23rd February – 3rd March 2011
Communication No. 334/2006

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
Ninth Extra-Ordinary Session
23rd February – 3rd March 2011

EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS AND INTERIGHTS
v.
EGYPT

DECISION

Citation: Egyptian Initiative for Personal Rights v. Egypt, Decision, Comm. No. 334/2006 (ACmHPR, Mar. 2011)

SUMMARY OF THE COMPLAINT

1. This communication is brought before the African Commission on Human and Peoples' Rights (the African Commission or the Commission) on behalf of Mohamed Gayez Sabbah, Mohamed Abdalla Abu-Gareer and Ossama Mohamed Al-Nakhlawy (the Victims), by the Egyptian Initiative for Personal Rights and Interights (the Complainants).

2. The Respondent State is Egypt, a State Party to the African Charter on Human and Peoples' Rights (the African Charter or the Charter).

3. The Complainants state that the Victims were tried and sentenced to death after being accused of bombings which took place on 6 October 2004 and 23 July 2005 on the Sinai Peninsula in Egypt.

4. The Complainants submit that on the night of 7 October 2004, three bombings took place in the Taba Hilton Hotel and in two tourist resorts (Al-Badia and Gozor Al-Qamer) near Nuweiba, on the Sinai Peninsula ("the Taba bombings"). They further state that as a result of the attacks, 34 people died and at least 157 were injured. The Complainants say that the Victims were Egyptian, Israeli and other foreign tourists and workers.

5. They allege that the security forces of the Respondent State responded with a campaign of mass arrests and detentions in Northern Sinai, from where the perpetrators of the attacks were believed to have originated. According to the Complainants, among those taken into custody was the First Victim, Mohamed Gayez Sabbah.

6. The Complainants also state that on 23 July 2005, a series of new bombings took place in the city of Sharm El-Sheikh on the Sinai Peninsula, and that following those attacks, the security forces again arrested a large number of Egyptian citizens, including Ossama Mohamed Abdel-Ghani al-Nakhlawy (the Second Victim) and Younis Mohamed Abu-

Gareer (the third victim), on 12 August and 28 September 2005, respectively.

7. According to the Complainants, agents of the State Security Intelligence (the SSI) subjected the victims to various forms of torture and ill-treatment during their detention, in order to "confess" before the State Security Prosecutor for their involvement in the Taba bombings. The Complainants state that the victims were held incommunicado for a long period of time without access to a lawyer.

8. The Complainants state that the victims were denied necessary medical attention as well forensic medical examination during interrogation sessions. They allege that the victims were charged with crimes in relation to the Taba bombings and were tried by the Supreme State Security Emergency Court in a trial characterized by procedural and substantive anomalies. They further allege that the court's decision was based substantially on the 'confessions' obtained through torture and prolonged ill-treatment.

9. They state that on 30 November 2006, the victims were sentenced to death by hanging. The Complainants state that the First Victim, Mohamed Gayez Sabbah, was arrested on 22 October 2004 pursuant to an Administrative Order issued under Law 162/1958 of the State of Emergency (the Emergency Law).[FN1] The Complainants allege that the first victim was held incommunicado detention by SSI agents until March 2005. They state that SSI agents blindfolded and bound the first victim, and occasionally hung him from the ceiling by his arms and legs.

[FN1] The order was issued in accordance with Art. 3 of Law 162/1958 on the State of Emergency, as amended (hereinafter "Emergency Law").
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10. The Complainants state that the First Victim was held in these conditions for 96 days, being untied only during his interrogation by the State Security Prosecutor.

11. They further allege that SSI agents applied electrical shocks to several parts of his body. They state that beatings and torture took place before and after his interrogation sessions by State Security Prosecutors which started on 3 November 2004 and that most of the interrogation sessions took place around midnight and lasted for several hours each.

12. They allege that despite the fact that the First Victim was tortured before these sessions, the interrogation sheet completed by the State Security Prosecutor in respect of the First Victim indicated that there were no visible injuries on his body.

13. According to the Complainants, during the first interrogation session, the First Victim denied involvement in the Taba bombings. The Complainants submit that it was during the second session, held on 4 November 2004 that the First Victim "confessed" to the State Security Prosecutor. The Complainants also aver that the First Victim was held incommunicado, without access to his family, legal counsel, medical care or a court until 24 March 2005. Requests for access to a defence lawyer by the first victim were ignored.

14. The Complainants allege that a plea submitted by a group of human rights lawyers to the Public Prosecutor's Office, which exercises oversight over the State Security Prosecutor's Office, requesting permission to represent the victims together with others

whose names had been printed in the local press as the chief suspects in the investigation of the Taba bombings, went unanswered.[FN2]

[FN2] The plea, submitted on 24 November 2004, was registered under Number 16332.
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15. Thus according to the Complainants, from the date of arrest on 22 October 2004 to 24 March 2005, the First Victim was denied access to counsel and that it was on 24 March 2005 that a lawyer attended the final interrogation hearing during which the First Victim retracted his "confessions".

16. The Complainants assert that the First Victim also requested medical attention and a forensic examination in relation to his allegations of torture while in detention but the request for a forensic examination was rejected by the Public Prosecutor's Office according to the viciously circular logic that only a legal representative (which he was also denied) could make such a claim.

17. According to the Complainants, the charges against the victims and two other individuals in relation to the Taba bombings were referred to the Supreme State Security Emergency Court in Ismailiya on 30 March 2005, and listed as case No. 40/2005[FN3]. They state that the trial started on 2 July 2005 and it was at this time that the First Victim appeared before a judge for the first time since his arrest, eight months earlier. The Complainants also assert that during the first hearing on 2 July 2005 the First Victim informed the court that he had been tortured by SSI officers before and after interrogation sessions, in an attempt to force him to confess.

[FN3] The Supreme State Security Emergency Court was set up in accordance with the Emergency Law (above, n. 1). The scope of the jurisdiction ratione materiae, composition of, and appointment procedures to, the Supreme State Security Emergency Court are discussed in Section III.B.1(a) on the right to an independent tribunal.
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18. The Complainants further state that the First Victim told the prosecutor about his torture and requested medical attention, but the prosecutor denied his requests.

19. The Complainants state that it was during this hearing that the First Victim and his defence counsel requested that he be examined by a forensic expert. According to the Complainants, the court itself examined the First Victim in camera, in the presence of his defence counsel as well as a lawyer attending the hearing on behalf of Human Rights Watch. They state that he was stripped of his clothes for the court to examine whether there were any physical signs of torture and that the court found "… brown spots on his arms."[FN4] The Complainants further state that, as a result, the court granted the application for a medical examination, and adjourned the trial to 24 July 2005.

[FN4] See Forensic Report, Case no. 40/2005, 5 July 2005 (page 2 of the English translation).
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20. The Complainants aver that the Forensic Medical Authority (FMA) examination took place eight months after the victim's alleged torture and that the report, dated 5 July 2005, noted injuries that were consistent with the First Victim having been subjected to torture, including "healings" and "dark discolorations" on his right and left forearms, right elbow, left thigh, upper left leg and left hip joint.[FN5]

[FN5] Ibid. (page 4 of the English translation).
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21. The Complainants also state that the two Government examiners concluded that "due to the long lapse of time and the fact that the marks were not examined at the time they occurred, it was not possible to determine with certitude the reason, manner or time of such marks."[FN6] According to the Complainants, further charges were preferred against the First Victim during his trial on 25 March 2006, in relation to the Taba bombings.

[FN6] Ibid.
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22. The Complainants submit that the Second Victim, Ossama Mohamed Abdel-Ghani Al-Nakhlawy, was arrested on 12 August 2005 and placed under administrative detention pursuant to a decree of the Minister of Interior issued under the Emergency Law.

23. The Complainants further submit that the Second Victim was also tortured by SSI officers during the initial period of his detention and interrogation, including the use of electric shocks, beatings and suspension from the roof in painful positions. They state that the Second Victim was only informed of the charges against him on 22 August 2005, when he first appeared before the State Security Prosecutor for interrogation.

24. The Complainants assert that during the interrogation session, the Second Victim agreed to sign a written confession recounting his role in the Taba bombings. They state that during this session, the State Security Prosecutor indicated on the interrogation sheet that there were no visible injuries on the body of the Second Victim.

25. According to the Complainants, the Second Victim was denied access to a lawyer during the interrogation sessions, which spanned a period of seven months and that during the session held on 19 March 2006, the second victim insisted on summoning lawyers to represent him and to that effect submitted the names and mobile phone numbers of two human rights lawyers.

26. The Complainants further submit that on 25 March 2006, the State Security Prosecutor presented a "complementary indictment" in relation to the Taba bombings in which the First Victim had been charged (Case No. 40/2005).

27. The Complainants state that the Second Victim also retracted his "confessions" before the court on 26 March 2006 when he informed the court that he had been tortured during his detention. The Complainants say that the court granted the Second Victim's request for a medical examination which took place two months later, nine months after the second

victim's alleged torture. They state that the forensic medical report, dated 27 May 2006, noted "darker intersecting discolorations all over the back" as well as an unhealed fracture in one of the toes of his left foot. The Complainants submit that despite the findings, the Report concluded that, due to the time lapse, it was not possible to determine precisely the cause or date[FN7] of the discolorations.

[FN7] See Forensic Report, Case no. 40/2005, 27 May 2006.

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28. The Complainants state that the Third Victim, Younis Mohamed Abu-Gareer, was detained on 28 September 2005 under an Administrative Detention Decree issued under the Emergency Law.

29. According to the Complainants, the period of their arrest was between 12 August and 28 September 2005. The Complainants submit that the Third Victim was first interrogated by the State Security Prosecutor on 20 November 2005, 50 days after his arrest, at which point he was informed of the charges against him.

30. They state that on 25 March 2006 the Third Victim was referred to the Supreme State Security Emergency Court, as a result of the referral of the complementary indictment by the State Security Prosecutor.

31. They state that he had not been brought before a judge at any point during his six-month period of pre-trial detention. According to the Complainants, he too was held in incommunicado detention without access to family members, lawyers or medical care.

32. The Complainants state that all the victims informed the court during the trial that they were subjected to beatings, electric shocks and different forms of cruel and degrading treatment, and that their requests for referral to the Forensic Medical Authority were consistently denied by the Prosecution Office, but on a referral by the court the examination confirmed the presence of several injuries but was unable to decisively conclude the cause of injuries due to the long period of time that had elapsed.

33. The Complainants allege that the repeated requests of the victims to obtain official copies of the transcript of the hearing of the trial were reportedly denied by the court.

34. The Complainants aver that despite the obvious anomaly of the trial of the Victims and the objections raised by the defence with respect to procedural impropriety, the court proceeded with the trial and adjourned on September 2006 to 30 November 2006 to seek the Mufti's (Religious Adviser's) view on the proceedings in order to deliver its judgement. They state that according to Article 381 of the Criminal Procedure Code, the court is only obliged to seek the Mufti's view when it intends to issue a death sentence, indicating that the court had already reached verdict to sentence the Victims to death.

35. According to the Complainants the victims were charged with; belonging to a group established in violation of the provisions of the law and with the intention of flouting the provisions of the constitution and the relevant laws as well as violating personal freedoms and targeting foreign tourists and the police as well as tourist installations; premeditated murder, attempted premeditated murder, damaging property, illegal manufacture and

possession of explosives and car robbery.

ARTICLES ALLEGED TO HAVE BEEN VIOLATED

36. The Complainants submit that the rights of the victims under Articles 4, 5, 7 (1) (a), (c) and 26 of the African Charter have been violated.

PRAYERS

37. The Complainants seek the following reliefs:

a. Recognition by the African Commission that the rights in the above mentioned articles in the Charter have been violated;

b. An order for compensation in respect of the violations of the rights of the victims;

c. Harmonisation of the Respondent State's legislations in line with the Guidelines and Principles of the Rights to a Fair Trial and Legal Assistance adopted by the African Commission;

d. Ensure that the appropriate mechanisms are implemented to avoid the reoccurrence of similar human rights violations.

PROCEDURE

38. The Complaint was received at the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) during the Commission's 40th Ordinary Session, held from 15 to 29 November 2006, in Banjul, The Gambia. A provisional measure was requested to be taken under Rule 111 of the African Commission's Rules of Procedure.

39. The African Commission decided to be seized of the communication at its 40th Ordinary Session, held from 15 to 29 November 2006, in Banjul, The Gambia.

40. The African Commission requested for provisional measures under Rule 111(1) of its Rules of Procedure, via a letter dated 5 December 2006 addressed to the President of the Arab Republic of Egypt.

41. By letter dated 21 December 2006, the Complainants were informed that the African Commission had decided at its 40th Ordinary Session to be seized of the communication and that a request for Provisional Measures had been sent to the President of the Arab Republic of Egypt, and requested the Complainants to send their submissions on admissibility to the Secretariat by 21 march 2007.

42. By Note Verbale dated 21 December 2006, the African Commission informed the Respondent State its decision to be seized of the communication and brought to the attention of the Government to the request for provisional measures that was previously sent, and requested that the submissions on admissibility of the Respondent State be sent to the Secretariat by 21 March 2007.

43. On 22 March 2007, the Secretariat received the submissions on admissibility of the

Complainants.

44. On 23 March 2007, the Secretariat received the submission on admissibility of the Respondent State in Arabic language.

45. By Note Verbale and letter dated 29 March 2007, the Secretariat acknowledged receipt of the submissions on admissibility of both parties and forwarded the submission to the other party.

46. By letter dated 19 April 2007, the Secretariat transmitted to the Complainants the translated version (from Arabic to English) of the Respondent State's submissions on admissibility.

47. By letter dated 20 April 2007, the Complainants acknowledged receipt of the African Commission's letter dated 19 April 2007, but informed the Secretariat that it had not received the previous letter dated 29 March 2007 by which the submissions on admissibility in original Arabic language were forwarded.

48. On 20 April 2007, the Secretariat forwarded again the original Arabic version of the Respondent State's submissions on admissibility to the Complainants.

49. During its 41st Ordinary Session, held from 16 to 30 May 2007 in Accra, Ghana, both parties made oral submissions before the African Commission to clarify on their written submissions on the admissibility of the communication. The representative of the Respondent State also submitted in writing what was presented orally before the Commission on this occasion and this document was added to the file.

50. At its 41st Ordinary Session, held from 16 to 30 May 2007 in Accra, Ghana, the Commission declared the communication admissible.

51. By Note Verbale dated 8 June 2007, the Secretariat informed the Respondent State of its decision on admissibility; the Complainants were also informed in a letter dated 6 June 2007. Both parties were invited to make their submission on the merits.

52. On 7 June 2007, the Secretariat received from the Complainants a letter addressed to the Chairperson requesting for renewal of the Provisional Measures under Rule 111(1).

53. By letter dated 7 June 2007 addressed to H.E. President Hosni Moubarak, a request for provisional measures was made by the Commission.

54. On 24th October 2007, the Embassy of the Arab Republic of Egypt to Dakar, Senegal, sent a Note Verbal to inquire about the submission if any, made by Complainants.

55. At the 42nd Ordinary Session held in Brazzaville, Congo from 15 to 28 November 2007, the Commission deferred the communication to the 43rd Ordinary session so as to allow the parties to make their submissions on the merits. During that same Session, the Secretariat received a submission on the Merit from the Respondent State.

56. By Note Verbale dated 20 March 2008 and letter dated 19 March 2008, the parties to the communication were informed that the 43rd Ordinary Session is scheduled to be held

from 7 to 22 May 2008 in Ezulwini, Swaziland.

57. On 23 April 2008, the Secretariat received an electronic version of the submission on the merits from the Complainants.

58. On 24 October 2008 the Secretariat transmitted to the Respondent State the submission on the merits of the Complainants.

59. By letter dated 24 October 2008, the Complainants were informed that the 44th Ordinary Session will be held in Abuja, Federal Republic of Nigeria from 10 to 24 November 2008.

60. During the 44th Ordinary Session the African Commission considered the communication on the merits and deferred it to the 45th Ordinary Session scheduled to be held from 13 to 27 May 2009 in Banjul, The Gambia.

61. By Note Verbale and letter dated 19 December 2008, the Secretariat informed the parties of the decision to defer the consideration on the Merit of the communication to the 45th Ordinary Session.

62. By Note Verbale and a letter both dated 24 April 2009, the parties were reminded that the communication will be considered on the Merit at the 45th Ordinary Session to be held in Banjul, The Gambia from 13-27 May 2009.

63. By Note Verbale and letter dated 16 July 2009, the African Commission informed the parties of its decision to defer the communication to the 46th Ordinary Session, scheduled to take place from 11 to 25 November 2009.

64. By Note Verbale and letter dated 20 December 2009, the African Commission informed parties of its decision to defer consideration of this communication to the 47 Ordinary Session of the African Commission scheduled to take place from 12 to 26 May 2010.

65. By Note Verbale and letter dated 11 June, the African Commission informed parties of its decision to defer the communication to the 48th Ordinary Session scheduled to take place from 10 to 24 November 2010.

THE LAW ON ADMISSIBILITY

SUBMISSIONS OF THE COMPLAINANTS ON ADMISSIBILITY

66. The Complainants submit that all the criteria of Article 56 of the African Charter are satisfied and that therefore, the communication should be declared admissible.

67. On the issue of exhaustion of local remedies, the Complainants state that under the Emergency Law (Law No. 162 of 1958 as amended), the President may decide to commute the sentence, revoke the judgement, or order a retrial by another circuit of the State Security Emergency Court. They submit that in the present case, the sentence imposed by the State Emergency Court on 30 November 2006 on the victims becomes final once it has been ratified by the President of the Republic and that there is no judicial right to appeal the decision of the State Security Emergency Court.

68. According to the Complainants, the President's decision under the Emergency Law is not judicial in nature and therefore it cannot be defined as an available remedy for the Complainants to pursue. They compare the facts of the present communication to those of Constitutional Rights Project v Nigeria in which the Commission described the power of the Governor to confirm or disallow the decision of a special tribunal in Nigeria as a "discretionary, extraordinary remedy of a non-judicial nature" and where it was found that the Governor's decision was not a remedy of the nature that required exhaustion under Article 56(5) of the African Charter. The Complainants also refer to Civil Liberties Organisation v Nigeria wherein it was found that in the absence of a judicial body to adjudicate on the Applicant's complaint, there was no effective remedy available.

69. The Complainants further argue that the President's decision under the Emergency Law cannot be made subject to any appeal. Therefore, they submit that the victims are left without any judicial right to appeal the decision of the State of Emergency Court.

THE RESPONDENT STATE'S SUBMISSIONS ON ADMISSIBILITY

70. The Respondent State submits that the communication is inadmissible for two reasons: firstly, it was lodged before exhausting local means of redress as the sentence was not final; and secondly, the content of the communication is inaccurate.

71. In terms of the second grounds the Respondent State submits that certain facts of the communication are false. It argues that the victims were given due process before and during the trial and that they had access to lawyers during interrogations.

72. The Respondent State submits that the victims had access to a forensic doctor and were examined. They further State that copies of court proceedings were made available to the victims and their lawyers and they were properly remanded by a court prior to the commencement of interrogations commenced.

73. The Respondent State asserts that trial of the victims was fair and was conducted in public.

74. On the issue of exhaustion of local remedies, the Respondent State submits in its written statement that the judgment pronounced on 30 November 2006 by an Emergency Court is not final as it has not yet been endorsed.

75. The Respondent State further explains that the Act No. 162 of 1958 stipulates that judgments by the State of Emergency Security Courts are only made final after being endorsed by the President of the Republic (Article 42), and that the ratifying authorities may, in examining the judgment, mitigate the sentence, replace it by a more lenient punishment, rescind it or rescind part thereof or stop its implementation or a part thereof (Article 14).

76. In addition, the Respondent State points out that for endorsement, the law stipulates that all cases on which a ruling has been made must be examined by legal advisers assigned for this purpose to ascertain that the proper procedure was followed.

77. The Respondent State also submits that the law allows the person convicted to submit a

written appeal to the Office of the Public Prosecutor.

78. The Respondent State confirmed that the request for Provisional Measures sent by the Chairperson in December 2006 to suspend the execution of the death penalty sentence while the communication was before the Commission had been received, and further explained that the request was transmitted to the President of Egypt who considered it.

THE COMMISSION'S ANALYSIS ON ADMISSIBILITY

79. The second ground submitted by the Respondent State pertains to the merits of the case and is not relevant at the stage of admissibility.

80. The admissibility of communications within the African Commission is governed by the requirements of Article 56 of the African Charter which provides for seven requirements to be met before a communication can be declared Admissible. If any of the requirements set out in this article are not met, the African Commission declares the communication Inadmissible, unless the Complainant provides sufficient justifications why any of the requirements could not be met.

81. In the present communication, the Complainants claim that this communication fulfils all the requirements of Article 56 of the African Charter. The Respondent State on the other hand submits that the Complainants have not fulfilled the requirements under Article 56(5) and as such, the African Commission should declare the communication inadmissible. The Commission would thus analyze the arguments of both parties based on the provisions of Article 56 of the Charter.

82. Article 56(1) of the African Charter states that "Communication relating to Human and Peoples' Rights… received by the Commission shall be considered if they indicate their authors even if the latter request anonymity…" This communication is brought before the African Commission by the Egyptian Initiative for Personal Rights and Interights, the Complainants, on behalf of the victims. In this communication, the authors as well as the victims have been identified. The African Commission is therefore of the view that sub-article (1) of Article 56 has been complied with.

83. Article 56(2) of the African Charter states that "Communications…received by the Commission shall be considered if they are compatible with the Charter of the Organization of African Unity or with the present Charter." The present communication sets out that Articles 4, 5, 7(1) (a), and 26 of the African Charter have been violated. The communication is brought against the Arab Republic of Egypt a State Party to the African Charter, and alleges violation of the rights of Mohamed Gayez Sabbah, Mohamed Abdallah Abu-Gareer and Ossama Mohamed Al-Nakhlawy who are in custody awaiting to be executed by the Respondent State. The African Commission therefore holds that the requirements under Article 56(2) have been fulfilled.

84. Article 56(3) of the African Charter states that "Communications …received by the Commission shall be considered if they are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity (AU)". The present communication is not written in a disparaging or insulting language directed to the Respondent State, its institutions or the AU and for these reasons the African Commission holds that the requirements of Article 56(3) have been complied

with.

85. Article 56(4) of the African Charter states that “Communications relating to human and Peoples’ Rights… shall be considered if they are not based exclusively on news disseminated through the mass media”. There is no evidence in this communication indicating that the allegations contained therein are based exclusively on news or news disseminated through the mass media. The Complainants submit that the communication is based on eyewitness evidence, as well as documented reports, which they have submitted along with the communication as attachments. The Respondent State have not challenged this assertion. For these reasons, the African Commission holds that the requirements of Article 56(4) have been fulfilled.

86. Article 56(5) of the African Charter states that “Communications relating to human and Peoples’ Rights… shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged”.

87. The rationale of the local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the Respondent State concerned must have had the opportunity to remedy the matters through its own local system. This prevents the Commission from acting as a court of first instance rather than a body of last resort. Three major criteria could be deduced from the practice of the Commission in determining this rule, namely: the remedy must be available, effective and sufficient.[FN8]

[FN8] See Sir Dawda Kairaba Jawara vs The Gambia.
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88. The only issue at stake at this stage of admissibility in the present case is the one of the exhaustion of local remedies.

89. It appears from the oral submissions of the Respondent State that there is no local remedy left for the complainants to exhaust. They argued that the decision of the State of Emergency Court has been examined and confirmed by a legal adviser and the final procedure of endorsement (ratification by the President) of the decision of the State of Emergency Court what is a waiting. The outcome of these two procedures did not change the decision of the State of Emergency Court.

90. The fact that the endorsement of the Emergency Special Court in Egypt is of legal nature or not is not relevant for the examination of the communication by the Commission at this stage, because what is at stake is whether there are other remedies available that the applicants did not resort to. The clarifications brought before the Commission by the representatives of the Respondent State during the 41st Ordinary Session led to the conclusion that there were no other local remedies available for the Complainant to resort to. The endorsement process was completed and it was submitted by both parties that the Complainants had already used the appeal that was available to them by bringing their grievance to the “judgment ratification office” and that this remedy was unsuccessful.

91. Most of the submissions made by the Respondent State and examined during the 41st Ordinary Session of the Commission refer to the notion of due process during the trial and

would be examined at the merits' stage. The respect of the rights of the Complainants is indeed a matter relevant at the merits stage and irrelevant at the admissibility stage.

92. The African Commission in several communications held that the condition of exhaustion of local remedies "should not constitute an unjustifiable impediment to access international remedies. Therefore, Article 56(5) should be applied concomitantly with Article 7, which establishes and protect the right to fair trial"[FN9]. To this extent the African Commission, in determining whether local remedies have been exhausted takes into consideration the circumstances of each case, including the general context in which the formal remedies operate and the personal circumstances of the applicant."[FN10]

[FN9] Communication No 48/90 Amnesty International v. Sudan at 31.
[FN10] Communication No 299/05 Anuak Justice Council v. Ethiopia at 49.
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93. In Communication No 250/2002 Zegveld v Eritrea[FN11], the African Commission confirmed that a domestic remedy is considered effective if it offers a prospect of success, and sufficient or adequate if it is capable of redressing the complaint.[FN12] In Sir Dawda Kairaba Jawara v The Gambia, the African Commission decided that the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. In the instant case and consistent with the jurisprudence of the Commission, there are no remedies remaining for the Complainants to pursue as they have no judicial right to appeal the decision of the State Security Emergency Court. What remains was for the President of the Republic to ratify the judgment to give force to it.

[FN11] Communication. No. 250/2002 (2003) at 37.
[FN12] See, also, Jawara v The Gambia, Comm. No. 147/95, 149/96 (2000) at 32.
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94. Therefore, if the victim cannot turn to the judiciary of his country because of lack of an effective legal remedy to address his fear and concerns, local remedies would be considered to be unavailable to him.

95. In the present case, the sentence imposed by the State Security Emergency Court on 30 November 2006 on the Victims becomes final once it has been ratified by the President of the Respondent State. Under Article 14 of the Emergency Law (Law No. 162 of 1958 as amended), the President may decide to commute the sentence, revoke the judgment, or order a retrial by another circuit of the State Security Emergency Court. The President's decision is discretionary and cannot be made subject to any appeal.

96. The African Commission decided in Communication No. 60/91 Constitutional Rights Project v Nigeria[FN13] that purely discretionary remedies of non judicial nature where "the object of the remedy is to obtain a favour and not to vindicate a right" are not of the kind contemplated by Article 56(5). In this decision, the African Commission described the power of the Governor to confirm or disallow the decision of a Special Tribunal in Nigeria as a "discretionary, extraordinary remedy of a non-judicial nature."[FN14] The African Commission stated that the remedy was neither adequate nor effective because the

Governor was under "no obligation to decide according to legal principles"[FN15] and concluded that the Governor's decision was therefore not a remedy of the nature that required exhaustion under Article 56(5) of the Charter.[FN16] In Communication No 87/93 Civil Liberties Organisation v Nigeria [sic], the African Commission also found that in the absence of a judicial body to adjudicate the applicant's complaints, there was no effective remedy to which the applicant could have recourse.[FN17]

[FN13] See Communication 60/91 (1994).
[FN14] Serac Vs Nigeria.
[FN15] See, also, Constitutional Rights Project v Nigeria, Comm. No. 87/93 (1994) in which the Commission affirmed this reasoning in the same language at 8.
[FN16] Communication 87/97 [sic].
[FN17] Civil Liberties Organisation v Nigeria, Comm. No. 129/94 (1995) 9.
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97. In the Instant matter, the clarifications by the Representatives of the Respondent State during the 41st Ordinary Session led the Commission to the conclusion that there were no other local remedies available for the victims to resort to. The ratification process was completed and it has been submitted by both parties that the victims had already used the appeal that was available to them by bringing their grievance to the "judgment ratification office" and that this remedy has proved unsuccessful.

98. The African Commission therefore concludes that since the decision of the court is not appealable by any other judicial authority, the Complainants have exhausted the requirements of Article 56(5) of the Charter.

99. Article 56(6) of the African Charter states that "Communications relating to human and Peoples' Rights… shall be considered if they: are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter". The Complainant states that the case has been decided by the State Security Emergency Court whose decision was awaiting the ratification by the President of the Republic. The Secretariat of the African Commission received this communication during the Commission's 40th Ordinary Session, held from 15 to 29 November 2006, in Banjul The Gambia and acknowledged receipt by a letter dated 12 February 2007. The Charter does not provide for what constitutes a reasonable time, for a Complainant to bring his/her Complaint before the Commission. The Commission has however dealt with this issue, on a case by case basis. The communication got to the Commission ten months after the decision of the State Security Emergency Court. The African Commission considers this to be a reasonable time, taking into consideration the complexities of getting a representation before an international body, and the challenges of communications system in Africa. The African Commission therefore holds that this provision has also been complied with.

100. Article 56(7) of the African Charter states that "Communications relating to human and Peoples' Rights… shall be considered if they: do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter." The Complainants state that this communication has not been settled by any international body and as such this requirement has been met. The Respondent State did not object to Complainants assertion and there is no evidence before the Commission to

show that the communication is being or has been settled by another international body. The Commission therefore holds that the requirement set out in Article 56(7) has been fulfilled.

101. Therefore, since all, under Article 56 have been met, the African Commission declares the communication Admissible and maintains the request for Provisional Measures communicated to the Respondent State on 5th December 2006, in order to prevent irreparable damages.

102. Other submissions which are made by the Respondent State and examined during the 41st Ordinary Session of the Commission refer to the notion of due process during the trial and will be examined at the merits stage.

THE MERITS

THE COMPLAINANTS' SUBMISSIONS ON THE MERITS

103. The Complainants submit that the manner in which the Respondent State conducted the arrest, detention, interrogation, trial and sentencing of the victims violates Articles 4, 5, 7 (1) (a), (c) and 26 of the African Charter.

ALLEGED VIOLATION OF ARTICLE 5 (TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT)

104. It is submitted by the Complainants that, the First Victim, Mohamed Gayez Sabbah, after his arrest on 22 October 2004 was held incommunicado by SSI (State Security Intelligence) agents until March 2005. SSI agents blindfolded and bound him, and occasionally hung him from the ceiling by his arms and legs. According to the Complainants he was held in this condition for 96 days, being untied only during his interrogation by the State Security Prosecutor. They also allege that the SSI agents applied electric shocks to several parts of his body. They further allege that this beatings and torture took place before and after his interrogation sessions by state security prosecutors which started on 3 November 2004.

105. The Complainants also submit that the First Victim initially denied involvement in the bombings but due to the beatings and torture was compelled to change his plea and confessed on 4 November 2004. They also submit that the First Victim was not allowed access to his family, lawyers, medical care until 24 March 2005.

106. The Complainants aver that the Second Victim, Ossama Mohamed Abdel-Ghani Al-Nakhlawy, who was arrested on 12 August 2005, was tortured by SSI officers during the initial period of his detention and questioning, includes the use of electric shocks, beatings and suspension from the roof in painful positions. They further submit that, during the interrogation session which spanned over seven months, the Second Victim was denied access to his legal counsel.

107. They submit on behalf of the Third Victim, Younis Mohamed Abu-Gareer, that between 28 September 2005 and 20 November 2005, he was questioned by SSI officers in at least twenty-five sessions and that he was subjected to electric shocks and suspended by the hands and legs in painful positions.

108. In arguing this case, the Complainants further refer to the African Commission's jurisprudence[FN18] where it held that the prohibition of torture, cruel, inhuman or degrading treatment includes 'actions which cause serious physical or psychological suffering (or) humiliate the individual or force him or her to act against his or her will or conscience'.

[FN18] See International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa) v. Nigeria (Comm. nos 137/94, 139/94, 154/96 and 161/97), para. 79. 27.

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109. The African Commission was also referred to the absolute prohibition of torture and ill treatment as contained in the Robben Island Guidelines[FN19] and Hurilaws v Nigeria[FN20]. They further contend that the absolute character of the prohibition of torture and ill-treatment is recognized in other regional and international instruments including the RIG and CAT.[FN21] The Complainants submit that even those instruments which, in contrast to the African Charter, allow for some derogation during times of national emergency explicitly exclude from the scope of permissible derogation, inter alia, the provisions prohibiting torture and ill-treatment.[FN22] The Complainants argue that even the undoubted threat posed by terrorism, do not affect in any way the absolute prohibition on torture.[FN23]

[FN19] , Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading treatment or Punishment in Africa, adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002 (hereinafter "Robben Island Guidelines"), para. 9.
[FN20] Hurilaws v. Nigeria (Comm. no. 225/98), para. 41.
[FN21] Art. 2(2) CAT; United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 3452 (XXX) of 9 December 1975, Art. 3.
[FN22] See ICCPR, Art. 4; ECHR, Art. 15; ACHR, Art. 27.
[FN23] Saadi v. Italy (App. No. 37201/06), ECtHR (Grand Chamber), judgment of 28 February 2008.

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110. The Complainants further argue that, because of the importance of the values it protects, and as international courts and bodies have recognized, the prohibition of torture has now evolved into a peremptory norm or jus cogens, reflecting that the prohibition has become one of the most fundamental standards in the international community.[FN24]

[FN24] Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 23 November 2007, UN doc. CAT/C/GC/2/CRP.1/Rev.4, para. 1 (excerpted in the Annex of the Complainants); International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Furundzija 10 December 1988, case No IT-95-17/1-T, paras 153-154 (excerpted in the Annex the Complainants).

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111. The Complainants submit that, not only is the Respondent State required to refrain from torture and ill-treatment, but also that, it must take positive measures to effectively prevent and protect against it. They argue that, certain safeguards – such as access to counsel, courts and medical personnel, and the inadmissibility of evidence obtained through torture – are inherent aspects of the prohibition of torture and ill-treatment. They further submit that where torture or ill-treatment does arise, the Respondent State is obliged to respond with effective investigation and remedial action. The importance of such measures they argue, lies firstly, in acting as a deterrent to the commission of torture and ill-treatment and, secondly, in ensuring that where torture and other ill-treatment occurs, it is investigated and documented. The Complainants refer the African Commission to General Comment No. 2 of the Committee against Torture, which recognized judicial remedies and access to counsel and to medical assistance during detention as "baseline" guarantees which the state is obliged to respect in order to give effect to the obligation to prevent and protect against torture or ill-treatment.[FN25]

[FN25] Committee against Torture, General Comment No. 2, para. 13.
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112. The Complainants argue that under the African Charter, a parallel obligation to prevent torture or ill-treatment derives from the undertaking given by the States Parties in Article 1 of the Charter "to adopt legislative or other measures to give effect" to the rights contained in the Charter. The importance of such safeguards, the Complainants argue, has been recognized by the African Commission in the Robben Island Guidelines.[FN26] The Complainants aver that, the Commission itself has noted that while "punishment of the torturer is important, […] preventive measures such as halting of incommunicado detention, effective remedies under a transparent, independent and efficient legal system, and ongoing investigations into allegations of torture"[FN27] are the best ways to deal with such atrocities.

[FN26] Robben Island Guidelines, para. 20.
[FN27] See Amnesty International and others v. Sudan (Comm. nos 48/90, 50/91, 52/91 and 89/93), para. 56.
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113. It is submitted by the Complainants that, the victims were subjected to torture and ill-treatment by state agents – members of the security forces – while they were in state custody. They argue that, the victims were subjected to repeated electric shocks, beatings, prolonged hanging, binding and blindfolding aimed at their complete disorientation. They further state that, this treatment, which was inflicted by state officials on the victims, which intended to elicit confessions and information, clearly meets the torture threshold.

114. The Complainants also argue that, although the context of the victims incommunicado detention and interrogation is such that available evidence is necessarily limited, the allegations of torture and ill-treatment are supported by the victims' independent testimonies of similar ill-treatment. According to the Complainants, the fact that the victims were held incommunicado, hidden from the outside world during the 6-9 months of pre-trial detention, and that access to medical professionals was persistently denied until during trial itself is indicative of ill-treatment. They submit that, the irregular nature of the

“interrogation” sessions which is also consistent with the decision to interrogate late at night is a form of ill-treatment.

115. The Complainants submit that the Forensic Medical Report, following the examination of the first victim on 5 July 2005, nearly nine months after his injuries were sustained, noted “healings” and “dark discolorations” on his right and left forearms, right elbow, left thigh, upper left leg and left hip joint. The second report of the FMA of 27 May 2006, following examination of the second and third victims also nearly nine months after their torture, found that the Second victim had a “darker intersecting discolorations” all over his back, as well as an unhealed fracture in a left foot toe and that the third victim had dark discolorations in the chest, abdomen and upper arms. The Complainants concede that, in both cases the government examiners concluded that the long time lapse between being examined and the injuries made it impossible to determine with certainty the reason, manner or time of such injuries.”

116. The Complainants aver that their allegations are consistent with reports of the systemic nature of torture by security forces in Egypt in cases such as the present one. By referring the African Commission to the 1996 findings into the use of torture in Egypt, in which it concluded that “torture is systematically practiced by the security forces in Egypt, in particular by State Security Intelligence”,[FN28] the Complainants argue that human rights mechanisms consistently point to widespread and systematic torture in places of detention in Egypt. The Complainants also refer the African Commission to the decision of the Committee Against Torture which found that “Egypt resorted to consistent and widespread use of torture against detainees” and that “[r]isk of such treatment was particularly high in the case of detainees held for political and security reasons.”[FN29]

[FN28] Activities of the Committee against Torture pursuant to article 20 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Egypt, 3 May 1996, UN doc. A/51/44, para. 220.
[FN29] Agiza v. Sweden (Comm. no. 233/2003), Committee against Torture, decision of 24 May 2005, UN doc. CAT/C/34/D/233/2003, para. 13.4. See also Human Rights Committee, Comments: Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, UN Doc. CCPR/C/79/Add. 23, 9 August 1993, para. 10; Committee against Torture, Conclusions and Recommendations on the Fourth Periodic Report of Egypt, UN doc. CAT/C/CR/29/4 (2002), in particular para. 5. See also Amnesty International, “Egypt: Systematic Abuses in the Name of Security”, AI Index MDE 12/001/2007 (April 2007), at p. 18 (in support of the conclusion that “torture and other forms of ill-treatment are systematic in detention centres”.)
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117. The Complainants aver that under international human rights law, when a person is injured in detention or while under the control of security forces, there is a strong presumption that the person was subjected to torture or ill-treatment. They argue that, it is incumbent on the state to provide a plausible explanation of how the injuries were caused.[FN30]

[FN30] Colibaba v. Moldova (Appl. no. 29089/06), ECtHR, Judgment of 23 October 2007, para. 43.

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118. The Complainants also argue that, the Respondent State has failed to discharge this burden in that, they made no attempt to give satisfactory explanation of how the injuries were sustained, or to take any steps to investigate and address the surrounding circumstances. The Complainants contend further that, the trial court did nothing to follow up on questions raised in the FMA reports or the victims' testimonies. They also argue that the SSI officers who were called to testify against the defendants in court were not asked to confront a single question with regard to the alleged torture and ill-treatment. They submit that the judgment fails to mention, still less to address, the allegations of ill-treatment; and that the authorities have continuously failed to take any steps to investigate the allegations of ill-treatment or the questions raised by the FMA reports.

119. The Complainants also contend that the carrying out of a death sentence using a particular method of execution may amount to cruel inhuman or degrading treatment or punishment if the suffering caused in execution of the sentence is excessive and goes beyond that strictly necessary. They further argue that where a death sentence has been imposed "it must be carried out in such a way as to cause the least possible physical and mental suffering."[FN31] This approach they submit was tested and applied in the case of Ng v. Canada where it was found that the particular method of gas asphyxiation fell foul [sic] of it.[FN32]

[FN31] Human Rights Committee, General Comment No. 20, para. 6.
[FN32] Ng v. Canada (Comm. No 469/1991), Human Rights Committee, 7 January 1994, UN doc. CCPR/C/49/D/469/1991, para. 16.2 and 16.4.
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120. The Complainants submit that in the present case, the victims have been sentenced to death by hanging. Hanging, they contend, is a notoriously slow and painful means of execution. If carried out without appropriate attention to the weight of the person condemned, hanging can result either in slow and painful strangulation, because the neck is not immediately broken by the drop, or, at the other extreme, in the separation of the head from the body. The risk of either possibility is not compatible with respect for the inherent dignity of the individual and the duty to minimize unnecessary suffering.

ALLEGED VIOLATION OF ARTICLES 7(1) AND 26 (RIGHT TO FAIR TRIAL AND INDEPENDENT JUDICIARY)

121. The Complainants argue that the victims right to a fair trial was violated in that; (a) they were tried by a court that was not independent and impartial and whose decisions is not subject to appeal; (b) their right to a counsel was not fully respected; (c) confessions made under torture or ill-treatment were used by the court, and

122. The Complainants also submit that by virtue of Article 7(1) (d) of the African Charter, the victims have "the right to be tried within a reasonable time by an impartial court or tribunal". They also state that, the victims were tried by an exceptional security court, which failed to meet the minimum guarantees of an independent and impartial tribunal.

123. The Complainants state that the requirement of impartiality in Article 7 of the Charter

is complemented by Article 26 of the same which imposes on States Parties 'the duty to guarantee the independence of the courts' in their respective territories. These obligations, they submit, are captured in the Commission's Principles and Guidelines on Fair Trial wherein the Commission inter alia stated that: 'judicial bodies shall be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner;[FN33] there should not be any inappropriate or unwarranted interference with the judicial process nor shall decisions be subject to revision except through judicial review;[FN34] all judicial bodies shall be independent from the Executive branch[FN35] and the government shall respect that independence;[FN36] the process of appointments to judicial bodies shall be transparent;[FN37] the judicial body shall decide matters before it without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.[FN38]

[FN33] Principles and Guidelines on Fair Trial, Section A(4)(b).
[FN34] Id, Sec A(4)(f).
[FN35] Id, Sec A(4)(g).
[FN36] Id, Sec A(4)(a).
[FN37] Id, Sec A(4)(h).
[FN38] Id, Sec (A)(4)(e) and (g) and (A)(5)(a).

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124. The Complainants aver that, not applying these fair trial principles stated above, to special tribunals, violates Article 7(1) (d) of the African Charter because their composition is at the discretion of the executive branch. They also contend that the removal of cases from the jurisdiction of the ordinary courts and placing them before an extension of the executive branch necessarily compromises their impartiality[FN39] and that "[the] very existence [of such special tribunals] constitutes a violation of the principles of impartiality and independence of the judiciary."[FN40]

[FN39] See International Pen and Others v. Nigeria, para. 86.
[FN40] Malawi African Association and others v. Mauritania (Comm. nos 54/91, 61/91, 98/93, 164-196/97 and 210/98), 11 May 2000, para. 98.

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125. The Complainants state that the above averments are founded on the jurisprudence of the African Commission and are equally reflected in broader international and comparative law approaches to the right to be tried by an independent and impartial tribunal. To support this position the Complainants refer the African Commission to the jurisprudence and case law of other regional and international and human rights mechanisms. They argue that an interpretation of such a right under Article 14(1) of the ICCPR has been deemed to be "an absolute right that may suffer no exception,"[FN41] and that where the executive is able to 'control or direct' the judiciary, the notion of an independent and impartial tribunal is violated.[FN42] This jurisprudence they submit has been followed by regional human rights treaty bodies such as the Inter-American and European Courts of Human Rights, which have similarly held that special courts with close ties to the executive branch violate provisions requiring an independent and impartial tribunal.[FN43]

[FN41] See González del Río v. Peru (Comm. no. 263/1987), Human Rights Committee, 28 October 1992, para. 20. The Inter-American Court of Human Rights has similarly recognized that the right to an impartial tribunal constitutes one of those fundamental judicial guarantees from which no derogation is allowed, including during times of emergency; see I-ACtHR, Advisory Opinion OC-8/87, 30 January 1987, Habeas Corpus in Emergency Situations; I-ACtHR, Advisory Opinion OC-9/87, 6 October 1987, Judicial Guarantees in States of Emergency, OAS/Ser.L/V/III.19 doc.13, 1988.
[FN42] See Olo Bahamonde v. Equatorial Guinea (Comm. no. 468/1991), Human Rights Committee, 20 October 1993, para. 9.4.
[FN43] Lorenzo Enrique Copello Castillo et. al. v. Cuba, Case 12.477, I-ACtHR, Report No. 68/06, OAE/Ser.L./V/II.127, doc. 4 rev., paras 117–18 (2006); Incal v. Turkey (Appl. No. 22678/93), ECtHR, Reports 1998-IV, para. 65 (holding that, in establishing whether a special tribunal satisfies requirements of independence, regard must be had as to the manner of appointment of its members, the existence of safeguards against outside pressures, and whether it presents an appearance of independence); Öcalan v. Turkey (App. No. 46221/99), ECtHR, Reports 2005-IV, paras 112–118.
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126. The Complainants state that the competence and procedures of the Supreme State Security Emergency Court, an Exceptional Court, which tried the victims fall far short of the above standards. They also argue that the Supreme State Security Emergency Court was established by the Emergency Law as a temporary court,[FN44] although, like the Emergency Law itself, it has been in force continually since 1981. The Emergency Law gives the court the primary competence of ruling on crimes perpetrated in violation of decrees issued by the President of the Republic in application of the Emergency Law,[FN45] but the President of the Republic may also, at his/her discretion, refer any ordinary crime to the Supreme State Security Emergency Court.[FN46] According to Presidential Decree 1/1981 regarding the referral of some crimes to Emergency State Security Courts, all felonies and misdemeanors against the government's security or related to explosives shall be referred to State Security Emergency Courts, established under the Emergency Law.

[FN44] See Art. 3b, Emergency Law.
[FN45] Id, Art. 7.
[FN46] Id, Art. 9.
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127. It is further contended by the Complainant that the composition of the Supreme State Security Emergency Court, and the procedure for appointments to it, illustrate the lack of independence. They state that while normally composed of three judges of the Court of Appeal,[FN47] the President of the Republic may order that the Security Court be formed of three judges of the Court of Appeal and two officers of the army,[FN48] or simply decide that it be formed of three military officers.[FN49] Before appointing the judges and/or military officers, the law provides that the President of the Republic shall seek the opinion of the respective Minister of Justice and the Minister of War.[FN50]

[FN47] Id, Art. 7.

[FN48] Id, Art. 7.
[FN49] Id, Art. 8.
[FN50] Id, Art. 7.
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128. The Complainants also argue that, the degree of control which the President of the Republic exercises over the composition, conduct and outcome of proceedings before the State Security Court is antithetical to the notion of an independent and impartial judicial process because, the President, for example exercises the following powers:

● the President may suspend a case before it is submitted to Supreme State Security Emergency Court or order the temporary release of the accused person before referral of the case to the Supreme State Security Emergency Court;[FN51]

● decisions of the Supreme State Security Emergency Court are final only when they're approved by the President of the Republic, and cannot thereafter be challenged before any other court in Egypt;[FN52]

● the President of the Republic may commute, change, suspend or cancel such decisions. He may also order the release of defendants[FN53]; and or

● order the retrial of the case before another court.[FN54]

[FN51] Id, Art. 13.
[FN52] Id, Art. 12.
[FN53] Id, Art. 14.
[FN54] Id, Art. 15.
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129. The Complainants further aver that, this lack of independence and impartiality of the Supreme State Security Emergency Court has been identified and criticized by the Human Rights Committee when it expressed its 'alarm' at the fact that "that Military Courts and State Security Courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those Courts' independence and their decisions are not subject to appeal before a higher Court."[FN55]

[FN55] Human Rights Committee, Concluding Observations on Egypt, UN doc. CCPR/CO/76/EGY (2002), para. 16 (b).
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130. With regards to the right to a counsel, as enshrined in Article 7(1) (c) of the African Charter, [FN56] the Complainants contend that this right which underpins several others, such as freedom from ill-treatment and the right to prepare a defense,[FN57] should be observed during all stages of criminal prosecution "including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings."[FN58] They submit that in proceedings relating to criminal charges, legal representation is the "best means of legal defence against infringements of human rights and fundamental freedoms".[FN59] They also argue that in cases involving capital

punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings".[FN60]

[FN56] Art. 7(1) of the Charter guarantees "the right to defence, including the right to be defended by counsel of his choice.
[FN57] Amnesty International and others v. Sudan, para. 64.
[FN58] Id, Sec N(2)(c).
[FN59] Principles and Guidelines on Fair Trial, Sec N(2)(a).
[FN60] Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, UN doc. CCPR/C/GC/32 (2007), para. 38.
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131. They refer the African Commission to its decision in the matter of Malawi African Association and Others v. Mauritania,[FN61] the Complainants submit that the right to counsel in Article 7 refers to the right to counsel of the detainee or defendant's choice and argues that where the accused either had no access, or only restricted or delayed access, to lawyers, there is a violation of Article 7(1) (c). They contend that this right guarantees the right to timely and confidential consultations with that counsel.[FN62]

[FN61] See Malawi African Association v. Mauritania para. 96.
[FN62] As noted by the Human Rights Committee in relation to the right to a lawyer under the ICCPR "[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter" (Human Rights Committee, General Comment No. 32 (above, n. 60), para. 34.
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132. The Complainants further argue that although the European system has recognized that in certain exceptional circumstances it may be necessary to limit the right to counsel, such restrictions can only be allowed if they are no more than strictly necessary and do not hinder the fairness of the proceedings.[FN63] The Complainants refer the African Commission to the case of Ocalan v. Turkey, where the court held inter alia that the denial of access to a lawyer for ten days during interrogations, "a situation where the rights of the defence might well be irretrievably prejudiced", interfered with the fairness of the proceedings and violated the defendant's human rights.[FN64]

[FN63] See Öcalan v. Turkey (above n. 43), para. 131; Murray v. United Kingdom (Appl. no. 18731/91), ECHR (Grand Chamber), Series A, No. 300-A, para. 63.
[FN64] Öcalan v. Turkey, para. 131.
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133. In the instant matter, the Complainants state that none of the Victims had lawyers present at the critical early interrogation stage. They argue that on 23 November 2004 a group of human rights lawyers submitted a specific request to the Public Prosecutor's

Office (registered under number 16332) to legally represent a number of individuals, including the First Victim but received no response. They submit that the First Victim was denied representation at interrogations for a period of 5 months until 24 March 2005 and the Second and Third Victims had no access to counsel until 26 March 2006, when they first appeared in court.

134. The Complainants submit that, even at the beginning of the trial, all three victims were denied the opportunity to consult with counsel privately, in order to prepare their defence. They also submit that, the lawyer client communication took place through bars of the court room, in the presence of, and within earshot security officials. It is submitted that the complete denial of access to counsel before their appearance in court and the restrictive access thereafter, violated the right to counsel and the right to a defence under Article 7(1)(c).[FN65]

[FN65] See Malawi African Association v. Mauritania, para 96.
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135. With regards to the issue of the State Security Emergency Court's reliance on the "confessions" of the three Victims, the Complainants submit that "any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing."[FN66] They argue that "any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion."[FN67] They further argue that any evidence and/or confessions obtained through torture or cruel, inhuman and degrading treatment cannot be used in judicial proceedings except for the purpose of prosecuting the act of torture or ill-treatment itself.[FN68]

[FN66] N.6.d.1, Principles and Guidelines on Fair Trial, Section N (6)(d)(1).
[FN67] Id, Sec N (6) (d) (1).
[FN68] They argue that an express prohibition of reliance on evidence obtained by torture is contained in Art. 10 of the Inter-American Convention to Prevent and Punish Torture of 9 December 1985, OAS Treaty Series No. 67; Concluding Observations of the Human Rights Committee: the Philippines, UN doc. CCPR/CO/79/PHL (2003), para. 12.
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136. Relying on decisions from European Court of Human Rights[FN69], the Complainants aver that the use of evidence obtained under torture or ill-treatment in criminal proceedings raises serious issues as to the fairness of such proceedings. They contend that any incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterized as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value."[FN70] They further submit that the Egyptian Constitution of 1971 also stipulates that "if a confession is proved to have been made by a person under any …forms of duress or coercion, it shall be considered invalid and futile".[FN71]

[FN69] Jalloh v. Germany (App. No. 54810/00), ECtHR, judgment of 11 July 2006 [GC], paras 99 and 104- 106; Harutyunyan v. Armenia (Appl. No. 36549/03), ECtHR, judgment

of 7 June 2007, at para. 63; Concluding Observations of the Human Rights Committee: Philippines, UN doc. CCPR/CO/79/PHL (2003), para. 12.
[FN70] ECHR, Harutyunyan v. Armenia (above 50), para. 63.
[FN71] See Article 42 in fine.
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137. The Complainants submit that although the Committee against Torture has affirmed in a number of cases that, "it is for the author to demonstrate that the allegations are well founded", [FN72] the duty is generally on the state to prove that the confessions were freely obtained.[FN73] In support of this view the Complainants refer the Commission to observations of the Human Rights Committee that "all allegations that statements of detainees have been obtained through coercion must lead to an investigation and such statements must never be used as evidence, except as evidence of torture, and the burden of proof, in such cases, should not be borne by the alleged victim."[FN74] The African Commission was also referred to in the UN Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, who had noted that "[…] the applicant is only required to demonstrate that his or her allegations of torture are well founded. This means that the burden of proof to ascertain whether or not statements invoked as evidence in any proceedings, including extradition proceedings, have been made as a result of torture shifts to the State, [sic][FN75]

[FN72] P.E. v. France, para. 6.3; they also refer the Commission to G. K. v. Switzerland (Comm. 219/2002), Committee against Torture, decision of 7 May 2003, UN doc. CAT/C/30/D/219/2002, para. 6.11.
[FN73] P. E. v. France, para. 6.2; see also the slightly different formulation used by the Committee in G. K. v. Switzerland "[…] the broad scope of the prohibition in article 15, proscribing function of the absolute nature of the the invocation of any statement which is established to have been made as a result of torture as evidence "in any proceedings", is a prohibition of torture and implies, consequently, an obligation for each State party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction, including extradition proceedings, have been made as a result of torture."
[FN74] Concluding Observations of the Human Rights Committee: the para. 12.
[FN75] Report of the Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN doc. A/61/259 (2006), Annex, para. 63.
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138. The Complainants assert that the victims in this case all raised allegations of torture and ill-treatment and that these allegations are at least consistent with the circumstances of their case, such as the incommunicado nature of their detention and the reports of the FMA which, at a minimum, indicate a risk of ill-treatment. The Complainants also state that despite these concerns, and the apparent inconsistency and unreliability of the evidence, the "confessions" were admitted as evidence and appear to have formed at least part of the basis of their convictions and the imposition of the death penalty. The reliance on such evidence, they argue, violates Article 7 of the Charter.

139. With regards to the right to appeal, the Complainants aver that Article 12 of the Egyptian Emergency Law stipulates that "It is not allowed in any form to appeal the decisions pronounced by State Security Courts." They argue that these laws, and its application in practice, violate Article 7(1) (a) of the Charter, which provides for 'the right

to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.'

140. The Complainants also submit that States Parties should guarantee the right to appeal as well as provide for a genuine and timely review of the cases, including the facts and the law",[FN76] and that in extreme cases where life is at risk States Parties should take steps to make appeals mandatory especially in death penalty cases.[FN77] The Complainants refer the Commission to its decisions in Law Office of Ghazi Suleiman v Sudan[FN78] to highlight the importance of appeal rights in the Commission's jurisprudence, and to Civil Liberties Organization and Others v. Nigeria[FN79] concerning the right to appeal in death penalty cases.

[FN76] See Principles and Guidelines on Fair Trial,(ACHPR) Sec N(10)(a)(1).
[FN77] Id, Sec N (10)(b).
[FN78] Communication 222/98 and 229/99 – Law Office of Ghazi Suleiman v. Sudan (, para. 53; see also para 65.
[FN79] Communication 218/98 – Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria (, para 33. See also Id, para 34.

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141. As a result of the above, the Complainants submit that the court before which the victims were tried failed to meet the criteria which the Commission has identified as essential for an independent and impartial tribunal and urged the Commission to hold that the Arab Republic of Egypt has violated Articles 7 and 26 of the African Charter.

ALLEGED VIOLATION OF ARTICLE 4 (RIGHT TO LIFE)

142. In support of the alleged violation of Article 4 of the African Charter, the Complainants contend that although the imposition of the death penalty is not per se unlawful under the Charter or broader international human rights law, certain circumstances, which are present in this case, will render it a breach of the right to life. For the purposes of this instant case the Complainant argued that these special circumstances would include situations where the sentence was passed without meeting the requirements of a fair trial set out in Article 7 of the African Charter; and where the death penalty is mandatory or automatic, imposed by law rather than being applied by a court of law in light of all relevant circumstances.

143. They submit that in criminal proceedings which may lead to the imposition of the death penalty, respect for due process is required to ensure that the right to life guaranteed under Article 4 of the Charter is not violated. By referring the African Commission to its decisions in International Pen and Others (on behalf of Saro-Wiwa) v Nigeria[FN80] and in Malawi African Association and Others v Mauritania, they argue that, where the death penalty is unlawfully imposed, Article 4 is violated because the victims' rights under Article 7 of the Charter had been denied.

[FN80] See Communication 137/94, 139/94, 154/96 and 161/97

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144. The Complainants submit that ‘a higher threshold of rights is intended for those who are charged with crimes the sentence of which might be the death penalty’[FN81], which explains the need for “scrupulous respect of the guarantees of fair trial” in capital offence cases.[FN82] It is submitted that the Respondent State in a statement to the UN General Assembly in 2007 recognized the critical nature of respect for due process rights in capital offence cases.[FN83]

[FN81] Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria (above, n. para. 34 (citing Constitutional Rights Project v. Nigeria (Comm. nos [sic] 10/91 and 87/93).
[FN82] Human Rights Committee, General Comment No. 32, para. 59.
[FN83] See Official Records of the General Assembly, Sixty-second session; Summary Record of the 76th Plenary Meeting, 18 December 2007; UN doc. A/62/PV.76, at p. 24.

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145. It is contended by the Complainants that the imposition of the death sentence by the Supreme State Security Emergency Court in the particular circumstances of this case would amount to an arbitrary deprivation of life.

THE RESPONDENT STATE’S SUBMISSIONS ON THE MERITS

146. Concerning the alleged violation of Article 5, the Respondent State submits that Article 42 of the Constitution of Egypt provides for and guarantees the right to security of the person and that if a confession is proved to have been made by a person under duress or coercion, it shall be considered invalid and futile. It is further submitted by the Respondent State that Article 57 the law shall be considered a crime, whose criminal and civil lawsuit is not liable to prescription. The State shall grant a fair compensation to the victim of such an assault.”

147. Concerning the allegation that the victims were denied visits while in detention, the Respondent State submit that the relatives of Ossama Mohamed al- Nakhlawy visited him 17 times, the relatives of Mohamed Gayez Sabah visited him 30 times and the relatives of Yunis Mohamed Abu Gareer visited him 16 times until April 2007. These, argues the Respondent State shows that the allegations of the Complainants are baseless.

148. The Respondent State avers that its penal code criminalizes acts of torture in Articles 126 and 282, and that the same code further criminalizes unjustified detention imposes penalties exceeding those decided by Articles 127 and 280.

149. The Respondent State contends that, the assessment, value and reliance on any confession as a piece of evidence in any criminal proceedings is an issue entirely at the discretion of the Court. It is argued that it is the judge who in exercise of this discretion decides whether or not to accept and rely on the confession as reliable evidence for conviction.

150. It is contended by the Respondent State that the judge’s competence to assess the value of a confession entails as well his competence to interpret it, define its significance and explore its motives. This principle, argues the Respondent State, applies whether the confession was judicial or non judicial, whether it took place in the process of factual

investigation, interrogation or even before a normal person. The judge, argues the Respondent State, does not rely on a confession if he is not convinced with it even in the case where the accused person insists on his confession. In such a case, the judge may issue an acquittal and clarify in the causation why he did not take the confession into consideration. If it is proved that the confession was made under duress or coercion, it would be considered as invalid. But this does not prevent the court from taking other evidences to prove the accusation.

151. It is argued by the Respondent State that the court judgment against the victims took into consideration all the circumstances related to the facts according to the satisfaction of the court based upon the processes in the case, the investigations, the court sessions and the related hearings of witnesses and the written and verbal pleadings of the defence in order to clarify the facts, the elements of the crime and the provisions of the law applicable thereon. The Respondent State argues that the court considered, scrutinized and analyzed all the evidences of the subject matter of the complaint including the related medical and technical reports and the public prosecution investigations to reach the facts upon which its judgment was established.

152. It is further contended by the Respondent State that the court responded to all the pleas of the defence during the trial including the plea of the invalidity of the confessions, and that the court was satisfied that the confessions of the victims and the other accused persons during the investigation were made by persons who have the will and the discernment and are fully aware of the charges against them.

153. The Respondent State submits that when the accused persons first appeared before the public prosecutor they were free from any injuries. They further submit that the court was certain that the victims were fully aware that the investigations were made by the Public Prosecution Office (PPO) and that the PPO had informed them of the charges against them. The Respondent State also stated that 'the Office of the Public Prosecutor in carrying out its investigations, interrogated the accused, Mohamed Gaiz Sabah in four sessions, Osama Abdel Ghani El-Nakhlawi in eight sessions and Mohamed Alyan Abu Garir in twenty five sessions. During these sessions, all the accused pleaded guilty of having committed the crimes attributed to them'.

154. The Respondent State contends that as a result of the findings of the PPO, the victims were referred to Court in suit number No. 40/2005 of breaching security under the State of Emergency by committing capital offence. The Court, the Respondent State contends, had responded throughout its sittings to all the requests made by the victims. They also submit that the Court had during deliberations allowed the victims and their defence to produce evidence in support of their case and to bring their own to witnesses. They further submit that the Complainants were heard and that their request to be examined by a forensic doctor was also granted. They submit that the court equally heard the Complainants submissions in defence of the victims in 12 sessions and that they were allowed access to visit victims whenever they requested. They also submit that the Complainants were given copies of the minutes of investigations and all the records of court sittings as well as the witnesses and that the court was convinced that their confessions were valid.

155. Concerning the Complainants' allegation that the fair trial rights of the victims were violated, the Respondent State adopted its earlier position that the victims had a fair and just trial before a legal, national and competent court. They submit that the trial sessions

were public and were attended by the lawyers who represented the victims; and that, the trial was concluded within a reasonable period.

156. The Respondent State argues that it is clear from the court processes that the victims were tried before a legal, national and independent court constituted of judges who enjoy judicial immunity. This according to the Respondent State negates the allegation of a any violation of Article 26 of the African Charter.

THE AFRICAN COMMISSION'S ANALYSIS ON THE MERITS

157. In this communication, the African Commission is called upon to determine whether the arrest, pre-trial detention, trial and sentencing of the Victims by the Respondent State following their alleged involvement in a bomb attack on 6 October 2004, in the Taba and Noueiba' resorts of the Sinai Peninsula which led to the death of 34 and the injury of 105 Egyptian, Israeli and other foreigners, violates the victims' rights guaranteed under Articles 4, 5, 7(1) (a) (c) and 26 of the African Charter as alleged by the Complainants. The summary of the rights allegedly violated by the Respondent State are viz:

● The torture of the victims while in State custody, including electrical shocks, beatings, hanging from their hands and legs and prolonged sensory deprivation violates the prohibition of torture and cruel, inhuman or degrading treatment enshrined in Article 5 of the Charter;

● The denial of essential safeguards necessary to give effect to that prohibition, such as access to counsel, courts and medical personnel, and the use in court of evidence obtained through torture, themselves amount to a violation of Article 5 of the Charter;

● The character, procedures and conduct of the Office of the State Security Prosecutor and of the Supreme State Security Emergency Court violate the victims' rights to due process under Article 7(1) of the Charter and the State's obligations to ensure the independence of the courts under Article 26;

● The denial of fair trial rights and the imposition of the death penalty which would constitute a breach of the right to life, as protected by Article 4 and 5 of the Charter.

158. The Commission will accordingly proceed to analyze each of the Articles of the Charter alleged to have been violated by the Respondent State

ALLEGED VIOLATION OF ARTICLE 5

159. The Complainants submit that the Respondent State violated Article 5 in that, the Victims were held incommunicado and denied access to their families, lawyers and medical care by SSI agents. They State that they were beaten, tortured, blindfolded and occasionally hung from the ceiling by their arms and legs in painful positions by SSI agents who applied electrical shocks to several parts of their bodies.

160. Article 5 of the African Charter, reads, "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 42 of the 1971 Constitution of Egypt stipulates that:

"any citizen arrested, detained or whose freedom is restricted shall be treated in a manner concomitant with the preservation of his dignity. No physical or moral harm is to be inflicted upon him…"[FN84]

[FN84] See Articles 126 and 127 of the Penal Code.
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161. In order to analyse the allegation of torture by the Victims, the African Commission will look at what amounts to torture in accordance with the Charter and other international instruments. Article 60 of the Charter has drawn inspiration from broader international law to deal with specific issues. Substantive international jurisprudence and practice has therefore developed in recent years regarding the nature of the prohibition of torture and cruel, inhuman and degrading treatment and the obligations of states to protect its citizens against such treatment.

162. Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment (CAT) has defined 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."[FN85]

[FN85] Art. 1 CAT.
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163. The African Commission will now seek to address issues as outlined in the submissions of the Complainants viz:

(a) the Arab Republic of Egypt, through its State Security Intelligence force tortured and/or ill-treated the victims; (b) the State, through its intelligence services, prosecutor's office and security court, denied the Victims the essential safeguards against torture and ill-treatment, including prompt access to counsel, to a court and to medical personnel, and has permitted the admissibility of "confessions" obtained through torture in proceedings against them. (c) the State has failed to conduct an effective investigation into these alleged acts of torture and ill-treatment and no diligent attempts have been made to hold anyone to account.

164. The facts of torture as contained in the complaints is that the SSI agents subjected the victims to repeated electrical shocks, beatings, prolonged hanging by the leg, binding and blindfolding aimed at their complete disorientation.

165. The Respondent State on the other hand submit that the investigations carried out by the Public Prosecutor established that it has conducted external check on the accused persons immediately when they were brought before it and that it was confirmed that they were free from any external injuries. The question therefore that would follow is, who then inflicted the injuries that were subsequently found on the victims?

166. The victims' allegation is also consistent with the forensic reports which were eventually issued for each of the victims. The FMA report, following the examination of the First Victim on 5 July 2005, nearly nine months after his injuries were sustained, noted "healings" and "dark discolorations" on his right and left forearms, right elbow, left thigh, upper left leg and left hip joint. The Second Report of the FMA of 27 May 2006, following examination of the Second and Third Victim also nearly nine months after their torture, found that the Second Victim had a "darker intersecting discolorations" all over his back, as well as an unhealed fracture in a left foot toe and that the Third Victim had dark discolorations in the chest, abdomen and upper arms.[FN86] However, in both cases the government examiners concluded that the long time lapse between being examined and the injuries made it impossible to determine with certainty the reason, manner or time of such injuries."[FN87]

[FN86] See above, n. 7 and accompanying text.
[FN87] Ibid.
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167. The question therefore that begs the mind is who then is responsible for the dark colorations found on the bodies of the Victims? Certainly this could not have been inflicted by the Victims themselves, especially when it has been established that during all this time they were under the custody of the Respondent State's agents.

168. It is a well established principle of international human rights law, that when a person is injured in detention or while under the control of security forces, there is a strong presumption that the person was subjected to torture or ill-treatment. As the European Court of Human Rights has recently noted:

Where a person is injured while in detention or otherwise under the control of the police, any such injury will give rise to a strong presumption that the person was subjected to ill-treatment […]. It is incumbent on the State to provide a plausible explanation of how the injuries were caused, failing which a clear issue arises under Article 3 of the Convention […].[FN88]

[FN88] Colibaba v. Moldova (Appl. no. 29089/06), ECtHR, Judgment of 23 October 2007, para. 43.
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169. The African Commission wishes to state that under such circumstance, the burden now shifts to the Respondent State to convince this Commission that the allegations of torture raised by the Complainants is unfounded. The context of the Victims incommunicado detention and interrogation is such that available evidence is necessarily limited. However, the allegations of torture and ill-treatment are supported by the victim's independent

testimonies of similar ill-treatment. Their allegations fit also with the fact that they were held incommunicado, hidden from the outside world during the 6-9 months of pre-trial detention, and that access to medical professionals was persistently denied until during trial itself.

170. In the present case, the Respondent State has made no attempt to give a satisfactory explanation of how the injuries were sustained, or to take any steps to investigate and address the surrounding circumstances. The trial court did nothing to follow up on questions raised in the FMA reports or the Victims' testimonies.

171. In the light of the above the African Commission concludes that the marks on the victims evidencing the use of torture could only have been inflicted by the Respondent State.

172. On the right to medical services, during detention, the African Commission and other international bodies have recognized and emphasizes that such rights be provided "promptly". The Human Rights Committee, in its General Comment No. 20, has observed that protection of the detainee from torture and ill-treatment requires "prompt and regular access" to doctors.[FN89] The General Assembly has repeatedly underlined the importance of the right to prompt medical examination promptly following detention to prevent abuse of detainees.

[FN89] Human Rights Committee, General Comment No. 20 on Article 7 (1992), UN doc. HRI/GEN/1/Rev. 6 (1994), p. 151, para. 11 (excerpted in the Annex).
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173. In the presence of allegations or possible indications of abuse, the importance of prompt access to medical personnel becomes all the more critical. The Istanbul Protocol, a set of detailed guidelines on the investigation of torture and ill-treatment elaborated by an independent group of experts in 1999, recalls that "[t]he investigator should arrange for a medical examination of the alleged victim. The timeliness of such medical examination is particularly important. A medical examination should be undertaken regardless of the length of time since the torture, but if it is alleged to have happened within the past six weeks, such an examination should be arranged urgently before acute signs fade."[FN90]

[FN90] Istanbul Protocol – Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 August 1999 (reproduced as OHCHR, Professional Training Series No. 8/Rev. 1, UN Doc. HR/P/PT/8/Rev.1, available at http://www.irct.org/Default.aspx?ID=2701), para. 104. See also Principle 2 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (annexed to the Istanbul Protocol). See also see.(Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment90 and GA Res. 61/153, 14 February 2007).
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174. The Robben Island Guidelines in its section 20, urges State Parties to make sure that "all persons who are deprived of their liberty by public prder or authority should have that detention controlled by properly and legally constituted regulations. Such regulations

should provide a number of basic safeguard, all of which shall apply from the moment when they are first deprived of their liberty. These include:

a) The right that a relative or relative or other appropriate third person is notified of the detention;

b) The right to an independent medical examination;

c) The right of access to a lawyer; and

d) Notification of the above rights in a language which the person deprived of their liberty understand. [sic]

175. In the present case, the victims were not examined by doctors at any point during their pre-trial detention. Even when they reported their torture and ill-treatment, they were still denied access to medical personnel by the authorities.

176. Only when the allegations of torture were made for the second time during the trial itself did the Judge order the examination of the Victims by the FMA. The forensic examination conducted by the authorities plainly did not satisfy the obligations set out above, as it was carried out more than 6 months after the Victims complained that they were subjected to torture and ill-treatment and was, therefore, ineffectual as a method of prevention or investigation.

177. The African Commission therefore holds that the failure by the Respondent State to provide prompt medical services to the victims whiles they were under detention violates the victims' rights to prompt medical services whiles under custody.

178. The African Commission also notes that the victims were denied counsel during their detention, including the critical interrogation sessions. In the Jamaican Case of Osbourne Wright and Eric Harvey v. Jamaica, adopted on 27 October 1995, the United Nations Human Rights Committee has held that the requirement that legal assistance must be made available to an accused faced with a capital crimes applies not only to the trail and relevant appeals, but also to any preliminary hearing relating to the case.

179. The African commission, therefore, notes that there is no disputed that the victims were unrepresented at the preliminary investigation stage, and notwithstanding the Respondents State's assertion that it is not the responsibility of the State authorities to pay for such legal aid, it finds that it is axiomatic that legal assistance be available in capital cases, at all stages of the proceedings, especially when there were request from human rights lawyers to represent the victims. It should be understood by the Respondent State that there a positive obligation on them to provide access to independent legal assistance under the Charter, inherent in the international prohibition of torture and ill-treatment. The African Commission has recognized the right to access to a lawyer as one of the "basic procedural safeguards for those deprived of their liberty"[FN91] and as one of the necessary safeguards against abuse during the pre-trial process.[FN92]

[FN91] See Robben Island Guidelines (above n. para. 20.
[FN92] Ibid., para. 27.

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180. The link between the prevention of torture and the right to prompt access to a lawyer has likewise been emphasised by other international human rights bodies. In its Resolution 61/153 of 2007, reaffirming the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the General Assembly stressed that permitting prompt and regular access to legal counsel constitutes an "effective measure […] for the prevention of torture and other cruel, inhuman or degrading treatment and punishment."[FN93] Similarly, the Human Rights Committee has stated that the protection of detainees from torture and ill-treatment "requires that prompt and regular access be given to […] lawyers"[FN94] and that the use of prolonged detention without any access to a lawyer violates a number of provisions of the Covenant, including Article 7.[FN95]

[FN93] GA Res. 61/153, 14 February 2007, para. 11.
[FN94] Human Rights Committee, General Comment No. 20 (above, n. 89), para. 11.
[FN95] Concluding Observations of the Human Rights Committee: Israel, 21 August 2003, UN doc. CCPR/CO/78/ISR, para. 13.
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181. Human rights bodies have thus recognized that, for access to a lawyer to constitute an effective protection against torture and ill-treatment, such access has to be "prompt" and regular.[FN96] For example the Human Rights Committee has recommended "that no one is held for more than 48 hours without access to a lawyer",[FN97] whilst the UN Special Rapporteur on Torture has clarified that "[l]egal provisions prescribing that a person shall be given access to a lawyer not later than 24 hours after he has been arrested usually function as an effective remedy against torture, provided compliance with such provisions is strictly monitored."[FN98]

[FN96] See, e.g., Principle 17 of the UN Body of Principles): "A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it." See also Principle 15 (excerpted in the Annex).
[FN97] Concluding Observations of the Human Rights Committee: Israel (above, n. 95), para. 13.
[FN98] "Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Report of the Special Rapporteur Mr. P. Kooijmans, pursuant to Commission on Human Rights resolution 1988/32", UN doc. E/CN.4/1989/15, p. 50, para. 241.
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182. Further, the right is to have access to a lawyer of one's choice, as recognized for instance in the UN Basic Principles on the Role of Lawyers.[FN99] For the right to counsel to be meaningful it must also comprise the right to timely, effective and confidentially communicate with counsel.

[FN99] Principle 1, Basic Principles on the Role of Lawyers, adopted by the Eighth United

Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August - 7 September 1990, UN doc. A/CONF.144/28/Rev.1 (1990), p. 118.
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183. In the instant matter, the obligation to permit access to counsel or independent legal advice was breached, as detailed above. The African Commission is convinced that the Victims were not given access during the critical early stage of detention, including interrogation sessions, when there is the greatest risk of torture and ill-treatment. The African Commission's view is that right of a detainee to have prompt recourse to a court is established as a matter of international law. It constitutes a vital aspect of the prevention and deterrence of torture and other ill-treatment.

184. In this regard it is worth mentioning that in the Robben Island Guidelines, the African Commission has recognized that the right to be brought promptly before a judicial authority constitutes an essential safeguard against torture and ill-treatment,[FN100] In its General Comment No. 2, the Committee Against Torture expressed the view that the obligation to take measures to ensure the effective prevention of torture implied a requirement that States should ensure

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[FN100] Robben Island Guidelines (above, n. para. 27 (in relation to "Safeguards during the pre-Trial Process"); and see in general, ibid., para. 20.

"the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaint promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment."[FN101]

[FN101] Committee against Torture, General Comment No. 2 (above, n. 24), para. 13.
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185. This approach has been repeatedly endorsed by the General Assembly,[FN102] and finds further support in the jurisprudence of the Inter-American Court of Human Rights.[FN103]

[FN102] See, e.g., Principles 9 and 11 (1) of the UN Body of Principles and GA Res. 61/153, 14 February 2007, para. 11.
[FN103] See, e.g., Habeas Corpus in Emergency Situations (Arts 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-American Court of Human Rights, Series A, No. 8 (1987).
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186. As one of the inherent aspects of the protection of detainees from torture and ill-treatment, judicial oversight of detention applies at all times, including times of national emergency, as noted by the Inter-American Court:

"[…] even in emergency situations, the writ of habeas corpus may not be suspended or

rendered ineffective. […] the immediate aim of this remedy is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse. The importance of this remedy cannot be overstated, considering that the right to humane treatment recognized in Article 5 of the American Convention on Human Rights is one of the rights that may not be suspended under any circumstances."[FN104]

[FN104] Ibid., para. 12. See also ibid., para. 35.
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187. In this case the Respondent States' obligation to bring the victims promptly to an independent judicial authority was breached. While they did appear before a prosecutor, the right guaranteed in law is to bring them before a judicial authority that is independent of the authorities detaining, interrogating and ultimately prosecuting them. They also had no meaningful opportunity to challenge the lawfulness of their detention, due to lack of access to a court and to lawyers. Article 3 of the Emergency Law 50/1982 as amended, stipulates that detainees or their representatives may appeal their arrest or detention orders within 30 days after the orders are issued. However, in practice detainees often have little access to the appeal provided for in law. The victims had no access to lawyers neither were they arraigned before a competent court during to properly remand them to custody

188. The Respondent State, while arguing that the victims were allowed access to their families, failed to challenge in specific terms the allegations that they were refused access to medical care. The allegation of torture and more particularly the particulars of injuries sustained by the Victims as contained in the Forensic Medical Reports were never challenged by the Respondent State.

189. The Respondent State has not refuted the allegations of torture or the harsh treatment to which the victims were subjected to. The African Commission has in many of its decisions held that facts uncontested by the Respondent State shall be considered as established.[FN105] The fact that the victims were subjected to repeated electric shocks, beatings, prolonged hanging, binding and blindfolding and denied access to medical care violates their physical and psychological integrity. There was also no evidence whatsoever pointing to violent action from the victims themselves nor has there been any reported escape attempt by the victims to warrant holding them in such degrading and inhuman manner.

[FN105] Communication 25/89, 47/90, 56/91, 100/93 – Free Legal Assistance Group and Others v Zaire.
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190. Article 5 prohibits not only torture, but also cruel inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her against his or her will or conscience. The African Commission therefore holds that the action of the Respondent State constitutes a multiple violation of Article 5 of the African Charter.

ALLEGED VIOLATIONS OF ARTICLE 7 AND 26

191. The Complainants contend that the victims right to fair trial were violated in that;

● they were tried by a Court that was not independent and impartial and whose decisions cannot be appealed;

● their right to a counsel was not fully respected;

● confessions made under torture or ill-treatment were used by the Court; and

● they were denied the right of appeal.

192. The essential question that must be asked here is whether the trial of the Victims complied with the provisions of Articles 7(1) and 26 of the African Charter.

193. Article 7 of the African Charter provides that: "Every individual shall have the right to have his cause heard. This comprises:

a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by the conventions, laws, regulations, and customs in force;

b) The right to be presumed innocent until proven guilty by a competent court or tribunal;

c) The right to defence, including the right to be defended by counsel of his choice;

d) The right to be tried within a reasonable time by an impartial court or tribunal.

194. Article 26 on its part provides that: 'States Parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter'.

195. A combined reading of Articles 7 and 26 brings to the fore two core issues – having access to appropriate justice and the other relating to the independence of justice system. These two issues constitute the bedrock of a sound justice delivery system. The African Commission believes that the right to a fair trial is analogous with the concept of access to appropriate justice and requires that one's cause be heard by efficient and impartial courts[FN106].

[FN106] Communication 281/2003 – Marcel Wetsh'okonda Koso and Others v Democratic Republic of Congo. See also Communication 151/96 – Civil Liberties Organisation v Nigeria,

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196. Article 7(1) (d) of the African Charter enshrines "the right to be tried within a reasonable time by an impartial Court or tribunal." The requirement of impartiality in Article 7 is complemented by Article 26 of the African Charter which imposes on States parties "the duty to guarantee the independence of the Courts" in their respective territories.

197. These obligations are captured in the Commission's Principles and Guidelines on Fair Trial where the Commission has expounded on what should be required for an independent and impartial tribunal. Among other criteria, the Principles and Guidelines on Fair Trial state that:

- judicial bodies shall be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner;[FN107]
- there should not be any inappropriate or unwarranted interference with the judicial process nor shall decisions be subject to revision except through judicial review;[FN108]

- all judicial bodies shall be independent from the Executive branch[FN109] and the government shall respect that independence;[FN110]

- the process of appointments to judicial bodies shall be transparent;[FN111]

- the judicial body shall decide matters before it without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.[FN112]

[FN107] Principles and Guidelines on Fair Trial (above n. Section A(4)(b).
[FN108] Ibid., Section A(4)(f).
[FN109] Ibid., Section A(4)(g).
[FN110] Ibid., Section A(4)(a).
[FN111] Ibid., Section A(4)(h).
[FN112] Ibid., Sections (A)(4)(e) and (g) and (A)(5)(a).
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198. Applying these fair trial principles to special tribunals, the African Commission has held that they "violate Article 7(1) (d) of the African Charter because their composition is at the discretion of the executive branch.

199. The victims were tried before the Supreme State Security Emergency Court, whose competence and procedures fall far short of the above standards. The Supreme State Security Emergency Court is an exceptional court. It was established by the Emergency Law as a temporary court,[FN113] although, like the Emergency Law itself, it has been in force continually since 1981. The Emergency Law gives the Court the primary competence of ruling on crimes perpetrated in violation of decrees issued by the President of the Republic in application of the Emergency Law,[FN114] but the President of the Republic may also, at his discretion, refer any ordinary crime to the Supreme State Security Emergency Court.[FN115] According to Presidential Decree 1/1981 regarding the referral of some crimes to Emergency State Security Courts, all felonies and misdemeanours against the Government's security or related to explosives shall be referred to the State Security Emergency Courts, established under the Emergency Law.

[FN113] See Art. 3b, Emergency Law (above, n.
[FN114] See ibid., Art. 7.

[FN115] See ibid., Art. 9.
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200. In view of the above, the African Commission is of the view that the degree of control which the President of the Republic exercises over the composition, conduct and outcome of proceedings before the State Security Court is antithetical to the notion of an independent and impartial judicial process. The law itself provides, for example, for the President to exercise the following powers:

● The President may suspend a case before it is submitted to Supreme State Security Emergency Court or order the temporary release of the accused person before referral of the case to the Supreme State Security Emergency Court.[FN116]

● Decisions of the Supreme State Security Emergency Court are final only when they're approved by the President of the Republic, and cannot thereafter be challenged before any other court in Egypt.[FN117]

● The President of the Republic may commute, change, suspend or cancel such decisions. He may also order the release of defendants[FN118] or order the retrial of the case before another court.[FN119]

[FN116] See ibid., Art. 13.
[FN117] See ibid., Art. 12.
[FN118] See ibid., Art. 14.
[FN119] See ibid., Art. 15.
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201. It most [sic] be pointed out that Supreme State Security Emergence Court is not part of the regular criminal court structure in Egypt. Sentences passed by this court can only be reviewed by the office responsible for ratifying its judgments, office of the President of the Republic who is also the ratifying authority. The ratifying authority which is not a court of law, may mitigate the sentence or repeal it and, once the sentences are upheld the convicts may only petition the President for an amnesty or mitigation in accordance with the provisions of Article 149 of the Constitution.

202. The Respondent State, however, submitted that the State of Emergency Security Court which tried the accused persons is a prosecuting court with limited functions according to the law and the objective criteria. They further asserted that membership of this court comprises three experts (Judges who are members of the judiciary. They also state that the trials and procedures in this case and in stages and phases were carried out in public and in accordance with the law. It further argued that the criteria of fair trial adopted by the international agreements on human rights were observed, and therefore, it is obvious from the above and from the records of the proceedings of the court trials that two lawyers appeared during all the hearings together with the first and the second accused persons and four lawyers representing the third complainant.

203. From the submissions of the Respondent State, the African Commission of the view that the Respondent State does not appreciate the importance of an independent tribunal, especially one that is responsible for trying victims charged with capital offences. The

African Commission therefore reiterates that the essence of a higher tribunal is that, it affords the victims the opportunity to have their case re-examined on both law and facts by a judicial body. In this way the decision of the court below can be tested. The omission of the opportunity of such an appeal therefore greatly deprives the victims of due process.

204. In this regard the African Commission also wishes to make reference to the UN Basic Principle on the Independence of the Judiciary. Those principles provide that every one shall have the right to be tried by the ordinary courts or tribunals using established procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals. Therefore, it is the view of the African Commission that a tribunal cannot be said to be independent when the implementation of its decision squarely vests on the executive branch of the Government, in this case the Head of State. This has completely defeated the criteria envisaged in a democratic state.

205. In Civil Liberties Organisation, and Others v Nigeria[FN120], the African Commission held that 'the foreclosure of any avenue of appeal to competent 63 national organs in a criminal case attracting punishment as severe as the death penalty clearly violates Article 7(1) (a)'. The African Commission agrees with the Complainants that the fact that the decisions of the Supreme State Security Emergency Courts are not subject to appeal constitutes a de jure procedural irregularity and manifestly violates Article 7(1) (a) of the African Charter.

[FN120] Communication 218/98 – Civil Liberties Organisation and Others v Nigeria, para 33 63.
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206. Therefore, the African Commission notes that in all cases, the independence of a court must be judged in relation to the degree of independence of the judiciary vis-à-vis the executive. This implies the consideration of the manner in which its members are appointed, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence: as the saying goes 'justice must not only be done: it must be seen to be done'.

207. The African Commission is of the view that the degree of control which the President exercises over the composition, conduct and outcome of proceedings before the State Security Court does not guarantee an independent and impartial judicial process. In its view that amounts to executive interference in the judicial process defeating the intent and purporse of Article 7(1) (d). The African Commission is therefore of the view that the verdict of the Supreme State Security Emergency court did not offer guarantees of independence, impartiality and equity and therefore constitutes a violation of the Article 7 of the African Charter.[FN121]

[FN121] Resolution No ACHPR/Res. 41(XXVI) 99 on the Right to a Fair Trial and Legal Aid in Africa.
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208. In any event, it was the responsibility of the Respondent State to adduce sufficient

evidence to rebut the arguments that the court in its composition was independent and was capable of giving an impartial ruling, and this the Respondent State has not done to the satisfaction of the African Commission. In the absence of such rebuttal or facts that could convince the African Commission of the opposite view, it cannot invalidate the submission by the complainants regarding the inexistence of a fair justice system.

209. The African Commission will look into the issue of the right to counsel of ones [sic] choice. This right as enshrined in Article 7(1) (c) of the African Charter[FN122] is an important right which underpins several others, such as freedom from ill-treatment and the right to prepare a defence.[FN123] In the Principles and Guidelines on Fair Trial, the African Commission considered that in proceedings relating to criminal charges, legal representation is the "best means of legal defence against infringements of human rights and fundamental freedoms".[FN124] Such right to counsel applies during all stages of any criminal prosecution "including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings. Article 7 is explicit that the right is to counsel of the detainee or defendant's choice. It comprises the right to timely and confidential consultations with that counsel.[FN125] Where the accused either had no access, or only restricted or delayed access, to lawyers, the African Commission has found a violation of Article 7.1(c)[FN126].

[FN122] Art. 7(1) of the Charter guarantees "the right to defence, including the right to be defended by counsel of his choice."
[FN123] Amnesty International and others v. Sudan (above, n. 27), para. 64.
[FN124] See Principles and Guidelines on Fair Trial (above n. Section N(2)(a).
[FN125] As noted by the Human Rights Committee in relation to the right to a lawyer under the ICCPR "[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter" (Human Rights Committee, General Comment No. 32 (above, n. 60), para. 34.
[FN126] See Malawi African Association and Others v. Mauritania).

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210. In the instant case, none of the Victims had lawyers present at the critical early interrogation stage. It is submitted by the Complainants and not refuted by the Respondent State that on 23 November 2004 a group of human rights lawyers submitted a specific request to the Public Prosecutor's Office (registered under number 16332) to legally represent a number of individuals, including the First Victim, whose names had appeared in the local press as chief suspects in the Taba bombings' investigation. The lawyers received no response. The First Victim was denied representation at interrogations for a period of 5 months until 24 March 2005. The Second and Third Victims had no access to counsel until 26 March 2006, when they first appeared in court.

211. Moreover, even at the beginning of the trial, all three were denied the opportunity to consult with counsel privately, in order to prepare their defence. The lawyer client communication, as alleged by the Complainants and not refuted by the Respondents, took place through bars of the court room, in the presence of and within earshot security officials. The African Commission therefore finds that the complete denial of access to

counsel before their appearance in court and the restrictive access thereafter violated the right to counsel and the right to a defence (see below) under Article 7(1) (c).[FN127]

[FN127] See Malawi African Association v. Mauritania (above, n. 40), para. 96.
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212. Furthermore, in interpreting Article 7 of the African Charter, the African Commission has stated that "any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing."[FN128] In Malawi African Association V. Mauritania, this Commission has held that "any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion."[FN129]

[FN128] Principles and Guidelines on Fair Trial (above n. Section N(6)(d)(1).
[FN129] Ibid., Section N(6)(d)(1).
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213. These principles correspond with other international human rights norms, addressed in relation to torture and ill-treatment, under which evidence and confessions obtained through torture or cruel, inhuman and degrading treatment, cannot be used in judicial proceedings apart from for the purpose of prosecuting the act of torture or ill-treatment itself.[FN130]

[FN130] See above, note and accompanying text and, in general, Section III.A.2 (b)(iv).
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214. The African Commission makes reference to Article 15 of the Convention Against Torture (CAT). It also notes that it has been accepted as inherent in international fair trial provisions comparable to Article 7 of the African Charter. The European Court of Human Rights for example has held that "the use of evidence obtained in violation of Article 3 [prohibition against torture or ill-treatment] in criminal proceedings raises serious issues as to the fairness of such proceedings. Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterized as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value."[FN131]

[FN131] ECtHR, Harutyunyan v. Armenia at para. 63.
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215. It notes that the principle can also be found in the Egyptian Constitution of 1971 which stipulates that "if a confession is proved to have been made by a person under any …forms of duress or coercion, it shall be considered invalid and futile"[FN132].

[FN132] See Article 42.
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216. Thus, where an individual alleges that a confession has been obtained by torture or ill-treatment, the burden of proof then lies in this case on the state to demonstrate that the confession in question was freely made. Although the Committee against Torture has affirmed in a number of cases that, "it is for the author to demonstrate that her allegations are well founded",[FN133] it nevertheless stressed in P. E. v. France that,

"In the light of the allegations that the statements at issue, which constituted, at least in part, the basis for the additional extradition request, were obtained as a result of torture, the State party had the obligation to ascertain the veracity of such allegations."[FN134]

[FN133] P.E. v. France para. 6.3; see also G. K. v. Switzerland (Comm. 219/2002), Committee against Torture, decision of 7 May 2003, UN doc. CAT/C/30/D/219/2002, para. 6.11.
[FN134] P. E. v. France (above n. para. 6.2; see also the slightly different formulation used by the Committee in G. K. v. Switzerland para. 6.10: "[…] the broad scope of the prohibition in article 15, proscribing the invocation of any statement which is established to have been made as a result of torture as evidence "in any proceedings", is a function of the absolute nature of the prohibition of torture and implies, consequently, an obligation for each State party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction, including extradition proceedings, have been made as a result of torture."

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217. In a similar vein, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, reviewing two national decisions that adopted a somewhat different approach to the standard of proof question,[FN135] noted as follows:

"[…] the applicant is only required to demonstrate that his or her allegations of torture are well founded. This means that the burden of proof to ascertain whether or not statements invoked as evidence in any proceedings, including extradition proceedings, have been made as a result of torture shifts to the State.[FN136]

[FN135] Hanseatisches Oberlandesgericht (Hanseatic Court of Appeals, Criminal Division), Hamburg; decision of 14 June 2005, NJW 2005, 2326 and A and others v. Secretary of State for the Home Department [2005] UKHL 71.
[FN136] Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment; UN doc. A/61/259 (2006), Annex, para. 63.

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218. Accordingly, once a victim raises doubt as to whether particular evidence has been procured by torture or ill-treatment, the evidence in question should not be admissible, unless the State is able to show that there is no risk of torture or ill-treatment. Moreover, where a confession is obtained in the absence of certain procedural guarantees against such abuse, for example during incommunicado detention, it should not be admitted as evidence.

219. The victims in this case all raised allegations of torture and ill-treatment. These allegations are at least consistent with the circumstances of their case, such as the incommunicado nature of their detention and the reports of the FMA which, at a minimum,

indicate a risk of ill-treatment. Despite these concerns, the "confessions" were admitted as evidence and appear to have formed at least part of the basis of their convictions and the imposition of the death penalty. The reliance on such evidence violates Article 7 of the Charter.

220. The African Commission will now briefly address the matter of appeal. In this regard, the African Commission notes that Article 12 of the Egyptian Emergency Law stipulates that "It is not allowed in any form to appeal the decisions pronounced by State Security Courts." This law, and its application in practice, violate Article 7(1)(a) of the Charter, which provides for "the right to an appeal to competent national organs against acts violating the fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force."

221. According to the Commission's Principles and Guidelines on Fair Trial, the right to appeal should be guaranteed in all States Parties and should provide "a genuine and timely review of the case, including the facts and the law".[FN137] The Commission has noted that States Parties should take steps to make appeals mandatory in death penalty cases, confirming the heightened importance of fair trial guarantees where life is at stake.[FN138]

[FN137] See Principles and Guidelines on Fair Trial, Section N(10)(a)(1).
[FN138] Ibid. 69
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222. The importance of appeal rights is also reflected in the Commission's jurisprudence. In Law Office of Ghazi Suleiman v. Sudan, the Commission held that "the fact that the decisions of the military Court [was] not subject to appeal […] constitute[d] a de jure procedural irregularity."[FN139] Concerning the right to appeal in death penalty cases, the Commission found that "the foreclosure of any avenue of appeal to competent national organs in a criminal case attracting punishment as severe as the death penalty clearly violates [Article 7(1)(a) of the Charter]."[FN140]

[FN139] Law Office of Ghazi Suleiman v. Sudan (Comm. nos. 222/98 and 229/99), at para. 53; see also para. 65.
[FN140] Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria (Comm. No. 218/98), para. 33. See also ibid., para. 34.
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223. By denying the victims the right to appeal the decision of the Supreme State Security Emergency Court, the Arab Republic of Egypt has violated Article 7(1) (a) of the African Charter. It should be noted that the imposition of the death penalty is not per se unlawful under the Charter or broader international human rights law.

224. The African Commission therefore concludes that the victims' rights under Article 7 (1) (a), (b) and (c) of the African Charter including their right to appeal, were violated.

225. The African Commission will now analyse the submissions of the parties on Article 4 of the Charter.

226. The Complainants aver that the imposition of the death penalty on the victims by a court, whose composition is illegal and unconstitutional, such as the Supreme State Security Emergency Court, violates the victims' right to life and would amount to an arbitrary deprivation of life.

227. The Respondent State argues that trial as well as procedures adopted in this case satisfied the requirement of fair trial as guaranteed by international norms and standard. They stated that the trials were carried out in public and in accordance with the assurances provided by the law. They also state that the victims were represented by lawyers of their choice during trial.

228. Article 4 of the African Charter provides that 'human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one shall be arbitrary deprived of this right'.

229. The victims were charged, inter alia, under Article 86 b (ii) and (iii) of the Egyptian Penal Code. This law provides that the punishment for the crimes specified in those provisions is death penalty where "the action of the offender leads to the death of the victim of the crime"[FN141] or "the crime which occurred was the object of the efforts or intelligence /contacts or involvement in committing it."[FN142]

[FN141] Article 86 b(ii)(iii) of the Penal Code added by Law No. 97 of 1992 on Counter-terrorism).
[FN142] Ibid.
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230. The above law imposes a penalty on a particular crime in specified circumstances but did not provide an avenue for a competent judiciary to evaluate the appropriate penalty, in light of all of the circumstances of the case. The penalty is effectively mandated by law for certain categories of offences, with the President empowered to decide not to apply that sentence if he so decides. This is at odds with the requirements of right to life, as reflected in international legal practice.

231. The African Commission in the case of International Pen and Others (on behalf of Saro-Wiwa) v Nigeria[FN143] took the view that the execution and implementation of a death sentence emanating from a trial which did not conform to Article 7 of the African Charter will amount to an arbitrary deprivation of life. Having held that the trial of the applicants offended Article 7 of the African Charter, it follows that any implementation of the death sentence imposed on the applicants by the Supreme State Security Emergency courts will therefore amount to an arbitrary deprivation of life.

[FN143] Communication 137/94, 139/94, 154/96 and 161/97, para. 103
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232. However after careful consideration of Articles 7 and 26 and the wordings of Article 4, the African Commission is of the view that Article 4 of the Charter has not been violated. The victims are still under the custody of the Respondent State, through a process that denied them due process and are not yet executed.

HOLDING

233. For these reasons, the African Commission holds as follows:

(a) That the Respondent State – Republic of Egypt has violated the provisions of Articles 5, 7 (1) (a), (d) and 26 of the African Charter;

(b) that there has been no violation of Article 4 of the African Charter;

The African Commission therefore calls on the Respondent State;

I. Not to implement the death sentences;

II. Calls on the Respondent State to adequately compensate the victims in line with international standard;

III. Reform the composition of the State Security Emergency Courts and ensure their independence;

IV. Take measures to ensure that its law enforcement organs particularly the police respect the rights of suspects detained in line with Article 5 of the Charter;

V. Calls on the Respondent State to harmonize the State Security Emergency Laws with a view to bringing it in conformity with the Charter and other international legislations and regional norms and standards

VI. Calls on the Respondent State to release the victims;

VII. Calls on the Respondent State to submit the African Commission within 180 days from the date of receipt of this decision (in line with Rule 112(2) of the African Commissions Rules of Procedure) on the measures taken to give effect to these recommendations.

Done in Banjul this 9th Extra-Ordinary Session held From 23 February to 3 March 2011.