

African Commission on Human and Peoples' Rights

Communication 502/14:

**S.A. (represented by REDRESS and Synergie pour l'assistance judiciaire aux-
victimes de violation des Droits humains au Nord Kivu)**

v.

Democratic Republic of Congo (DRC)

SUBMISSION ON MERITS

18 November 2016

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I. INTRODUCTION

1. XXXXX (the ‘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 the ‘Authors’), submitted a complaint against the Government of the Democratic Republic of Congo (‘Respondent State’) to the African Commission on Human and Peoples’ Rights (the ‘Commission’) on 21 November 2014 (‘Communication’) together with Exhibits A to E.
2. In the Communication, the Applicant asserts that she 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 XXXX for rape and pillaging as war crimes. The Applicant joined the criminal proceedings as Civil Party and was awarded damages in the amount of XXXXX 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.
3. 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.
4. By letter dated 5 December 2014, the Commission acknowledged receipt of the Communication. On 8 April 2015, the secretariat of the Commission informed the Authors that it was seized of *Communication 502/14 – S.A. v. DRC* at its 17th Extraordinary Session and requested the Applicant to make a submission on the admissibility of the Communication within two months of notification. The Applicant filed her submission on admissibility on 1 June 2015. The Respondent State did not make a submission on the admissibility of the Communication.
5. At the 20th extraordinary session held from **6 to 18 June 2016**, the Commission declared the Communication admissible. The Commission notified the Authors by letter dated **21 September 2016** and asked the Applicant to make her submission on the merits of the Communication.
6. The Applicant herewith makes her submission on the merits in accordance with Rule 108(1) of the Rules of Procedure of the African Commission.

7. The Applicant reiterates her wish to withhold her identity from the public by referring to her as S.A. and redacting her name, address and any other information which might identify her from any publicly available documents.

II. OBSERVATION ON THE MERITS

8. The Applicant hereby presents her observations on the merits of the Communication ('Submission'). This Submission re-iterates the Applicant's earlier submission on the merits included in the initial Communication filed on 21 November 2014.¹ The Applicant furthermore refers the Commission to the particular context of her case as set out in the initial Communication.²

III. FACTS

9. For ease of (cross-) referencing, this Submission will set out the facts of the case as included in the Communication.
10. The Applicant is a Congolese national born on XXXXXX, currently residing at XXXXX, Democratic Republic of the Congo.
11. A judgment issued by the OMT of XXXX on XXXX against XXXXX of the XXXX Brigade of FARDC³ and the Applicant's statement dated XXXXXX,⁴ establish the following facts:

III.1. Crimes committed against the Applicant

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

¹ See section E of the Communication.

² See Section B of the Communication.

³ **Exhibit B:** Operational Military Tribunal XXXXX, Judgment in Case XXXXX, XXXXX (hereinafter OMT Judgment) - submitted to the African Commission together with the Communication.

⁴ **Exhibit C:** Déclaration de XXXXX, XXXXXX (hereinafter Applicant Statement) - submitted to the African Commission together with the Communication.

⁵ OMT Judgment, p. 6.

⁶ Applicant Statement, para. 7f.

⁷ Ibid.

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

hand over XXXXX.⁹ They gave him all their savings amounting to XXXXX.¹⁰ Their XXXX children who were in the house at that time hid under the bed.¹¹

14. XXXXXX then dragged the Applicant outside to a clearing XXXXXX while her husband, whose hands had been tied by XXXXX, remained in the house.¹² XXXXXX.¹³

15. At the clearing, threatening her with the rifle, XXXXX 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.¹⁴ XXXXX.¹⁵ After this act, he brought her back into the house to her husband who was helpless in face of the armed attacker.¹⁶ When leaving the premises, XXXX stole XXXXXXX.¹⁷ He returned after a short moment but was chased away by the cries of the entire family.¹⁸

16. XXXXX was arrested by the FARDC unit under the command of XXXXX stationed in XXXX after the Applicant reported the incident with the help of XXXXXX.¹⁹

III.2. Procedural history

17. On XXXXX, the Higher Military Prosecution indicted XXXXX on charges of rape and extortion.²⁰

18. On XXXXXX, the Applicant was examined by XXXXX, Official of the Ministry of Public Affairs, for the purposes of the criminal investigations.²¹ A medical report dated the same day concluded that it was likely that the Applicant was raped.²² According to the Applicant, the hospital where the medical examination had taken place lost her medical report and for this reason refused further treatment.²³ She therefore never received an HIV/Aids test.²⁴

19. On XXXXXXX, the Applicant filed a Civil Party application claiming moral damages, and the restitution of XXXXXXX.²⁵ The claims were directed against the accused and the State *in*

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

¹⁰ Ibid.

¹¹ Applicant Statement, para. 8.

¹² OMT Judgment, p. 6; Applicant Statement, para. 9.

¹³ Applicant Statement, para. 9.

¹⁴ OMT Judgment, p. 6; Applicant Statement, para. 10.

¹⁵ Applicant Statement, para. 19.

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

¹⁷ Ibid.

¹⁸ Applicant Statement, para. 11.

¹⁹ OMT Judgment, p. 6; Applicant Statement, para. 14.

²⁰ OMT Judgment, p. 6.

²¹ OMT Judgment, p. 7; Applicant Statement, para. 20.

²² OMT Judgment, p. 6.

²³ Applicant Statement, para. 20.

²⁴ Ibid.

²⁵ OMT Judgment, p. 3.

olidum, i.e. as jointly liable parties.²⁶ The Applicant's husband did not file a Civil Party application.

20. On XXXXX, following evidentiary hearings held in closed session pursuant to a request by the Applicant, the OMT of XXXX issued a judgment ruling unanimously that the accused was guilty of having committed rape and pillaging as war crimes.²⁷ XXXX was sentenced to life imprisonment and removed from military ranks.²⁸ In the judgment, the Applicant's application as Civil Party was declared admissible and well-founded.²⁹

21. The OMT ordered the accused to pay XXXXXX.³⁰ The accused and the Respondent State were held jointly and severally liable to pay damages in the amount of XXXXX.³¹ 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 XXXXX, un militaire dont l'Etat avait perdu tout moyen de contrôle, manquant ainsi à sa mission de puissance publique.*³²

[UNOFFICIAL TRANSLATION: *Effectively, the rape of [the Applicant] and the pillaging of her belongings were committed by XXXXX, 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.*]

22. The Applicant testified in the proceedings and was present during the announcement of the judgment.³³ Subsequently, she approached the Registrar of the OMT more than one time to demand the payment.³⁴ 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.³⁵

23. Following the announcement of the judgment, XXXXX was imprisoned but it is unknown to the Applicant if he remains in detention.³⁶

24. On XXXXXX the Registrar of the OMT of XXXXX issued a notification³⁷ of the judgment addressed to XXXXX and the Governor of XXXXXX as representative of the Respondent State

²⁶ Ibid, p. 3f.

²⁷ Ibid, p. 14.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid, p. 15.

³² Ibid, p. 13.

³³ Applicant Statement, para. 14.

³⁴ Ibid, para. 16.

³⁵ Ibid.

³⁶ Ibid, para. 18.

and ordered each to pay XXXX in damages and 13,425 Congolese Francs (equal to \$108.22) for the fees of the notification. The notification was delivered to the Governor's secretariat but not to XXXXXX.³⁸

25. On XXXXXX, the Office of the Provincial Governor of XXXXX confirmed the receipt of a letter issued by the Applicant's counsel XXXXXX on 14 July 2014 and sent in copy to the Minister of Justice and Human Rights in Kinshasa as well as REDRESS.³⁹ This letter outlined the facts as described above and called on the Office of the Provincial Governor of XXXXX 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 XXXXX or the Ministry of Justice and Human Rights.

26. The XXXXX was returned to the Applicant in the course of the proceedings.⁴⁰ The Applicant has neither received the stolen sum of XXXX nor any payments of the court-awarded compensation of XXXXX to date.⁴¹

III.3. Impact of the crimes committed against the Applicant⁴²

27. 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. XXXXX.

28. 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.

29. 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.

30. 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 XXXXX. The Applicant who used to XXXXX at a favourable spot lost her clients and the location. She is now XXXXX but does not have many clients and needs to commute constantly. The Applicant's husband lost his job as XXXXX as he accompanied her to the hearings and could no longer make regular

³⁷ **Exhibit D:** Registrar of the Operational Military Tribunal XXXXX, Notification Order in Case No. XXXXX, XXXX - submitted to the African Commission together with the Communication.

³⁸ Ibid.

³⁹ **Exhibit E:** Letter addressed to XXXXXX, Governor of XXXXX, XXXX - submitted to the African Commission together with the Communication.

⁴⁰ Applicant Statement, para. 17.

⁴¹ Ibid, para. 16f.

⁴² The information under this section reflects the Applicant Statement, para. 19-26.

deliveries. He is now XXXX but can no longer bring food to keep in stock for the family as he used to when he was a XXXXX.

IV. SUBMISSION ON THE MERITS

31. 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 XXXX in damages, plus costs.
32. Although the Applicant and her family could raise additional issues about the responsibility of the Respondent State in connection with this case,⁴³ in this communication the Applicant focusses on the payment of compensation due to her from the Respondent State as found by its own courts.
33. 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 Articles 1, 2, 5, 7, 14 and 18 (3) of the **African Charter**. They also amounted to violations of Articles 2, 4 (2) (f), 8, 11 and 25 of the **Protocol to the Charter on the Rights of Women in Africa ('Maputo Protocol')**, to which the Respondent State is a party.⁴⁴

IV.1. Violations directly arising from the acts committed on XXXXX

34. On the facts found proven by the OMT of XXXX, it is clear that the Applicant is the victim of rape and pillage. These amount to violations of Articles 2, 5, 14 and 18 (3) of the African Charter, and Articles 2, 4 (1), and 11 of the Maputo Protocol. 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.

IV.1.1. The rape amounted to torture (Article 5 African Charter)

35. 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.

⁴³ 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 Respondent State.

⁴⁴ Instrument of ratification deposited with the Chairperson of the Commission of the African Union on 9 February 2009.

36. 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’),⁴⁵ 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.

37. The African Commission has also drawn on the jurisprudence of the European Court of Human Rights (ECtHR) on Article 3 of the European Convention on Human Rights (prohibition of torture), for example in *Huri Laws v. Nigeria*.⁴⁶ According to the ECtHR, torture is characterised by “deliberate inhuman treatment causing very serious and cruel suffering”.⁴⁷

38. The African Commission has confirmed that acts of rape, and the failure to prevent and respond to such acts, amount to a violation of Article 5.⁴⁸ The jurisprudence of each of the other major international and regional human rights courts and treaty bodies, confirms 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.⁴⁹

⁴⁵ African Commission, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Comm. No. 245/2002, para.180.

⁴⁶ African Commission, *Huri Laws v Nigeria*, Comm. No. 225/98, para. 41.

⁴⁷ ECtHR, *Ireland v UK* (1978) App. No.5310/71, 18 January 1978, para. 167.

⁴⁸ 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).

⁴⁹ See, eg. Inter-American Commission on Human Rights (IACmHR), *Raquel Marti de Mejia v Peru* (1996), Case 10.970, Report No. 5/96, Decision of 1 March 1996; European Court of Human Rights (ECtHR), *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 ECtHR 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 ECtHR 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).

39. 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.⁵⁰

(i) Rape automatically meets the severity threshold for torture

40. 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*,⁵¹ *V.L. v. Switzerland*⁵² and *Miguel Castro Castro Prison v. Peru*⁵³). In the case of *Fernandez Ortega v. Mexico*, the IACtHR explained that:

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.⁵⁴

41. Successive UN Special Rapporteurs on Torture have also identified rape and sexual violence as a form of torture,⁵⁵ as has the Committee on the Elimination of Discrimination Against Women.⁵⁶

⁵⁰ IACtHR, *Fernandez Ortega v Mexico*, Series C. No. 215, Judgment (Merits, Reparations and Costs) of August 30, 2010, para. 128.

⁵¹ 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.

⁵² UN Committee Against Torture, *V.L. v Switzerland*, CAT/C/37/D/262/2005, 20 November 2006, para. 8.10.

⁵³ IACtHR, *Miguel Castro Castro Prison v Peru* (2006), Series C. No. 160, Judgment (Merits, Reparations and Costs) of 25 November 2006.

⁵⁴ IACtHR, *Fernandez Ortega v Mexico* (2010), Series C. No. 215, Judgment (Merits, Reparations and Costs) of 30 August 2010, para. 124.

⁵⁵ See relevant reports of several Special Rapporteurs on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 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).

⁵⁶ Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation 19: Violence against Women, A/47/38, 1992, para. 7 (hereinafter CEDAW General Recommendation 19).

42. 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.”⁵⁷
43. 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.”⁵⁸ 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.*⁵⁹

(ii) Rape is committed for prohibited purposes

44. 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.⁶⁰
45. For conduct to amount to torture there is no requirement that the conduct must be solely perpetrated for one of the prohibited purposes; the prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose.⁶¹ 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”.⁶² 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.⁶³

⁵⁷ International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v Kunarac*, IT-96-23&23/1, Appeals Chamber Judgment, 20 June 2002, paras. 150-151.

⁵⁸ ICTY, *Prosecutor v Delalic*, IT-96-21, Trial Chamber Judgment, 16 November 1998, para. 495.

⁵⁹ *Ibid.*

⁶⁰ 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/IOF53/001/2011/en/7f5eae8f-c008-4caf-ab59-0f84605b61e0/ior530012011en.pdf> (hereinafter Amnesty International Report).

⁶¹ ICTY, *Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23-T & IT-98-30/1-T, Trial Chamber Judgment, 22 February 2001, para. 816.

⁶² 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.

⁶³ ICTY, *Prosecutor v Delalic*, IT-96-21, Trial Chamber Judgment, 16 November 1998, par. 495.

46. 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.
47. 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.⁶⁴ This was recognised, for example, by the Inter-American Commission on Human Rights ('IACmHR') in the leading case of *Mejia v. Peru*.⁶⁵ 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".⁶⁶ This purpose has also been discussed and held to be present in a number of other leading judgments on rape and torture.⁶⁷
48. 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.⁶⁸
49. 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".⁶⁹
50. 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,⁷⁰ thereby 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.⁷¹ 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:

⁶⁴ See ICTY, *Prosecutor v Furundzija*, IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, para. 162; UN Committee Against Torture, *V.L. 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, A/HRC/7/3, 15 January 2008, para. 36 (hereinafter Special Rapporteur on Torture 2008 Report).

⁶⁵ IACmHR, *Raquel Marti de Mejia v Peru* (1996), Case 10.970, Report No. 5/96, Judgment of 1 March 1996.

⁶⁶ *Ibid.*, Section V (B) (2).

⁶⁷ See, e.g. 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.

⁶⁸ Special Rapporteur on Torture 2008 Report, para. 30.

⁶⁹ Amnesty International Report, p. 45.

⁷⁰ 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.

⁷¹ Special Rapporteur on Torture 2008 Report, para. 30.

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 [...] ⁷²

(iii) The rape of the Applicant constituted torture

51. The Courts of the Respondent State have established that XXXX, a soldier of the State's armed forces, raped the Applicant on XXXX, and that the State is responsible for his actions.

52. The rape of the Applicant on XXXXX 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 as described above at paragraphs 23 to 26 bear this out.

IV.1.2. The rape also amounted to a violation of the right to integrity of the person (Art. 4 (1) Maputo Protocol)

53. The rape of the Applicant also amounted to a violation of the right to integrity of the person guaranteed by Article 4 (1) 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.

54. 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.⁷³ 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 (1) has been violated in this case.

IV.1.3. The rape amounted to a violation of the obligation to protect women from gender-based violence in Armed Conflict (Article 5 African Charter and Article 11 Maputo Protocol)

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

⁷² UN Committee Against Torture, *V.L. v Switzerland*, CAT/C/37/D/262/2005, 20 November 2006, para. 8.10.

⁷³ See, e.g. IACtHR, *Fernandez Ortega v Mexico*, Series C. No. 215, Judgment (Merits, Reparations and Costs) of August 30, 2010, para. 128.

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.

56. 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.⁷⁴ 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.⁷⁵ 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.⁷⁶

57. The African Commission emphasised specifically in regards to Article 5 of the African Charter, that it applies at all times, including in times of armed conflict, and that State Parties are obliged to protect civilians during conflict, including from violations of Article 5.⁷⁷ It considered for instance in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, that the State’s failure to protect women against, human rights violations, including, rape by its forces during the Darfur conflict constituted, inter alia, a violation of Article 5.⁷⁸

58. 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 Articles 5 African Charter and Article 11(2) to protect civilians.

⁷⁴ Geneva Academy of International Humanitarian Law and Human Rights, *Rule of Law in Armed Conflicts: Democratic Republic of Congo*; Elizabeth Wilmshurst, *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 189-192.

⁷⁵ Andrew Clapham, *Human rights obligations of non-state actors in conflict situations*, International Review of the Red Cross, Volume 88 No. 863, September 2006, p. 498, available at https://www.icrc.org/eng/assets/files/other/irrc_863_clapham.pdf.

⁷⁶ *Ibid*; see further International Committee of the Red Cross, Customary International Humanitarian Law, Rule 93. Rape and Other forms of Sexual Violence,

⁷⁷ See for instance, African Commission, *Amnesty International and others v Sudan*, Comm. Nos. 48/90-50/91-52/91-89/93, para. 42; see also CEDAW, General Recommendation No.30, providing in para.2 that “States parties’ obligations continue to apply during conflict or states of emergency without discrimination between citizens and non-citizens within their territory or effective control, even if not situated within the territory of the State party.”

⁷⁸ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Comm. Nos. 279/03-296/05, para. 168.

IV.1.4. The rape amounted to discrimination on the basis of gender (Art. 2 and 18(3) African Charter and Art. 2 Maputo Protocol)

59. Article 2 of the African Charter provides that:

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 [...]

60. Article 18(3) of the African Charter stipulates that:

The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

61. 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.

62. The African Commission, in developing its jurisprudence on Articles 2 and 18(3) 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 recognise gender-based violence as a form of discrimination. This includes in particular the UN Declaration on the Elimination of Violence against Women,⁷⁹ the sources referred to in the Preamble to the Maputo Protocol and more recent declarations and decisions.⁸⁰ 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.⁸¹

63. In *Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt*, the African Commission confirmed that it

[...] holds the same view with the CEDAW which held that, violence against women affects, compromises or destroys the enjoyment and exercise by women of their fundamental and

⁷⁹ 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>.

⁸⁰ Southern African Development Community, *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>).

⁸¹ See Special Rapporteur on Torture 2008 Report; CEDAW General Recommendation 19, para. 9; see further jurisprudence cited in previous section.

*human rights in different spheres of life. In this regard, the African Commission considers violence against women as a form of discrimination against them.*⁸²

64. 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.
65. The State also has a positive obligation under Article 2 and 18(3) 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.⁸³ 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.⁸⁴ 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”.⁸⁵ Such an obligation can also be read into Article 2 and 18 (3) 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.
66. As set out above, and as recognised in the African Commission’s Resolution 284 on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo,⁸⁶ 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.⁸⁷ 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

⁸² African Commission, *Egyptian Initiative for Personal Rights & INTERRIGHTS v. Egypt*, Comm. No. 323/06, 16 December 2011, para. 165.

⁸³ See, e.g. 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.

⁸⁴ CEDAW, General Recommendation 19, para. 7.

⁸⁵ 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.

⁸⁶ African Commission, *Resolution on the Suppression of Sexual Violence against Women in the Democratic Republic of Congo*, adopted 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/>.

⁸⁷ See for the period of 2010 to 2013: 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, paras. 19-24, available at <http://www.monusco.unmissions.org/LinkClick.aspx?fileticket=GyhdUBNGcs%3D&tabid=10770&mid=13783&language=en-US>.

of reparation.⁸⁸ The failure to tackle these factors creates an environment that facilitates violations of rape.⁸⁹

IV.1.5. Pillage breached the Applicant’s right to property (Art 14 African Charter)

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

68. 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.

69. The African Commission has confirmed that Article 14 also applies in conflict and that “it is the primary duty and responsibility of the State to establish conditions, as well as provide the means, to ensure the protection of both life and property, during peace time and in times of disturbances and armed conflicts.”⁹⁰ The Commission concurred with the ICTY’s ‘*Celibici Judgment*’, finding that “private property must be respected and cannot be confiscated...pillage is formally forbidden.”⁹¹

70. 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 XXXX for the pillage.

IV.1.6. The Applicant continues to be a victim of the above violations

71. Although the Respondent State, through the criminal proceedings against XXXX, 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 ECtHR:

*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).⁹²*

⁸⁸ Ibid, paras. 57 and 59.

⁸⁹ See further Section B of the Communication filed on 20 November 2014 on the particular context in the Respondent State.

⁹⁰ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Comm. Nos. 279/03-296/05, para. 201.

⁹¹ African Commission, *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, Comm. No. 227/99, para.85, citing ICTY, *The Prosecutor v Zejnil Delalić et al*, Judgment, Trial Chamber, IT-96-21-T, 16 November 1998, at para.587.

⁹² ECHR, *Kopylov v Russia* (2010) App. No. 3933/04, 29 July 2010, para. 128.

72. Jurisprudence establishes that compensation must always be accorded for violations of the prohibition of torture and other ill-treatment.⁹³ 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.⁹⁴ 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.
73. In this case, the Applicant remains a victim of the violations in question as she has not received any compensation.

IV.2. Additional violations arising from failure to pay compensation awarded to the Applicant

74. The Respondent State’s failure to provide the compensation awarded by the OMT of XXXX 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.

IV.2.1. Violation of the right to a remedy (Articles 1 and 7 in conjunction with Article 5 African Charter, Articles 25 and 4(2)(f) Maputo Protocol)

75. The Respondent State has been found by its own court to be responsible for the actions of XXXX, 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 (2) (f) of the Maputo Protocol.

⁹³ *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).

⁹⁴ ECHR, *Kopylov v Russia* (2010) App. No. 3933/04, 29 July 2010, para. 131, citing *Gäffgen v Germany* [GC] (2010) App. No. 22978/05, 1 June 2010, paras. 121 and 126.

76. 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 [...]

77. 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.⁹⁵ 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.*⁹⁶

78. The African Commission's 2002 *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa* ('Robben Island Guidelines') urges States to ensure that all victims of torture as well as their dependents are offered appropriate medical care, have access to appropriate social and medical rehabilitation, and are provided with appropriate levels of compensation and support.⁹⁷ It is furthermore standard practice of the African Commission to award reparation to victims who had their rights under the African Charter violated.⁹⁸

79. For gender-based violence, the CEDAW General Recommendation No.30 specifically provides that:

⁹⁵ African Commission, *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.

⁹⁶ 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.

⁹⁷ African Commission, 'Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, October 2002, at http://www.achpr.org/files/sessions/32nd/resolutions/61/achpr32_robber_island_guidelines_eng.pdf.

⁹⁸ See for example African Commission, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93; *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v. Mauritania* Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98; *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 334/06; for an overview of the African Commission's approach to and jurisprudence on the right to reparation, see REDRESS, 'Reaching for Justice – The right to Reparation in the African Human Rights System, October 2013, at <http://www.redress.org/downloads/publications/1310reaching-for-justicefinal.pdf>.

*[...] State parties obligations also require them to ensure women’s rights to a remedy, which encompasses the right to adequate and effective reparations for violations of their rights under the [CEDAW] Convention.*⁹⁹

80. The right to an effective remedy and reparation is also recognised in major international human rights treaties.¹⁰⁰ It has been affirmed and elaborated upon by United Nations treaty bodies,¹⁰¹ regional courts,¹⁰² 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 law.¹⁰³
81. 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.¹⁰⁴
82. 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 individuals whose [...] rights have been violated, the obligation to provide an effective remedy [...] is not discharged”.¹⁰⁵
83. International and regional human rights bodies recognise that the obligation to provide reparation for serious violations generally requires the provision of appropriate

⁹⁹ CEDAW, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situation, CEDAW/C/GC/30, 18 October 2013, para.79.

¹⁰⁰ For example, Articles 2(3), 9 (5) and 14 (6) ICCPR; 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).

¹⁰¹ 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.

¹⁰² See, for example, IACtHR, *Velasquez Rodriguez v Honduras*, Series C No. 4, Judgment (Merits) of 29 July 1988, para. 174; and ECtHR *Papamichalopoulos v Greece* (1995) App. No. 14556/89, 31 October 1995, para. 36.

¹⁰³ 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, 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).

¹⁰⁴ 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.

¹⁰⁵ 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.

compensation.¹⁰⁶ While in the present case, the Applicant focusses on the payment of compensation due to her from the Respondent State, it is important to emphasise that for serious violations such as those committed in the present case, reparation should also involve restitution, rehabilitation, measures of satisfaction and guarantees of non-repetition such as changes in law and practice.¹⁰⁷

84. 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.¹⁰⁸ 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.*¹⁰⁹

85. In the jurisprudence of the ECtHR, 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.¹¹⁰

¹⁰⁶ Ibid; see, e.g. ECtHR, *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.

¹⁰⁷ See, e.g. UN Basic Principles and Guidelines on the Right to Remedy and Reparation; CAT General Comment No. 3, paras. 2, 6-18.

¹⁰⁸ 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.

¹⁰⁹ Ibid, para. 8.6.

¹¹⁰ See, e.g. ECtHR, *Kopylov v Russia* (2010) App. No. 3933/04, 29 July 2010, paras. 143-150.

86. 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 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*,¹¹¹ 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.*¹¹²

87. 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.¹¹³

88. 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.¹¹⁴

89. The previous section outlined the violations arising from the conduct of XXXXX against the Applicant, for which the Respondent State bears responsibility. Under Article 1 and 7 in

¹¹¹ 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).

¹¹² IACtHR, *Acevedo-Jaramillo et. al. v Peru*, Series C, No. 144, Judgment (Preliminary Objections, Merits, Reparations and Costs) of 7 February 2006, para. 220.

¹¹³ *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.

¹¹⁴ CAT General Comment No. 3, para. 38.

conjunction with Article 5 of the African Charter, and Article 25 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.

IV.2.2. Violation of the right to a fair trial (Art. 7 African Charter) and the right of access to justice (Art. 8 Maputo Protocol)

90. 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.

91. In the analogous case of *Bissangou v. Congo*¹¹⁵ where Congo had not paid compensation awarded by its courts against the State 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’”.¹¹⁶

92. In its decision, the African Commission extensively cited the jurisprudence of the ECtHR, 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.*¹¹⁷ [emphasis added]

93. In consequence, the ECtHR 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 ECtHR expects national authorities to comply with the judgments of their own courts, the ECtHR has regularly found that the period for enforcement “should not generally exceed

¹¹⁵ African Commission, *Bissangou v Congo*, Comm. No. 253/02.

¹¹⁶ *Ibid*, para. 74.

¹¹⁷ ECtHR [GC], *Scordino v. Italy (no. 1)* (1996) App. No. 36813/97, 29 March 2006, para. 196; see also ECtHR, *Hornsby v Greece* (1997) App. No. 18357/91, 19 March 1997, para. 40 ff.; ECtHR, *Metaxas v Greece* (2004) App. No. 8415/02, 27 May 2004, para. 25; ECtHR, *Musci v. Italy* (2006) App. No. 64699/01, 29 March 2006, para. 88.

six months from the date on which the decision awarding compensation becomes enforceable”.¹¹⁸

94. 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”.¹¹⁹
95. 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 (sic) 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.*¹²⁰

96. In the 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 7.
97. 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. The ECtHR has repeatedly stated that “a person who had obtained a judgment against the State may not be expected to bring separate enforcement proceedings”.¹²¹ Requiring a person to bring separate enforcement proceedings results in a violation of the right to a fair trial.¹²² Instead, “[i]t is for the Contracting States to organise their legal systems in

¹¹⁸ ECtHR, *Cocchiarella v. Italy* (2006) App. No. 64886/01, 29 March 2006, para. 89; ECtHR, *Scordino v. Italy (no. 1)* (1996) App. No. 36813/97, 29 March 2006, para. 198.

¹¹⁹ UN Human Rights Committee, *Pimentel et al. v Philippines*, Comm. No. 1320/2004, CCPR/C/89/D/1320/2004, 2007, para. 10.4.

¹²⁰ African Commission, *Bissangou v Congo*, Comm. No. 253/2002, para. 75.

¹²¹ ECtHR, *Puleva and Radeva v Bulgaria* (2012), App. no. 36265/05, 14 February 2012, para. 40; ECtHR, *Metaxas v Greece* (2004), App. No. 8415/02, 27 May 2004, para. 19; ECtHR, *Burdov v Russia (no. 2)* (2009), App. no. 33509/04, 4 May 2009, para. 68.

¹²² *Ibid.*

such a way that the competent authorities can meet their obligation” to enforce a binding and enforceable judicial decision within a reasonable time.¹²³

98. 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 [...]

99. The failure to implement the judgment of the Court in the present case amounts to a violation of the Applicant’s right to a fair trial and undermines her “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.

IV.2.3. Right to property (Art. 14 African Charter)

100. 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 jurisprudence of the EtCHR 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.*¹²⁴

101. 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.

IV.2.4. Violation of Article 1 of the African Charter

102. 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:

¹²³ ECtHR, *Burdov v Russia (no. 2)* (2009) App. no. 33509/04, 4 May 2009, paras. 68-70, citing ECtHR, *Comingersoll S.A. v Portugal* [GC], App. No. 35382/97, para. 24, ECHR 2000-IV, and ECtHR, *Frydlender v. France* [GC], App. No. 30979/96, para. 45, ECtHR 2000-VIII.

¹²⁴ African Commission, *Bissangou v Congo*, Comm. No. 253/02, para. 76.

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.

103. Section B of the initial Communication submitted in November 2014 sets out how the legislative and practical environment in the Respondent State establishes 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.¹²⁵
104. 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.¹²⁶ 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.

V. REQUEST

105. The Applicant and the Authors reiterate the requests made in the Communication as follows:
106. 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.
107. 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,
- (i) The specific measures of:
- Immediate execution of the judgment of the OMT of XXXX in Case No. XXXX, issued XXXX, including
 - (a) payment of XXXX compensation awarded to the Applicant, and
 - (b) restitution of XXXX;

¹²⁵ See in particular paras.27-28 and 37 -43 of initial Communication.

¹²⁶ 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.

- Payment of interest on the above amounts at a rate of 6%,¹²⁷ calculated from the date of the judgment;
 - Ensuring that XXXX is serving the sentence as ordered by the judgment of the OMT in Case XXXXX, issued XXXXX, 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;
 - (e) Taking positive steps to overcome barriers that women face in accessing those remedies, such as providing effective free legal aid;

¹²⁷ 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.

- (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.

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

LIST OF EXHIBITS

- EXHIBIT A:** Power of Attorney signed by XXXXX, XXXXX
- EXHIBIT B:** Judgment of the Operational Military Tribunal XXXXX in Case No. XXXX, XXXXX
- EXHIBIT C:** Déclaration de XXXXX, XXXXXX
- EXHIBIT D:** Notification Order of the Registrar of the Operational Military Tribunal XXXXX in Case No. XXXXX, XXXXX
- EXHIBIT E:** Letter addressed to XXXXX, Governor of XXXXX, XXXXX

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

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
IACtHR	Inter-American Court of Human Rights
IACmHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
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