Applicant, were given one year's suspended prison sentence. On 11 March 2011 at around 10 pm, the Second Applicant was released from the military prison along with the other detainees.

(3) Response by members of the Supreme Council of Armed Forces:

24. In response to leaks about the forced genital examinations, the Supreme Council for the Armed Forces published Statement No. 29 on their official Facebook page on 28 March 2011. The SCAF stated that the military would "look into the truth of what was said recently about the torture of women arrested during the latest sit-in in Tahrir by military officers". On 11 April 2011, General Mohamed al-Assar and General Ismail Etman, two members of SCAF, appeared on the cable talk show 'Akher Kalam'. During the show, they denied that forced genital examinations took place.

25. On 31 May 2011, Shahira Amin, a journalist with CNN, reported that an unnamed general had confirmed that forced genital examinations were conducted by the military as a precautionary measure to protect soldiers against claims of sexual assault.[4] At a later stage, it was reported that the interviewed general was General

[4] CNN, *Egyptian general admits 'virginity checks' conducted on protesters*, May 30, 2011, available at: http://articles.cnn.com/2011-05-30/world/egypt.virginity.tests_1_virginity-tests-female-demonstrators-amnesty-report?_s=PM:WORLD.

Etman, the same SCAF member who had denied the occurrence of such practice earlier on the above-mentioned cable talk show.[5]

26. On 6 June 2011, a delegation from Human Rights Watch met with General al-Assar from SCAF. According to Human Rights Watch, and in contrast to his statements on the above-mentioned cable talk show, General al-Assar stated that "any girl or woman who goes to jail in Egypt has to go through a virginity testing" and that "the army has issued orders for that practice to be stopped".[6]

27. On 13 June 2011, General Hassan al-Ruweini, a member of SCAF, told a delegation from the activist group 'No To Military Trials' that forced genital examinations are routine in military prisons and that this practice is to protect soldiers from later accusations of depriving detainees of their virginity.[7]

28. On 26 June 2011, General Abd el-Fattah el-Sisi told a delegation from Amnesty International that forced genital examinations were carried out to protect the army from allegations of rape inside military prisons, and that such tests will not be conducted in the future.[8]

(4) Case before the military court [9]

29. In reaction to increasing public pressure, and after SCAF members had admitted that "virginity tests" were a routine practice in prisons, the head of the Military Justice Department requested the military prosecutor to open an investigation into the matter.

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[5] Video testimony of Shahira Amin, Mona Seif and Heba Morayyef on their meetings with SCAF members, interviewed by EIPR, dated 25 February, 2012, *Shihadat 'haq 'ala koshoof al-'ozreyya al-igbareyya*, available at: http://www.youtube.com/watch?v=VHV4lKc5gL4.
[6] Ibid.
[7] Ibid.
[8] Letter by Amnesty International, dated 22 February 2012, confirming SCAF member's admission of virginity tests and promise to halt them, *see* Annex 3.
[9] For case files, *see* Annexes 5, 6, 7, 8 and 9. *See also* Human Rights Watch, *Egypt: Military Impunity for Violence Against Women* (Apr. 7, 2012), http://www.hrw.org/news/2012/04/07/egypt-military-impunity-violence-against-women, *see* Annex 11.

30. On 9 June 2011, the military doctor who had allegedly performed the forced genital examinations, Dr. El-Mogy, was summoned by the military prosecutor and denied that the forced genital examinations took place. On 28 June 2011, after making an official complaint to his office on 25 June 2011, Samira was summoned by the military prosecutor and gave her testimony to the deputy prosecutor of the East Cairo Military Prosecution Office. The military prosecutor requested the Military Investigations Unit (*idarat al-ta'harreyat al-'askareyya*) to investigate her claims. In response to filing her complaint, the first Applicant received several threatening phone calls urging her to "drop the charges, you'll pay with your life."

31. From 9 July 2011 to 13 December 2011, the military prosecutor only questioned Dr. El-Mogy, two female prison wardens (Abeer Rashad and Fawzeyya Sobhi) and officer Ashraf Sayyed, the officer in charge of the prison's security.

32. On 20 December 2011, the trial of Dr. El-Mogy commenced at the Supreme Military Court. The military prosecutor charged Dr. El-Mogy with public indecency and insubordination. Dr. El-Mogy's trial was adjourned and sentencing was scheduled for 11 March 2012, on which date the Court acquitted Dr. El-Mogy of all charges. The decision of the Supreme Military Court was ratified by General al-Rowaini on 1 April 2012. The military prosecutor has chosen not to bring an appeal to the higher courts.

(5) Case before the Court of Administrative Justice:[10]

33. On 17 July 2011, a coalition of rights groups filed a lawsuit before the Administrative Court to demand the immediate cessation of the virginity testing policy in military prisons. The case was filed on behalf of the First Applicant and Maha Mohamed Maamoun, a human rights lawyer and activist. On 27 December 2011, Chief Justice Aly Fekry of the Court of Administrative Justice ruled that

[10] Human Rights Watch, *Egypt: Military Impunity for Violence Against Women* (Apr. 7, 2012), *see* Annex 11.

forced genital examinations carried out on the detainees were illegal and that any further occurrence of such practices would also be illegal.[11]

34. Decisions of the Court of Administrative Justice are made with respect to administrative decisions of a State agent. In this case, the Court's decision meant that the military had to cease its practice of virginity testing. A decision of the Court of Administrative Justice, however, does not afford any vindication to the individual victims nor does it prosecute or punish the perpetrators.

35. In response to the Court of Administrative Justice's decision, the head of the military judiciary, General Adel Morsy, stated that the ruling was inapplicable because there were no military laws allowing the practice of forced genital examination or virginity testing in the first place.[12]

C. OVERVIEW OF SUBMISSIONS

[11] *Samira Ibrahim and Maha Maamoun v. SCAF & others*, Court of Administrative Justice of Egypt, Case 45029 Year 65, (2012), *see* Annex 1 and 2.
[12] Human Rights Watch, *Egypt: Military Impunity for Violence Against Women* (Apr. 7, 2012), *see* Annex 11.

36. The Applicants submit that the Respondent State has violated their rights under the Charter in several respects. Analysis of the violations claimed is set out as follows:

(1) The analysis of the violations under **Article 2** (right to freedom from discrimination) and **Article 18(3)** (elimination of discrimination against women) details state obligations regarding non-discrimination, and details how the Respondent State discriminated against the Applicants on the grounds of their sex and political opinion (whether considered separately and from an intersectional perspective). Such discrimination constitutes a violation in itself, and also formed the background context for further violations by the Respondent State.

(2) The analysis of the violation of **Article 5** (prohibition of torture, and cruel, inhuman and degrading treatment) submits that the use of sexual violence by state officials, alone and in combination with other state violence, constitutes torture under the Charter, and that procedural violations have also occurred.

(3) The analysis of the violations under **Article 26** (right to equality before the law and equal protection of the law) and **Article 3** (duty to guarantee independence of the courts) argues that the Respondent State's use of its military justice system as a means of responding to the Applicants' claims of violence was inadequate in terms of remedy, given the lack of impartiality and independence in such system.

(4) The analysis of the violations of **Articles 9 and 11** examines how the Respondent State in arresting and detaining the Applicants, and subjecting them to torture and other ill-treatment, has violated the Applicants' right to freedom of opinion and freedom of assembly.

(5) The analysis of the **Article 1** (obligations of member states) violation notes the respect, protect, promote and framework for state compliance with obligations under the Charter and asserts that a violation of any right under the Charter is also a violation of Article 1.

D. ANALYSIS OF ARTICLE 2 AND ARTICLE 18(3) VIOLATIONS

37. The analysis of violations under Articles 2 and 18(3) are considered together below, given the overlap between sex discrimination under Article 2 and 18(3). Article 2 also includes discrimination on the ground of political opinion, which is considered separately below.

(1) AS TO THE LAW

The State must ensure that individuals enjoy Charter rights and freedoms without distinction on the basis of sex

38. Article 2 of the Charter 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, color, *sex*, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." (emphasis added)

39. Article 18(3) of the Charter provides further protection against gender discrimination and extends state obligations to include those set out in relevant international human rights instruments. It states 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."

40. Sex (and/or gender) is a widely prohibited ground for discrimination in many international and regional legal instruments,[13] and may incur both negative and positive State obligations. In determining discrimination under Article 2, the Commission has noted that:

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

> A violation of the principle of non-discrimination arises if: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; and c) if there is no proportionality between the aim sought and the means employed.[14]

41. Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women **(CEDAW)**[15] contains an expansive definition of discrimination against women.[16] Further, CEDAW calls on States Parties to CEDAW to condemn discrimination against women in "all its forms," and refers to appropriate measures States should take in "all fields" to ensure the full development and advancement of women.[17] The Commission has suggested that both direct and indirect forms of discrimination are prohibited by stating that, in relation to Article 2: "…it is apparent that international human rights law and the community of States accord a certain importance to the eradication of discrimination *in all its guises*".[18] 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.[19]

Violence against women constitutes discrimination on the basis of sex

[14] African Commission on Human and Peoples' Rights, *Kenneth Good v Republic of Botswana*, , Communication No. 313/05, (2010), para. 219."Discrimination against women" is defined in the Protocol to the African Charter on the Rights of Women in Africa **(Maputo Protocol)** 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, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.[14]

[15] The Respondent State ratified CEDAW on 18 September 1981.

[16] Article 1 of CEDAW provides that: *[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.*

[17] CEDAW, Articles 2 and 3.

[18] African Commission on Human and Peoples' Rights, *Association Mauritanienne des Droits de l'Homme v Mauritania*, Communication No.210/ 98, (2000), para. 11 (emphasis added).

[19] CEDAW Committee, General Recommendation 28, para 16.

42. The Commission has confirmed that violence against women amounts to a form of discrimination against women.[20] The Protocol to the African Charter on the Rights of Women in Africa **(Maputo Protocol)** describes 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.[21]

43. The Committee on the Elimination of All Forms of Discrimination Against Women **(CEDAW Committee)** established clearly that violence against women is a human rights issue, stating that: "[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men"[22] and that it can be understood as "violence that is directed against a woman because she is a woman or that affects women disproportionately".[23]

44. The UN General Assembly recognises that gender-based violence "…seriously inhibits women's rights to enjoy rights and freedoms on a basis of equality with men."[24] More specifically, the CEDAW Committee has stated that the rights and freedoms impaired or nullified by such violence include, among others: the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; the right to liberty and security of person; and the right to equal protection under the law.[25] The Commission itself "…holds the same view with the CEDAW…that, violence against women affects, compromises or destroys the

[20] African Commission on Human and Peoples' Rights, *EIPR and INTERIGHTS v Egypt*, Communication No. 323/2006, (2013), para. 165.
[21] Maputo Protocol, Article 1. It is to be noted that Egypt has not signed the Maputo Protocol, despite the Commission's decision in *EIPR and INTERIGHTS v Egypt*, Communication 323/2006 which requested the Government of Egypt to sign the Protocol.
[22] CEDAW Committee, General Recommendation 19, para 1.
[23] Ibid, para 6.
[24] General Assembly Resolution 67/144 Intensification of efforts to eliminate all forms of violence against women, 20 December 2012, para 2.
[25] CEDAW Committee, General Recommendation 19, para 7.

enjoyment and exercise by women of their fundamental and human rights in different spheres of life."[26]

The State must take steps to eliminate discrimination on the basis of sex, including violence against women

45. In determining State obligations to eliminate discrimination, the CEDAW Committee has interpreted CEDAW to require States Parties to *respect, protect and fulfil* women's rights to non-discrimination and to the enjoyment of equality.[27] The obligation to respect 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."[28] The obligation to promote and fulfil encompasses, at least: the development of 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 taken to identify the causes and consequences of violence against women through the generation and dissemination of gender-disaggregated data.[29] This obligation also extends to raising public awareness about the issue[30] and taking steps to transform social and cultural norms regulating the relations of power between women and men.[31]

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[26] African Commission on Human and Peoples' Rights, *EIPR and INTERIGHTS v Egypt,* Communication No. 323/2006, (2013), para. 165.
[27] CEDAW Committee, General Recommendation 28, para 9. The obligation to *protect* was of particular relevance in the Commission's decision in *EIPR and INTERIGHTS v Egypt*, Communication 323/2006.
[28] CEDAW Committee, General Recommendation 28, para 9
[29] Such obligations are set out in, among other instruments: 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); CEDAW General Recommendation 28, para 10. See also Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Article 8.
[30] 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.
[31] United Nations Secretary General, In Depth Study on Violence against Women, para 101.

46. In applying this framework to violence against women in particular, State Parties' obligations have been elucidated globally through case law, UN treaty-body concluding observations, and authoritative commentary. Specifically in relation to violence against women, States are obliged to, at least:

47. Enact laws prohibiting all forms of violence against women[32] and ensure that existing legislation is amended as necessary, and monitored through adequate funding and functioning of legal processes. [33] The obligation on States to adopt or amend legislation in order to eliminate violence against women and gender-based discrimination has been confirmed by, for example, the European Court of Human Rights (**European Court**) in *X and Y v. the Netherlands*,[34] and the Inter-American Commission on Human Rights (**Inter-American Commission**) in *María Mamérita Mestanza Chávez v. Peru*.[35] In *MC v. Bulgaria*,[36] the European Court found that although the article prohibiting rape in Bulgaria's penal code did not "mention any requirement of physical resistance by the victim", physical resistance appeared to be required in practice to pursue a charge of rape.[37] The Court found a violation of the prohibition on torture, inhuman or degrading treatment or punishment, and the right to respect for private life, in that domestic law and practice in rape cases and the investigation into the victim's rape did not secure the observance by the respondent State of its positive obligation to provide effective legal protection against rape and sexual abuse.

[32] Maputo Protocol, Article 4(2)(a) and Article 2(1). See also Belem do Para, Article 7; Istanbul Convention, Article 4; see also CEDAW, Articles 2 and 3; CEDAW General Recommendation 28, para 10, 24, 32, 35; Special Rapporteur on Violence Against Women, 1999, para 25; UN Special Rapporteur on Violence against Women, State Responsibility to Eliminate Violence against Women, 2013, para 21.
[33] Maputo Protocol, Article 2(1) and 4(2)(i); see also UN Secretary General, In Depth Study of Violence against Women, paras. 300-301; See also the National Accountability Framework to End Violence against Women and Girls, produced in 2010 by the former United Nations Development Fund for Women (merged into UN Women in July 2010 by the UN General Assembly) as a tool to assist States in their national-level efforts at monitoring laws, policies and programmes; UN Secretary General, In Depth Study of Violence against Women, para 388.
[34] European Court of Human Rights, *X and Y v. the Netherlands*, App. No. 8978/80, (1985), which found that the Netherlands had breached its human rights responsibilities by failing to create appropriate criminal legislation applicable to the rape of a mentally handicapped young woman.
[35] Inter-American Commission on Human Rights, *Maria Mamerita Mestanza Chavez v. Peru*,Case 12.191, No. 66/00, (2000), which involved a government sterilization programme.
[36] European Court of Human Rights, *MC v. Bulgaria*, App. No. 39272/98 (2003).
[37] Ibid, para 174.

48. Enforce existing legislation, including through effective investigation, prosecution of perpetrators, reparation and support/rehabilitation services for victims:[38] States have a duty to investigate, prosecute, punish, and provide redress in cases of violence against women, whether those acts are perpetrated by the state or by private persons.[39] In elaborating on these duties, courts and treaty-bodies have provided the following guidance to States.

(1) Investigations and prosecutions must be conducted without undue delay:[40] In rendering the present communication admissible, the Commission noted that "[s]eventeen months of inaction on the part of the State following the introduction of a complaint […] is an unduly prolonged period."[41] The European Court stated that one year of inaction in relation to a rape investigation constituted "significant delay".[42]

(2) Investigations and prosecutions must be effective: In *MC v. Bulgaria*,[43] the European Court upheld the positive duty of States to ensure the effectiveness of the criminal law through effective investigation and prosecution. It found that the approach of the prosecutors and investigators "fell short of the requirement inherent in States' positive obligations — viewed in the light of the relevant modern standards in comparative and international law — to establish and apply

[38] Maputo Protocol, Article 4(a), (e), (f).
[39] African Commission on Human and Peoples' Rights, *EIPR and INTERIGHTS v Egypt*, Communication 323/2006, (2013), para. 155-156, 163; Report of the Fourth World Conference on Women, para 124 (b); CEDAW General Recommendation 28, para 17; CSW 57, Agreed Conclusions, para 16; General Assembly resolutions 64/137 and 65/187, Human Rights Council resolution 14/12; Istanbul Convention, article 5(2); Belem do Para Convention, article 7; HRI/GEN/1/Rev.8, 8 May 2006, para. 27; United Nations General Assembly Resolution, Human Rights Council, *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*, A/HRC/14/L.9/Rev.1, 16 June 2010.
[40] Istanbul Convention, Article 49(1).
[41] African Commission on Human and Peoples' Right, *EIPR and INTERIGHTS v Egypt*, Communication 424/12, Admissibility decision dated 22 November 2013, para 41. *See also Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000), para 55. The Inter-American Commission found that the failure of Brazil to prosecute and punish a perpetrator of domestic violence for more than 15 years after the start of an investigation contradicted Brazil's international commitments and was an indication that the State condoned such violence.
[42] European Court of Human Rights, *MC v. Bulgaria*, App. No. 39272/98 (2003), para 184.
[43] Ibid.

effectively a criminal law system punishing all forms of rape and sexual abuse".[44] In particular, the Court held that the creation of a safe and confidential system for reporting violence against women, and protection of Applicants from any possible acts of retaliation, form part of effective investigation procedures.[45] In the case of *Opuz v Turkey*,[46] the applicant and her mother were the victims of severe, escalating and ultimately fatal domestic violence and serious threats by the applicant's husband. The European Court found that delays, police and judicial passivity created a climate conducive to domestic violence in Turkey and that such failure to respond to gender-based violence amounts to a form of discrimination as it mainly affects women and therefore fails to provide them with protection by the law on an equal footing to men.[47]

49. Take specific measures to ensure gender-sensitive investigations and prevent gender stereotyping and secondary victimisation: The CEDAW Committee considered gender stereotyping in the context of the prevention and elimination of violence against women in *Vertido v the Philippines.*[48] The applicant argued that the trial court relied on gender-based myths in its judgment. The CEDAW Committee found the Philippines in violation of its obligations under Articles 2(f) and (a) and noted that: "the judiciary must take caution not to create inflexible standards of what women or girls should be…based merely on preconceived notions…"[49] The Maputo Protocol requires that:

> States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices

[44] Ibid, paras 177 and 185.
[45] Ibid, para 8(c).
[46] European Court of Human Rights, *Opuz v Turkey*, App. No. 33401/02 (2009).
[47] Ibid, para 196-200.
[48] CEDAW Committee, *Vertido v the Philippines*, CEDAW Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008 (2010).
[49] Ibid, para 8.4

> and all other practices which are based on the idea of the inferiority of either of the sexes, or on stereotyped roles for women and men.[50]

50. States must have "regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences…"[51] In this regard, the UN Secretary General urges investigation into violence against women in a "prompt, thorough, gender-sensitive and effective manner" including maintaining official complaint records, undertaking investigation and evidence-gathering expeditiously, collecting and safeguarding evidence, witness protection where needed, and providing the opportunity for women to make complaints to, and deal with, skilled and professional female staff.[52]

51. Rules of evidence and procedure must be developed to ensure that they are not based on harmful stereotypes that would inhibit women from testifying, and strategies to make criminal proceedings more gender-sensitive may require victim confidentiality through in-camera proceedings where appropriate, victim support and protection measures and trained personnel.[53] In addition, those who respond to violence against women, such as law enforcement officers, immigration, judicial and medical personnel and social workers, must have the capacity to deal with such violence in a gender-sensitive manner[54] and training, guidelines and manuals relating to violence against women contribute to such efforts.[55]

52. Secondary victimisation is victimisation that occurs not as a direct result of the criminal act but through subsequent victim-blaming attitudes, behaviours and

[50] Article 2(2). See also Maputo Protocol Article 4(d); CEDAW Articles 2(f) and 5(a); Convention Belem do Para, Articles 6(b) and 8b(b); CRPD Article 8(1)(b); CESCR GC16, paras 11 and 14.
[51] Istanbul Convention, Article 49.
[52] UN Secretary General, In Depth Study on Violence against Women, para 268; Report of the Fourth World Conference on Women, para 284.
[53] UN Secretary General, In Depth Study on Violence against Women, para 268; Report of the Fourth World Conference on Women, para 268.
[54] CEDAW Committee, *A.T. v. Hungary*, CEDAW Communication No. 2/2003, UN Doc. CEDAW/C/32/D/2/2003 (26 January 2005), 9.6.
[55] General Assembly Resolution 55/67, para. 17.

practices of State institutions responding to the complaint.[56] Secondary victimization can be the result of, and a contribution to, harmful stereotyping and stigmatizing. Due to the particular susceptibility of victims of rape and other forms of sexual violence to being re-traumatised through interaction with the criminal justice system, it is submitted that a distinct approach should be adopted to the interpretation of States' positive obligation in the context of sexual violence crimes. In particular, States have a special duty to avoid secondary victimisation, which constitutes an additional violation of the victim's rights quite distinct from the rape itself, as it interferes with her psychological integrity.

States Parties must not discriminate on the basis of a person's political belief

53. Article 2 of the Charter furthermore prohibits discrimination on the basis of a person's *political opinion.* The test for establishing discrimination on the basis of political opinion is the same as for discrimination on other grounds, and requires that: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; and c) if there is no proportionality between the aim sought and the means employed.

Intersection between gender and political opinion as bases for discrimination

54. The freedom to express one's political opinion without fear of discrimination is all the more important for groups at risk of violations, including women. The UN Special Rapporteur on the rights to freedom of assembly and association has stated that "[t]he ability to hold peaceful assemblies is a fundamental and integral component of the multifaceted right to freedom of peaceful assembly, which shall

[56] This definition is adopted by the 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 Survivors' Help-Seeking Experiences With the Legal and Medical Systems*, Violence and Victims (2005), 20(1), p. 50.

be enjoyed by everyone…all the more relevant for groups most at risk of violations and discrimination, such as women…"[57] He called upon States "[t]o ensure that those who violate and/or abuse the rights of individuals to freedom of association and of peaceful assembly are held fully accountable by an independent and democratic oversight body and by the courts of law."[58]

55. CEDAW provides that "States Parties shall take in all fields, in particular in the *political*, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men"[59] and that "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country…"[60]

56. In discussing the ways that women may be discriminated against while exercising their right to political participation, the CEDAW Committee found that:

> traditional attitudes by which women are regarded as subordinate to men…may justify gender-based violence as a form of protection or control of women…The underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation.[61]

57. As one example, the Working Group on the issue of discrimination against women in law and in practice found that "[s]tigmatization, harassment and outright attacks have been used to silence and discredit women who are outspoken as leaders,

[57] *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).
[58] Ibid, 81. See 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).
[59] CEDAW, Article 3.
[60] CEDAW, Article 6.
[61] CEDAW Committee, *General Recommendation 23, Political and Public Life* (Sixteenth session, 1997), ¶11, U.N. Doc. A/52/38/Rev.1 at 61 (1997).

community workers, human rights defenders and politicians…Violence against women defenders is sometimes condoned or perpetrated by State actors, including through police harassment of female demonstrators."[62] The Working Group notes that in order "for women to have the capacity to participate in political and public life on equal footing with men, including to build autonomous movements for their own empowerment, they must be able to exercise their rights to freedom of thought, conscience, religion, expression, movement and association. It is imperative to recognize and secure these rights as individual rights for women's effective participation in political and public life."[63]

(2) AS TO THE FACTS

58. The Applicants were not able to enjoy the rights and freedoms set out in the Charter as the State discriminated against them on the basis of their gender and, separately and in combination, on the basis of their political opinion. The specific ways in which this occurred are set out below, which are individual violations and collectively can be viewed as a widespread pattern of discrimination.

59. The present case offers a critical opportunity for the Commission to develop an effective and holistic approach to equality, by considering not only formal and substantive equality, but also the underlying structural factors such as stereotyping that contribute to gender discrimination. In particular, it offers an opportunity to examine the Respondent State's obligations to adopt and ensure an appropriate non-discrimination framework and protective measures for victims of rape and sexual assault.

The State engaged in violence against the Applicants, on the basis of their sex, their political opinion, and on the basis of their sex and political opinion considered together

[62] Report of the Working Group on the issue of discrimination against women in law and in practice, ¶65. *Delivered to the Human Rights Council*, U.N. Doc. A/HRC/23/50 (Apr. 19, 2013).
[63] Ibid, para 34.

60. On 10 March 2011, the Applicants (along with 15 other female detainees and 157 male detainees) were transported to a military prison. State agents then questioned the female detainees on their marital status and, following identification of the seven unmarried female detainees in the group, subjected them to beating, electroshocks, and forced genital examinations by a male military doctor. One at a time, each of the Applicants was coerced through verbal intimidation and electroshocks by State agents to undress completely in view of the male military doctor, a female prison guard, and other male officers and soldiers. The military doctor then conducted forced genital examinations using his hand, an examination lasting for approximately five minutes. The Applicants did not consent to such procedure. Following the forced genital examinations, the military doctor ordered each of the Applicants to sign a prepared statement saying that she was unmarried and a virgin, and that her hymen was intact.

61. At no time did any State official or other person inform the Applicants of any lawful purpose for the genital examination or the statement they were ordered to sign. When the Second Applicant asked the officer in charge of the prison why the seven unmarried female detainees had been subjected to such examination, he replied "so that no girl (who is not a girl) goes out and says we attacked her".[64] The same logic is also to be found in the justifications of forced genital examinations made by members of SCAF.

62. Such action by State agents is unjustified and constitutes gender discrimination and discrimination on the basis of political opinion. It had severe physical, mental and social impact on the Applicants, both at the time and of a continuing nature. In terms of physical impact, the Applicants suffered pain through rough handling, beating, electroshocks and the forced genital examinations. In terms of mental suffering and social impact:

[64] Second Applicant testimony, p4 (translated). *See* Annex 18

(a) The First Applicant reports that the humiliation and physical, psychological and mental damage she experienced was of such an extent that she wished for death, stating that. "I kept telling myself people get heart attacks, why don't I just have one and die"[65] and "[w]e wished we were dead. I felt…envy. Others had died, why couldn't I have died too? Why wasn't I dead?"[66] She subsequently lost her job due to the emotional impact.[67]

(b) The Second Applicant felt that "[t]he soldiers enjoyed beating us and ordering us: 'wash the dishes; clean the floor'" and that in beating and electrocuting the detainees, the State agents "meant to harm us psychologically."[68]

63. The discriminatory impact of such State violence against women extends beyond the Applicants themselves to place women in Egypt generally in a state of fear regarding their political engagement specifically, and their participation in public space generally, given the anticipated retaliatory treatment by State officials and culture of impunity. This impact is reflected in the First Applicant's comment that "[t]hey're breaking you so you don't even think of asking for Egypt's rights. So that you don't even consider demonstrating against oppression"[69] and the Second Applicant's statement that "…the aim of their aggressive act was to break our will and to stop us from continuing our activism."[70] Sexual violence against women engaged in political activity in Egypt in recent years has been described as aimed at "…silencing them, excluding them from public spaces and the political events shaping Egypt's future, and breaking the resistance of the opposition"[71] and as "…

[65] First Applicant video testimony (transcribed and translated), p4. *See* Annex 20
[66] Ibid.
[67] First Applicant testimony to military prosecution on 28 June 2011 (translated), p8. *See* Annex 9
[68] Second Applicant testimony, p5. *See* Annex 18
[69] First Applicant video testimony (transcribed and translated), p5. *See* Annex 20
[70] Second Applicant testimony, p4. *See* Annex 18
[71] Amnesty International, *Egypt Gender-Based Violence Against Women Around Tahrir Square* (February 2013) at http://www.amnesty.org/es/library/asset/MDE12/009/2013/es/4100936b-954c-4696-ab69-35b2790b7ccb/mde120092013en.pdf, p8.

serious crimes that are holding women back from participating fully in the public life of Egypt at a critical point in the country's development."[72]

64. In *EIPR and INTERIGHTS v Egypt*, the Commission captured the concerns echoed by the Applicants, specifically noting the wider social context in which the violations occurred:

> It is clear that the incidents alleged took place in a form of a systematic sexual violence targeted at the women participating or present in the scene of the demonstration. Furthermore, perpetrators of the assaults seemed to be aware of the context of the 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 means of punishing and silencing them from expressing their political opinion.[73]

The State engaged in gender stereotyping against the Applicants

65. The focus on the marital/virgin status of the Applicants by the State is evidence that such action was taken on the basis of the sex of the Applicants and on the stereotypes associated with gender roles in society. Specifically, in response to their participation in a political demonstration in a public space, each of the Applicants was branded a 'prostitute' by State agents. The labelling of the Applicants in this manner, and the consequential swearing, physical abuse and sexual harassment, sends a strong message to women and men across the Respondent State that political engagement by women and prostitution are connected. As noted by the Second Applicant, at the military prison an officer named Ibrahim threatened

[72] Human Rights Watch, **"**Egypt Epidemic of Sexual Violence: At Least 91 Attacks in 4 Days; Government Neglect Means Impunity Rules (3 July 2013). *See* Annex 10

[73] African Commission on Human and Peoples' Rights, *EIPR and INTERIGHTS v Egypt*, Communication 323/2006, (2013), para 152.

female detainees in the unmarried group that he would electrocute, beat and rape with any unmarried woman who says she is a virgin but turns out not to be. In making such statements, State agents demonstrated their willingness and apparent entitlement to interfere with the private lives of the Applicants and engage in rape and physical attack based on their moral judgments about the women's perceived sexual activity.

66. Many of the questions put by the authorities to the Applicants during their detention and trial, were of seeming irrelevance and based on gender stereotypes of the activity expected of a young woman in Egypt. For example, the military prosecutor asked the First Applicant, among other things: "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 stated address] in spite of the fact that it is very far from where you used to work?", "What were you wearing at the time of your arrest?"[74]

67. These statements all suggest a negative gender stereoptyping of women protesters which assigns to them a subservient position in society, devalues their role and voices, and (when the message is absorbed by both women and society in general), contributes to women adopting and being assigned a passive role in society.

The State has failed to adequately investigate the Applicants' claims of violence and prosecute the perpetrators.

68. <u>During the detention and trial against the Applicants</u>: The Applicants were refused an opportunity to give a proper account to the prosecutor and judge of the abuse suffered. In this regard, the First Applicant notes that "I was shocked. I was

[74] English translation of testimony of Samira Ibrahim Mahmoud before the military prosecutor, dated 28 June 2011, *see* Annex 9.

counting on [the prosecutor]…That he would ease my troubles, listen to me"[75] and that "[n]obody listens…not the judge…nobody listens."[76]

69. Initial investigation and charges: Upon the First Applicant filing a complaint with the military public prosecutor about the violations she had suffered in the military prison, the military at first denied the allegations and only later ordered an investigation to be carried out. Despite the severity of the forced genital examinations, the accused military doctor was charged only with "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. The use of this provision meant that, instead of focusing on the sexual violence against the Applicants, the charge was directed at addressing the effect of the accused's action on society at large rather than the attack on the Applicants' bodily integrity. It is submitted that the State's prosecutorial approach in response to violence against women does not focus on the body as the site of these actions, but is instead drafted with an emphasis on gender stereotypes of what the attack on the body means or should mean to the (individual and) society.

70. As the investigation and trial took place under the Code of Military Justice, the First Applicant was prevented 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 (bis) of the Code allows only the military prosecutor or the defendant to appeal the decision. A justice system that places victims in such a passive position effectively prevents victims from claiming redress.

71. Further, she experienced substantial delay in her attempt to access justice in response to the forced genital examination and other abuse. Samira notes that after filing a report: "First they said they were away on vacation, etc. Then that it's

[75] First Applicant video testimony (transcribed and translated), p6. *See* Annex 20
[76] Ibid, p7.

summer, that there are exams…there's summer vacation, then there's Ramadan…then there'd be Eid, and that the country is unstable. Slower than you could believe. Nothing, no steps. I filed two law suits with the government. Everything just gets postponed. They don't want to investigate so as not to raise the issue of virginity tests."[77]

72. At the same time, Samira 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 to her safety:

> If only you knew, God knows, how many threatening phone calls I've been getting. … When I first filed the report and it started getting known, I started getting calls. 'Drop the charges, you'll pay with your life.' 'You'll end up like Khaled Said.'[78]… When I went there to complain about the unknown numbers calling me they told me they can't file against unknown or secret numbers, or when it says no number, or that it's a private number.[79]

73. The Egyptian criminal justice system in practice completely prevented the Second Applicant from pursuing justice in relation to the sexual violence. This is because the forced genital examinations of the seven female detainees was considered in court as one criminal act, despite the fact that multiple victims 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 Applicant was precluded from pursuing a case against the military doctor as

[77] First Applicant video testimony (transcribed and translated), p7. *See* Annex 20
[78] Khaled Said was a young Egyptian man who died under disputed circumstances in Alexandria on 6 June 2010, after being arrested by Egyptian police. In October 2011, two Egyptian police officers were found guilty of manslaughter and sentenced to seven years in prison for beating Saeed to death. See, for example: Maggie Michael, "Khaled Said, Young Man Whose Death Inspired Egypt's Protests, Police Attackers Convicted" (26 October 2011) The World Post at http://www.huffingtonpost.com/2011/10/26/khaled-said-police-convicted_n_1032884.html.
[79] First Applicant video testimony (transcribed and translated), p7-8. *See* Annex 20

he had been acquitted in the trial ensuing from the First Applicant's claim, and this decision had not been repealed.

74. The Second Applicant was effectively denied any opportunity to address the violations against her by the Respondent State. In its admissibility decision in the present case, the Commission noted that:

> …the Applicants have amply demonstrated that as a result 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.[80]

75. In light of the above and the 17 months of inaction on the part of Respondent State following the introduction of a complaint by the Second Applicant, the Commission concluded 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.[81]

76. The treatment of the Applicants by the State is representative of the weak response by the State regarding complaints about rape and sexual violence in Egypt. In a previous case concerning violence against women in Egypt, the Commission has indicated that the State should improve its response to gender-based violence.[82] The complete lack of implementation of this decision of the Commission to date is a

[80] African Commission, *Samira Ibrahim Mahmoud and Rasha Ali Abdel-Rahman v. Egypt*, Communication 424/12, Admissibility decision dated 22 November 2013, para 41.
[81] Ibid, para 42.
[82] African Commission on Human and Peoples' Rights, *EIPR and INTERIGHTS v Egypt*, Communication 323/2006, (2013)

strong evidence of the systemic delays and lack of political will in relation to the reform of Egypt's legal framework as it relates to gender-based violence.

77. This is further supported by a number of reports by international organisations. For example, a report by Human Rights Watch details high levels of gender-based violence against female protesters, amid a climate of impunity, and notes the need for "concerted efforts to improve law enforcement's practice in protecting victims and effectively investigating and prosecuting the attackers, as well as a comprehensive national strategy on the part of the government."[83] Similarly, a report by Amnesty International into the targeting of female protesters by security and armed forces noted a culture of impunity and an inadequate response by the authorities and stated:

> It is clear that these attacks are facilitated by the deep discrimination against women in law and practice, the institutionalized attitudes that discriminate against women, and the failure of the authorities to prevent, combat and punish violence against women and adopt anti-harassment legislation proposed by women's rights activists.[84]

The Commission is respectfully requested to take account of the mentioned NGO reports in this case, coupled with the lack of action by the State for the implementation of the Commissions earlier decision addressing gender-based violence in Egypt, as they demonstrate the existence of a prima facie indication that the criminal justice system passivity towards violence against women creates a climate conducive to such conduct, which can be regarded as a form of discrimination against women. In *Opuz v Turkey*, the European Court examined a number of reports by leading NGOs regarding the prevalence and impact of violence against women generally in Turkey. These reports, unchallenged by the

[83] Human Rights Watch, "Egypt Epidemic of Sexual Violence: At Least 91 Attacks in 4 Days; Government Neglect Means Impunity Rules (3 July 2013). *See* Annex 10

[84] Amnesty International, *Egypt Gender-Based Violence Against Women Around Tahrir Square* (February 2013) at http://www.amnesty.org/es/library/asset/MDE12/009/2013/es/4100936b-954c-4696-ab69-35b2790b7ccb/mde120092013en.pdf, p9.

government, contributed significantly to the Court's finding that violence against women was tolerated by the authorities and that the available remedies did not function effectively.[85]

78. It is submitted that the failure by the Respondent State to take steps to ensure an effective investigation and prosecution in response to instances of violence against the Applicants was a breach of the Respondent State's obligations to prevent and to prosecute gender-based violence, and therefore constituted discrimination on the basis of sex in violation of Article 2. Further, in light of such lack of progress and wider culture of impunity, it is submitted that more detailed guidance in this case would benefit the Respondent State in relation to its obligations under the Charter.

The State's actions constituted secondary victimisation of the Applicants

79. Further, the Applicants, in seeking to pursue criminal convictions, faced a State response to rape that constituted secondary victimisation. The response of institutions and individuals to the Applicants including victim-blaming attitudes, behaviours and practices engaged in by officers, the prosecutor and judges resulted in additional trauma for the Applicants separate to the initial violations. Many of the questions put by the authorities to the Applicants during their detention and trial, were of seeming irrelevance and based on gender stereotypes of the activity expected of a young woman in Egypt.

80. Beyond the impact on the Applicants themselves, such secondary victimisation undermines the effective operation of Egypt's criminal justice system itself. It prevents victims from seeking redress for sexual violence and rape because of the fear of stereotyping and secondary victimisation, leading to impunity and to the detriment of the rule of law as a whole. While a recent UN report found that over 99 per cent of women and girls are subjected to sexual harassment in Egypt (which

[85] European Court of Human Rights, *Opuz v Turkey*, App. No. 33401/02 (2009), para. 197-200

experts attributed to a general rise in gender-based violence in the past few years),[86] another study reported that only 2 per cent of Egyptian women who are subjected to such abuse report such incidents to the police as they expect their communities to blame them for having put themselves in a position that made them vulnerable to harassment.[87]

The State has failed to enact appropriate legislation to protect women from violence

81. The Egyptian Penal Code[88] includes the following provisions:

(b) Article 267 prohibits anyone from "lying with a woman without her consent" (with a sentence of death or life imprisonment).[89] However, the Court of Cassation, the highest court of the Egyptian judicial system, has clarified that this means nothing less than full vaginal intercourse using a penis.[90]

(c) Article 268 prohibits indecent assault and punishes it with hard labor for three to seven years. Instances of anal rape or rape using parts of the body or objects other than male genitals are treated as an indecent assault .[91]

(d) Article 278 prohibits public acts of indecency (with a penalty of detention up to one year or a fine).

(e) Article 279 prohibits immoral acts against women, whether carried out in public or private (with a penalty of detention up to one year or a fine).

82. In comparison to standards regarding rape under international criminal and human rights law (which are set out in the analysis of the Article 5 violation below), the

[86] See Study on Ways and Methods to Eliminate Sexual Harassment in Egypt, UN WOMEN, May 2013 (Ed. Bouthaina El Deeb, Ph.D.), http://harassmap.org/en/wp-content/uploads/2014/02/287_Summaryreport_eng_low-1.pdf, p6.

[87] Amal Abdelhamid and Ziad al-Alaimy, "Gara'im al-ightisab bain al-waqe' wat-tashree'", New Woman Foundation (2009).

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

[89] Sentence was increased by Decree No. 11 for the Year 2011, issued by the Supreme Council of Armed Forces.

[90] Court of Cassation Reports s.3, no. 294, p.788, decision dated 14 April 1964, as cited in Badawy, Ahmed Mohammed, *Gara'im al-'ird*, p.17.

[91] Court of Cassation, decision dated 21 March 1960, Technical Office, Year 11, p.286, as cited in Badawy, Ahmed Mohammed, *Gara'im al-'ird*, p.33, 37.

Respondent State has a narrow definition of rape, which inadequately protects against violence against women. It requires penile penetration (so does not protect against rape using other parts of the perpetrator's body or using objects).

83. Around the world, a substantial number of States have moved towards a definition of rape that encompasses a broader range of acts than in current Egyptian law.[92] Across Africa, only Kenya and Liberia require penetration with a penis in their legislative rape definitions. At least Namibia, Zimbabwe, Angola, Mauritius, Djibouti, Lesotho, Botswana, Mali, Burkina Faso, Niger, Senegal, Guinea and South Africa have broader rape definitions than Egypt, for example, variations on the wording 'any act of sexual penetration'. Many countries across Europe have moved towards less restrictive rape definitions, for example, using language such as "any act of sexual penetration of any kind and by any means whatsoever". Similarly, a large number of countries in the Americas have adopted statutes including rape definitions that explicitly include penetration by objects other than genitalia.

84. Accordingly, the Applicants are precluded from accessing appropriate remedies given the restricted legislative framework, leading to feelings of disempowerment. Further, the lack of access to justice is one of the most important determinants of poverty among women,[93] and impacts disproportionately upon disadvantaged women. As noted by UN Women "[l]aws can play a positive role in shaping society, by creating new norms and by helping to bring about social change."[94] In the absence of a comprehensive rape definition, the Respondent State sends a clear message to Egyptian society that certain forms of rape are either acceptable or not as significant as the narrowly defined form of rape.

[92] See Annex 21 for extracts of rape legislation from Africa, Europe and the Americas.

[93] ActionAid, "Supporting Women's Access to Justice" at http://www.actionaid.org/what-we-do/emergencies-conflict/conflict-and-protection/supporting-womens-access-justice

[94] UN Women, Progress of the World's Women: In Pursuit of Justice (2011) http://progress.unwomen.org/legal-frameworks/

85. In terms of the onus on the Applicants, the European Court, in its consideration of the requirements within Bulgaria's rape legislation, noted that "[it] is not required to seek conclusive answers about the practice of the [state] authorities in rape cases in general. It is sufficient…to observe that the applicant's allegation of a restrictive practice is based on reasonable arguments and has not been disproved by the government."[95]

[95] European Court of Human Rights, *MC v. Bulgaria,* App. No. 39272/98 (2003), para. 174.

E. ANALYSIS OF ARTICLE 5 VIOLATION

86. Article 5 of the Charter provides:

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

87. In the present case, the Applicants submit that the authorities subjected them to treatment in violation of their right to dignity and amounting to cruel, inhuman and degrading treatment (ill-treatment) and torture contrary to Article 5 of the Charter. The Respondent State's failure to adequately investigate the alleged ill-treatment and torture, to prosecute those responsible and to provide redress to the Applicants constitute separate violations of Article 5.

Rape and other forms of sexual violence may amount to torture contrary to Article 5 of the Charter

88. This section focuses exclusively on the authorities' forced genital examination of the Applicants. The use of sexual violence generally, and of forced genital examinations in particular, is reportedly a common practice in the Respondent State. Indeed, as outlined above, representatives of the leadership of the Armed Forces of the Respondent State admitted that "the virginity tests procedures are a normal procedure executed in the military prisons."[96] In its jurisprudence, the Commission recognised that acts of rape, and the failure to prevent and respond to

[96] English Translation of Judgment of the Administrative Court of Justice, First District, in the case of *Samira Ibrahim Mohamed Mahmoud & Maha Mohamed Maamoun Hassan Adallah v (1) Head of the Supreme Council of the Armed Forces, (2) Defence Minister, (3) The Military Public Prosecutor, (4) Commander of The Central Military Region*, 27 December 2011, p.2. *See* Annex 2

such acts, can amount to a violation of Article 5 of the Charter.[97] The present case presents an opportunity for the Commission to further 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.

(1) AS TO THE LAW

89. The jurisprudence of other human rights treaty bodies confirms that sexual violence and rape by officials can constitute a form of torture, and 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."[98] The UN Security Council has recognised that rape and other forms of sexual violence constitute grave international crimes.[99]

(i) Rape under international criminal and human rights law

90. In its landmark case of *The Prosecutor v Anto Furundžija*, the International Criminal Tribunal for the former Yugoslavia (**ICTY**) found that the following elements constitute rape: "(i) sexual penetration, *however slight*, of the vagina of the victim by the penis of the perpetrator or *any other object used by the*

[97] African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communication Nos. 279/03-296/05, 2009, para.157; *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*, Communication Nos. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97, 210/98, para.118; see also *Egyptian Initiative for Personal Rights & Interights v Egypt*, Communication 323/06, paras.201-202; *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, Communication No. 249/02.

[98] UN Special Rapporteur on Contemporary Forms of Slavery, 'Systematic rape, sexual slavery and slavery-like practices during armed conflict,' E/CN.4/Sub.2/1998/13, 22 June 1998, para.55.

[99] 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.

perpetrator; (ii) by *coercion or force or threat of force* against the victim or a third person".[100]

91. This definition is further expanded upon in the 'Elements of Crimes of the International Criminal Court' which define rape as:

> [T]he perpetrator invaded the body of a person by conduct resulting in penetration, *however slight*, any part of the body of the victim or of 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.
>
> The invasion was committed *by force, or by the threat of force* or coercion, such as that was caused by fear of violence, duress, *detention*, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent.[101]

92. The ad-hoc tribunals' jurisprudence on what constitutes rape is reflected in the approach of regional human rights mechanisms. The Inter-American Court of Human Rights (Inter-American Court) considered this matter in the '*Castro Castro Prison case*' where a prisoner had been subjected to sexual violence through a "finger vaginal examination" that:

> sexual rape must be understood as an act of vaginal or anal penetration, without the victim's consent, through the use of other parts of the

[100]International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Anto Furundžija*, Case No IT-95-17/1-T, Trial Chamber Judgment of 16 November 1998, para.185. (emphasis added)
[101]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. (emphasis added)

> aggressor's body or objects, as well as oral penetration with the virile member.[102]

The Court went on to find that:

> the acts of sexual violence to which an inmate was submitted under an alleged finger vaginal examination *constituted sexual rape* that due to its effects constituted torture.[103]

93. The European Court held that for sexual contact to be legal, "consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances."[104] Where the perpetrator uses force, threat of force or coercion, it is not possible to infer consent.

94. Other forms of sexual assault or violence falling short of actual penetration are similarly prohibited under international law and may constitute torture or ill-treatment.[105] Sexual violence or sexual assault has been defined as "any violence, physical or psychological, carried out through sexual means or by targeting sexuality."[106] According to the International Criminal Tribunal for Rwanda (**ICTR**), "[S]exual violence is not limited to a physical invasion of the human body and may include acts that do not involve penetration or physical contact. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics."[107]

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[102] 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'*).
[103] Ibid, para.312. (emphasis added)
[104] ECtHR, *MC v. Bulgaria*, App. No. 39272/98,4 December 2003, para.163.
[105] ICTY, Trial Chamber, *Furundžija*, para.186; see also Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/7/3, 15 January 2008, para. 35.
[106] UN Special Rapporteur on Contemporary Forms of Slavery, 'Systematic rape, sexual slavery and slavery-like practices during armed conflict,' E/CN.4/Sub.2/1998/13, 22 June 1998, para. 21.
[107] ICTR, Prosecutor v Akayesu, Case No ICTR-96-4-T, Trial Chamber Judgment of 2 September 1998), para.688.

(ii) Rape and certain other forms of sexual violence meet the severity threshold for torture

95. Under international law, rape and certain other forms of sexual violence may constitute torture, taking into account the severe pain or suffering caused by such acts.

96. The UN Human Rights Committee has clearly recognised that rape may amount to a violation of Article 7 of the International Covenant on Civil and Political Rights (**ICCPR**) (prohibition of torture).[108] This reflects 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 (see in particular *Mejia v Peru*,[109] *Aydin v Turkey*,[110] and *Miguel Castro Castro Prison v Peru*[111]). In the case of *Raquel Mejia v Peru*, where a military official had twice raped the complainant, the Inter-American Commission explained that:

> [r]ape causes physical and mental suffering in the victim…the fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimised, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.[112]

97. Jurisprudence of regional and international human rights mechanisms suggests that rape committed against detainees will always amount to torture. The European Court held in *Aydin v. Turkey* that:

> [R]ape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease

[108] 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.
[109] 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.
[110] ECtHR, *Aydin v Turkey* (1997) Application No. 57/1996/676/866, Judgment of 25 September 1997.
[111] IACtHR, *Castro-Castro Prison Case*.
[112] Annual Report of the IACmHR, Report No. 5/96, Case No. 10.970, 1 March 1996.

> with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence.
>
> [and]
>
> although the ill-treatment that Mrs. Aydin had suffered included being stripped naked, beaten, sprayed with cold water… and raped by an individual in military clothing, the rape on its own would have been sufficient for the Court to make a finding of torture under Art.3 of the European Convention on Human Rights.[113]

98. The Committee Against Torture similarly held in *C.T. and K.M. v. Sweden* that:

> the first named complainant was repeatedly raped in detention and **as such** was subjected to torture in the past (emphasis added).[114]

99. In the case of *Castro-Castro Prison Case*, the Inter-American Court found that the finger 'vaginal inspection' of one of the victims during her detention constituted sexual rape amounting to torture, as it was an:

> especially gross and reprehensible act, taking into account the victim's vulnerability and the abuse of power displayed by the agent. Similarly, sexual rape is an extremely traumatic experience that may have serious consequences and it causes great physical and psychological damage that leaves the victim physically and emotionally humiliated.[115]

100. In international criminal law, rape has been recognised as automatically meeting the threshold for torture because it is a crime of such a serious and cruel nature that

[113] ECtHR, *Aydin v Turkey* (1997) Application No. 57/1996/676/866, Judgment of 25 September 1997, paras.83, 86.
[114] Committee against Torture (CAT), *C. T. and K. M. v. Sweden*, Communication No. 279/2005, 17 November 2006, para. 7.5.
[115] IACtHR, *Castro-Castro Prison Case*, para.311.

it has a devastating impact on victims. According to the Appeals Chamber of the ICTY in the *Kunarac* case: "[s]ome acts establish per se the suffering of those upon whom they are inflicted. Rape is obviously such an act."[116]

101. Similarly, in the case of *Delalic*, the Trial Chamber of the ICTY stated that it considered "the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity".[117] According to the Trial Chamber:

> [R]ape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting.[118]

102. Sexual violence other than rape similarly can cause severe pain and suffering, depending on the circumstances of the case. The CEDAW Committee[119] as well as successive UN Special Rapporteurs on torture and cruel, inhuman or degrading treatment or punishment (**Special Rapporteur on Torture**) have identified certain forms of sexual violence other than rape as a form of torture.[120]

103. The ICTY Appeals Chamber in the *Kunarac* case considered that "[S]exual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture."[121]

104. Where such sexual violence is committed against women held in detention, as in the present case, it is a "particularly ignominious violation of the inherent dignity

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[116] ICTY, *Prosecutor v Kunarac*, IT-96-23&23/1, Appeals Chamber Judgment, 20 June 2002, paras. 150-1.
[117] ICTY, *Prosecutor v Delalic*, IT-96-21, Trial Chamber Judgment, 16 November 1998, para. 495.
[118] Ibid.
[119] CEDAW Committee, General Recommendation 19: 'Violence against Women', (11th Session, 1992), para. 7.
[120] See E/CN.4/1995/34, paras. 15-24 (Sir Nigel Rodley) and A/HRC/7/3, para. 26 and paras. 34-36 (Manfred Nowak); see also Interim Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/55/290, 11 August 2000, para.5.
[121] ICTY, *Prosecutor v Kunarac*, IT-96-23&23/1, Appeals Chamber Judgment, 20 June 2002, para.150.

and right to physical integrity of the human being" and "accordingly constitutes an act of torture."[122]

105. The Inter-American Court similarly considered in the *Castro Castro case*, that "sexual violence against women has devastating physical, emotional, and psychological consequences for them, *which are exacerbated in the cases of women who are imprisoned* (emphasis added)."[123]

(iii) Rape and other forms of sexual violence are committed for prohibited purposes

106. The recognition of rape and certain other forms of sexual violence by a public official as a form of torture serves an important function of acknowledging that rape and other forms of sexual violence are intentional acts of humiliation, discrimination and intimidation, rather than (as may have traditionally been argued or assumed) a natural result of the perpetrators' sexual urges.[124]

107. For conduct to amount to torture there is no requirement that the conduct must be solely perpetrated for one of the prohibited purposes; the prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose.[125] The determination of the purpose behind an act of torture does not "involve a subjective inquiry into the motivation of the perpetrators, but rather must be objective determinations under the circumstances".[126]

108. In addition to purposes of obtaining information, punishment, and intimidation,

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[122] Commission on Human Rights (1986), 'Report by the Special Rapporteur, Mr P Kooijmans, UN Doc. E/CN.4/1986/15, 19 February 1998, para.35.
[123] IACtHR, *Castro- Castro Prison Case*, para.313.
[124] See Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, March 2011, ('Amnesty International, 'Rape and Sexual Violence') p. 39, available at: http://www.amnesty.org/en/library/asset/IOR53/001/2011/en/7f5eae8f-c008-4caf-ab59-0f84605b61e0/ior530012011en.pdf.
[125] ICTY, *Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23-T & IT-98-30/1-T, Trial Chamber Judgment, 22 February 2001, para. 816.
[126] CAT, General Comment 2: Implementation of article 2 by States Parties, CAT/C/GC/2/CRP. 1/Rev.4 (2007), para. 9.

which may be obvious on the facts in an individual case, sexual violence will frequently have two further purposes.

109. The first of these is the degradation and humiliation of the victim, his or her family, and community. This purpose, though not specifically enumerated in the definition contained in the UN Torture Convention, has been recognised in international jurisprudence.[127] The Inter-American Commission held in the case of *Mejia v Peru*,[128] that "rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community".[129] This purpose has also been discussed and held to be present in a number of other leading judgments on rape and torture.[130]

110. Another recognised purpose underlying the use of sexual violence as a method of torture is discrimination on the basis of sex or gender. As outlined in detail further above,[131] sexual violence inherently has an underlying discriminatory purpose. Sexual crimes "embody gendered discrimination in that these crimes target the gender identity and sexual identity of the victims – whether the victims are men or women".[132]

(2) AS TO THE FACTS

[127] See ICTY, *Prosecutor v Furundzija*, IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, para. 162; CAT, *V.L. v Switzerland*, CAT/C/37/D/262/2005, 20 November 2006, para. 8.10; Report of the Special Rapporteur on Torture: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/7/3 (2008), para. 36.
[128] IACmHR, *Raquel Marti de Mejia v Peru*, Case 10.970, Report No. 5/96 of 1 March 1996.
[129] Ibid, para. 3(a).
[130] See, eg. ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 687; ICTY, *Prosecutor v Furundzija*, IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, para. 162; Committee Against Torture, *V.L. v Switzerland*, CAT/C/37/D/262/2005, 20 November 2006, para. 8.10.
[131] See above, Section D: Analysis of Violations of Articles 2 and 18 (3).
[132] Amnesty International (2008), *Rape and Sexual Violence*, p. 45.

The sexual violence committed against the Applicants in the present case constituted torture contrary to Article 5

111. The Applicants submit that the forced genital examination in both cases amount to torture contrary to Article 5. The Applicants have stated that the army officials in the detention centre forced the Applicants to undress and to lie on their back. When the First Applicant tried to resist the examination in full view of other soldiers, a military official subjected her to electroshocks. The Second Applicant was threatened to be beaten, raped and subjected to electroshocks if she resisted the examination. A male military doctor who the Applicants identified as Dr El-Mogy, then carried out the examination, using his hand to examine the Applicants' hymen. Following the forced genital examination, the Applicants were then forced to sign a prepared statement saying that they were unmarried and a virgin and that their hymen was intact.

112. The First Applicant testified that:

> A woman prison guard in plainclothes stood at my head and then a man in military uniform examined with his hand for several minutes. It was painful. He took his time.[133]

113. The Second Applicant testified that:

> there was a prison warden called Azza dressed in black. I was the fifth one to be examined. They took me to a bed in the passage way. There were others there: the prison doctor, a soldier called Ibrahim, Azza the prison warden, and a man standing in the room opposite. The doctor examined me with his hand… [134]

[133] Statement given to Human Rights Watch, in 'Egypt: Military 'Virginity Test' Investigation a Sham', 9 November 2011, *See* Annex 12

[134] Written Testimony of Second Applicant. *See* Annex 18 See also: Human Rights Watch, "Egypt: Military Impunity for Violence against Women," 7 April 2012. *See* Annex 11.

In both cases, the male military doctor used his hand to examine the Applicants' genitals for several minutes so as to assess whether their hymen was intact. The doctor reportedly carried out similar examinations using his hand in regard to other women detained together with the Applicants.[135] **[REDACTED.**

115. As outlined above, this practice of forced genital examinations has been widely documented by international and national organisations and the media specifically reported the forced genital examination of the Applicants. Egypt's Court of Administrative Justice confirmed that these examinations had taken place, and representatives of the Armed Forces' leadership stated that these "virginity tests" had been normal practice. The head of the Respondent State's military intelligence reportedly "promised Amnesty International that the army will no longer carry out "forced virginity tests after defending their use".[136]

116. In light of the foregoing, it is submitted that the forced genital examination constituted vaginal penetration of the First Applicant and sexual violence committed against both Applicants. As it was carried out with the use of force and threat of force and under the coercive circumstances of detention, this treatment in regard to the First Applicant amounted to rape and in regard to both Applicants to sexual violence amounting to torture under international human rights law. The nature of the forced genital examinations and the circumstances under which they took place met the severity threshold for torture. As outlined above, the military officials forced both Applicants to strip naked while male soldiers and officers were present and were taking pictures, electroshocked the First Applicant and threatened both Applicants not to resist the examination. The Applicants had to lie on their

[135] One of the women arrested and detained together with the Applicants, Salwa al-Hosseini, testified to Human Rights Watch that "[O]n Thursday morning the officers came in and said that they would check to see if we were virgins. They took me to a bed in the passageway and made me take off my trousers. The doctor used his fingers to check me….[T]here were around three or four soldiers behind him," see Human Rights Watch, 'Egypt: Military 'Virginity Test' Investigation a Sham', 9 November 2011. *See* Annex 12
[136] Amnesty International, 'Egypt: Military pledges to stop forced 'virginity tests', 27 June 2011.

back, with their legs raised and were examined for several minutes in full view of military officers.[137]

117. The First Applicant testified that she was forced to lie down and to raise her legs, and that:

> [I] was naked, it was like a show, with people watching, all those officers and soldiers. I asked her to please reduce their numbers. The man electrocuted me in the stomach. And I was getting very badly insulted…I surrendered. If this is a doctor, what is he checking for five whole minutes?... it's just humiliation, they are breaking you. They are breaking you so you don't even think of asking for Egypt's rights.[138]

> [O]n that day [10 March 2011], I truly wished for death. I kept telling myself people get heart attacks, why don't I just have one and die.[139]

> [I] suffered a great deal of psychological and mental damage. I also lost my job.[140]

118. The Second Applicant similarly testified to the severe psychological consequences, stating that she was shocked by the treatment and scared of electric shocks by the military officers, who "were enjoying making us miserable".[141] She and the other detainees were "ill-treated badly" by the soldiers and the officer in charge of the prison" who were harming them "psychologically."[142] She testified that she was scared during the forced genital examination and that she was thinking "is he going to rape me now? I was really worried that I could be raped or even killed and thrown in the desert and nobody would know."[143]

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[137] First Applicant video testimony (transcribed and translated). *See* Annex 20
[138] Ibid.
[139] Ibid.
[140] See First Applicant's testimony to the military prosecutor on 28 June 2011. *See* Annex 9
[141] Written Testimony of Second Applicant. *See* Annex 18
[142] Ibid.
[143] Ibid.

119. The degree of humiliation and fear the Applicants were exposed to as a result, in addition to their vulnerability due to their detention and constant threats, further exacerbated the severe physical, emotional and psychological consequences for the Applicants.

120. Several military officers who had admitted that the forced genital examinations had taken place argued that this was normal practice to prevent false accusations of rape allegations of rape being made against the army. The Applicants submit, and outline in further detail below, that this is an illegitimate and discriminatory contention. Contrary to the assertion of the military as to the purported reason for the examination, at the time of the examination neither the Applicants (nor the other detainees) accused military officials of rape during their detention. The Applicants (and other detainees subjected to the forced genital examination) strongly objected to the forced nudity and genital examination. The real purpose for subjecting the Applicants to the forced genital examinations include:

a. *Punishment:* As set out above, the treatment to which the Applicants were subjected was a direct response to the Applicants' participation in a sit-in at Tahrir Square in Central Cairo. The military officers accused the Applicants of having "ruined the country! What do you want from the country?" and the line of questioning and insults of the Applicants, and in particular the forced genital examination of the Applicants were indicative of teaching the Applicants a lesson to abstain from future protests. The Applicants perceived the forced genital examination as a strategy to break their will and to prevent them from demonstrating for their rights. The Second Applicant for instance testified that "the aim of their aggressive act was to break our will and to stop us from our activism".[144]

b. *Intimidation:* from the point of arrest until their release from detention, the authorities intimidated the Applicants, threatening that they would be beaten,

[144] Ibid.

subjected to electroshocks and raped. The authorities subjected the First Applicant on several occasions to electroshocks. A military policeman assaulted the Second Applicant in the toilet of the museum where the Applicants were held. The Second Applicant testified that military police soldiers kept saying throughout the interrogation "you will see dark days ahead". Both Applicants testified to their fear as a result of these incidents and threats.

c. *Discrimination on the grounds of gender and political opinion*: The authorities subjected the Applicants to various methods of ill-treatment because of their participation in the protests in Tahrir Square. The Applicants' treatment during their detention indicated that they were tortured owing to their role as women protesters. From the very beginning of their detention, and during their interrogation and torture, the authorities addressed the Applicants in sexually demeaning terms such as "prostitute", "bitch" and "slut." Out of all protesters arrested on 9 March 2011 on Tahrir Square and who were taken to the military prison on 10 March 2011, the only detainees subjected to forced genital examinations were the seven women who the authorities had identified as "girl" or "unmarried". As discussed in detail above, the focus on the marital/virgin status of the Applicants by the State is evidence that such action was taken on the basis of the sex of the Applicants and on the stereotypes associated with gender roles in society and therefore discriminatory.[145]

d. *To humiliate and degrade the Applicant*s: as discussed below, the authorities deliberately used the different methods of ill-treatment and torture to attack the Applicants' dignity, and both Applicants were subjected to degradation and humiliation.[146] The deliberately sexual nature of the authorities' treatment of the Applicants, including forcing them to strip naked in front of male and

[145] See above, Section D: Analysis of Articles 2 and 18 (3) Violations.
[146] See further below, page 55- 58.

female officers, and carrying out forced genital examinations in full view of others, is particularly degrading and humiliating in view of the prevailing high levels of stigma of being subjected to sexual violence in the Respondent State. The Applicants ill-treatment and torture carried an implied message to other women engaged in protests that they risk suffering the same fate if they engage in activities related to the protest movement.

121. It is therefore submitted that, in light of the foregoing, the sexual violence committed against the Applicants amounted to torture contrary to Article 5.

Treatment amounting to torture and other ill-treatment contrary to Article 5

122. The Applicants submit further that the Respondent State's soldiers and army officials involved in the abuses committed against the Applicant deliberately used a range of methods in addition to the forced genital examinations to inflict severe physical and mental pain and suffering on the Applicant. This included repeated verbal abuse, repeated electroshocks and beatings, dragging the Applicants by their headscarf, threats of beatings, electroshocks and rape and strip searches in full view of others.

(1) AS TO THE LAW

123. It is the Commission's standard jurisprudence that for conduct to amount to treatment contrary to Article 5, it must reach "a minimum level of severity". The Commission in this respect has referred to the jurisprudence of the European Court to assess that minimum level, having regard to the circumstances of the case such as the duration, physical and mental effects of the treatment and the sex, age and state of health of the victim.[147]

[147] African Commission, *Huri Laws v Nigeria*, *Communciation* 225/98, para.41.

124. While the Commission does not always explicitly distinguish between torture and ill-treatment in interpreting the scope of Article 5, it has made clear 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."[148]

125. The Commission has furthermore emphasised 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," taking into account Article 1 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN Torture Convention), which defines the term 'torture' to mean:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[149]

126. The Commission has held that:

> [T]orture thus constitutes the intentional and systematic infliction of physical or psychological pain and suffering in order to punish, intimidate or gather information. It is a tool for discriminatory treatment of persons or groups of person who are subjected to the torture by the State or non-state actors at the time of exercising

[148] African Commission, *Curtis Francis Doebbler v Sudan*, Communication 236/00, para.37; see also, African Commission, *Media Rights Agenda v Nigeria*, Communication No. 224/98, para. 71.

[149] See African Commission, *Gabriel Shumba v Zimbabwe*, Communication 288/04, para.143, citing the Commission's decision in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communications 279/03-296/05.

> control over such person or persons. The purpose of torture is to control populations by destroying individuals, their leaders and frightening entire communities.[150]

(2) AS TO THE FACTS

127. The treatment inflicted on the Applicants resulted in physical injuries and psychological trauma as documented in the Applicants' testimonies and relevant documentation on the Applicants' cases.[151] The First Applicant testified that following the ill-treatment at the museum and military prison C-28 she came "out as a wreck- psychologically, physically and emotionally" and that her entire body had marks from the electro shocks.[152] The Second Applicant 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.[153]

128. According to the established jurisprudence of the Commission and other human rights bodies:

> [W]here a person is injured while in detention or otherwise under the control of the police, any such injury will give rise to a strong presumption that the person was subjected to ill-treatment […]. It is incumbent on the State to provide a plausible explanation of how the injuries were caused.[154]

129. The Commission previously held in a case against the Respondent State that under such circumstances:

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[150] African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communications 279/03-296/05, para.156.
[151] See First Applicant'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
[152] First Applicant video testimony (transcribed and translated). *See* Annex 20
[153] Written Testimony of Second Applicant. *See* Annex 18
[154] African Commission, *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Communication 334/06, para.168.

> The burden now shifts to the Respondent State to convince this Commission that the allegations of torture raised by the Complainants are unfounded. The context of the Victims' 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.[155]

130. International and national organisations as well as media have widely documented the use of the methods of ill-treatment by Egyptian soldiers and army officials against female demonstrators in March 2011.[156] Other female demonstrators arrested together with the Applicants equally testified about similar violations, including electroshocks, forced nudity and genital examinations.[157]

131. The Applicants therefore submit 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.

State obligations regarding the right to dignity

132. The Applicants submit further that the authorities violated the Applicants' right to dignity contrary to Article 5.

(1) AS TO THE LAW

[155] Ibid., para.169

[156] See e.g. Human Rights Watch, 'Egypt: Military 'Virginity Test' Investigation a Sham', 9 November 2011. *See* Annex 12; Human Rights Watch, 'Egypt: Military Impunity for Violence against Women', 7 April 2012; Amnesty International, 'Egypt and its generals: between denial and repression', 14 February 2012; Amnesty International, 'Broken Promises- Egypt's Military Rulers Erode Human Rights', 2011, pp.26-27; Al-Jazeera, 'What made her go there? Samira Ibrahim and Egypt's virginity test trial', 16 March 2012; The Guardian, 'Virginity test' on Egypt protesters are illegal, says judge', 27 December 2011; Global Post, 'Egypt: Samira v. the Military,' 23 October 2011.

[157] See e.g. Human Rights Watch, 'Egypt: Military 'Virginity Test' Investigation a Sham', 9 November 2011. *See* Annex 12

133. This section sets out relevant international standards pertaining to the right to dignity. The Commission for instance held that human dignity enshrined in Article 5 of the Charter is:

> an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.[158]

134. According to the Commission, exposing an individual to:

> personal suffering and indignity violates the right to human dignity. Personal suffering and indignity can take many forms and will depend on the particular circumstance of each communication brought before the African Commission.[159]

135. The Commission has referred to the jurisprudence of the European Court in considering whether a particular treatment may amount to a violation of the right to dignity, considering that "treatment itself will not be degrading unless the person concerned has undergone-either in the eyes of others or in his own eyes-humiliation or debasement attaining a minimum level of severity. That level has to be assessed with regard to the circumstances of the case."[160]

136. Specifically in regard to treatment of a sexual nature, the European Court has considered that it can diminish human dignity and be particularly degrading. For instance in respect of 'strip searches', the Court held that:

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[158] African Commission, *Purohit and Moore v The Gambia*, Communication 241/01, para. 57.
[159] Ibid, para.58; African Commission, *John K. Modise v Botswana*, Communication 97/93, para. 92.
[160] African Commission, *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*, Communication 323/06 , para.200, referring to the judgment of the European Court of Human Rights in *Campbell and Cosans v UK*, Application no.7511/76; 7743/76, Judgment, 25 February 1982, para.28.

> whilst strip searches may be necessary on occasions to ensure prison security or prevent disorder in prisons, they must be conducted in an appropriate manner. In the present case, the prison's guards verbally abused and derided the applicant. Their behavior was intended to cause in the applicant feelings of humiliation and inferiority. This, in the Court's view, showed a lack of respect for the applicant's human dignity.[161]

137. The CEDAW Committee held in a case involving sexual harassment of a woman in detention, including through threats of being stripped naked, that respect for women prisoner's privacy and dignity must be a high priority for the prison staff. The Committee considered that:

> the disrespectful treatment of the author by State agents, namely male prison staff, including inappropriate touching, unjustified interference with her privacy constitutes sexual harassment and discrimination… and a form of gender-based violence.[162]

138. Specifically in regard to the practice of forced gynecological examinations of women, the CEDAW Committee stated that it:

> views with the gravest concern the practice of forced gynecological examinations of women… including of women prisoners while in custody. The Committee emphasized that such coercive practices were degrading, discriminatory and unsafe and constituted a violation by state authorities of the bodily integrity, person and dignity of women.[163]

139. The Commission in a previous case against the Respondent State considered that the use of terms such as "whore" and "slut" amounted to sexual humiliation, in particular in combination with 'sexual molestation.' It held that such treatment

[161] ECtHR, *Iwanczuk v Poland*, Application no. 25196/94, Judgment of 15 November 2001, para.59.
[162] CEDAW Committee, *Inga Abramova v Belarus*, CEDAW/C/49/D/23/2009, 25 July 2011, para.7.7.
[163]CEDAW Committee, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Turkey- Combined second and third periodic report*, 13-31 January 1997, para.172.

[which included fondling of the complainants' breasts and other body parts and tearing off the complainants' clothes] amounted to discrimination as well as physical and emotional trauma contrary to Article 5.[164]

(2) AS TO THE FACTS

140. In the present case, the authorities' treatment was aimed specifically at the Applicants' dignity and intended to humiliate them. The authorities on multiple occasions called the Applicants 'prostitutes' and 'sluts' and used other terms to insult the Applicants, which the Applicants are too ashamed to repeat.[165] The First Applicant testified that upon her arrest, the authorities, in addition to verbally insulting her, spat at her and slapped her in her face with a shoe.[166] The military authorities forced both Applicants to strip naked in full view of male soldiers and officers, who laughed at the First Applicant and took photos of her with their mobile phones. No reasons were given for the strip search. A military police officer sexually assaulted the Second Applicant, trying to kiss her and preventing her from leaving, arguing that he had not seen his wife in 38 days.[167] The First Applicant testified that the forced strip search in front of male officers left her wanting to die. The forced genital examination of both Applicants took place with both Applicants lying on their back with their legs up, and in the presence and the full view of male soldiers and officers. The sexual nature of this treatment is particularly degrading and humiliating in view of the prevailing high levels of stigma of being subjected to sexual violence in the Respondent State.

141. The Respondent State's Administrative Court of Justice ruled, on 27 December 2011, specifically in relation to the practice of forced genital examination that conducting virginity tests on women in detention was "targeted at humiliating

[164] African Commission, *Egyptian Initiative for Personal Rights & Interights v Egypt*, Communication 323/06, paras. 197, 201-202.
[165] Written Testimony of Second Applicant. *See* Annex 18
[166] Transcript of First Applicant's Video Testimony. *See* Annex 20
[167] Written Testimony of Second Applicant. *See* Annex 18

women participating in demonstrations" and that they were "an illegal act and a violation of women's rights and an assault on their dignity."[168]

142. In light of the foregoing, the Applicants submit that the authorities' treatment was humiliating and degrading and violated their right to dignity contrary to Article 5.

The Respondent State's failure to adequately investigate and punish the perpetrators constitutes a separate violation of Article 5 of the African Charter

143. Where violations such as those in the present case are alleged to have occurred, the State is obliged to carry out an effective investigation. This also applies to alleged violations of Article 5 of the Charter. The Robben Island Guidelines for instance, as an "authoritative interpretation of the provisions of Article 5 of the Charter in respect of torture and other forms of ill-treatment",[169] stipulate that States have an obligation to:

> (17) Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.
>
> (18) Ensure that whenever persons who claimed to have been or who appear to have been tortured or ill-treated are brought before competent authorities an investigation shall be initiated.
>
> (19) Investigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and effectively, guided by the UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol).

[168] Human Rights Watch, "Egypt: Military Impunity for Violence against Women", 7 April 2012, *See* Annex 11. The case was filed by Egyptian human rights lawyers who had asked the Court to order an end to virginity tests in military prisons as a violation of human rights.
[169] See for instance African Commission admissibility decision in the case of *Hawa Abdallah (represented by the African Centre for Justice and Peace Studies) v Sudan*, Communication 401/11, para.57.

> (49) Ensure that alleged victims of torture, cruel, inhuman and degrading treatment or punishment, witnesses, those conducting the investigation, other human rights defenders and families are protected from violence, threats of violence or any other form of intimidation or reprisal that may arise pursuant to the report or investigation.

144. The Commission recognised such an obligation in *Amnesty International and others v. Sudan*, according to which there should be "ongoing investigations into allegations of torture" and the state party must provide "effective remedies under a transparent, independent and effective legal system."[170]

145. These obligations are in line with international standards contained in Article 13 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and recognised and elaborated upon in a series of key judgments and decisions by international and regional human rights treaty bodies. The Commission, in a previous case against the Respondent State, referred to Article 4 (c) of the Declaration on the Elimination of Violence against Women, which provides that States should:

> [E]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons. [171]

146. Similarly, the Maputo Protocol provides that State Parties shall take "appropriate and effective measures to punish the perpetrators of violence against women… "[172] The duty to investigate allegations of torture promptly and impartially has also been

[170] African Commission, Amnesty International and Others v Sudan, Communications 48/90, 50/91, 52/91, 89/93, para.56.
[171] African Commission, *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Communication 334/06, para.204.
[172]Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa, Article 4 (e).

recognised and underscored by the UN Special Rapporteur on Torture[173] as well as in instruments such as the *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*,[174] the *Standard Minimum Rules for the Treatment of Prisoners*[175] *and the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).*[176] The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* also affirm this important obligation.[177]

147. As a general rule there is:

> an obligation on the authorities to proceed automatically to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture or ill-treatment has been committed, no special importance being attached to the grounds for the suspicion.[178]

148. In the present case, as set out above,[179] the investigation of the First Applicant'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 Applicant.[180] 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

[173] 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).
[174] Principle 33 (4): "Every request or complaint shall be promptly dealt with and replied to without undue delay."
[175] 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."
[176] Endorsed by UN General Assembly Resolution 55/89, Annex, 4 December 2000, Principle 2.
[177] A/RES/60/147, 16 December 2005, Principle 3 (b).
[178] CAT, *Dhaou Belgacem Thabti v. Tunisia*, Communication No. 187/2001, CAT/C31/D/187/2001, 14 November 2003, para.10.4; see also CAT, *Bouabdallah Ltaief v. Tunisia*, Communication No. 189/2001, CAT/C/31/D/189/2001, 14 November 2003 para.10.4.
[179] See above, Section D: Analysis of Articles 2 and 18 (3) Violations.
[180] Ibid.

offence associated with a maximum prison sentence of one year, which clearly does not reflect the gravity of the First Applicant's complaint. The First Applicant received several threatening phone calls following her attempts to obtain justice.[181] The Second Applicant was subsequently prevented from pursuing justice as also set out in previous submissions, and recognised by the Commission in its admissibility decision of 22 November 2013. The Commission confirmed that "not even an investigation was initiated following the Second Victim's complaint despite the seriousness of the allegations".[182]

The Respondent State's failure to provide redress to the Applicants constitutes a separate violation of Article 5

149. The Applicants submit that the Respondent State has failed in its positive obligation to provide adequate redress to the Applicants, as required by Article 1 read in conjunction with Article 5. The Commission recognised a right to an effective remedy for violations of the Charter, including Article 5, in a wide range of cases,[183] and provided in its Resolution on the Right to Recourse and Fair Trial, stating that:

> Every person whose rights or freedoms are violated is entitled to have an effective remedy. This right entails that an individual whose rights have been violated is able to 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 of time.[184]

[181] Transcript of First Applicant's Video Testimony. *See* Annex 20
[182] Admissibility Decision of 22 November 2013, para.38.
[183] See e.g. African Commission, *Gabriel Shumba v Zimbabwe*, Communication 288/04, dispositif; *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 334/06, dispositif; *Curtis Francis Doebbler v Sudan*, Communication 236/00, dispositif; *Malawi African Association and others v Mauritania*, Communications 54/91-61/91-96/93-264/97-296/97-210/98, dispositif.
[184] African Commission, Resolution on the Right to Recourse and Fair Trial, March 1992.

150. The Commission's 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (Fair Trial Principles) similarly highlight a State's obligation to provide redress, i.e. an effective remedy and adequate reparation, to victims, and places particular emphasis on victims of sexual violence, stipulating that:

> States shall ensure that women victims are able to 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.[185]

151. The Robben Island Guidelines provide that States shall:

> ensure that all victims 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.[186]

152. 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) stated that in addition to the procedural obligations under Article 14, State parties to the Convention:

> shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.[187]

153. Specifically in relation to the right of victims of sexual violence to a remedy and reparation, the Commission has urged States to:

[185] African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle N (e).
[186] African Commission, Robben Island Guidelines, para.50.
[187] CAT, General Comment No 3: Implementation of Article 14 by State parties, CAT/C/GC/3, 19 November 2012, para.5, at http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf.

1. put in place efficient and accessible reparation programmes that ensure information, rehabilitation and compensation for victims of sexual violence; and
2. ensure that victims of sexual violence have access to medical assistance and psychological support.[188]

154. As highlighted above, in the present case, the Applicants have not been able to pursue their complaints effectively, and could not claim adequate reparation-restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition- 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. The Applicants 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.

[188] African Commission, 'Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence', adopted during the 42nd Ordinary Session held in Brazzaville, Republic of Congo, from 15-28 November 2007; the Resolution followed the adoption of the 'Nairobi Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, at http://www.redress.org/downloads/publications/Nairobi%20Principles%20on%20Women%20and%20Girls.pdf.

F. ANALYSIS OF ARTICLE 26 VIOLATION

155. Article 26 of the Banjul Charter affirms that:

> [s]tate 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.

The Egyptian Military Justice System is neither Independent nor Impartial

156. The Egyptian military justice system does not satisfy the criteria of independence, impartiality and appropriateness that can give effect to the rights guaranteed by the Charter. This is especially so in cases which involve allegations of gross violations of human rights by military personnel. The Applicants submit that for the following reasons, the Commission should find that recourse to the Egyptian military justice system in this case violated Article 26.

(1) AS TO THE LAW

In cases involving civilians, military courts do not satisfy the requirement of independence

157. In its Fair Trial Principles the Commission set out clear criteria as to what constitutes an independent court:

> [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, in accordance with the law.[189]

158. The Fair Trial Principles also require that "[a]ll judicial bodies shall be independent from the executive branch" [190] In *Marcel Wetsh'okonda Koso and others* v. *DRC* the Commission reaffirmed its position by explaining 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."[191] In a clear statement, the Commission stated that it:

> considers that *the selection of active military officers to play the role of judges 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 competent, with adequate legal training and qualifications.'[192]

159. Other human rights bodies such as the Inter-American Court and the European Court have interpreted the right to a fair trial to include guarantees of independence. The same bodies have criticised the use of the military justice system to try military personnel for human rights abuses as lacking such procedural guarantee.

160. Inter-American Court jurisprudence has addressed the issue of independence and impartiality of the military courts extensively and has done so specifically in the context of the trials of members of armed forces for crimes committed against civilians. In *La Cantuta v. Perú*, the Inter-American Court stated that "military courts do not guarantee the necessary independence and impartiality to try cases

[189] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted in 2001, Principle A.4(f). (hereinafter "Fair Trial Principles")
[190] Ibid, Principle A.4(g).
[191] African Commission, *Marcel Wetsh'okonda Koso and others* v. *DRC*, Comm. No. 281/03, para. 79.
[192] Ibid, para. 66, citing African Commission, *Media Rights Agenda v. Nigeria*, Comm. No. 224/98, para. 60. (emphasis added)

involving members of the Armed Forces…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."[193]

161. Furthermore, in *Pueblo Massacre v. Colombia*, the Inter-American Court pointed to a number of 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.[194] The Court concluded the following:

> Consequently, the case law of this Court, the case law of the Constitutional Court of Colombia, and the speed and total lack of interest with which the bodies of the military criminal jurisdiction acted to clarify the facts of the case, allow this Court to conclude that, in addition to this jurisdiction not being the appropriate channel, it did not constitute an effective recourse to investigate the grave violations committed to the detriment of the 43 Pueblo Bello victims, or to establish the truth of the facts and to prosecute and punish those responsible. The proceedings under this system were exceedingly negligent and members of the Armed Forces who could have been involved in the facts were not investigated genuinely.[195]

162. The European Court has as well emphasised that judicial proceedings must not only be independent and impartial, but must also *appear* to be independent and impartial. In *Incal v. Turkey*, 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,

[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, para. 193. *See also*, IACtHR, *Zambrano Vélez et al. v. Ecuador*, (ser. C) No. 166, Judgment dated July 4, 2007.
[195] IACtHR, *Pueblo Bello Massacre v. Colombia*, (ser. C) No. 140, Judgment dated Jan. 31, 2006.

and the short duration of this judge's term rendered concerns about independence and impartiality of the trial objectively justified.[196]

163. The International Commission of Jurists has explained that the concerns of partiality and lack of independence of military judges and prosecutors as active members of the military has made military courts particularly vulnerable to allegations of impunity and lack of independence and impartiality. The independence and impartiality of military courts is 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.[197] As shown below, the Egyptian military justice system falls precisely within this framework, with subordination to the executive, in particular the Minister of Defense.

In cases involving civilians, military courts do not satisfy the requirement of impartiality

164. The Commission has elaborated specifically on what it considers "the impartiality of courts" by stating, inter alia, that:

> [a] judicial body shall base its decision only on objective evidence, arguments and facts presented before it. Judicial officers shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.[198]

[196] ECtHR, *Incal v. Turkey*, App. No. 22678/93, Judgment dated Jun 9, 1998, paras. 65-73.
[197] 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-part-i.pdf, p 10.
[198] Fair Trial Principles, Principle A.5(a).

165. In *Incal v. Turkey*, the European Court put forth two tests to determine impartiality, "the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect."[199]

166. The Commission's Fair Trial Principles also state, that "the impartiality of a judicial body would be undermined when […] a judicial official has some connection with the case or a party to the case".[200]

167. Specific to military courts where judges are active military officers, the Commission noted 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 violates the fundamental principles of fair trial."[201]

168. While the Commission was dealing with Article 7 of the Charter in this context, its statements are clearly general statements about the necessity of impartiality of courts. 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 fulfillment of its duty to investigate, prosecute and punish. The Commission's Fair Trial Principles referred to in the above judgment is therefore applicable both for violations of Article 7 and Article 26.

169. The intrinsic connection between Article 7 and Article 26 was made explicit by the Commission in *Amnesty International and Others v. Sudan*, where it stated:

> National legislation permits the President, his deputies and senior military officers to appoint these courts to consist of "three military officers or any other persons of integrity and competence". The

[199] ECtHR, *Incal v. Turkey*, para 65.
[200] Fair Trial Principles, Principle A.5(d).
[201] African Commission, *Law Office of Ghazi Suleiman v. Sudan*, Comm. Nos. 222/98 and 229/99, para.64.

> composition alone creates the impression, or indicates the reality, of lack of impartiality, and as a consequence, violates Article 7(1)(d) The government has a duty to provide the structures necessary for the exercise of this right. By providing for courts whose impartiality is not guaranteed, it has violated Article 26.[202]

170. In its report on "Military Jurisdiction and International Law", the International Commission of Jurists notes the existence of:

> a direct correlation between, on the one hand, the phenomenon of military jurisdiction and human rights violations committed by members of the military and police and, on the other, the principles, norms and standards relating to the right to a fair trial by an independent and impartial court, the right to judicial protection and an effective remedy, the obligation to prosecute and punish those responsible for human rights violations.[203]

(2) AS TO THE FACTS

The Egyptian military justice system is not independent or impartial

Structural and Systemic Defects of the Egyptian Military Justice System

171. The Applicants argue that the military justice system in Egypt, including military prosecutors and judges, lacks independence and impartiality. The judges in Dr El-Mogy's trial were all active members of the military.[204] Article 2 of the Code of Military Justice provides that the eligibility of military judges 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

[202] African Commission, *Amnesty International (and others) v. Sudan*, African Commission on Human and Peoples' Rights, Comms. Nos. 48/90-50/91-52/91-89/93, para 68.
[203] Int'l Comm'n of Jurists, *Military Jurisdiction and International Law*, p.18.
[204] Human Rights Watch, *Egypt: Military Impunity for Violence Against Women* (Apr. 7, 2012), http://www.hrw.org/news/2012/04/07/egypt-military-impunity-violence-against-women, *see* Annex 11.

the military.[205] Effectively, this means that judges sitting in military courts must be active members of the armed forces. The judges are selected by the head of the military justice system and are appointed by the Minister of Defense, a member of the executive.[206]

172. In addition to their selection process, the judges' tenure is also not guaranteed and remains at the behest of the executive. The *Code of Military Justice* states that judges may only be removed in accordance with the disciplining procedures in the *Code of Military Services*, which in Articles 110, 112 and 134 lists a number of disciplining measures (including forced retirement) determined solely by a committee of officers of the armed forces.[207]

173. Furthermore, being active members of the armed forces, military prosecutors and judges report to higher ranking officers. 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. In fact, 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.[208] The judges therefore must make decisions within a framework that does not provide structural independence from the executive branch.

174. The First Applicant's legal action before the military court is a case in point. Here, the prosecutors and the judges had to deal with a case that implicated at least four generals from the Supreme Council of Armed Forces, Generals Etman, Assar, Sisi and Roweini, who had admitted that virginity tests or forced genital examinations

[205] *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.
[206] *Code of Military Justice,* Arts. 1, 54, *see* relevant Articles in Annex 15.
[207] *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.
[208] *Code for the Conditions of Service and Promotion of Officers of the Armed Forces*, Art. 101, *see* relevant Articles in Annex 16.

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." [209] In noting the significance of General Morsy's comments, Human Rights Watch stated that:

> Given his status in the military hierarchy and his 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. [210]

175. The same structural and systemic flaws that call into question the independence in the Egyptian military justice system also raise serious concerns regarding its impartiality. In the case at hand, an active member of the military (the judge) is 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 on whether one or more members of the same institution has committed a crime against someone who does not belong to the same institution. This raises serious concerns as to the potential bias that the process may be marred by.

Incidents that show the lack of independence and impartiality of the Military Justice System

176. Furthermore, the conduct of the military prosecutor and the court in the particular case at hand are additional evidence of their lack of impartiality.

[209] Human Rights Watch, *Egypt: Military Impunity for Violence Against Women* (Apr. 7, 2012), *See* Annex 11.
[210] ibid.

177. 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 from higher-ranking officers. The choice of charge is notable, since the facts, as determined by the military prosecutor, form grounds for a charge of sexual assault, which is defined in Section 268 of the Egyptian *Penal Code* to include any intentional touching of certain body parts, including the genitals, without consent.[211] The crime of sexual assault carries with it a heavier penalty than the crime of public indecency that the military prosecutor chose to charge Dr. El-Mogy with. The First Applicant's lawyer tried several times to have the charges amended from public indecency to sexual assault, but his request was denied.[212] Notably, the military prosecutor had charged Dr. El-Mogy with "sexual assault" on 13 December 2011 during his interrogation, yet on 18 December 2011 only charged him with insubordination and public indecency.[213]

178. Moreover, the military prosecutor ignored several criminal acts that the First Applicant had reported, such as beating, verbal abuse and the use of an electroshock device by military personnel during the dispersal of the March 9th protest and at the preliminary place of detention at the Egyptian Museum. The military prosecutor ignored such acts despite the presence of a statement by General Hamdy Badeen, Director of the Military Police Department, which stated that the detained individuals had suffered bruises and injuries during the dispersal process.[214] Criminal acts that soldiers had allegedly committed against the First Applicant and other protesters at the military prison were also ignored by the military prosecutor. Instead, the charge was tailored in a way that only focused on the act of the forced genital examination by Dr. El-Mogy.

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[211] *Penal Code (Egypt),* Law 58/1937 (as amended), Article 268, *see* relevant Articles in Annex 13.
[212] Request to the Head of the Military Prosecution of East Cairo, dated 3 January 2012, to amend the charges against Dr. El-Mogy and to allow Samira's lawyers to attend as counsels for Samira.*see* Annex
[213] Human Rights Watch, *Egypt: Military Impunity for Violence Against Women* (Apr. 7, 2012), *See* Annex 11.
[214] Memo on 9th March arrest by head of Military Police, General Hamdi Badeen, dated April 2011, *see* Annex14.

179. Moreover, contrary to Section 214/2 of the Code of Criminal Procedures, the military prosecutor also failed to present to the military court a record of witness statements and other evidence for the prosecution. In its report on the case, Human Rights Watch quoted the First Applicant's lawyer, Ahmed Hossam, who explained that "the prosecutor also failed to summon a single witness to prove the charges he set out in his indictment referring the case to court, and that Abdel Rahman and three other witnesses for the prosecution were able to testify only by petitioning the judge."[215]

180. Another example which highlights the Respondent State's failure to properly prosecute was when at trial the military prosecutor failed to highlight inconsistencies in the statements of the witnesses for the defense, cross-examine these witnesses or present any witnesses for the prosecution. Four witnesses for the prosecution were presented only after the First Applicant's lawyers asked the judge for permission to bring witnesses.[216]

181. Moreover, the military prosecutor chose not to appeal the Court's acquittal of Dr. El Mogy, a decision that may not be appealed by the victim herself, but only by the military prosecutor. Article 43 (bis) and 117 of the *Code of Military Justice* provide that the only form of appeal from a decision by the Supreme Military Court lies in the Supreme Court of Military Appeals (*al-ma'hkama al-'olya lel-to'on al-'askareyya*) and that the only parties permitted to bring an appeal are either the military prosecutor or the convicted person.[217] Such appeal needs to be made within 60 days of the ratification of the decision of the Military Court.[218] The decision of the Supreme Military Court was ratified by General al-Rowaini on 1 April 2012. The military prosecutor has chosen not to bring an appeal to the Supreme Court of Military Appeals. Accordingly neither of the Applicants, nor any other victim could appeal the Military Court's decision.

[215] Human Rights Watch, *Egypt: Military Impunity for Violence Against Women* (Apr. 7, 2012). *See* Annex 11
[216] Ibid.
[217] *Code of Military Justice*, Articles 43 (bis), 117, Annex 15.
[218] *Code of Military Justice*, Articles 43(bis), 84, 118, Annex 15.

182. The prosecutor's choice of charges for the defendant as well as his choice of witnesses and lack of questioning of higher ranked officials, are all demonstrations of the fact that the investigations fell short of established standards.

183. In its ruling,[219] the Court's reasoning was partially built on testimonies and statements of seven witnesses of the defense that are all members of or employed by the military: two women prison guards, a security officer at the rank of a major, the commander of the prison's medical unit during the trial at the rank of a Captain Medic, a First Lieutenant Medic and two Privates Medics. The seven witnesses denied the occurrence of any forced examination of any of the women admitted or present in the military prison the day of the incident. The "medics" officers testified that there are no directives requiring such examinations for women.

184. On the other hand, three of the four witnesses for the Prosecutor, a political activist, a member of a human rights organization and a media person, all testified that when they attended a meeting with members of the Supreme Council of the Armed Forces—specifically Major General Hassan al-Roweini, Major General Ismail Etman and Major General Mohamed al-Assar—they confirmed that such an examination was performed on female detainees in the military prison and offered reasons and causes for it, saying it was to avoid claims of sexual assault or rape of the female inmates and that this procedure takes place in military and civil prisons pursuant to prison laws.[220] However, the judges decided to dismiss such testimonies stating that:

> regarding the court's assessment of their testimony and its assignment of the legally correct evidentiary weight of that testimony pursuant to established rules of jurisprudence, the testimony is considered hearsay and is no more than the repetition of what people have said and heard

[219] Court of Military Justice (Egypt), Felonies/East Cairo Court, *Military Prosecution v. Ahmed Adel El-Mogy*, Case no. 918/2011, Judgment dated 11 March 2012, *See* Annex 5 and 6.
[220] Ibid.

> among themselves about the incident. It is not pertinent to the incident to be proved, but rather to widespread public opinion about the incident.[221]

185. The judges' impartiality here is once again questionable for the mere fact that the ruling relies on military personnel testimonies exclusively, while dismissing the only civilian testimonies available. In addition, the military judges rejected the request by the First Applicant'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.

The Expansive Jurisdiction of the Egyptian Military Justice System Violates Article 26

(1) AS TO THE LAW

186. 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 Fair Trial Principles alludes to this when it states that "Military Courts shall be to determine offences of a purely military nature committed by military personnel" and that they "should not try offences which fall within the jurisdiction of regular courts."[222] The case at hand, however, presents an opportunity 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.

187. This position has been firmly taken by other human rights mechanisms. The 2005 United Nations "Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity" state that "the jurisdiction of military

[221] Ibid.
[222] *Fair Trial Principles*, Principle L.1;3.

tribunals must be restricted solely to specifically military offenses committed by military personnel, *to the exclusion of human rights violations*."[223]

188. In the same vein, Principle 9 of the *Draft Principles on Military Justice* adopted by the former UN Human Rights Commission states 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."[224]

189. Other regional human rights systems, specifically the Inter-American Court, have adamantly rejected the appropriateness of trying military personnel accused of gross human rights violations before military courts. The Inter-American Court in *Pueblo Bello Massacre v. Colombia* decided 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 misdemeanors that, due to their very nature, harm the juridical interests of the military system".[225]

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[223] 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,. (emphasis added)

[224] 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.

[225] Inter-Am. Ct. H.R., *Pueblo Bello Massacre v. Colombia*, para.164(d), para.189. The same line has been followed in *Radilla-Pacheco v. Mexico*, where the IACtHR held that "the commission of acts such as the forced disappearances of persons against civilians by the members of the military can never be considered as a legitimate and acceptable means for compliance with the military mission. It is clear that those behaviors are openly contrary to the duties of respect and protection of human rights and, therefore, are excluded from the competence of the military jurisdiction.", Inter-Am. Ct. H.R., *Radilla-Pacheco v. Mexico*, Judgment dated Nov 23, 2009, para 277. In other cases, the IACtHR found that military courts were inappropriate to try military personnel accused of extrajudicial killings and enforced disappearances. The Court clarified that military justice is not only an inappropriate forum to address these types of alleged abuses, but that it is generally inappropriate in addressing other allegations of human rights abuses. In this regard, the Court stated: "the criteria to investigate and prosecute human rights violations before the ordinary jurisdiction reside not on the gravity of the violations, but rather on their very nature and on that of the protected juridical right." *See* Inter-Am. Ct. H.R., *Vélez Restropo et al. v. Colombia*, (ser. C) No. 248, Judgment dated Sep 3, 2012, at paras. 243-44.

190. Other statements and observations from the United Nations Human Rights Council, as well as jurisprudence and legislative developments coming from national jurisdictions demonstrate a growing international trend recognizing the risks of impunity arising from the use of military justice in cases alleging violations of human rights by the military. [226]

191. Focusing on the particular juridical right that is harmed by the crime alleged is of paramount importance. Creating a separate judicial system to try members of the armed forces for cases that do not harm the juridical interest of the military creates an air of impunity and solidifies the image that such members deserve a special treatment. This is the case even if the military justice system respected fair trial principles, as it would still be a parallel institution, independent from the ordinary judiciary that has jurisdiction over all other members of society.

(2) AS TO THE FACTS

192. The Egyptian Code of Military Justice gives the military prosecutor and courts an expansive jurisdiction and a wide discretion that violates the principles enunciated above. Articles 4, 5 and 7 of the *Code of Military Justice* give the military justice

[226] For example, in its 1997 Concluding Observations to Chile, the HRC expressed its concern that the "wide jurisdiction of the military courts to deal with all the cases involving prosecution of military personnel . . . contribute to the impunity which such personnel enjoy against punishment for serious human rights violations." U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Chile, para.9, U. N. Doc. CCPR/C/79/Add.104 (Mar. 30, 1999). The HRC repeated its discomfort with military trials for military human rights abuses in many other Concluding Observations. *See, e.g.*, U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Guatemala, para.20, U.N. Doc. CCPR/CO/72/GTM (Aug. 27, 2001), (expressing concern about the wide jurisdiction of military courts and recommending that military jurisdiction be limited to "the trial of military personnel who are accused of crimes of an exclusively military nature."); U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Dominican Republic, para.10, U.N. Doc. CCPR/CO/71/DOM (Apr. 26, 2001), (noting with concern the existence of a separate judicial body to try the National Police and recommending that the jurisdiction of this body be limited to internal disciplinary matters); U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Colombia, para.18, CCPR/C/79/Add.76 (1997), (noting concern with the jurisdiction of military courts to try military personnel accused of human rights abuses); U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Lebanon, para. 14, U.N. Doc. CCPR/C/79/Add.78 (1997), (expressing similar concerns and recommending that cases involving violations of human rights by military personnel be transferred to civilians courts); U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee: Cameroon, para.21, U.N. Doc. CCPR/C/79/Add.116 (Nov. 4, 1999).

system jurisdiction over complaints against members of the military, especially when the alleged abuses take place in a military institution.[227] 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.

193. Moreover, in accordance with Article 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.[228] Based on the above sections, this means that a court that lacks independence and impartiality is the sole entity that decides on whether it has jurisdiction over a case.

194. The Applicants' situation is a case in point. Although the alleged crime was one of sexual violence and alleged torture, two crimes that are clearly not connected to the juridical interests of the military, the case was dealt with before the military justice system. When the Second Applicant attempted to direct the matter to the attention of the ordinary criminal justice system, the ordinary public prosecutor transferred her complaint to the military prosecutor on 5 September 2011, in compliance with the *Code of Military Justice*.

195. In this regard, the Commission should note the larger context of increased military impunity in Egypt coupled with an expanding jurisdiction of military tribunals that encroach on the traditional boundaries of ordinary courts. In 2011, the SCAF issued a Decree amending the *Code of Military Justice* to give it exclusive jurisdiction over allegations of financial corruption against military personnel, even if such charges are made after their retirement from service.[229]

196. Article 26 of the African Charter imposes a duty on States Parties to "guarantee the independence of the Courts" and to "allow the establishment and improvement of

[227] *Code of Military Justice*, Articles 1, 4, 5, 7 and 48, Annex 15.
[228] *Code of Military Justice*, Article 48, Annex 15.
[229] Decree 45 for the Year 2011 amending the *Code of Military Justice*, the Official Gazette, 10 May 2011.

appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter." It is the Applicants' submission that since the military justice system in the present case did not provide guarantees of impartiality and independence of the judges nor the prosecution, as demonstrated above, it cannot be considered as "independent" or "appropriate" and that the Respondent State is hence in violation of Article 26 of the Charter.

G. ANALYSIS OF ARTICLE 3 VIOLATION

197. Article 3 of the Charter provides that "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law." The Applicants submit that both their right to be equal before the law and to equal protection of the law have been violated."

The Applicants' right to equality before the law was violated by the military

198. In elaborating on the meaning of Article 3 of the Charter, the Commission in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum)* v. *Zimbabwe* explained that the most fundamental meaning of equality before the law under Article 3(1) of the Charter is "the right by all to equal treatment under similar conditions."[230] It further elaborated that this means that individuals should expect to be treated "fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens".[231] Finally the Commission stated 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 administration officials may not act arbitrarily in enforcing laws."[232]

199. As is shown by arguments raised in above sections relating to Arts. 2, 18(3), 5 and 26, the Applicants, 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. The Applicants therefore submit that, while in military detention and during the trial of the military doctor, they did not enjoy "the

[230] African Commission, *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (On behalf of Andrew Barclay Meldrum) v. Zimbabwe*, Comm. No. 294/04, para. 96.
[231] Ibid.
[232] Ibid.

rights available to other citizens" and that the Respondent state has hence violated their rights under Article 3(1).

The Applicants submit that they did not enjoy "equal protection of the law" as other similarly situated persons enjoy it

200. The Commission stated 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."[233] The Commission also explained that:

> In order for a party therefore to establish a successful claim under Article 3(2) of the Charter, it should show that the Respondent State had not given the Complainant the same treatment it accorded to the others. Or that the Respondent State had accorded favourable treatment to others in the same position as the Complainant.[234]

(i) The Applicants did not receive the same treatment as other male detainees who were arrested in the same events

201. Arguments relating to unequal protection of the law on the basis of gender were discussed at length above, in relation to arguments with respect to Article 2. The Applicants aver that 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 argued above, this was a clear act of discrimination in the administrative and legal procedures. In *Egyptian Initiative for Personal Rights & INTERIGHTS* v *Egypt* the Commission stated that:

[233] Ibid, para 100.
[234] Ibid, para 101.

> 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 opinion, national or social origin, property, birth or other status. In this respect, the State has an affirmative duty to prohibit discrimination and ensure that all persons are protected by the law and are equal before the law.[235]

202. The Commission then added that "for all individuals to have equal protection of the law, the dignity of every individual, whether male or female should be fair, equally safeguarded by the law and this should also be the case when applying or enforcing the law."[236] The Applicants submit that they have been discriminated against based on their sex. Therefore, as non-discrimination is seen by the Commission as a cornerstone to equality before the law, by engaging in acts of discrimination the Respondent State has violated their right to equal protection of the law under Article 3(2).

(ii) The Applicants did not receive the same treatment accorded to other individuals being tried by a civilian court

203. The Applicants submit that had they 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. Due to the fact that the alleged perpetrator happened to be a member of the military, the Applicants were forced to seek remedy through a military justice system which lack impartiality and independence and were therefore deprived of their right to equal

[235] African Commission, *Egyptian Initiative for Personal Rights & INTERIGHTS* v *Egypt*, Comm. No. 323/06, para. 176.
[236] Ibid, para 177.

protection of the law. This is discussed in detail in reference to violations under Article 26. Manifestations of lack of impartiality and independence of military courts were for example that the military prosecutor decided to ignore several criminal acts that the victim had reported, such as beating, verbal abuse and the use of an electroshock device by military personnel. Furthermore, the military prosecutor did not present the military court with a record of witness statements and other evidence for the prosecution. As argued below, such shortcomings occured within the context of a military justice system which lacked independence and impartiality. Therefore, the Applicants submit that the mere fact that the military doctor was tried before a military tribunal does not offer them the same level of protection that is guaranteed before a civil court. The trial of the doctor before a military court deprived the Applicants of their right to remedy and truth.

204. In *Egyptian Initiative for Personal Rights & INTERIGHTS* v *Egypt*, the Commission explained this particular notion:

> This Commission further asserts 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.[237]

205. The Applicants, were not subjected to the same criminal and investigative procedures they would have been 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).

[237] Ibid.

H. VIOLATION OF ARTICLES 9 (2) AND 11

(1) AS TO THE LAW

206. Article 9 (2) of the Charter provides that every individual shall have the right to express and disseminate his opinion within the law. Article 11 stipulates that "[E]very 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."

207. In its prior jurisprudence, the Commission underlined the close relationship between these rights[238] and the violation of the rights of freedom of expression and assembly in the present case will therefore be examined jointly. These rights complement each other and the Commission has emphasized their important contribution to the promotion of democracy on the continent.[239]

208. According to the Commission, "freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Under the African Charter, this right comprises the right to receive information and to express one's opinion."[240] The Human Rights Committee confirmed that "[T]he right for an individual to express his political opinions, including obviously his opinions on the question of human rights, forms part of the freedom of expression guaranteed by article 19 of the Covenant."[241] In its General Comment on Freedom of Opinion and Freedom of Expression, the Committee further considered that "States parties

[238] African Commission, *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria*, Communications 137/94-154/96-161/97, para.101.
[239] African Commission, *Law Offices of Ghazi Suleiman v Sudan*, Communication 228/99, para. 53.
[240] African Commission, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, Communications 140/94-141/94-145/95, para.36; see also UN Human Rights Committee, General Comment No.34, 'Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para.23.
[241] Human Rights Committee, *Kivenmaa v. Finland*, CCPR/C/50/D/412/1990, para. 9(3).

should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights."[242]

209. The Commission has also underlined that State parties to the Charter have a duty to guarantee the right to freedom of assembly as enshrined in Article 11.[243] According to the UN Human Rights Committee, the exercise of the right to freedom of peaceful assembly "provides avenues through which people can aggregate and voice their concerns and interests and endeavour to fashion governance that responds to their issues. For example, such rights are essential in order to campaign and participate in public rallies, form political parties, participate in voter education activities, cast votes, observe and monitor elections and hold candidates and elected officials accountable."[244]

Restrictions to rights protected under Articles 9 and 11

210. In considering limitations to the rights enshrined in Articles 9 and 11, the Commission has emphasized that the "Charter contains no derogation clause, which can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose danger to a democratic state governed by the rule of law." Accordingly, restrictions of rights enshrined in the Charter should be as minimal as possible and should not undermine fundamental rights guaranteed under international law. Any restrictions on rights should be the exception."[245]

[242] UN Human Rights Committee, General Comment No.34, 'Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para.23.
[243] African Commission, *Kevin Mgwanga Gunme et al v Cameroon*, Communication 266/03, para.137.
[244] Report of the UN Special Rapporteur on the Rights to freedom of peaceful assembly and of association, A/68/299, 7 August 2013, para.6.
[245] African Commission, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, Communications 48/90-50/91-52/91-89/93, para.79.

211. Specifically in regard to the limitation of Article 9, the Commission considers that "any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society."[246] A particularly high threshold of tolerance regarding an individual's freedom of expression is required when it is "directed toward the government and government officials."[247] The UN Human Rights Committee has similarly highlighted that in light of the important role of the freedom of expression and assembly in any democratic society, a State invoking restrictions would need to demonstrate how these restrictions applied in the specific case were necessary to "safeguard the rights and national imperatives set forth in Article 19 (3) (a) and (b)."[248] Similarly, restrictions of the right to freedom of assembly must be "*necessary* in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."[249] In addition, for such restrictive measures be lawful, they must be proportionate.

212. Accordingly, while a State may invoke restrictions to the rights enshrined in Article 9 (2) and 11, this does not absolve the State from their 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.[250]

(2) AS TO THE FACTS

[246] 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.
[247] African Commission, *Kenneth Good / Republic of Botswana*, Communication 313/05, para.198.
[248] Human Rights Committee, *Kivenmaa v. Finland*, CCPR/C/50/D/412/1990, para. 9(3).
[249] Ibid.
[250] See also, African Commission, *Kevin Mgwanga Gunme et al v Cameroon*, Communication 266/03, para.137.

213. As stated in the Facts section (Section B), the Applicants were 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 Applicants 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.

214. On 9 March 2011, Egyptian military tanks and soldiers, together with individuals dressed in civilian clothes marched onto Tahrir Square, burned tents belonging to individuals who participated in the sit-in, and arrested 18 female protesters[251] and 157 male protesters. In his statement, General Hamdi Badeen, Director of the Military Police Department, claims that the sit-in was dispersed by "civilian citizens" who detained individuals causing trouble and handed them over to military soldiers.

215. Army forces marched into Tahrir at 3 pm, at which time the curfew was still not in place. At the time of the army's attack, the First Applicant was standing on a pavement close to Tahrir Square, holding a banner that said "Constitution First". Both the First and Second Applicant, along with many others who were either part of the protest, or who were just passing by at the time of the attack, were arrested by army officers and were taken to the Egyptian Museum, where they were subjected to electroshocks, beatings, verbal assaults and sexual assaults, before being transported to the military prison.

216. The activities through which the Applicants expressed their political opinions clearly 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 Applicants were in response to the Applicants exercise of their freedom of expression and assembly, as is evident from the context the violations took place,

[251] One of the 18 female protesters was released after being detained at the Egyptian Museum, and was not transported to the military prison with the other 17 detainees.

the nature of the questions put to the Applicants and other demonstrators and the accusations leveled against them. The authorities' measures were designed to punish and intimidate the Applicants and aimed at discouraging them from exercising their freedom of expression and assembly. The measures were unnecessary to preserve national security and clearly disproportionate and therefore amounted to a violation of Articles 9 (2) and 11.

I. ANALYSIS OF ARTICLE 1 VIOLATION

(1) AS TO THE LAW

217. Article 1 of the African Charter provides that:

> [t]he Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

218. In the *SERAC* case, the Commission confirmed that compliance with the Charter entails both negative and positive obligations on the part of the State. It established that, as with other international human rights instruments, the Charter recognises four levels of duties for a State to abide by. These are the duties to respect, protect, promote, and fulfill the rights of the Charter.[252]

219. According to the Commission, the obligation to **respect** entails that the State should refrain from interfering in the enjoyment of all fundamental rights.[253] The Inter-American Court has elaborated on the matter by stating 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 set forth in the Convention".[254] This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.[255]

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[252] African Commission, *The Social and Economic Rights Action Center (SERAC) v. Nigeria*, Comm. No. 155/96
[253] Ibid para 45.
[254] IACtHR, *Velasquez Rodriguez v Honduras*, Series C, No.4, Judgment of July 29, 1988, para 169.
[255] Ibid, para 170.

220. Pursuant to the obligations to protect, **promote and fulfil**, the State needs not only to refrain from directly violating the concerned rights, but also to take appropriate positive steps to ensure a positive framework to prevent and address violations. A significant component of such obligation is the State's procedural duty to investigate a human rights violation and prosecute the perpetrator(s). In this regard, investigations must be prompt, thorough, impartial and independent.[256]

221. In relation to Article 5 in particular, the Commission has interpreted this human right as obliging State Parties to:

> Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.[257]

> [Ensure that] [i]nvestigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and effectively, guided by the UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol).[258]

(2) AS TO THE FACTS

222. It is submitted that the Respondent State has 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, 18(3) and 26 above, agents of the Respondent State were directly responsible for engaging in discrimination and torture against the Applicants, subjecting the Applicants to violence, including sexual violence, and

[256] International Commission of Jurists, *Military Jurisdiction and International Law*, p.33.
[257] African Commission, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), adopted in October 2002, Article 17.
[258] Ibid, Article 19.

failing to undertake an adequate investigation into, or prosecution of, the violations, therefore preventing the Applicants from accessing an appropriate remedy. The criminal laws of the Respondent State failed to provide sufficient protection against the crime of 'rape' committed against the Applicants.

223. The Applicants submit that this Commission, as it has consistently concluded in several of its decisions, should be of the view that "a violation of any provision of the Charter automatically means a violation of Article 1. If a State party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article."[259]

J. REMEDIES

224. The Applicants ask the Commission for relief in the following terms:

(1) A finding that the Respondent State violated Articles 1, 2, 3, 5, 9, 11, 18(3) and 26 of the Charter.

(2) That the Commission accept a separate submission on remedies and reparation, or alternatively allow for a hearing on reparation if it has found the Respondent State to be in violation of the African Charter; such a hearing is merited as remedies and reparation are matters pertinent to the Communication in accordance with Rule 99 (3) of the Commission's Rules of Procedure; it would also allow the Applicants to provide more detail specifically regarding the amount of compensation sought, and thereby ensure that it reflects the loss at the time the Commission is rendering its decision, rather than at the time of this Submission.

[259] African Commission, *Dawda Jawara v. The Gambia*, Comm. Nos. 147/95 and 149/96, para 46.

(3) A request to the Respondent State to immediately open an effective, impartial and gender-sensitive investigation into the circumstances of these violations. Where sufficient evidence of these violations exists, the suspected perpetrators should be prosecuted, tried and adequately punished if found guilty through an impartial prosecutorial and judicial mechanism.

(4) A request to the Respondent State to publicly acknowledge the violations committed in national print media and to apologise to the Applicants for the violations suffered.

(5) request to the respondent State to ensure the payment of adequate compensation for all 17 female detainees arrested on March 9th and subjected to the violations of the rights as outlined above. The amount of compensation will be set out in a later submission, though should reflect the following elements of damages in line with international standards set out in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[260] and the jurisprudence of international human rights mechanisms:[261]

i. material damages, including past and potential future costs for medical treatment, medical, psychological and social services, legal or other expert assistance;
ii. loss of earnings and loss of earning potential;[262]
iii. lost opportunities, including employment;[263]

[260] UN General Assembly, A/RES/60/147, 16 December 2005, principle 20.
[261] Human Rights Committee, *Bozize v Central African Republic*, Communication No.449/1990; African Commission, *Egyptian Initiative and Interights v Egypt*, Communication 323/06; ECtHR, *Mikhejev v The Russian Federation*, Application No.77617/01, Judgment of 26 January 2006; IACtHR, *Castro Castro Prison Case*; see further REDRESS, The Right to Reparation in the African Human Rights System, October 2013, pp. 51-65, at http://www.redress.org/downloads/publications/1310Reaching%20For%20JusticeFinal.pdf.
[262] ECtHR, *Çakici v Turkey*, Application No.23657/94, Judgment of 8 July 1999, para.127; IACtHR, *Suarez- Rosero v Ecuador*, Judgment (Reparations and Cost), 20 January 1999, para.60; UN Human Rights Committee, *Adrien Mundyo Busyo et al v Democratic Republic of Congo*, Communication No. 933/2000, CCPR/C/78/D/993/2000 (2003), para.6.2.
[263] These costs have also been referred to as "pecuniary damages" or "special damages", see ECOWAS Community Court of Justice, *Chief Ebrimah Manneh v the Republic of Gambia*, Suit No:

iv. moral damages / non-pecuniary damages that take into account the severe psychological pain and suffering of the Applicants, including the humiliation and their sense of injustice.[264]

Should the Commission not grant a separate submission or a hearing on reparations, the Applicants request a monetary compensation of not less than 120,000 Egyptian Pounds for each of the 17 victims of the violations set above.

(6) A request to the Respondent State to amend the Egyptian Penal Code to reflect international criminal and human rights standards regarding rape. In specific, the Applicants request an amendment to Provision 267 (pertaining to rape) to reflect that rape must not be solely restricted to full vaginal penetration by the penis and that the definition of rape must comply with international standards.

(7) A request to the Respondent State to amend the Egyptian Code of Military Justice, in particular Provisions 1, 7 and 48, to explicitly exclude cases of alleged human rights abuses by military personnel against civilians from the jurisdiction of the military justice system;

(8) A request to the Respondent State to undertake relevant institutional and practical reforms to ensure that women alleging to have been subjected to rape or other forms of sexual violence can effectively pursue complaints. This entails the confidentiality of and protection of victims at the time of making a complaint and during the investigation and prosecution; increase the number of female police officers and prosecutors;

(9) A request to the Respondent State to undertake gender sensitivity training of members of the military and officials in the justice system;

ECW/CCJ/APP/04/07, Judgment of 5 June 2008, para.29: "Special damages are the enumerable or quantifiable monetary costs or losses suffered by the plaintiff. For example, medical costs, repair or replacement of damaged property, lost wages, lost earning potential, loss of business, loss of irreplaceable items, loss of support, etc."

[264] ECtHR, *Varnava and others v Turkey*, Judgment (Grand Chamber), 18 September 2009, Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), para.224; IACtHR, *Castro Castro Prison Case*, para.50 e.

(10) Establishment of an independent complaint mechanism with powers to investigate actions and complaints against military personnel.

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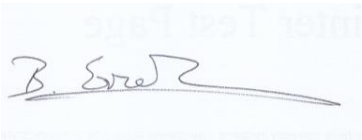

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