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c/o The Executive Secretary to the Commission, Dr Mary Maboreke, African Commission on Human and Peoples' Rights

BY E-MAIL

London, 20 November 2014

Dear Chairperson of the African Commission on Human and Peoples' Rights,

Introduction of Communication: S.A. (represented by REDRESS and SAJ) v. Democratic Republic of the Congo

1. This complaint is submitted by XXX XXX ('Applicant'), represented by the REDRESS Trust (REDRESS) and Synergie pour l'assistance judiciaire aux victimes de violation des droits humains au Nord Kivu (SAJ) (together 'Authors')¹, pursuant to Article 55 and 56 of the African

¹ **Exhibit A:** Power of Attorney signed by XXX XXX, 27 May 2014.

Charter on Human and Peoples' Rights ('African Charter') and Rule 83 (1) of the Rules of Procedure of the African Commission on Human and Peoples' Rights ('African Commission').

2. Given the sensitive nature of the alleged violation, the Applicant wishes her identity to be withheld from the public by referring to her as S.A. and through the redaction of her name, address and any other information which might identify her from any publicly available document, including the present communication.
3. The complaint is filed against the State of the Democratic Republic of the Congo ('Respondent State'), which ratified the African Charter on 20 July 1987. The Applicant has not submitted this complaint to any other regional or international procedure of investigation or settlement.
4. The Applicant was raped by a member of the Armed Forces of the Democratic Republic of the Congo (FARDC). The perpetrator was tried and was convicted by the Operational Military Tribunal (OMT) of XXX for rape and pillaging as war crimes. The Applicant joined the criminal proceedings as Civil Party and was awarded damages in the amount of XXX to be paid by the perpetrator and the Respondent State *in solidum*. To date, the Respondent State has failed to fulfil this obligation and issue the payment to the Applicant.
5. The Applicant submits that this failure violates Articles 1, 2, 3(2), 5, 7, 14, 18(3) of the African Charter and Articles 2, 4, 8, 11 and 25 of the Protocol to the Charter on the Rights of Women in Africa.

A. FACTS

6. The Applicant is a Congolese national born on XXX XXX XXX currently residing at XXX XXX, XXX XXX, XXX XXX, Democratic Republic of the Congo.
7. A judgment issued by the OMT of XXX on XXX XXX XXX against XXX XXX XXX of the XXX Brigade of FARDC² and the Applicant's statement dated XXX XXX XXX,³ establish the following facts:

(i) Crimes committed against the Applicant

8. On XXX XXX XXX, in the context of fighting between the FARDC and the rebel group of XXX XXX XXX XXX in the province of North Kivu, XXX XXX left the front line and went to the lodging of the Applicant in XXX XXX XXX XXX, near the XXX XXX XXX.⁴ The Applicant recognised him as he was her neighbour at that time.⁵ XXX XXX was wearing a uniform of the government's military and was on his own.⁶
9. When the Applicant opened the door, XXX XXX fired his automatic rifle into the floor of the house.⁷ Once inside, he threatened to kill the Applicant and her husband if they did not hand

² **Exhibit B:** Operational Military Tribunal XXX, Judgment in Case No. XXX, XXX (hereinafter OMT Judgment).

³ **Exhibit C:** Déclaration de Madame XXX (hereinafter Applicant Statement).

⁴ OMT Judgment, p. 6.

⁵ Applicant Statement, para. 7f.

⁶ *Ibid*, para. 7f.

⁷ OMT Judgment, p. 6; Applicant Statement, para. 8.

over XXX.⁸ They gave him all their savings amounting to XXX.⁹ Their XXX children who were in the house at that time hid under the bed.¹⁰

10. XXX XXX then dragged the Applicant outside to a clearing XXX XXX XXX XXX XXX XXX while her husband, whose hands had been tied XXX XXX XXX, remained in the house.¹¹ XXX XXX XXX XXX, XXX XXX.¹²
11. At the clearing, threatening her with the rifle, XXX XXX forced the Applicant to undress and lie down on the ground where he raped her by inserting his penis into her vagina until he ejaculated inside her body.¹³ XXX XXX XXX XXX XXX XXX XXX XXX XXX.¹⁴ After this act, he brought her back into the house to her husband who was helpless in face of the armed attacker.¹⁵ When leaving the premises, XXX XXX stole XXX XXX XXX XXX XXX XXX.¹⁶ He returned after a short moment but was chased away by the cries of the entire family.¹⁷
12. XXX XXX was arrested by the FARDC unit under the command of Colonel XXX stationed in XXX after the Applicant reported the incident with the help of her brother XXX XXX.¹⁸

(ii) Procedural history

13. On XXX XXX XXX, the Higher Military Prosecution indicted XXX XXX on charges of rape and extortion.¹⁹
14. On XXX XXX XXX, the Applicant was examined by XXX XXX XXX, Official of the Ministry of Public Affairs, for the purposes of the criminal investigations.²⁰ A medical report dated the same day concluded that it was likely that the Applicant was raped.²¹ According to the Applicant, the hospital where the medical examination had taken place lost her medical report and for this reason refused further treatment.²² She therefore never received an HIV/Aids test.²³
15. On XXX XXX XXX, the Applicant filed a Civil Party application claiming moral damages, and the restitution of XXX XXX.²⁴ The

⁸ OMT Judgment, p. 6, Applicant Statement, para. 8.

⁹ OMT Judgment, p. 6 ; Applicant Statement, para. 8.

¹⁰ Applicant Statement, para. 8.

¹¹ OMT Judgment, p. 6; Applicant Statement, para. 9.

¹² Applicant Statement, para. 9.

¹³ OMT Judgment, p. 6; Applicant Statement, para. 10.

¹⁴ Applicant Statement, para. 19.

¹⁵ OMT Judgment, p. 6; Applicant Statement, para. 10.

¹⁶ OMT Judgment, p. 6; Applicant Statement, para. 10.

¹⁷ Applicant Statement, para. 11.

¹⁸ OMT Judgment, p. 6; Applicant Statement, para. 14.

¹⁹ OMT Judgment, p. 6.

²⁰ OMT Judgment, p. 7; Applicant Statement, para. 20.

²¹ OMT Judgment, p. 6.

²² Applicant Statement, para. 20.

²³ *Ibid.*

²⁴ OMT Judgment, p. 3.

claims were directed against the accused and the state *in solidum*, i.e. as jointly liable parties.²⁵ The Applicant's husband did not file a Civil Party application.

16. On XXX XXX XXX, following evidentiary hearings held in closed session pursuant to a request by the Applicant, the OMT XXX XXX XXX issued a judgment ruling unanimously that the accused was guilty of having committed rape and pillaging as war crimes.²⁶ XXX XXX was sentenced to life imprisonment and removed from military ranks.²⁷ In the judgment, the Applicant's application as Civil Party was declared admissible and well-founded.²⁸
17. The OMT ordered the accused to pay back XXX XXX XXX XXX XXX.²⁹ The accused and the Respondent State were held jointly and severally liable to pay damages in the amount of XXX.³⁰ According to the OMT, the liability of the Respondent State was founded on the fact that the State had lost control over the actions of the accused who was a member of the military:

*En effet, le viol de [Applicant] et le pillage de ses biens ont été commis par XXX XXX XXX XXX, un militaire dont l'Etat avait perdu tout moyen de contrôle, manquant ainsi à sa mission de puissance publique.*³¹

[UNOFFICIAL TRANSLATION: *Effectively, the rape of [the Applicant] and the pillaging of her belongings were committed by XXX XXX XXX, a member of the military over whom the state had lost any means of control and therefore failed in its duty to exercise public control.*]

18. The Applicant testified in the proceedings and was present during the announcement of the judgment.³² Subsequently, she approached the Registrar of the OMT more than one time to demand the payment.³³ However, the Registrar asked her to speak to her lawyer and told her that it would be necessary to pay 10% of the awarded total amount which discouraged her from contacting the Registrar again.³⁴
19. Following the announcement of the judgment, XXX XXX was imprisoned but it is unknown to the Applicant if he remains in detention.³⁵
20. On XXX XXX XXX, the Registrar of the OMT of North-Kivu in Goma issued a notification³⁶ of the judgment addressed to XXX XXX and the Governor of the province of XXX as representative of the Respondent State and ordered each to pay XXX in damages and 13,425 Congolese Francs

²⁵ *Ibid.*, p. 3f.

²⁶ *Ibid.*, p. 14.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*, p. 15.

³¹ *Ibid.*, p. 13.

³² Applicant Statement, para. 14.

³³ *Ibid.*, para. 16.

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 18.

³⁶ **Exhibit D:** Registrar of the Operational Military Tribunal XXX, Notification Order in Case No. XXX, XXX XXX XXX.

(equal to \$108.22) for the fees of the notification. The notification was delivered to the Governor's secretariat but not to XXX XXX.³⁷

21. On **28 July 2014**, the Office of the Provincial Governor of XXX confirmed the receipt of a letter issued by the Applicant's counsel XXX XXX XXX on 14 July 2014 and sent in copy to the Minister of Justice and Human Rights in Kinshasa as well as REDRESS.³⁸ This letter outlined the facts as described above and called on the Office of the Provincial Governor of XXX to fulfil the Respondent State's legal obligation under international law to pay the compensation awarded by the OMT to the Applicant. To date, neither the Applicant nor her legal representatives have received a response by the Office of the Provincial Governor of XXX or the Ministry of Justice and Human Rights.
22. The XXX XXX was returned to the Applicant in the course of the proceedings.³⁹ The Applicant has neither received the stolen sum of XXX nor any payments of the court-awarded compensation of XXX to date.⁴⁰

(iii) Impact of the crimes committed against the Applicant⁴¹

23. As a result of the rape, the Applicant experienced injuries on her back caused by the stones that she was pushed against during the attack which took one week to heal. XXX XXX.
24. From time to time, the Applicant feels that her life is useless when she remembers what happened to her. Generally, her husband has been very supportive but occasionally he refers to the rape and blames her when they are arguing.
25. The Applicant, her husband and her family have kept it secret that she was raped, even towards her children, as her community discredits and humiliates rape victims. When she was younger, the Applicant witnessed how a girl victim of rape was treated this way.
26. The Applicant's economic situation has deteriorated following the rape. She and her family were forced to relocate to another area for fear of the return of XXX XXX. The Applicant who used to XXX XXX XXX at a favourable spot lost her clients and the location. She is now XXX XXX but does not have many clients and needs to commute constantly. The Applicant's husband lost his job as XXX XXX as he accompanied her to the hearings and could no longer make regular deliveries. He is now XXX XXX but can no longer bring food to keep in stock for the family as he used to when he was XXX XXX.

B. PARTICULAR CONTEXT FOR CONSIDERATION OF ADMISSIBILITY AND MERITS

³⁷ *Ibid.*

³⁸ **Exhibit E:** Letter addressed to Excellency XXX XXX XXX, Governor of XXX, 14 July 2014.

³⁹ Applicant Statement, para. 17.

⁴⁰ *Ibid.*, para. 16f.

⁴¹ The information under this section reflects the Applicant Statement, para. 19-26.

27. As a result of a series of obstacles described below, court-ordered compensation awarded against the Respondent State is routinely not paid.⁴² The Applicant is merely one victim among many whose hopes have been frustrated and rights violated in this way. In Mbandaka in Equator province, 31 women raped by FARDC soldiers obtained reparation awards of \$5,000 each but had not received any payments from the perpetrator or the state at the time of reporting in March 2011.⁴³ In Songo Mboyo in Equator province, 29 women raped by rebels were awarded compensation of \$5,000 and \$10,000 in 2006. None of the women received any payments at the time of reporting in March 2011.⁴⁴
28. The failure of the Respondent State to fulfil its obligation is undermining trust in the judiciary and victims' willingness to seek justice in the formal justice system.⁴⁵ At the same time, it encourages the practice of amicable settlements outside of the court which disregards victims' interests by allowing the alleged perpetrator to evade prosecution through providing a small amount of money, a goat or a plot of land to the family and in some cases forcing the victim to marry the attacker.⁴⁶

(i) Historical context of the conflict in Eastern DRC

29. Around August 2008, Laurent Nkunda, a former rebel who had been reportedly integrated into the Congolese army, defected and established the National Council for the Development of the People (CNDP), which started an armed rebellion in North and South Kivu.⁴⁷ Following

⁴² See also Physicians for Human Rights, *Summary of Roundtable Discussion: Reparations for Survivors of Sexual Violence in the Democratic Republic of Congo*, June 2014, p. 4, available at https://s3.amazonaws.com/PHR_other/reparations-for-survivors-of-sexual-violence.pdf (hereinafter PHR Summary of Roundtable); UN Office of the High Commissioner for Human Rights, *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights*, March 2011, pp. 20 and 38, available at <http://www.refworld.org/docid/4d708ae32.html> (hereinafter OHCHR Report); FIDH, *DRC Victims of Sexual Violence Rarely Obtain Justice and Never Receive Reparation*, August 2013, pp. 7 and 56, available at http://www.fidh.org/IMG/pdf/rapport_rdc_.pdf (hereinafter FIDH report); Committee on the Elimination of Discrimination against Women, *Concluding Observations on the combined sixth and seventh periodic report of the Democratic Republic of the Congo*, 30 July 2013, para. 9(e) (hereinafter: CEDAW Concluding Observations); United Nations Office of the High Commissioner for Human Rights (OHCHR) and United Nations Organisation Stabilization Mission in the Democratic Republic of Congo (MONUSCO), *Progress and Obstacles in the Fights Against Impunity for Sexual Violence in the Democratic Republic of Congo*, April 2014, para. 57, available at http://www.monusco.unmissions.org/LinkClick.aspx?fileticket=Gyh_dUBNGcs%3D&tabid=10770&mid=13783&language=en-US (hereinafter: MONUSCO Report); International Center for Transitional Justice, *Judgment Denied: The Failure to Fulfill Court-Ordered Reparations for Victims of Serious Crimes in the Democratic Republic of the Congo*, May 2012, p. 4, available at <http://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Reparations-2012-ENG.pdf> (hereinafter ICTJ Report); ACORD, *Protection and Reparation Under Congolese Law for Survivors of Sexual and Gender-Based Violence*, June 2010, p. 12, available at <http://www.acordinternational.org/silo/files/drc--protection-and-reparation-for-survivors-of-sexual-and-genderbased-violence.pdf> (hereinafter: ACORD Report); Report on the Special Rapporteur on violence against women, its causes and consequences – Mission to the Democratic Republic of Congo, 28 February 2008 (hereinafter Special Rapporteur VAW Report), para. 88.

⁴³ OHCHR Report, p. 31.

⁴⁴ *Ibid.*, p. 35.

⁴⁵ *Ibid.*, p. 49; Special Rapporteur VAW Report, para. 87.

⁴⁶ OHCHR Report, p. 21 and 33; FIDH Report, p. 55; Special Rapporteur VAW Report, para. 20.

⁴⁷ The Guardian, *Profile: Laurent Nkunda – Congolese warlord is persistent source of instability, say experts*, 23 January 2009, available at <http://www.theguardian.com/world/2009/jan/23/profile-laurent-nkunda-congo>; Africa Confidential, *General Laurent*

skirmishes on 28 August 2008, large-scale hostilities broke out in Masisi and Rutshuru territory between the CNDP and the FARDC, which were backed by other militant groups.⁴⁸ On 26 October 2008, CNDP forces advanced to within several kilometres of Goma forcing the FARDC to retreat.⁴⁹ Fighting continued until a peace treaty was signed between the Congolese government and CDNP in March 2009.⁵⁰

30. During the attacks and ensuing combat, civilians were reportedly subjected to a wide range of abuses, including extra-judicial killings, displacement and looting.⁵¹ Cases of rape against women by members of the FARDC during their retreat from Goma in October 2008 were also reported.⁵² The Applicant knows of the rape of a woman near her house during this period.⁵³
31. Throughout the above-mentioned period of armed conflict, the single largest group of alleged perpetrators of conflict-related rape in the Eastern provinces of the Respondent State were members of the FARDC even though other armed groups, including the rebel groups M23, Democratic Forces for the Liberation of Rwanda (FDLR) and Mai Mai, also committed sexual violence.⁵⁴ A research study conducted by Harvard Humanitarian Initiative and Oxfam International in South-Kivu between 2004 and 2008, reviewed and analysed 4,311 post-rape interviews with victims as they were seeking support at the Panzi Hospital.⁵⁵ The results showed that the vast majority of alleged perpetrators of sexual violence, in particular rape and sexual slavery, were identified by the victims as armed combatants without specifying the group they belonged to.⁵⁶
32. As acknowledged by the African Commission in its Resolution 284 on the Suppression of Sexual Violence against Women in the Democratic Republic of the Congo adopted in May 2014,⁵⁷ the perpetration of rape and other forms of sexual violence has persisted and

Nkunda (Laurent Nkundabatware or Laurent Nukunda Batware), Who's Who database, available at <http://www.africa-confidential.com/whos-who-profile/id/129/page/3>.

⁴⁸ UN Security Council, Final Report of the Group of Experts on the Democratic Republic of the Congo, S/2008/773, 12 December 2008, para. 14, available at <https://www.documentcloud.org/documents/411977-letter-dated-10-december-2008-from-the-chairman.html>.

⁴⁹ *Ibid*, para. 15.

⁵⁰ Democratic Republic of Congo, *Peace Agreement between the government and le Congrès national pour la défense du peuple (CNDP)*, 23 March 2009, available at http://www.iccwomen.org/publications/Peace_Agreement_between_the_Government_and_the_CNDP.pdf.

⁵¹ IRIN, *DRC: At least 20 civilians killed in North Kivu clashes*, 7 November 2008, available at

<http://www.irinnews.org/report/81355/drc-at-least-20-civilians-killed-in-north-kivu-clashes>; IRIN, *DRC: Tens of thousands displaced in renewed fighting in North Kivu*, 6 November 2008, available at <http://www.irinnews.org/report/81329/drc-tens-of-thousands-displaced-in-renewed-fighting-in-north-kivu>; IRIN, *DRC: "Government troops on the rampage"*, 30 October 2008, available at <http://www.irinnews.org/report/81204/drc-government-troops-on-the-rampage>.

⁵² New York Times, *A Massacre in Congo, Despite Nearby Support*, 11 December 2008, available at <http://www.nytimes.com/2008/12/11/world/africa/11congo.html?pagewanted=all&r=0>.

⁵³ Applicant Statement, para. 12.

⁵⁴ Human Rights Watch, *Soldiers Who Rape, Commanders Who Condone*, 2009, p. 21, available at <http://www.hrw.org/sites/default/files/reports/drc0709web.pdf>. This trend was apparent in 2007 according to the Special Rapporteur VAW Report, para. 13, and continued from 2010 to 2013 according to MONUSCO Report, para. 19, and chart on p. 10.

⁵⁵ Harvard Humanitarian Initiative and Oxfam, *Now the World is Without Me: An Investigation of Sexual Violence in Eastern Democratic Republic of Congo*, April 2010, p. 8f., available at <http://hhi.harvard.edu/sites/default/files/publications/hhi-oxfam%20drc%20gbv%20report.pdf>.

⁵⁶ *Ibid*, p. 14.

⁵⁷ Issued at the 55th Ordinary Session held from 28 April to 12 May 2014 in Luanda, Angola, available at <http://www.achpr.org/sessions/55th/resolutions/284/>.

increased over the past decades in the conflict-affected provinces, especially in the East of the Respondent State.⁵⁸ At the same time, impunity, especially in cases involving high-ranking FARDC commanders, still prevails and victims do not have access to compensation or other forms of reparation.⁵⁹

(ii) Legal framework for compensation awards

33. The Congolese domestic law grants victims of an alleged crime the right to join criminal proceedings as Civil Parties in order to claim damages. Where the accused acted as an agent of the state, the Respondent State can be jointly held liable to pay any damages awarded. Following a judgment awarding compensation, Congolese law requires victims to initiate a separate enforcement procedure in order to obtain any payments.

a. Legal basis for compensation

34. According to Article 258 of the Civil Code of the Respondent State,⁶⁰ any act committed by an individual which causes damages to another person creates the obligation to repair the harm suffered through monetary compensation. For a claim to be successful, a plaintiff needs to establish the commission of a wrongful act, the existence of damages and the causal link between both.⁶¹ Such civil claims can be made for various types of harm, including physical, moral (e.g. harm to honour or reputation) and material harm.⁶² There are no specific rules on how to calculate the amount of compensation.⁶³

b. Jurisdiction of criminal courts for compensation awards

35. According to Article 77(1) of the Code for the Military Judiciary,⁶⁴ a civil claim for damages resulting from a violation under the jurisdiction of the military courts can be brought by a Civil Party before the judge who tries the criminal charges. Between the seizure of the court and the closing of the hearings, any victim of the alleged criminal acts can file an application to be admitted as Civil Party to the criminal proceedings according to Article 69 of the Code of Criminal Procedure.⁶⁵ In addition, according to Article 108 of the Law on the Organisation, Operation and Jurisdiction of the Judiciary,⁶⁶ courts can award monetary damages to victims which are due pursuant to law, custom or local practice without the participation of any Civil Party. However, this is only used in a very limited number of cases.⁶⁷

⁵⁸ See for the period of 2010 to 2013: MONUSCO Report, para. 19-24.

⁵⁹ MONUSCO Report, paras. 57 and 59.

⁶⁰ Decree of 30 July 1888 on Contracts and Obligations under Agreements.

⁶¹ ACORD Report, p. 9.

⁶² Physicians for Human Rights, *Barriers to Justice: Implementing Reparations for Sexual Violence in the DRC*, May 2013, p. 16 (hereinafter: PHR Report).

⁶³ FIDH Report, p. 43.

⁶⁴ Law No. 023/2002 of 18 November 2002 on the Code for the Military Judiciary.

⁶⁵ Decree of 6 August 1959 on the Code of Criminal Procedure.

⁶⁶ Organic Law No. 13/011 of 11 April 2013 on the Organisation, Operation and Jurisdiction of the Judiciary.

⁶⁷ PHR Summary of Roundtable, p. 3.

c. State liability for compensation awards

36. According to Article 260 of the Civil Code, individuals or entities other than the person who committed the wrongful act can be held liable for damages. This rule, in combination with a still applicable decision by the Belgian Court of Cassation dated 5 November 1920,⁶⁸ allows victims who are admitted as Civil Parties to claim damages against the state for the harm caused by a state agent.⁶⁹ State liability for damages results from the erroneous selection or the lack of supervision of its agents.⁷⁰ It can only arise in criminal procedures but not in tort claims before civil courts⁷¹ and is secondary to the perpetrator's liability, i.e. compensation awards against the state can only be enforced if the perpetrator is not able to pay the amount awarded.⁷² Apart from court-ordered compensation, the government's Comprehensive Strategy to Combat Gender-Based Violence issued in 2009 provides for the creation of a reparation fund for victims of sexual violence whose perpetrators are either unidentified or at large.⁷³ This fund has not been established to date.

d. Enforcement procedure for compensation awards

37. In the event a guilty verdict together with a compensation order is issued by the competent court, Article 109 of the Code of Criminal Procedure⁷⁴ stipulates that Civil Parties must pursue the enforcement of this award. In practice the following steps are required of victims:⁷⁵

(1) The victim must obtain a copy of the judgment from the Court's Registrar or the Public Ministry against the payment of a fee.⁷⁶ This has to be done in person which typically incurs transport costs.

(2) According to Article 129 of the Code of Criminal Procedure and an Inter-ministerial Act dated 15 April 2013,⁷⁷ the victim has to pay "proportional fees" of 3% of the amount awarded. Article 117 of the Code of Criminal Procedure requires the payment to be made to the Registrar within 8 days of the final judgment, i.e. before the compensation is paid to the Civil Party. Alternatively, s/he can apply for a certificate of indigence from the Ministry of Social Affairs to prove their inability to bear the costs. For this purpose,

⁶⁸ Belgian Court of Cassation, 1st Chamber, *City of Bruges v. Société La Flandria*, 5 November 1920, available at <http://www.evematringe.fr/blog/2009/02/06/la-flandria/>. This decision is still applicable today since at that time the Belgian Court of Cassation was the Court of Cassation of Belgian Congo and it ruled on the Articles under the Belgian Code equivalent to Art. 258 of the Congolese Civil Code.

⁶⁹ ACORD Report, p. 11.

⁷⁰ OMT Judgment, p. 13.

⁷¹ PHR Report, p. 29.

⁷² *Ibid.*, p. 16; REDRESS, *Submission to the Committee on the Elimination of Discrimination against Women for Consideration of the Combined 6th and 7th Report of the Democratic Republic of the Congo*, 24 June 2013, para. 23, available at <http://www.redress.org/downloads/publications/REDRESS%20Final%20DRAFT%20Submission%20to%20CEDAW%20on%20DRC%2020%20June%202013.pdf> (hereinafter REDRESS Submission).

⁷³ Comprehensive Strategy on Combatting Gender-Based Violence in the Democratic Republic of Congo, 1 April 2009, p. 31 (Component 1: Combatting Impunity – Objective D: To ensure reparations for victims – Activity D.3.3.).

⁷⁴ According to Article 77(3) of the Code on the Military Judiciary this rule applies equally in proceedings before the military courts.

⁷⁵ See process described in PHR Report, p. 28; FIDH Report, p. 60 f.

⁷⁶ On the amount of fees see Article 126(13) Code of Criminal Procedure and Inter-ministerial Act No. 002/CAB/MIN/J&DH/2013 and No. 785/CAB/MIN/FINANCES/2013 of 15 April 2013.

⁷⁷ Inter-ministerial Act No. 002/CAB/MIN/J&DH/2013 and No. 785/CAB/MIN/FINANCES/2013 of 15 April 2013.

the victim is required to travel to the provincial division of the Ministry of Social Affairs or another competent local authority for a personal interview followed by investigations on the financial status if necessary.⁷⁸ However, it has been reported that in practice, victims are often still required to pay the fee, even after being declared indigent.⁷⁹

(3) Upon the victim's request and payment of an additional notification fee,⁸⁰ the Court's Registrar will notify the provincial governor about the judgment and the payment order and will furnish him or her with a copy of the judgment.

(4) The copy of the judgment must be signed by the provincial governor and delivered to the Ministry of Justice in Kinshasa.

(5) The Enforcement Office at the Ministry of Justice must include the requested amount in the next budget. This inclusion must be approved by the Director of Litigation or the Secretary General of the Ministry of Justice and by the Minister of Justice. However, they can suspend enforcement without giving any justification.

(6) The amount awarded must be transferred to the Ministry of Finance which makes the payment according to the expenditure plan.

(7) The victim must present all documents to the presiding judge who dispenses the amount.

e. Additional obstacles for the enforcement of compensation awards against the Respondent State

38. Before arriving at the stage of enforcement of compensation awards, victims of sexual violence face a series of obstacles in obtaining a guilty verdict, including the pressures to accept amicable settlements instead of criminal procedures to the detriment of him/her,⁸¹ the lack of resources available to him/her to participate in the proceedings (e.g. transport costs, lawyer fees, court fees),⁸² the risk of stigma and shame associated with being a victim of sexual violence,⁸³ and the lack of victim protection programmes for their participation in the trial.⁸⁴
39. If victims are able to overcome these barriers and obtain a compensation award as the Applicant did, they continue to face a number of additional virtually insurmountable obstacles in enforcing their rights despite the legal obligation of the state to pay compensation to victims of sexual violence.

⁷⁸ *Avocats Sans Frontières, Etude sur l'aide légale en République démocratique du Congo*, January 2014, p. 59 (hereinafter ASF Report).

⁷⁹ ICTJ Report, p. 3.

⁸⁰ On the amount of fees see Inter-ministerial Act No. 002/CAB/MIN/J&DH/2013 and No. 785/CAB/MIN/FINANCES/2013 of 15 April 2013.

⁸¹ FIDH Report, p. 55; CEDAW Concluding Observations, para. 11(b); MONUSCO Report, para. 51; PHR Report, p. 20; PHR Summary of Roundtable, p. 7; Special Rapporteur VAW Report, para. 72.

⁸² MONUSCO Report, para. 52f.

⁸³ OHCHR Report, pp. 13 and 25; MONUSCO Report, para. 55.

⁸⁴ FIDH Report, p. 53; MONUSCO Report, para. 54.

(1) Lack of mandatory enforcement and compliance by Respondent State

40. Congolese law prohibits the seizure of government assets which means that victims have to rely on the good will of the government to voluntarily enforce compensation awards.⁸⁵ To date, the Respondent State has failed to fulfil its obligations established by the court orders obtained by victims of sexual violence. In statements made by the Ministry of Justice and Human Rights in 2010 and 2011, the Ministry claims that there is not sufficient budgetary provision for the payment of reparation awards and there is no plan to secure funding.⁸⁶ In 2010, it declared to have received 0.7% of the requested sum to pay reparation awards.⁸⁷ Provincial government officials who eventually have the duty to issue the payments defer to the responsibility of the central government.⁸⁸

(2) Excessive fees to be paid by victims

41. Victims are legally required to pay a series of fees for every step of the process, starting with fees for each page of any document copied from the case file,⁸⁹ fees to join proceedings as Civil Party,⁹⁰ fees for obtaining a copy of the judgment⁹¹ up to the fees for enforcing the reparation awards which are due in advance of receiving any payments. In the present case of the Applicant, these so-called proportional fees amount to \$300 which stands in stark contrast to the average annual income of \$230 per person in the Respondent State.⁹²
42. Due to the endemic corruption within the judicial system, victims are typically asked to pay additional amounts to the fees.⁹³ The option of applying for a certificate of indigence which could exempt victims from paying any fees or at least reduce the amount is in practice not accessible as the application process is cumbersome and incurs additional costs.⁹⁴ Furthermore, even with a certificate of indigence, judges can decide not to exempt the victim from the costs.⁹⁵

(3) Lack of victim support

43. The complete lack of support and information provided by the Respondent State to victims during the enforcement procedure effectively prevents victims from obtaining any payments. Victims have no access to legal assistance beyond the judgment because lawyers have no funding to pursue compensation.⁹⁶ However, the complexity of the enforcement procedure

⁸⁵ REDRESS Submission, para. 23.

⁸⁶ ACORD Report, p. 12; OHCHR Report, p. 49.

⁸⁷ FIDH Report, p. 61.

⁸⁸ ICJT Report, p. 4.

⁸⁹ Inter-ministerial Act No. 002/CAB/MIN/J&DH/2013 and No. 785/CAB/MIN/FINANCES/2013 of 15 April 2013.

⁹⁰ Article 126(10) Code of Criminal Procedure.

⁹¹ Art. 126 (13) Code of Criminal Procedure.

⁹² Gross National Income for 2012 according to the World Bank: <http://data.worldbank.org/country/congo-dem-rep>.

⁹³ FIDH Report, p. 54.

⁹⁴ PHR Report, p. 29; PHR Summary of Roundtable, p. 9; FIDH Report, p. 52; ICJT Report, p. 3; ASF Report, p. 59f.

⁹⁵ FIDH Report, p. 52.

⁹⁶ PHR Report p. 30; PHR Summary of Roundtable, p. 9.

makes it impossible for victims to pursue it without legal assistance.⁹⁷ Victims who are admitted as Civil Parties and therefore would benefit from compensation orders are not informed by the competent authorities on the final judgments and the award of damages.⁹⁸ When there is an appeal decision, the judgment is issued in Kinshasa and only accessible there.⁹⁹ Even if victims are aware of their entitlement to compensation, it is often difficult to obtain the judgment to initiate the enforcement procedure as the hardcopies are often lost, stolen or destroyed.¹⁰⁰

C. LEGAL ARGUMENTS

44. The Applicant has been judged by the Respondent's State's own courts to be the victim of rape and pillage at the hands of a soldier from its armed forces. The Respondent State's courts have found that the state is responsible for the violations, and that it must pay XXX in damages, plus costs.
45. Although the Applicant and her family could raise additional issues about the responsibility of the Respondent State in connection with this case,¹⁰¹ in this communication the Applicant focusses on the payment of compensation due to her from the Respondent State as found by its own courts.
46. This communication therefore does not require the Commission to re-examine the facts as established in the criminal trial. Rather, this case concerns the straightforward issue of the Respondent State's failure to comply with a judgment of its own courts. It is submitted that the acts committed against the Applicant on XXXXX amounted to violations of the following provisions of the **African Charter**:
 - **Article 5 (Prohibition of Torture and Cruel, Inhuman and Degrading Treatment), Article 2 (Enjoyment of rights without discrimination), and Article 18(3) (Elimination of discrimination against women), in relation to the rape committed against the Applicant;**
 - **Article 14 (Right to Property), in relation to the pillage committed against the Applicant;**
47. They also amounted to violations of the following provisions of the **Protocol to the Charter on the Rights of Women in Africa ('Maputo Protocol')**, to which the Respondent State is a party:¹⁰²
 - **Article 2 (Elimination of Discrimination Against Women);**

⁹⁷ PHR Report, p. 30.

⁹⁸ PHR Report, p. 26; FIDH Report, p. 59.

⁹⁹ FIDH Report, p. 48.

¹⁰⁰ MONUSCO Report, para. 48.

¹⁰¹ Including the use of military courts to try crimes amounting to serious human rights violations against a civilian and the types and amount of reparation awarded by the State Party.

¹⁰² Instrument of ratification deposited with the Chairperson of the Commission of the African Union on 9 February 2009.

- **Article 4 (Rights to Life, Integrity and Security of the Person); and**
 - **Article 11 (Protection of Women in Armed Conflicts).**
48. Although an investigation and prosecution was carried out in relation to the acts, the Applicant has not been provided reparation for the violations. As such, she remains a victim of these violations. The failure to provide compensation gives rise to additional violations of the following provisions of the **African Charter**:
- **The right to a remedy for the above violations (inherent in Articles 1 and 7);**
 - **Article 7 (Right to a Fair Trial), for failure to implement the Court's judgment, which is an integral part of the trial;**
 - **Article 14 (Right to Property), by failing to pay compensation awarded by the Courts, which amounts to the property of the Applicant.**
49. It also amounts to a violation of the following provisions of the **Maputo Protocol**:
- **Article 4(2)(f) (reparation for violation of the right to integrity of the person);**
 - **Article 25 (Remedies); and**
 - **Article 8 (Access to Justice and Equal Protection before the Law).**

D. ADMISSIBILITY

50. The Applicant submits that the conditions set out in Article 56 of the African Charter are complied with, including particularly Articles 56(5) and 56(6).

(i) The applicant has already exhausted local remedies

51. The Applicant, by constituting herself as a Civil Party in the criminal trial of XXX XXX, has exhausted domestic remedies for the violations committed against her, namely the rape and the pillage of her property. Her complaint is that the compensation awarded by the domestic judicial remedy for these violations has not been implemented by the executive, leading to a continuing violation of her rights, and further violation of her right to a fair trial.
52. In these circumstances, the Respondent State is made aware of its responsibility and has an obligation to implement the compensation order made by its Courts. It cannot require the Applicant to undertake further complicated and expensive procedures to have the judgment enforced (as discussed further in the following section). Such procedures therefore do not need to be exhausted before bringing this complaint to an international mode of adjudication.
53. This was clearly established by the African Commission in the case of *Bissangou v. Congo*.¹⁰³ In that case, the Commission considered the State's non-enforcement of a judgment

¹⁰³ African Commission, *Bissangou v Congo*, Comm. No. 253/02.

delivered in favour of an individual lawyer against it. The State Party argued that domestic remedies had not been exhausted, because the applicant should have appealed against a Minister's decision not to pay the compensation, and because the applicant had not undertaken proceedings for seizure against the State under the Administrative Procedure Code. The Commission did not accept these arguments, finding that "it is unreasonable to require from a citizen who has won the case of a payable debt against the State at the end of a legal proceedings to institute procedures of seizure against it".¹⁰⁴ The Applicant had notified the State Party of the judgment, and as such, the Commission held that he had "exhausted all local remedies in endeavouring to assert his right to compensation for the prejudice suffered".¹⁰⁵

54. This is consistent too with the jurisprudence of the European Court of Human Rights ('ECHR'), which has dealt with multiple cases of non-enforcement of judgments against the State. As that Court reiterated in the case of *Burdov*, decided under the pilot judgment procedure for issues where there are multiple cases raising the same issue before the Court:

A person who has obtained a judgment against the State may not be expected to bring separate enforcement proceedings (see Metaxas v. Greece, no. 8415/02, § 19, 27 May 2004). In such cases, the defendant State authority must be duly notified of the judgment and is thus well placed to take all necessary initiatives to comply with it or to transmit it to another competent State authority responsible for execution. This is particularly relevant in a situation where, in view of the complexities and possible overlapping of the execution and enforcement procedures, an applicant may have reasonable doubts about which authority is responsible for the execution or enforcement of the judgment (see Akashev v. Russia, no. 30616/05, § 21, 12 June 2008).

A successful litigant may be required to undertake certain procedural steps in order to recover the judgment debt, be it during a voluntary execution of a judgment by the State or during its enforcement by compulsory means (see Shvedov v. Russia, no. 69306/01, § 29–37, 20 October 2005). Accordingly, it is not unreasonable that the authorities request the applicant to produce additional documents, such as bank details, to allow or speed up the execution of a judgment (see, mutatis mutandis, Kosmidis and Kosmidou v. Greece, no. 32141/04, § 24, 8 November 2007). The requirement of the creditor's cooperation must not, however, go beyond what is strictly necessary and, in any event, does not relieve the authorities of their obligation under the European Convention on Human Rights to take timely action of their own motion, on the basis of the information available to them, with a view to honouring the judgment against the State (see Akashev, cited above, § 22). The Court thus considers that the burden to ensure compliance with a judgment against the State lies primarily with the State authorities starting from the date on which the judgment becomes binding and enforceable.

The complexity of the domestic enforcement procedure or of the State budgetary system cannot relieve the State of its obligation under the Convention to guarantee to everyone the right to have a binding and enforceable judicial decision enforced within a

¹⁰⁴ *Ibid.*, para. 59.

¹⁰⁵ *Ibid.*, para. 57.

*reasonable time. Nor is it open to a State authority to cite the lack of funds or other resources (such as housing) as an excuse for not honouring a judgment debt (see Burdov [No. 1], cited above, §35, and Kukalo v. Russia, no. 63995/00, § 49, 3 November 2005). It is for the Contracting States to organise their legal systems in such a way that the competent authorities can meet their obligation in this regard (see mutatis mutandis Comingersoll S.A. v. Portugal [GC], no. 35382/97, § 24, ECHR 2000-IV, and Frydlender v. France [GC], no. 30979/96, § 45, ECHR 2000-VII).*¹⁰⁶

55. As such, the Court has repeatedly found there to be no merit in the argument that an applicant in such a case should have initiated enforcement proceedings to meet the exhaustion requirement.¹⁰⁷
56. In this case, the requirements of Congolese law go far beyond “creditor’s cooperation” that is strictly necessary for the State to be able to pay the judgment debt, such as providing bank details. In contrast, the procedures of Congolese law put the onus on the individual to force implementation by the State.
57. Even if they did need to be exhausted, the enforcement proceedings erect insurmountable economic and procedural hurdles for the Applicant, making the award of compensation by the Courts illusory.¹⁰⁸
58. In addition, enforcement under these proceedings is essentially discretionary, as Congolese law prohibits the seizure of government assets meaning that victim must rely on the good will of the government to voluntarily enforce reparation awards.¹⁰⁹ In such cases, the Commission has held that “it would be improper to insist on the complainant seeking remedies from a source which... ha[s] no obligation to decide according to legal principles”.¹¹⁰
59. In the jurisprudence of the Commission, the remedy is therefore neither available, nor adequate, nor effective,¹¹¹ and would therefore in any event not need to be exhausted.

(ii) The State has had ample notice of the violations and the remedy has been unduly prolonged

60. This position is entirely consistent with the Commission’s established jurisprudence that the exhaustion of domestic remedies is not required in cases where it can be shown that the state failed to remedy a situation despite “ample notice and time to do so”.¹¹²

¹⁰⁶ ECHR, *Burdov v Russia (No. 2)* (2011) App. No. 33509/04, 15 January 2009, paras. 68-70.

¹⁰⁷ See, eg. ECHR, *Beshiri v Albania* (2006) App. no. 7352/03, 22 August 2006, para. 54 (“In particular, as to the Government’s argument relating to the applicants’ failure to initiate enforcement proceedings, the Court reiterates that a person who has obtained an enforceable judgment against the State as a result of successful litigation cannot be required to resort to enforcement proceedings in order to have it executed (see *Cocchiarella v. Italy* [GC], no. 64886/01, § 89, ECHR 2006; *Metaxas v. Greece*, no. 8415/02, § 19, 27 May 2004; *Koltsov v. Russia*, no. 41304/02, § 16, 24 February 2005; and *Petrushko v. Russia*, no. 36494/02, § 18, 24 February 2005).”).

¹⁰⁸ See further paras. 37-43 of this submission.

¹⁰⁹ REDRESS Submission, para. 23.

¹¹⁰ African Commission, *Constitutional Rights Project v Nigeria (in respect of Zamani Lakwot and 6 Others)*, Comm. No. 87/93, paras. 9-10.

¹¹¹ *Ibid.*

¹¹² African Commission, *Article 19 v Eritrea*, Comm. No. 275/03, paras. 72 and 77.

61. The Respondent State had ample notice of the alleged violations, first through the complaint made by the Applicant in late 2008, and further through the proceedings it carried out against XXX XXX. Its own courts issued the order for compensation in XXX XXX, and the Registrar notified the Executive of its liability to pay the judgment on XXX XXX XXX. As such, it has had not only ample notice of the violations, but ample notice of its own liability in respect of them.

(iii) The failure to pay reparation amounts to a continuing violation, so the ‘reasonable time period’ requirement of Article 56(6) is met

62. Article 56(6) of the African Charter stipulates that communications must be submitted within “a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter”. The rationale for the reasonable time requirement is to prevent challenges to domestic decisions within a jurisdiction long after they have been delivered, in the interests of legal stability and certainty.

63. However, where a final judgment has been delivered by domestic courts, and the onus is on the State to provide compensation awarded to repair a serious violation of human rights, a continuing situation arises. In such cases, the ECHR has held that an analogous six-month time limit for bringing complaints under the European Convention on Human Rights has no application to a failure to enforce domestic judgments.¹¹³

64. Even if the time limit was relevant, the Applicant has complied with it, as she has brought this complaint within six months of it being clear that the State did not intend to pay the judgment debt. The judgment was issued on XXX XXX XXX, and notified to the Executive by the Registrar of the OMT of XXX XXX XXX on XXX XXX XXX, and reiterated to the Provincial Governor of XXX by the letter issued by the Applicant’s counsel on 28 July 2014. When payment had not been made by July 2014, as a measure of last resort, the Applicant’s lawyer wrote the authorities requesting them to fulfil their responsibilities to provide reparation. Once no response was received to this letter it became apparent to the Applicant that the State Party would not comply with the judgment, and it is from this date that any “reasonable time period”, if it applied, would have to be judged.¹¹⁴

(iv) The African Commission has jurisdiction to consider violations of the Maputo Protocol

65. There is no question that the African Charter was in force for the Respondent State at the time the violations were committed.¹¹⁵

¹¹³ See eg. ECHR, *Driza v Albania* (2011) App. No. 10810/05, 15 March 2011, para. 60; see *Marini v Albania* (2007) App. No. 3738/02, 18 December 2007, para. 95, ECHR 2007-XIV (extracts).

¹¹⁴ See further African Commission, *Tsikata v Ghana*, Comm. No. 322/2006, para. 37.

¹¹⁵ The Democratic Republic of the Congo signed the Charter on 23 July 1987, and deposited its instrument of ratification on 28 July 1987.

66. In addition, although the attack on the Applicant and the trial took place a number of months before the Respondent State deposited its instrument of ratification of the Maputo Protocol,¹¹⁶ the violation alleged is a continuing violation, and the African Commission therefore has jurisdiction to consider it.
67. The African Commission has made it clear that “violations that occurred prior to the entry into force of the Charter, in respect of a State Party, shall be deemed to be within the jurisdiction *rationae temporis* of the Commission, if they continue, after the entry into force of the Charter”.¹¹⁷ This has been applied, for example, in relation to cases of enforced disappearance,¹¹⁸ and denial of nationality.¹¹⁹
68. The UN Committee Against Torture has explained how the failure to provide reparation for torture is a continuing violation where the State takes certain procedural steps after the entry into force of the Convention. In *Gerasimov v Kazakhstan* the alleged torture occurred before the State Party’s ratification, but its “failure to fulfil its obligations to investigate the complainant’s allegations and to provide him with redress continued after the State Party recognized the Committee’s competence under article 22 of the Convention”. In the circumstances, the Committee considered that it was not precluded *ratione temporis* from considering the complaint in its entirety.¹²⁰
69. In addition, as described above, the ECHR has established that the failure to pay a reparation award made by the State’s courts against it “creates a continuing situation”.¹²¹
70. In this case, although the initial violation took place before the entry into force of the Maputo Protocol for the Respondent State, the failure to provide a remedy, including by executing the compensation judgment, has occurred after the entry into force of the Maputo Protocol. As described above at paragraphs 19-21, a number of procedural steps have been taken to try to enforce the judgment since February 2009, including the notification of the judgment to the State by the Registrar on XXX XXX XXX, and letter on behalf of the Applicant to the Provincial Governor of XXX of 28 July 2014. In such a situation, the Commission has the jurisdiction to consider all of the alleged violations, whose effects continue.
71. In addition, the Maputo Protocol enshrines *specific* continuing obligations which have not been complied with in this case, including (as detailed further below):
- Article 4(2)(f) which requires the State to “establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women [...]”;

¹¹⁶ Instrument of ratification deposited with the Chairperson of the Commission of the African Union on 9 February 2009.

¹¹⁷ African Commission, *Kevin Mgwanga Gunme et al v Cameroon*, Comm. No. 266/03 para. 96.

¹¹⁸ African Commission, *JE Zitha & PJI Zitha v Mozambique*, Comm. No. 361/08.

¹¹⁹ African Commission, *John K Modise v Botswana*, Comm. No. 97/93.

¹²⁰ UN Committee Against Torture, *Gerasimov v Kazakhstan*, Comm. No. 433/2001, 25 July 2012, para. 11.2.

¹²¹ See eg. ECHR, *Driza v Albania* (2011) App. No. 10810/05, 15 March 2011, para. 60; ECHR, *Marini v Albania* (2007) App. No. 3738/02, 18 December 2007, para. 95, ECHR 2007-XIV (extracts).

- Article 2, which requires States Parties to “combat all forms of discrimination against women through appropriate legislative, institutional and other measures”; and
- Article 8, which provides that, “[w]omen and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure: a. effective access by women to judicial and legal services, including legal aid [...]”.

E. VIOLATIONS OF THE AFRICAN CHARTER AND MAPUTO PROTOCOL

(i) Violations directly arising from the acts committed on XXXX

72. On the facts found proven by the OMT of XXX, it is clear that the Applicant is the victim of rape and pillage. These amount to violations of a number of provisions of the African Charter (**the prohibition of torture and ill-treatment** and the **right to property**), and the Maputo Protocol (**right to personal integrity** and **right to protection from in times of conflict**). These underlying violations will be examined first, before turning to the violations arising from the Respondent State’s failure to implement the judgment awarded in the Applicant’s favour.

a. The rape amounted to torture (Article 5 African Charter)

73. The first key underlying violation for which an effective remedy, including reparation, has not been provided is the rape committed against the Applicant. This rape clearly amounts to a violation of Article 5 of the Charter, for which the Respondent State has failed to provide reparation.

74. Article 5 of the Charter prohibits all forms of “torture, cruel, inhuman or degrading punishment or treatment”. In interpreting Article 5, the African Commission has referred to Article 1 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (‘UN Convention against Torture’),¹²² which defines torture as:

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, or 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

75. The African Commission has also drawn on the jurisprudence of the ECHR on Article 3 of the European Convention on Human Rights (prohibition of torture), for example in *Huri Laws v.*

¹²² African Commission, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Comm. No. 245/2002, para.180.

Nigeria.¹²³ According to the ECHR, torture is characterised by “deliberate inhuman treatment causing very serious and cruel suffering”.¹²⁴

76. Although the African Commission has not had the opportunity to develop detailed jurisprudence on rape as a form of torture, each of the major international and regional human rights courts and treaty bodies, including the African Commission, have recognised that a failure to prevent and respond to acts of rape will amount to a violation of the prohibition of torture and other ill-treatment.¹²⁵ Where the act of rape is committed by an individual whose actions are directly attributable to the State, international human rights bodies have found that the act amounts to torture.¹²⁶
77. So, for example, in the case of *Fernandez Ortega v. Mexico*, analogous to the present case, the Inter-American Court of Human Rights (‘IACtHR’) found that rape of a woman in her house by a soldier amounted to torture. The IACtHR stated that:

*[...] rape may constitute torture even when it is based in a single fact alone and takes place outside State facilities, such as in the victim’s home. This is so because the objective and subjective elements that classify an act as torture do not refer either to the accumulation of facts or to the place where the act is committed, but to the intention, the severity of the suffering, and the purpose of the act, requisites that, in the present case, have been fulfilled.*¹²⁷

Rape automatically meets the severity threshold for torture

78. International human rights bodies have explicitly recognised 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*,¹²⁸ *V.L. v. Switzerland*¹²⁹ and *Miguel Castro Castro Prison v. Peru*¹³⁰). In the case of *Fernandez Ortega v. Mexico*, the IACtHR explained that:

¹²³ African Commission, *Huri Laws v Nigeria*, Comm. No. 225/98, para. 41.

¹²⁴ ECHR, *Ireland v UK* (1978) App. No.5310/71, 18 January 1978, para. 167.

¹²⁵ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Comm. Nos. 279/03-296/05, para. 157; *Malawi African Association et al v Mauritania*, Comm. Nos. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97, 210/98, para. 118; see also *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, Comm. No. 249/02. See also UN 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 (hereinafter UN Human Rights Committee General Comment No. 28).

¹²⁶ See, eg. IACmHR, *Raquel Marti de Mejia v Peru* (1996), Case 10.970, Report No. 5/96, Decision of 1 March 1996; ECHR, *Aydin v Turkey* (1997) App. No. 57/1996/676/866, 25 September 1997, in particular para. 83 (“Rape 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 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”). The ECHR in that case held that even if the only grounds for the complaint had been the act of rape, without the other ill-treatment the victim had been subjected to, the ECHR would still have found that the treatment of the victim (rape) amounted to torture in violation of Article 3 of the European Convention on Human Rights (at para. 86).

¹²⁷ IACtHR, *Fernandez Ortega v Mexico*, Series C. No. 215, Judgment (Merits, Reparations and Costs) of August 30, 2010, para. 128.

¹²⁸ IACmHR, *Raquel Marti de Mejia v Peru* (1996), Case 10.970, Report No. 5/96, Decision of 1 March 1996; ECHR, *Aydin v Turkey* (1997) App. No. 57/1996/676/866, 25 September 1997.

¹²⁹ UN Committee Against Torture, *V.L. v Switzerland*, CAT/C/37/D/262/2005, 20 November 2006, para. 8.10.

¹³⁰ IACtHR, *Miguel Castro Castro Prison v Peru* (2006), Series C. No. 160, Judgment (Merits, Reparations and Costs) of 25 November 2006.

*rape is an extremely traumatic experience that can have severe consequences and cause significant physical and psychological damage that leaves the victim “physically and emotionally humiliated,” a situation that is difficult to overcome with the passage of time, contrary to other traumatic experiences. This reveals that the severe suffering of the victim is inherent in rape, even when there is no evidence of physical injuries or disease. Indeed, the aftereffects of rape will not always be physical injuries or disease. Women victims of rape also experience complex consequences of a psychological and social nature.*¹³¹

79. Successive UN Special Rapporteurs on Torture have also identified rape and sexual violence as a form of torture,¹³² as has the Committee on the Elimination of Discrimination Against Women.¹³³
80. 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 has a devastating impact on victims. According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (‘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.”¹³⁴
81. 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”.¹³⁵ According to the Trial Chamber:

*Rape 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.*¹³⁶

Rape is committed for prohibited purposes

82. The recognition of rape as a form of torture serves an important function of acknowledging that rape is an intentional act of humiliation, discrimination and intimidation, rather than (as may have traditionally been argued or assumed) a natural result of the perpetrators’ sexual urges.¹³⁷
83. 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

¹³¹ IACtHR, *Fernandez Ortega v Mexico* (2010), Series C. No. 215, Judgment (Merits, Reparations and Costs) of 30 August 2010, para. 124.

¹³² See E/CN.4/1986/15, p. 26 (Pieter Kooijmans); E/CN.4/1995/34, paras. 15-24 (Sir Nigel Rodley); A/HRC/7/3, paras. 26 and 34-36 (Manfred Nowak).

¹³³ CEDAW, General Recommendation 19: Violence against Women, A/47/38, 1992, para. 7 (hereinafter CEDAW General Recommendation 19).

¹³⁴ ICTY, *Prosecutor v Kunarac*, IT-96-23&23/1, Appeals Chamber Judgment, 20 June 2002, paras. 150-1.

¹³⁵ ICTY, *Prosecutor v Delalic*, IT-96-21, Trial Chamber Judgment, 16 November 1998, para. 495.

¹³⁶ *Ibid.*

¹³⁷ See Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, March 2011, p. 39, available at: <http://www.amnesty.org/en/library/asset/IOR53/001/2011/en/7f5eae8f-c008-4caf-ab59-0f84605b61e0/ior530012011en.pdf> (hereinafter Amnesty International Report).

the motivation behind the conduct and need not be the predominant or sole purpose.¹³⁸ 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”.¹³⁹ Importantly, international criminal courts have stated that it is difficult to envisage circumstances (particularly in a conflict setting) in which rape by or with the consent or acquiescence of a public official would not involve prohibited purposes of punishment, coercion, discrimination or intimidation.¹⁴⁰

84. In addition to purposes of obtaining information, punishment, and intimidation, which may be obvious on the facts in an individual case, rape will frequently have two further purposes.
85. The first of these is the degradation and humiliation of the victim, his or her family, and community. This has been recognised as a prohibited purpose although it is not specifically enumerated in the definition contained in the UN Convention Against Torture.¹⁴¹ This was recognised, for example, by the Inter-American Commission on Human Rights (‘IACmHR’) in the leading case of *Mejia v. Peru*.¹⁴² According to the IACmHR “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*”.¹⁴³ This purpose has also been discussed and held to be present in a number of other leading judgments on rape and torture.¹⁴⁴
86. Another recognised purpose underlying the use of rape as a method of torture is discrimination on the basis of sex or gender. Certain forms of violence, including rape, are recognised as being gender specific – that is, in their form or purpose aimed at “correcting” behaviour perceived as non-consonant with gender roles and stereotypes or at asserting or perpetuating male domination over women.¹⁴⁵
87. Rape 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”.¹⁴⁶
88. Where rape is targeted at a woman because she is a woman, or affects women disproportionately, it has been recognised as being a form of discrimination,¹⁴⁷ thereby

¹³⁸ ICTY, *Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23-T & IT-98-30/1-T, Trial Chamber Judgment, 22 February 2001, para. 816.

¹³⁹ UN Committee Against Torture, General Comment No. 2: Implementation of article 2 by States Parties, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, para. 9.

¹⁴⁰ ICTY, *Prosecutor v Delalic*, IT-96-21, Trial Chamber Judgment, 16 November 1998, par. 495.

¹⁴¹ See ICTY, *Prosecutor v Furundzija*, IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, para. 162; UN Committee Against Torture, *VL v Switzerland*, CAT/C/37/D/262/2005, 20 November 2006, para. 8.10; Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/7/3, 15 January 2008, para. 36 (hereinafter Special Rapporteur on Torture Report).

¹⁴² IACmHR, *Raquel Marti de Mejia v Peru* (1996), Case 10.970, Report No. 5/96, Judgment of 1 March 1996.

¹⁴³ At para. 3(a).

¹⁴⁴ See, eg. International Criminal Tribunal for Rwanda, *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; UN Committee Against Torture, *VL v Switzerland*, CAT/C/37/D/262/2005, 20 November 2006, para. 8.10.

¹⁴⁵ Special Rapporteur on Torture Report, para. 30.

¹⁴⁶ Amnesty International Report, p. 45.

demonstrating a prohibited purpose for the offence of torture. These factors would be present in a case of rape; hence it will invariably have a discriminatory purpose.¹⁴⁸ The UN Committee Against Torture found as such in the case of *V.L. v. Switzerland*, concerning multiple rapes by State agents, outside of a formal detention setting. In its view:

*The acts concerned, constituting among others multiple rapes, surely constitute infliction of severe pain and suffering perpetrated for a number of impermissible purposes, including interrogation, intimidation, punishment, retaliation, humiliation and discrimination based on gender. Therefore, the Committee believes that the sexual abuse by the police in this case constitutes torture [...]*¹⁴⁹

The rape of the Applicant constituted torture

89. The Courts of the Respondent State have established that the Applicant was raped by XXX XXX, a soldier of the State's armed forces, on XXX XXX XXX, and that the State is responsible for his actions.
90. The rape of the Applicant on XXX XXX XXX unequivocally amounted to torture, automatically meeting the severity threshold, and having inherent purposes of intimidation, discrimination, humiliation and degradation. The severe consequences for the Applicant bear this out as described above at paragraphs 23 to 26 bear this out.

b. The rape also amounted to a violation of the right to integrity of the person (Art. 4 Maputo Protocol)

91. The rape of the Applicant also amounted to a violation of the right to integrity of the person guaranteed by Article 4 of the Maputo Protocol. That article provides that:

Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.

92. As set out above in relation to Article 5 of the Charter, the rape of an individual is a paradigmatic and extremely serious violation of their physical and psychological integrity.¹⁵⁰ Indeed, it is such a serious violation of personal integrity as to be held to amount to torture. As such, it is clear that Article 4 has been violated in this case.
93. Article 4 goes on to specify a number of obligations on States party with respect to such violations and each of its sub paragraphs is relevant to the issues raised by this case. Article 4(2)(f) which is particularly relevant to the facts at the heart of this case, namely the failure to

¹⁴⁷ CEDAW General Recommendation 19, para. 6.; see also Committee on Economic Social and Cultural Rights, General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2005/4, 11 August 2005, para. 27.

¹⁴⁸ Special Rapporteur on Torture Report, para. 30.

¹⁴⁹ UN Committee Against Torture, *V.L. v Switzerland*, CAT/C/37/D/262/2005, 20 November 2006, para. 8.10.

¹⁵⁰ See, eg. IACTHR, *Fernandez Ortega v Mexico*, Series C. No. 215, Judgment (Merits, Reparations and Costs) of August 30, 2010, para. 128.

pay reparation awarded by national courts, stipulates that the State must “establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women [...]”.

94. In addition to its general obligation to provide an effective remedy under Article 25 of the Maputo Protocol, the Respondent State therefore also has a specific obligation under Article 4(2)(f) to provide “effective [...] reparation” to the Applicant. It has completely failed to do so in this case, and has therefore violated Article 25 of the Protocol, in conjunction with Article 4, and Article 4(2)(f) alone.

c. The rape amounted to a violation of the obligation to protect women from gender-based violence in Armed Conflict (Art. 11 Maputo Protocol)

95. Article 11 of the Maputo Protocol provides (in part) that:

1. States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women.

2. States Parties shall, in accordance with the obligations incumbent upon them under international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.

96. It is recognised that the “extent and sustained nature of armed violence, and the level of organization of the non-state armed group fighting” means that the situation in the Respondent State, including during 2008, has reached the threshold of an armed conflict, and that international humanitarian law therefore applies.¹⁵¹ As a non-international armed conflict, Common Article 3 to the 1949 Geneva Conventions and customary international humanitarian law applies to all parties to the conflict, both state and non-state actors.¹⁵² Core obligations applicable in such a conflict include the prohibition on attacking any civilian taking no active part in hostilities, and the prohibitions of rape and torture.¹⁵³

97. The rape of the Applicant by a soldier of the Respondent State is therefore in violation of the obligation under the Article 11(1) of the Maputo Protocol to respect the rules of international humanitarian law, and under Article 11(2) to protect civilians.

d. The rape amounted to discrimination on the basis of gender (Art. 2 African Charter and Art. 2 Maputo Protocol)

98. Article 2 of the African Charter provides that:

¹⁵¹ Geneva Academy of International Humanitarian Law and Human Rights, *Rule of Law in Armed Conflicts: Democratic Republic of Congo*, available at http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=178; Elizabeth Wilmshurst, *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 189-192.

¹⁵² Geneva Academy of International Humanitarian Law and Human Rights, *Rule of Law in Armed Conflicts: Democratic Republic of Congo*, available at http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=178.

¹⁵³ *Ibid.*

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised in the present Charter without distinction of any kind such as [...] sex [...]

99. Article 2 of the Maputo Protocol provides that:

States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures.

100. The African Commission, in developing its jurisprudence on Article 2 of the African Charter and Article 2 of the Maputo Protocol with regard to gender-based violence, can build on a considerable body of treaties, declarations, jurisprudence and other sources that recognize gender-based violence as a form of discrimination. This includes in particular the UN Declaration on the Elimination of Violence against Women,¹⁵⁴ the sources referred to in the Preamble to the Maputo Protocol and more recent declarations and decisions.¹⁵⁵ The state therefore has an obligation to refrain from any acts of violence or ill-treatment that impair the enjoyment of women's rights as equal members of society. This applies in particular to acts of rape, which – as set out above – is consistently held to constitute a violation of the prohibition of discrimination.¹⁵⁶
101. Acts of rape are aimed at negating a woman's dignity as a human being on account of her gender. The treatment of the Applicant by the Respondent State's soldier was therefore inherently discriminatory.
102. The state also has a positive obligation under Article 2 of African the Charter (and under Article 5 of the African Charter), and under Article 2 of the Maputo Protocol, to respond to gender-based violence such as rape.¹⁵⁷ Gender-based violence "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms" and is recognised as constituting a form of discrimination.¹⁵⁸ The UN Human Rights Committee has made it clear that to fulfil their obligations of non-discrimination under Articles 3 and 26 of the International Covenant on Civil and Political Rights ('ICCPR'), States must ensure the "removal of obstacles to the equal enjoyment [...] rights" and take "positive measures in all areas so as to achieve the effective and equal empowerment of women".¹⁵⁹ Such an obligation can also be read into Article 2 of the African Charter and requires states to take the necessary steps to ensure that adequate protection against gender-based violence is put in place.

¹⁵⁴ UN Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993, available at <http://www.un.org/documents/ga/res/48/a48r104.htm>.

¹⁵⁵ African Commission, Resolution on the Prevention and Eradication of Violence against Women and Children (Addendum to the SADC Declaration on Gender and Development), 14 September 1998, available at <http://www.achpr.org/instruments/eradication-violence-woman-sadc-addendum/>; Economic Community of West African States (ECOWAS) Community Court of Justice, *Hadijatou Mani Koraou v The Republic of Niger*, Application No. ECW/CCJ/APP/08/08, Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008, paras. 62-71 (unofficial translation available at: <http://www.unhcr.org/refworld/pdfid/496b41fa2.pdf>).

¹⁵⁶ See Special Rapporteur on Torture Report; CEDAW General Recommendation 19, para. 9; see further jurisprudence cited in previous section.

¹⁵⁷ See, eg. UN Human Rights Committee, General Comment No. 28, para. 8; UN Human Rights Committee, Concluding Observations on Guatemala, CCPR/C/GTM/CO/3, 19 April 2012, para. 19; UN Human Rights Committee, Concluding Observations on Yemen, CCPR/C/YEM/CO/5, 23 April 2012, para. 9.

¹⁵⁸ CEDAW, General Recommendation 19, para. 7.

¹⁵⁹ UN Human Rights Committee, General Comment No. 28, para. 3; see also UN Human Rights Committee, General Comment No. 18: Non-discrimination, HRI/GEN/1/Rev.1, 10 November 1989, para. 2.

103. As set out above, and as recognised in the African Commission’s recent Resolution 284 on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo,¹⁶⁰ the perpetration of rape and other forms of sexual violence has persisted and increased over the past decades in the conflict-affected provinces, especially in the East of the Respondent State.¹⁶¹ At the same time, impunity, especially in cases involving high-ranking FARDC commanders, still prevails and victims do not have access to compensation or other forms of reparation.¹⁶² The failure to tackle these factors creates an environment that facilitates violations of rape.

e. Pillage breached the Applicant’s right to property (Art 14 African Charter)

104. The Judgment of XXX XXX XXX establishes that XXX XXX committed the war crime of pillage, by stealing the Applicant’s and her husband’s savings of XXX, and XXX XXX. Although the XXX was returned in the course of proceedings, the savings have not been returned.

105. Article 14 of the African Charter provides that:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

106. The taking of the Applicant’s property cannot be justified as having been in the interests of public need or the general interest of the community, nor in accordance with law, as demonstrated by the criminal judgment sentencing XXX XXX for the pillage.

f. The Applicant continues to be a victim of the above violations

107. Although the Respondent State, through the criminal proceedings against XXX XXX, has acknowledged the violations committed against the Applicant, the failure to provide her with reparation means that she continues to be a “victim” of the violations under the African Charter and Maputo Protocol. As consistently held by the ECHR:

*a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for example, Amuur v. France, 25 June 1996, § 36, Reports 1996-III, and Dalban v. Romania [GC], no. 28114/95, § 44, ECHR 1999-VI).*¹⁶³

¹⁶⁰ Issued at the 55th Ordinary Session held from 28 April to 12 May 2014 in Luanda, Angola, available at <http://www.achpr.org/sessions/55th/resolutions/284/>.

¹⁶¹ See for the period of 2010 to 2013: MONUSCO Report, paras. 19-24.

¹⁶² *Ibid.*, paras. 57 and 59.

¹⁶³ ECHR, *Kopylov v Russia* (2010) App. No. 3933/04, 29 July 2010, para. 128.

108. As set out above, jurisprudence establishes that compensation must always be accorded for violations of the prohibition of torture and other ill-treatment.¹⁶⁴ Accordingly, to determine whether an applicant has been afforded sufficient redress and lost his or her status as a “victim” the ECHR will examine, among other things, the adequacy of the compensation paid to him or her.¹⁶⁵ Where an investigation has been carried out, and a person prosecuted, but compensation provided has not been adequate, the individual will not be deprived of “victim” status.
109. In this case, as no compensation has been paid to the Applicant, it is clear that she remains a victim of the violations in question.

(ii) Additional violations arising from failure to pay compensation awarded to the Applicant

110. The Respondent State’s failure to provide the compensation awarded by the OMT of XXX to the Applicant gives rise to multiple violations of the African Charter and the Maputo Protocol. Significant guidance as to the types of violations arising can be drawn from the jurisprudence of international and regional human rights bodies that have considered similar cases, including the African Commission. Those cases show that a failure to enforce a domestic judgment in these circumstances gives rise to a violation of the **right to a remedy** for the underlying violations, as well as a violation of the **right to fair trial**, the **right to property**, and the **right to equal protection under the law**. Each of these will be examined in turn.

f. Violation of the right to a remedy (Articles 1 and 7 in conjunction with 5 and 14 African Charter, Articles 25 and 4(2)(f) Maputo Protocol)

111. The Respondent State has been found by its own court to be responsible for the actions of XXX XXX, and liable to pay the Applicant damages. By failing to provide this, the state has failed in its obligation to provide effective remedies for the violations committed against the Applicant, as required by Articles 1 and 7 read in conjunction with Articles 5 and 14 of the African Charter, and Article 25 read in conjunction with Article 4 of the Maputo Protocol.
112. The right to an effective remedy is at the core of Articles 1 and 7 of the Charter, and is explicitly enshrined in Article 25 Maputo Protocol. Article 4(2)(f) of the Maputo Protocol also includes the specific obligation on States to:

establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women [...]

¹⁶⁴ *Ibid.*, para. 130; see also UN Committee Against Torture, General Comment No. 3: Implementation of article 14 by States parties, CAT/C/GC/3, 19 November 2012 (hereinafter CAT General Comment No. 3).

¹⁶⁵ ECHR, *Kopylov v Russia* (2010) App. No. 3933/04, 29 July 2010, para. 131, citing *Gäfgen v Germany* [GC] (2010) App. No. 22978/05, 1 June 2010, paras. 121 and 126.

113. The right to a remedy and reparation for women and girls victims of sexual violence is also the topic of a specific resolution adopted by the African Commission at its 42nd Session.¹⁶⁶ More generally, it was recognised by the African Commission in its Resolution on the Right to Recourse and Fair Trial, which states 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.*¹⁶⁷

114. The right to an effective remedy and reparation is also recognised in major international human rights treaties.¹⁶⁸ It has been affirmed and elaborated upon by United Nations treaty bodies,¹⁶⁹ regional courts,¹⁷⁰ as well as in a series of declarative instruments, in particular the UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law¹⁷¹ and the Robben Island Guidelines.¹⁷²

115. According to the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the right to an effective remedy include (i) access to justice; (ii) reparation for the harm suffered; and (iii) access to the factual information concerning the violations.¹⁷³

116. An integral part of the right to an effective remedy is therefore the provision of reparation for the violation. As the UN Human Rights Committee has recognised, “[w]ithout reparation to

¹⁶⁶ Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, adopted by the African Commission on Human and Peoples' Rights, meeting at its 42nd Ordinary Session held in Brazzaville, Republic of Congo, from 15 - 28 November 2007.

¹⁶⁷ Article 1 of the Resolution on the Right to Recourse and Fair Trial, adopted by the African Commission on Human and Peoples' Rights, meeting at its 26th Ordinary Session, held in Kigali, Rwanda, from 1-15 November 1999.

¹⁶⁸ For example, Articles 2(3), 9 (5) and 14 (6) of the International Covenant on Civil and Political Rights (1966), Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965), Article 39 of the Convention of the Rights of the Child (1989), Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and Article 75 of the Rome Statute for an International Criminal Court (1998). It has also figured in regional instruments, e.g. Articles 5(5), 13 and 41 of the European Convention on Human Rights and Articles 25, 63 (1) and 68 of the American Convention on Human Rights (1969).

¹⁶⁹ See, for example, Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 29 March 2004, paras. 15-17; UN Committee Against Torture, General Comment No. 2: Implementation of article 2 by States Parties, CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, para. 15.

¹⁷⁰ See, for example, African Commission, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Comm. No. 245/2002, para.159; IACtHR, *Velasquez Rodriguez v Honduras*, Series C No. 4, Judgment (Merits) of 29 July 1988, para. 174; and ECHR *Papamichalopoulos v Greece* (1995) App. No. 14556/89, 31 October 1995, para. 36.

¹⁷¹ UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law: Human Rights Resolution, UN General Assembly Resolution 60/147, A/RES/60/147, 16 December 2005 (hereinafter UN Basic Principles and Guidelines on the Right to Remedy and Reparation); see also the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, A/RES/40/34, 29 November 1985; and the Universal Declaration of Human Rights (1948) (Article 8).

¹⁷² Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, adopted by the African Commission meeting at its 32nd Session, 17-23 October 2002 in Banjul, The Gambia, para.50 (hereinafter Robben Island Guidelines).

¹⁷³ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2001, adopted by the African Commission, meeting at its 33rd session in Niamey, Niger, 29 May 2003, Principle C.

individuals whose [...] rights have been violated, the obligation to provide an effective remedy [...] is not discharged”.¹⁷⁴

117. International and regional human rights bodies recognise that the obligation to provide reparation for serious violations generally requires the provision of appropriate compensation.¹⁷⁵ For serious violations it should also involve restitution, rehabilitation, measures of satisfaction and guarantees of non-repetition such as changes in law and practice.¹⁷⁶
118. Where a state is responsible for a violation of human rights, but fails to provide appropriate reparation, that failure will amount to a violation in and of itself. In the jurisprudence of the UN Human Rights Committee, in *Horvath v. Australia*, the national courts had awarded the applicant compensation for ill-treatment by police officers but the police officers were unable to pay the full amount and it was not possible for the applicant to sue the State directly. The UN Human Rights Committee held that this amounted to a violation of the victim’s right to an effective remedy under Article 2(3) in conjunction with Articles 7 (prohibition of torture and other ill-treatment), 9(1) (right to liberty) and 17 (right to privacy) of the ICCPR.¹⁷⁷ According to the Committee:

*[...] the obligation of States under article 2, paragraph 3 encompasses not only the obligation to provide an effective remedy, but also the obligation to ensure that the competent authorities enforce such remedies when granted. This obligation, enshrined in article 2, paragraph 3(c) means that State authorities have the burden to enforce judgments of domestic courts which provide effective remedies to victims. In order to ensure this, State parties should use all appropriate means and organize their legal system in such a way so as to guarantee the enforcement of remedies in a manner that is consistent with their obligations under the Covenant.*¹⁷⁸

119. In the jurisprudence of the ECHR, a failure to provide appropriate reparation amounts to a “procedural” violation of the relevant right. Accordingly, where a state does not provide compensation for ill-treatment, or provides compensation at a level below what it holds to be appropriate, states have been found to have committed a “procedural” violation of Article 3 (prohibition of torture and other ill-treatment) of the European Convention on Human Rights.¹⁷⁹
120. Similarly, in the jurisprudence of the IACtHR, a failure to provide appropriate reparation, including compensation, amounts to a violation of the right to an effective remedy, as

¹⁷⁴ UN Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 16.

¹⁷⁵ *Ibid.*; see, eg. ECHR, *Kopylov v Russia* (2010) App. No. 3933/04, 29 July 2010, para. 130 (in the case of a breach of Article 3 of the Convention, compensation for the pecuniary and non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress); see further UN Basic Principles and Guidelines on the Right to Remedy and Reparation, para. 20; UN Convention Against Torture, Article 14; Inter-American Convention to Prevent and Punish Torture, Article 9.

¹⁷⁶ See, eg. UN Basic Principles and Guidelines on the Right to Remedy and Reparation; CAT General Comment No. 3, paras. 2, 6-18.

¹⁷⁷ UN Human Rights Committee, *Horvath v Australia*, Comm. No. 1885/2009, CCPR/C/110/D/1885/2009, 27 March 2014, paras. 8.5 and 8.8.

¹⁷⁸ *Ibid.*, para. 8.6.

¹⁷⁹ See, eg. ECHR, *Kopylov v Russia* (2010) App. No. 3933/04, 29 July 2010, paras. 143-150.

expressed in the right to judicial protection (Article 25) and the general obligation to respect and guarantee rights and freedoms established in Article 1(1) of the American Convention on Human Rights. In the case of *Acevedo-Jaramillo et. al. v. Peru*,¹⁸⁰ the IACtHR considered a case where a judgment had been issued in favour of the applicants concerning labour rights, but had not been enforced. The IACtHR stated that:

*in order to satisfy the right to access to an effective remedy it is not sufficient that final judgments be delivered in the appeal for legal protection proceedings, ordering protection of plaintiffs' rights. It is also necessary that there are effective mechanisms to execute the decisions or judgments, so that the declared rights are protected effectively. As it is established [...] one of the effects of the judgment is its binding character. The enforcement of judgments should be considered an integral part of the right to access to the remedy, encompassing also full compliance with the respective decision. The contrary would imply the denial of this right.*¹⁸¹

121. Because the judgment in favour of the applicants had not been enforced, the IACtHR found the State Party to be in violation of the right to judicial protection, and the general obligation under Article 1(1) to respect and guarantee rights. The IACtHR further found that such violations “are particularly serious” due to the continuing impairment of rights guaranteed in the American Convention on Human Rights.¹⁸²
122. In relation to reparation for torture in particular, the UN Committee Against Torture recognised in its General Comment No. 3 that “[...] the failure of a State Party to execute judgements providing reparative measures for a victim of torture, handed down by national, international or regional courts, constitutes a significant impediment to the right to redress” enjoyed by an individual under Article 14 of the Convention Against Torture.¹⁸³
123. This previous section outlined the violations arising from the conduct of XXX XXX against the Applicant, for which the Respondent state bears responsibility. Under Article 1 and 7 of the African Charter, and Article 25 and 5(2)(c) of the Maputo Protocol, the Respondent State has the obligation to provide an effective remedy, including reparation, to the Applicant. By failing to implement the judgment of its own court awarding her compensation, the Respondent State has violated the Applicant’s right to an effective remedy, in conjunction with each of the Articles specified above.

¹⁸⁰ IACtHR, *Acevedo-Jaramillo et. al. v Peru*, Series C, No. 144, Judgment (Preliminary Objections, Merits, Reparations and Costs) of 7 February 2006; see also IACmHR, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A review of the standards adopted by the Inter-American system of human rights*, Chapter V: The substance of the right to effective judicial protection against violation of social rights, 7 September 2007, paras. 321-322 (which references the case in its discussion of the right to access to an effective remedy).

¹⁸¹ IACtHR, *Acevedo-Jaramillo et. al. v Peru*, Series C, No. 144, Judgment (Preliminary Objections, Merits, Reparations and Costs) of 7 February 2006, para. 220.

¹⁸² *Ibid.*, para. 278; IACmHR, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A review of the standards adopted by the Inter-American system of human rights*, Chapter V: The substance of the right to effective judicial protection against violation of social rights, 7 September 2007, para. 322.

¹⁸³ CAT General Comment No. 3, para. 38.

g. Violation of the right to a fair trial (Art. 7 African Charter) and the right of access to justice (Art. 8 Maputo Protocol)

124. Connected to this, the African Commission, and other human rights bodies have established that the failure to implement a domestic Court judgment against the state (whether or not it relates to human rights violations) gives rise to a violation of the right to a fair trial.
125. In the analogous case of *Bissangou v. Congo*¹⁸⁴ where Congo had not paid compensation awarded against the State by its courts in the applicant's favour, the African Commission held that there had been a violation of Article 7 concerning the right to a fair trial, even though this had not been argued by the applicant. In reaching its decision, the African Commission stressed that "[t]he effective exercise of this right by individuals requires that: 'All State Institutions against which an appeal has been lodged or a legal ruling has been pronounced conform fully with this ruling or this appeal'".¹⁸⁵
126. In its decision, the African Commission extensively cited the jurisprudence of the ECHR, which has consistently ruled that:

*the right of access to a tribunal guaranteed by Article 6§1 of the Convention would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of a judgment given by any court must therefore be regarded as an **integral part** of the "trial" for the purposes of Article 6.*¹⁸⁶ [emphasis added]

127. In consequence, the ECHR has consistently held that under Article 6 of the European Convention on Human Rights, the execution of a legal ruling must neither be unduly prevented, nullified nor delayed. In relation to the amount of time within which the ECHR expects national authorities to comply with the judgments of their own courts, the ECHR has regularly found that the period for enforcement "should not generally exceed six months from the date on which the decision awarding compensation becomes enforceable".¹⁸⁷
128. The UN Human Rights Committee has similarly found that the right to a fair trial is engaged where a state fails to enforce a judgment given in its courts. The UN Human Rights Committee has held that "protection guaranteed by article 2, paragraph 3 and article 14, paragraph 1 [right to a fair trial] of the [ICCPR] would not be complete if it did not extend to the enforcement of decisions adopted by courts in full respect of the conditions set up in article 14".¹⁸⁸

¹⁸⁴ African Commission, *Bissangou v Congo*, Comm. No. 253/02.

¹⁸⁵ *Ibid.* para. 74.

¹⁸⁶ ECHR [GC], *Scordino v. Italy (no. 1)* (1996) App. No. 36813/97, 29 March 2006, para. 196; see also ECHR, *Hornsby v Greece* (1997) App. No. 18357/91, 19 March 1997, para. 40 ff.; ECHR, *Metaxas v Greece* (2004) App. No. 8415/02, 27 May 2004, para. 25; ECHR, *Musci v. Italy* (2006) App. No. 64699/01, 29 March 2006, para. 88.

¹⁸⁷ ECHR, *Cocchiarella v. Italy* (2006) App. No. 64886/01, 29 March 2006, para. 89; ECHR, *Scordino v. Italy (no. 1)* (1996) App. No. 36813/97, 29 March 2006, para. 198.

¹⁸⁸ UN Human Rights Committee, *Sechremelis et al. v Greece*, Communication No. 1507/2006, U.N. Doc. CCPR/C/100/D/1507/2006 (2011), para. 10.4.

129. The African Commission’s jurisprudence is consistent with the jurisprudence of these bodies. In *Bissangou v. Congo* it held that:

*the right to be heard guaranteed by Article 7 of the African Charter includes the right to the execution of a judgment. It would therefore be inconceivable for this Article to grant the right for an individual to bring an appeal before all the national courts in relation to any act violating the fundamental rights without guaranteeing the execution of judicial rulings. To interpret Article 14 any other way would lead to situations which are incompatible with the rule of law. As a result, the execution of a final judgment passed by a Tribunal or legal court should be considered as an integral part of the right to be heard which is protected by Article 7.*¹⁸⁹

130. In above-mentioned case the State Party had failed to pay the compensation awarded to the applicant for a period of more than seven years. The African Commission found that this failure amounted to a violation of Article 14.

131. In addition, the laws requiring individuals to bring enforcement proceedings to have their awards of compensation implemented are in themselves in violation of Article 14. As set out above at paragraph 54 (on admissibility), the ECHR has repeatedly stated that “a person who had obtained a judgment against the State may not be expected to bring separate enforcement proceedings”.¹⁹⁰ Requiring a person to bring separate enforcement proceedings results in a violation of the right to a fair trial.¹⁹¹ Instead, “[i]t is for the Contracting States to organise their legal systems in such a way that the competent authorities can meet their obligation” to enforce a binding and enforceable judicial decision within a reasonable time.¹⁹²

132. In addition, Article 8 of the Maputo Protocol provides that:

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:
a. effective access by women to judicial and legal services, including legal aid [...]

133. Just as the failure to implement the judgment of the Court amounts to a violation of the right to a fair trial, so it undermines the Applicant’s “effective access” to judicial services, in that the access leads to no result for the Applicant. As such, it also amounts to a violation of Article 8 of the Maputo Protocol.

h. Right to property (Art. 14 African Charter)

134. The African Commission’s jurisprudence establishes that a state’s failure to pay a final judicial award of compensation amounts in itself to a violation of the right to property protected by Article 14 of the Charter. In the case of *Bissangou v. Congo*, drawing inspiration from the

¹⁸⁹ African Commission, *Bissangou v Congo*, Comm. No. 253/2002, para. 75.

¹⁹⁰ ECHR, *Puleva and Radeva v Bulgaria* (2012) App. no. 36265/05, 14 February 2012, para. 40; ECHR, *Metaxas v Greece* (2004) App. No. 8415/02, 27 May 2004, para. 19; ECHR, *Burdov v Russia (no. 2)* (2009) App. no. 33509/04, 4 May 2009, para. 68.

¹⁹¹ *Ibid.*

¹⁹² ECHR, *Burdov v Russia (no. 2)* (2009) App. no. 33509/04, 4 May 2009, paras. 68-70, citing ECHR, *Comingersoll S.A. v Portugal* [GC], App. No. 35382/97, para. 24, ECHR 2000-IV, and ECHR, *Frydlender v. France* [GC], App. No. 30979/96, para. 45, ECHR 2000-VII.

jurisprudence of the ECHR under Article 1 of Protocol No. 1 of the European Convention on Human Rights, the African Commission held that:

*a monetary compensation granted by judgment having acquired the authority of res judicata should be considered as an asset. Therefore, the unjustified refusal of the Respondent State to honour the final judgment passed in favour of the Complainant hindered the enjoyment of his assets.*¹⁹³

135. As such, the applicant in that case was held to have been the victim of a violation of Article 14. The same principles apply in the present case.

i. Violation of Article 1 of the African Charter

136. In combination, these violations show the failure of the Respondent State to put in place a system for the effective enforcement of court-ordered compensation awards in cases concerning serious human rights violations for which it is responsible. As such, it is in violation of Article 1 of the African Charter, which provides that:

The 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.

137. Paragraphs 27 to 28 and 37 to 43 above set out how the legislative and practical environment in the Respondent State sets up almost insurmountable barriers to enforcement – including complex procedures, exorbitant fees, and corruption – resulting in the non-payment of many, if not all, court-ordered compensation awards.

138. As set out above, in order to give effect to the rights to an effective remedy, to a fair trial, and to property, States must “use all appropriate means and organize their legal system in such a way so as to guarantee the enforcement of remedies” ordered by the Courts.¹⁹⁴ To prevent repetition of the violations, including under Article 1, the Respondent State must reform its legislation and practice to ensure that court-ordered compensation awards made against it are enforced as a matter of course.

F. REMEDIES SOUGHT

139. The Applicant submits that the facts described amount to a breach of the rights protected under Articles 1, 2, 5, 7, 14, 18(3) of the African Charter and Articles 2, 4, 8, 11 and 25 of the Maputo Protocol.

140. The Authors respectfully request the African Commission to recognise that these rights have been violated and to recommend to the Respondent State that full and effective remedies and reparation for the harm suffered be afforded, including inter alia,

¹⁹³ African Commission, *Bissangou v Congo*, Comm. No. 253/02, para. 76.

¹⁹⁴ See above paragraph 118.

(i) The specific measures of:

- Immediate execution of the judgment of the OMT of XXX in Case No. XXX, issued XXX XXX XXX, including
 - (a) payment of XXX compensation awarded to the Applicant, and
 - (b) restitution of XXX;
- Payment of interest on the above amounts at a rate of 6%,¹⁹⁵ calculated from the date of the judgment;
- Ensuring that XXX XXX is serving the sentence as ordered by the judgment of the OMT in Case XXX, issued XXX XXX XXX, in accordance with the applicable laws and procedures and informing the Applicant in the event of release and/or escape.

(ii) The general measures of:

- Reforming laws and institutions to ensure sufficient safeguards from the recurrence of the said violations in future, including by:
 - (a) Reforming legislation and process for execution of judgments against the State, including by removal of requirements for victims to take further legal action, and removal of any fees payable for execution of judgments;
 - (b) Designating a government authority responsible for coordinating implementation of court-ordered compensation awards against the State, including those in favour of victims of rape and other serious forms of sexual violence;
 - (c) Creating a specific budget line in national budget to pay court-ordered compensations for victims of torture, including sexual violence, and allocating funding to this line in each budgetary cycle, with a transparent oversight mechanism to ensure that the allocated budget is fully distributed to the beneficiaries without rerouting or losses;
 - (d) Undertaking a comprehensive reform of the justice system, including through providing adequate resources, to ensure crimes including sexual violence are prosecuted and women have effective remedies to address alleged violations;

¹⁹⁵ See International Court of Justice, Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Judgment of 19 June 2012, paras. 56-57.

- (e) Taking positive steps to overcome barriers that women face in accessing those remedies, such as providing effective free legal aid;
- (f) Establishing a consolidated and disaggregated data system on response to allegations of sexual violence, including complaints made, prosecutions completed, compensation awarded and awards implemented, to monitor progress and ensure better information to victims;
- (g) Establishing a vetting mechanism and providing sufficient resources for it to effectively scrutinise the past conduct of each military and police officer in relation to human rights violations, and ensure that where there is evidence that a violation may have been committed, an investigation is opened and appropriate action taken;
- (h) Setting up an administrative reparation programme for victims of sexual violence in accordance with the UN Basic Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law and the Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation to provide comprehensive reparation measures, including monetary compensation, rehabilitation, and restitution.

London, 20 November 2014

Carla Ferstman,
Director, REDRESS

S.A (represented by REDRESS and SAJ) v. Democratic Republic of the Congo

LIST OF EXHIBITS

EXHIBIT A: Power of Attorney signed by XXX XXX, XXX XXX XXX

EXHIBIT B: Judgment of the Operational Military Tribunal XXX in Case No. XXX, XXX XXX XXX

EXHIBIT C: XXX XXX XXX XXX XXX, XXX XXX XXX

EXHIBIT D: Notification Order of the Registrar of the Operational Military Tribunal XXX in Case No. XXX, XXX XXX XXX

EXHIBIT E: Letter addressed to Excellency XXX XXX XXX, Governor of XXX, XXX XXX XXX

S.A (represented by REDRESS and SAJ) v. Democratic Republic of the Congo

LIST OF ACRONYMS

| | |
|----------------|---|
| ASF | Avocats Sans Frontières |
| CEDAW | Committee on the Elimination of Discrimination Against Women |
| CNDP | National Council for the Development of the People |
| ECHR | European Court of Human Rights |
| FARDC | Armed Forces of the Democratic Republic of Congo |
| FDLR | Democratic Forces for the Liberation of Rwanda |
| HRW | Human Rights Watch |
| IACtHR | Inter-American Court of Human Rights |
| IACmHR | Inter-American Commission on Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICTJ | International Center for Transitional Justice |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| MONUSCO | United Nations Organisation Stabilization Mission in the Democratic Republic of Congo |
| OHCHR | United Nations Office of the High Commissioner for Human Rights |
| OMT | Operational Military Tribunal |
| PHR | Physicians for Human Rights |