

## Communication 344/07 – George Iyanyori Kajikabi v. The Arab Republic of Egypt

### Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received the Complaint from Interights (The International Centre for the Legal Protection of Human Rights) and Ashraf Ruxi (the Complainants), on behalf of George Iyanyori and seven other Victims against the Arab Republic of Egypt (Respondent State).
2. The Complainants allege that on 29 December 2005, a group of about 2,500 Sudanese nationals in Egypt were on a sit-in demonstration within the Mustafa Mahmoud Park close to the offices of the United Nations High Commissioner for Refugees (UNHCR) in Cairo. The Sudanese nationals had been on a sit-in demonstration for three months, since September 2005, in support of a series of demands from the UNHCR.<sup>1</sup>
3. The Complainants state that the number of protesters had gradually increased over the three-month period. The Complainants further state that the group consisted of asylum seekers, card carrying refugees and undocumented persons whose status in Egypt was yet to be determined. The Complainants aver that the protesters had gathered in support of a series of demands from the UNHCR on which, despite negotiations held on 29 September and 17 December 2005, there had been no agreement.

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<sup>1</sup> The demands included 1) a rejection of voluntary return; 2) a rejection of local integration; 3) rejection of the arbitrary detention of Sudanese refugees without change; 4) rejection of unfair standards in the UNHCR's treatment of Sudanese refugees; 5) demanding an end to discrimination against Sudanese refugees; 6) demand to reopen all closed cases concerning Sudanese refugees; 7) demand that Sudanese refugees be dealt with as individuals and not as groups; 8) demand not to authorize associations or groups to speak on behalf of Sudanese refugees; 9) not to apply the provisions of the Four Freedoms Agreement to Sudanese refugees; 10) to protect Sudanese refugees who are members of the Sudanese ruling party; 11) to register new asylum applications as soon as they arrive; 12) to search for missing Sudanese refugees; 13) to withdraw the military build-up around the UNHCR office in Cairo; 14) to give aid from donor organisations to Sudanese refugees without discrimination; 15) to raise the awareness of the police and security forces in host countries of all laws concerning Sudanese refugees; 16) to take care of the elderly and unaccompanied women and children; 17) to respond to all complaints made by Sudanese refugees; 18) to not allow Sudanese refugees to be provoked by Staff at the UNHCR office in Cairo; 19) to interview, settle refugees and reopen closed files and to expedite procedures once they have been settled; and 20) to find a radical solution for all Sudanese refugees or send them to other countries.

4. The Complainants allege that on 29 December 2005 at around 19:00, the protesters were in the park when it was surrounded by several thousands of plain clothes and riot police with heavy reinforcements in the form of State Security Wagons and armored cars. The Complainants allege that when the representatives of the protesters inquired from the officer in charge what the reason for the build-up of riot police was, he stated that they expected a fundamentalist demonstration against the sit-in the following day, hence the support.
5. The Complainants allege that around midnight on 29 December 2005 security officials informed the protesters that if they refuse to be taken voluntarily under police guard to camps where they would be provided with food, water and shelter, force would be used to remove them. It is further alleged by the Complainants that the protesters suggested that UNHCR officials provide guarantees regarding the safety of the camps or that a delegation of protesters be sent ahead to view the camps in advance, but that the authorities informed them that neither of these proposals were possible.
6. The Complainants aver that because guarantees of their security had not been provided by both the UNHCR and the Egyptian forces and weary of being taken to undisclosed destinations, the protesters refused to board the buses provided and that at around 02:00 a.m. on the morning of 30 December 2005, water cannons were fired at the protesters by the Police, and an officer announced that this was the last warning. The Complainants aver that plain clothed policemen were ordered by the same officer to attack the protesters.
7. The Complainants allege that around 5:00 a.m. on 30 December 2005, Egyptian riot police armed with sticks and truncheons charged into the park and attacked the protesters, forcibly removing them from the park. They aver that gas canisters were also used to control the crowd. They allege that the victims of this brutality were of all ages, and included protesters who had raised their hands in indication of 'surrender', or who were in fact unconscious. They allege that the security forces moved in from all sides, blocking possible escape routes, and that many people were crushed in the stampede. They estimate that the number of dead (men, women and children), though remaining unknown, could be as high as 53. They further allege that

over 500 protesters were injured and that the authorities refused to provide medical treatment to the persons who were subsequently detained.

8. The Complainants allege that the First Victim, George Iyanyori Kajikabi, stated that immediately after the police ordered them to board the bus, police fired high pressure streams of water at them. They were then set upon with batons, truncheons belts, and gas canisters. He alleges that his wife and son died in the melee, but that he was separated from them before he boarded the bus and while he was held in Dahshour camp he assumed they were being held in another camp. He states that he was released on 31 December 2005 and was informed by one of the other protesters that they saw his wife and son beaten to death. He indicated that he identified their bodies at the mortuary and noted injury marks on their bodies. The death certificates indicated death from asphyxia and injuries. He states that he was not allowed to take the bodies to Sudan for burial, and due to the amount of USD 450 that was required before the bodies were released, they were not buried until three months later, and thus denied a timely burial.
9. The Complainants allege that the Second Victim stated that the water from the water cannons seemed adulterated since it appeared light blue, and those parts of his body that came into contact with the water immediately felt extremely itchy. They allege that the Second Victim stated that he was beaten by police with batons and that while he did not resist, the beatings continued as he was dragged onto the bus, resulting in a leg injury. Prior to his release he was warned that if he went back to collect his belongings he would be beaten severely and deported.
10. The Complainants allege that upon inquiry to the Police, the Third Victim was informed that the reinforcement in Police was to deal with fundamentalists who intended to demonstrate the following day. However, at midnight the Third Victim was informed along with the other protesters that they had five minutes to board the waiting buses. The Third Victim indicated that the water cannons delivered powerful jets to which her eyes and skin reacted. She was also allegedly hit by empty bottles thrown at the protesters by people standing on a high rise building next to the park, which the Police did nothing to prevent. The Third Victim reported that policemen armed with batons and sticks beat her violently. Allegedly the Third Victim

tried to pick up a child but was beaten until she dropped him. Allegedly she received a particularly hard blow to her head which bled profusely, whereafter she ran to the buses, but the Police pursued and continued to hit her. She was reportedly also not given proper treatment for the head wound and was only given a bandage, despite feeling dizzy, sore and extremely tired. She was allegedly also ordered not to return to the park for her belongings.

11. Similar to the Third Victim, the Fourth Victim was also allegedly informed that there was nothing to worry about in relation to the additional riot Police and he also felt that the water from the water cannons was adulterated. The Fourth Victim was allegedly hit by a plain clothes policeman in his face with a bottle, and he lost a lot of blood. He further alleges that in the bus on the way to the camp he was verbally insulted by the Police.<sup>2</sup> He was taken to hospital and received treatment for his eye, but as a result of his injuries he allegedly faces the prospect of losing sight in the eye.
12. The Fifth Victim was also beaten at random by the Police, and while in the camp was not informed of the whereabouts of her family, from whom she had become separated, and was not allowed to have contact with anyone outside the camp. She maintains that she suffers on-going psychological harm. She was given her first meal twelve hours after the attack.
13. The Sixth Victim tried to assist women and children against the assault from the Police, but fell, was beaten on his injured leg and crammed into a bus for forty people along with over hundred people. Similarly, while at the camp he allegedly had no information about his family and did not receive proper care for the deep wound on his leg, he only received food fourteen hours after the incident and was warned not to return to the park for his belongings.
14. The Seventh Victim sustained injuries on his head after being beaten by the Police, and a policeman forced his mouth open and released gas into it from a canister, whereupon he fell into a coma. While his head injuries were stitched, he received no treatment for his lungs which were gravely affected by the gas.

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<sup>2</sup> Some of the alleged statements included, "Hope you had a nice shower"; "You were a black spot in the square" and "We hope you've learned a lesson that you are not human beings."

15. The Complainants allege that protestors were forcibly removed and bundled into buses and removed to several military and penitentiary locations in Mansheyet Nasser training Camp, Dahshour training Camp, Shebin Elkoum Prison, Qanatir Prison, Turra police barracks and to Abu Zaabal Prison. They state that families were torn apart, with children being separated from their parents during transfer to different camps and prisons in and around Cairo.
16. They also allege that detainees were denied essential medical treatment, food and access to information regarding family members who were also arrested and taken to different locations. They allege that detainees were also denied access to lawyers or the NGOs representing them.
17. The Complainants inform the African Commission on Human and Peoples' Rights (the Commission) that in the months preceding the forcible removal of the protestors, several controversial statements were made by UNHCR. On October 30, 2005, UNHCR issued a press release in which it cast doubt on the protestors' claim to refugee status and protection.<sup>3</sup> The Complainants state that according to Egyptian Foreign Minister Ahmed Abou-El Geit, on 22 December 2005 the Ministry of Foreign Affairs received a letter from UNHCR stating that the situation had become critical and requesting that the Egyptian Government end the protest.<sup>4</sup>
18. The Complainants further aver that the Ministry of Foreign Affairs issued a press release on 31 December 2005 indicating that the protestors had represented an uncivilized scene which threatened residents of the area and also expressed apprehension that communicable diseases may be prevalent in the camp.
19. The Complainants state that while card carrying refugees were generally released on the day following their arrest, some protestors were held for extended periods, however that by 11 February 2006, all of the Sudanese asylum seekers remaining in detention had been released from prison.

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<sup>3</sup> See "Sudanese Demonstrations in Cairo," UNHCR Cairo from in A Tragedy of Failures and Expectations by The American University in Cairo, Force Migration and Refugee Studies Program June 2006.

<sup>4</sup> Ahmed Abu El Geit, "Egypt's Calls to Explain the Facts Behind the Eviction of the Sudanese Protest, UNHCR Did Not Direct Any Blame to Egypt," *Al-Ahram*, 3 January 2006.

20. The Complainants allege that families of the deceased were denied access to the bodies of their loved ones for extended periods and were not able to provide for timely and religiously or culturally appropriate burials, nor did the authorities allow them to transfer the bodies of their deceased next-of-kin to Sudan for burial.
21. The Complainants say that no investigation has been undertaken by the Egyptian authorities with respect to events of 30 December 2005 nor has any individual or institution been held to account in any way for those events. They allege that attempts to impel such an investigation or secure an independent inquiry have proved futile.
22. They inform the Commission that the events to which this Application relates have been the subject of international condemnation, including from Kofi Annan, then Secretary-General of the United Nations<sup>5</sup> and the UN High Commissioner for Refugees, Antonio Guterres.<sup>6</sup>
23. They state that the United Nations Committee for the Protection of the Rights of All Migrant Workers had also expressed concern that the inquiry into the events of 30 December 2005 had been closed without clarifying the circumstances leading to the deaths of the 27<sup>7</sup> Sudanese migrants. That the Committee was also alarmed at reports that eyewitnesses were not heard in the course of the investigation.<sup>8</sup> They state that the Committee had recommended that the investigation into the events of 30 December 2005 be reopened in order to clarify the circumstances leading to the deaths and that measures be adopted to prevent the occurrence of similar events in the future.<sup>9</sup>

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<sup>5</sup> Annan Slams Cairo Protest Deaths," CNN, 30 December 2005, available at <<http://www.cnn.com/2005/WORLD/africa/12/30/egypt.sudanese/index.html>>.

<sup>6</sup> "Twenty Sudanese Die in Cairo Raid," BBC, 30 December 2005, available at <<http://news.bbc.co.uk/2/hi/africa/4568340.stm>>.

<sup>7</sup> The number of fatalities acknowledged by the Egyptian Ministry of Foreign Affairs, according to the Complainants, which is lower than their own estimate of 53.

<sup>8</sup> Concluding observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. Issued on 27 April 2007 after consideration of Egypt's report accessed 3 May 2007 from [http://www.ohchr.org/english/bodies/cmw/docs/co\\_advanceversion.doc](http://www.ohchr.org/english/bodies/cmw/docs/co_advanceversion.doc) para 24.

<sup>9</sup> Ibid n 12 para 25

### **Articles alleged to have been violated**

24. The Complainants allege violations of Articles 1, 2, 4, 5, 6, 11, 14, 16 and 18 of the African Charter on Human and Peoples' Rights (the African Charter) by the Respondent State.

### **Prayers of the Complainant**

25. The Complainants request the Commission to:
  - a. Declare a violation of the Victims rights under Articles 1, 2, 4, 5, 6, 11, 14, 16 and 18 of the African Charter.
  - b. Request that the Respondent State undertakes a thorough and impartial investigation to ensure the accountability of the alleged perpetrators.
  - c. Request that the Respondent State's national law be reviewed to:
    - i. Provide for adequate and effective safeguards against abusive use of force by security officials;
    - ii. Ensure that arbitrary or abusive use of force by law enforcement officials is punished as a criminal offence under the law in Egypt; and
    - iii. Provide for appropriate standards on demonstrations, crowd control and the lethal use of force in line with the African Charter.
  - d. Request the Egyptian Government to integrate human rights training for security and law enforcement officials, which training should include handling violent or potentially violent scenarios, crowd control and riots.
  - e. Request from the Respondent State compensation for:
    - a. The First Victim and other protestors who lost family members; and
    - b. All Victims for the injuries, pain and anguish they suffered and for loss of personal belongings.

### **Procedure**

26. The Complaint was received by the Secretariat on 25 May 2007 during its 41<sup>st</sup> Ordinary Session held from 16 to 30 May 2007, in Accra, Ghana. The

- Commission considered the Communication and decided to be seized of it. On 20 July 2007, the Secretariat informed the Complainant and the Respondent State of this decision and requested both parties to submit on Admissibility within three months from the date of notification.
27. On 26 October 2007, the Secretariat received the Complainants' submissions on Admissibility.
  28. On 05 November 2007, the Secretariat received a Note Verbale from the Respondent State requesting the African Commission to give it some more time to respond to the Complaint.
  29. On 22 November 2007, the Respondent State submitted its arguments on Admissibility in Arabic.
  30. On 07 January 2008 the Secretariat forwarded to the Respondent State the Complainant's submissions on Admissibility and granted the Respondent State an extension of thirty (30) days to submit on Admissibility. By letter on the same date the Complainant was informed that the consideration of the Communication was deferred to the 43<sup>rd</sup> Session.
  31. On 15 April 2008, the English translation of the Respondent State's submission was received by the Secretariat.
  32. At the 43<sup>rd</sup> Ordinary Session of the Commission from 07 to 22 May 2008, the parties made oral submissions to the African Commission.
  33. On 12 June 2008, the Secretariat informed the Complainant and the Respondent State that the Communication has been deferred to allow the Secretariat to draft a decision on Admissibility.
  34. On 26 August 2008 the Secretariat received the submission from the State on supplementary information requested during the oral hearing at the 43<sup>rd</sup> Ordinary Session.



35. On 25 September 2008 the Secretariat acknowledged receipt of the supplementary information from the Respondent State and requested that since several pages were not legible, the State resend a legible copy.
36. On 31 October 2008, the Secretariat informed the Respondent State and the Complainant that the Communication was deferred, since the State's submissions of supplementary information requested during the 43<sup>rd</sup> Ordinary Session were illegible and could thus not be translated. It also requested the State to send it a more legible version of its brief. On 5 January 2009, the Secretariat received from the Respondent State a legible version of the Ministerial Decree No. 139 of 1955 on "Regulations of public meetings and demonstrations in public areas." The Secretariat acknowledged receipt on 23 January 2009.
37. On 17 January 2009, the Secretariat informed the Complainant that a more legible copy of the supplementary information was received in Arabic and has been sent for translation, and on 23 March 2009 the Secretariat transmitted the said supplementary information to the Complainant.
38. The Secretariat informed the Respondent State by a Note Verbale dated 03 July 2012 that a draft decision on Admissibility was being prepared.
39. On 15 November 2012 and 31 May 2013, the Secretariat informed the Respondent State and the Complainants that the Communication was deferred.
40. At its 15<sup>th</sup> Extra-Ordinary Session which took place from 07 to 14 March 2014, the Commission declared the Communication Admissible.
41. By a Note Verbale and letter dated 26 March 2014 the Respondent State and the Complainant respectively were informed of the Commission's decision on Admissibility and the Complainants were requested to submit on the Merits within 60 days.
42. On 30 May 2014, the Secretariat received the submission of the Complainants on the Merits, which were acknowledged and transmitted to the Respondent

State by a Note Verbale on 03 June 2014, requesting the latter to submit its observations on the Merits within 60 days.

43. On 12 August 2014 the Respondent State submitted on the Merits, however, the Secretariat did not take note of this submission and on 30 March 2015 informed the Respondent State that its submissions on merits were overdue and granted a period of 30 days extension. By letter on the same date the Secretariat informed the Complainant of the same.
44. On 16 April 2015 the Secretariat received a Note Verbale from the Respondent State forwarding its submissions on Merits of 12 August 2014. The Secretariat acknowledged receipt on 30 April 2015 and forwarded the Respondent State's submissions on Merits to the Complainant requesting them to make any further observations within 30 days.
45. On 20 May 2015 the Secretariat informed the Respondent and the Complainant that at its 56<sup>th</sup> Ordinary Session, the Commission decided to defer the consideration of the Communication pending submission of additional written submissions on the Merits by the Complainant.
46. On 11 August 2015 and 23 November 2015 the Secretariat informed the Respondent and the Complainant that at its 18<sup>th</sup> Extra-Ordinary Session and 57<sup>th</sup> Ordinary Session the Communication was deferred due to time constraints.
47. By correspondence received by the Secretariat on 21 March 2016, the Complainant requested an update on the status of the Communication.
48. From March 2016 to July 2020 the Respondent and the Complainant were informed that the Communication was deferred.

## **Admissibility**

### **Complainants' Submission on Admissibility**

49. The Complainants submit that the present Communication raises *prima facie* evidence of a violation of the African Charter and satisfies all the requirements of Admissibility as contained under Article 56 of the Charter.

50. The Complainants submit that the Victims in the instant Communication have been identified and relevant details have been provided to the Commission of those individuals and the organizations representing the Victims. They argue that the Communication is compatible with the African Charter as it alleges serious breaches of rights protected by the Charter. They further state that the Communication is presented in polite and respectful language, and is based on information provided from a variety of sources, including testimony provided directly by the Victims and human rights organizations in Egypt, not solely on media reports. The Complainants also confirm that they have not submitted this Complaint to any other procedure of international investigation or settlement.
51. The Complainants state that although the Victims were reluctant to complain to the authorities, given the responsibility of law enforcement officers for the assaults in the park and abusive conduct thereafter, attempts were made to seek redress for the alleged breaches on their behalf.
52. They state that on 30 December 2005 at 07:00 pm, following the incidents in the park, a group of Egyptian activists submitted a complaint on behalf of all protesters to the District Attorney of North Giza Department.<sup>10</sup>
53. They allege that on 30 December 2005, a few hours after the attack, General Tariq Abdelrazik made a complaint against the protesters at Dokki Police Station, claiming that they had resisted arrest and in the process had injured police officers. They state that no investigations were undertaken and none of the protesters were interviewed nor was this complaint followed up to its conclusion.
54. The Complainants allege that in April 2006, the District Attorney indicated that the case would be closed because the perpetrators had not been identified and that there were no descriptions of the crimes related to the alleged attack by Egyptian Security Forces.<sup>11</sup> The Complainants submit that in this regard it was the duty of the authorities to identify the perpetrators of the alleged violations and that it was unreasonable for the authorities to expect that the protesters, before filing a complaint, would be able to identify

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<sup>10</sup> See Annex A.

<sup>11</sup> The District Attorney of North Giza Department who was dealing with this case at the time, met with Mr. Mohamed Bayoumi of the Association for Human Rights Legal Aid (AHLRA), Cairo on 15/04/2006.

the particular police officers who had assaulted them in the park,. They argue that to the extent that the law denies these Victims and similarly situated victims from accessing the Respondent State's judicial system to seek redress with respect to the human rights violations they have suffered, it is unreasonable and at odds with the duty to investigate serious human rights violations under the African Charter.<sup>12</sup>

55. The Complainants allege that on 13 June 2006, the District Attorney declared at his office, in the presence of the Victims' counsel,<sup>13</sup> that the case had in fact been closed. They said that he stated that the security officials responsible for the violations in the park had not been identified, as it had not been possible to pinpoint the specific perpetrators out of the several thousand law enforcement officials.<sup>14</sup> They further allege that the District Attorney stated that, contrary to Egyptian procedural law, there was no description of the alleged crime committed against the protesters who lost their lives while resisting the Egyptian riot police, and that the number of the dead had not been clarified. The Complainants aver that no formal document was issued after the District Attorney made this statement.
56. The Complainants argue that the statement by the District Attorney provides a spurious basis for refusing to proceed with the investigation. They contend that while there was conflicting information as to the precise numbers, it is unquestionable that a significant number of individuals were killed and injured on the day in question and that a thorough investigation would serve to clarify the details and extent of the deaths and injuries. They state that it is self-evidently the case that the protesters could not reasonably be expected to be able to identify, by name, the individual law enforcement officers responsible for the violence. They also state that basic investigative steps were not taken by the State. They argue that since it is clear that those responsible for assaulting the protesters were identified as police officers, an internal investigation into which police officers were at the park, and under whose operational control, should have been carried out. They state that the lack of internal investigation as well as interviews with eye-witnesses and

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<sup>12</sup> Art 1, 4 of the African Charter.

<sup>13</sup> In the presence of Ashraf Ruxi, Asylum Lawyer and Mohamed Badawi and Amel Gouda from AHRLA.

<sup>14</sup> See number of law enforcement officials in the park; Report of Egyptian Organisation of Human Rights issued after the events of 30 December 2007 <http://www.eohr.org/ar/report/2006/re0114.shtml> accessed on September 27 2007.

others in the vicinity of the park at the time demonstrates a lack of meaningful attempt to investigate and provide redress in this case.

57. The Complainants allege that various attempts were made by the protesters to reopen the file, but to no avail. They state that on 19 June 2006 an application<sup>15</sup> for the case to be re-opened was rejected orally by the District Attorney's clerk, without forwarding it to the District Attorney, on the basis that the Complainant was not a party to the original complaint. The Complainants argue that since the names of the protesters were not listed on the initial complaint, which was submitted on behalf of all the protesters shortly after the incident, it is difficult to understand how being named on such petition became a legitimate pre-requisite for requesting reopening of the case.
58. The Complainants allege that on 7 August 2006 a petition for civil remedies was submitted by the Association of Human Rights Legal Aid on behalf of the protesters to the Clerk of the District Attorney of North Giza. They state that the clerk rejected this petition because the petitioners' names were not included in the initial police report detailing the incident.
59. The Complainants state that on 4 September 2006, a further complaint was submitted to the District Attorney's Office on behalf of three other protesters injured during the attack. The Complainants state that the petition requested that the case be re-opened and investigations conducted. The request, they state was rejected as, according to the District Attorney, Procedural Law only allows those whose names appear in the initial complaint and those with a direct interest in the matter to lodge an appeal. They state that since the names of the three protesters were not mentioned in the original complaint (as noted above because no names appeared on that first, general complaint), they had no right to object to the District Attorney's decision.

They also state that a report in the Alhayat Newspaper of 26 April 2007 indicated that the Egyptian authorities declined to reopen the investigation as requested by the UN Committee on Migrant Workers.

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<sup>15</sup> Submitted by one of the Victim's representatives, Ashraf Ruxi, on behalf of Waddah Bin Idris, one of the protesters in the Park on 30 December 2005.

60. The Complainants also claim that human rights organizations requested the authorities to allow the protesters to retrieve their property from the park. They say that on 2 January 2007, a group of non-governmental organizations acting on behalf of the protesters sent a petition to the Prosecutor General demanding the return of the protesters' belongings which were barricaded in the park after the protest. They said no response was received from the authorities regarding the protesters' property.
61. The Complainants aver that as well as having been set out in the complaint of December 2005, the facts of this case were notorious and widely reported and that the Egyptian authorities were obliged to carry out a thorough, effective and independent investigation and to hold to account those responsible. They inform the Commission that no official documents have ever been issued by the District Attorney explaining any steps taken to investigate the complaints, or explaining his decisions to close the initial case on 03 June 2006 or to reject the petition for reopening it on 04 September 2006.
62. The Complainants further aver that to date no attempts have been made by the Egyptian authorities to bring to account law enforcement officials responsible for the alleged human rights violations that occurred in the park. They state that as far as they are aware, no investigation or inquiry into the events was ever carried out. They further claim that the complaints filed on behalf of the Victims and other individuals affected by events in the Park on 30 December 2005 have never been followed up. The Complainants conclude that there is nothing to indicate that they have been acted upon or even responded to by the Egyptian authorities and further state that the complaints have never been considered by Egyptian courts of law.
63. The Complainants conclude that there are, therefore, no remedies in Egypt for those affected by the brutal events which resulted in loss of life and serious injuries on 30 December 2005. They state that the Victims have had no recourse for the violations they suffered during the assault in the park and the unavailability of remedies within the Respondent State is borne out by the refusal of the authorities to take the most basic steps to investigate the events that took place in the park that day, and supported by the unconvincing reasons given for this failure. The Complainants conclude that the Victims

have been denied access to justice for the serious human rights violations which they had suffered.

### **Respondent State's Submission on Admissibility**

64. In its submission on Admissibility, the Respondent State urges the African Commission to strike out the Communication as it has not complied with Article 56 (5) of the African Charter.
65. The Respondent State avers that the Egyptian legal system grants the Victim the right to seek judicial remedy and to receive compensation for the harm he/she suffered. It states that the prosecutor had decided to drop charges due to the inability of identifying who the perpetrators were. The State argues that the Victims have the opportunity to reopen the investigation where there is new evidence or information. It states that it is clear that the Victims did not demand any compensation from the Egyptian judiciary and therefore, the submitted Communication is unacceptable because the local remedies were not exhausted according to Article 56 (5) of the African Charter.
66. The Respondent State argues that the Egyptian General Prosecution Authority is a part of the judicial structure of the state and its members enjoy immunity and independence similar to judges. The Respondent argues that the General Prosecution Authority is the entity that was assigned to investigate and prosecute in the instant case. The Respondent State avers further that it is the authority that conducted the investigations and which later dropped the charges of premeditated murder and use of brutality due to lack of the elements of the crime as required by law. It avers that the investigations could not identify a person or persons who committed the crimes of unintentional murder and injury, premeditated vandalizing of properties of the Sudanese protestors or others. Such conclusion, it argues, led to the decision to suspend any criminal prosecution because the perpetrators are not identified but that the police had been instructed to continue investigations to identify the perpetrators.
67. The Respondent State argues that the investigations of the General Prosecution Authority concluded that the crimes of unintentional murder and injury, resisting the authorities, premeditated vandalizing of properties were

- committed by the Sudanese protesters themselves. It states that these crimes occurred due to protesters' refusal to adhere to the repeated warnings to disperse. Such refusal led to protestors falling over and consequently asphyxia occurred which caused the death of some persons as well as injury including injury of some policemen. It concludes that these events are not related by any means to any violations of their rights as far as the African Charter is concerned.
68. The Respondent State further avers that none of the injured Sudanese who were questioned in the investigations of the General Prosecution Authority accused anyone in particular of causing their injuries. In addition, the Respondent State contends, none of the injured or the families of the deceased demanded any compensation for the damage caused or sought civil remedies. It reiterates that the fact that criminal charges had been dropped does not mean that the injured or the families of the deceased cannot seek civil remedies.
69. It further states that none of the Victims submitted any evidence or information to the police or the General Prosecution Authority that may help in identifying the perpetrators - and even whether these perpetrators were among the protesters or others who caused the incident. It states that the many requests submitted to the General Prosecution Authority by some of the NGOs calling for investigation by the General Prosecution Authority did not include any new evidence or information related to the incident.
70. 62. The Respondent State concludes that the complaints submitted to the esteemed Commission are unacceptable and are untrue as they lack any evidence. The Complainants are holders of refugee cards who enjoy legal status and permanently reside in Egypt and who were supposed to raise awareness to the other protestors and enlighten them of the law.

#### **Oral Submission to the Commission**

71. At the 44<sup>th</sup> Ordinary Session of the Commission, the parties made oral submissions to the Commission. However, no new facts were adduced and it was basically a restatement of what was already contained in their Admissibility briefs.



72. During the Oral Hearing the Commission requested the Respondent State to forward to it the Rules and Regulations Governing Public Meetings and Protests in Egypt, before a decision can be made.

### **The Commission's Analysis on Admissibility**

73. Article 56 of the Charter provides seven admissibility requirements which need to be cumulatively fulfilled before a Communication is declared Admissible. In the present Communication, the Respondent State contests the fulfillment of only one of the seven Admissibility requirements, which is exhaustion of local remedies. Accordingly, the assumption here is that the Respondent State agrees that the six other requirements have been fulfilled.
74. After carefully assessing the submissions of the Complainants, the African Commission is also convinced that the Communication does meet the other six Admissibility requirements under Article 56 of the African Charter. The Commission will therefore proceed to decide whether the Communication meets the requirement of exhaustion of local remedies as provided under Article 56(5) of the Charter.
75. According to the well-established jurisprudence of the African Commission, Complainants are required to exhaust local remedies only if the local remedies are available, effective and sufficient. A local remedy is considered available "if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint".<sup>16</sup>
76. The rationale behind the exhaustion of local remedies rule is that states should be given the opportunity to address the issue before the matter is brought before international treaty bodies.<sup>17</sup> The Commission has confirmed and reconfirmed this position in its decisions. For example, in *Free Legal Assistance Group and Others v Zaire* and *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*, the African Commission stated that the requirement of exhaustion of local remedies is founded on the principle that a

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<sup>16</sup> *Jawara* case, para 32.

<sup>17</sup> See Nsongurua J. Udombana 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *The American Journal of International Law* (2003) 9.

government should have notice of human rights violation in order to have the opportunity to remedy such violations before being called before an international body.<sup>18</sup> This provision also enables the Commission to avoid playing the role of a court of first instance, a role that it cannot under any circumstances arrogate to itself.<sup>19</sup>

77. In the *Jawara* case, the Commission stated that "...the Commission has stressed that, remedies the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant ..."; "... The existence of a remedy must be sufficiently certain, not in theory but also in practice. Failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the Victim cannot turn to the judiciary of his country ... local remedies would be considered to be unavailable."
78. In the present Communication, the main issue in contention with regard to exhaustion of local remedies is how the burden of proof is portioned between the Complainant and the Respondent State.
79. The Complainants submit that they have made every attempt to exhaust local remedies in Egypt. As recalled earlier, they cite attempts to do so made by them or on their behalf. A first complaint filed on behalf of all the protesters was closed on the grounds that the perpetrators had not been identified and there were no descriptions of the crimes related to the attack by the Egyptian Security Forces. An application made by one of the Complainants, Ashraf Ruxi, for the case to be re-opened was rejected on the grounds that the Complainant was not a party to the original complaint therefore the application was inadmissible. Finally, another attempt to re-open the case on behalf of three protesters injured during the attack was also rejected on the basis that the three victims did not have any interest in the matter. Reasons also include that the law only allows those whose names appear in the initial complaint and have a direct interest in the matter to lodge an appeal.

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<sup>18</sup> Communication Nos. 25/89, 47/90, 56/91, 100/93 – Free Legal Assistance Group and Others v Zaire (1995) para 36 & Communication 71/92 – Rencontre Africaine pour la Défense des Droits de l’Homme v Zambia (1997) para 10. 10th Annual Activity Report: 1996-1997.

<sup>19</sup> See Communications 54/91 Malawi African Association/Mauritania; 61/91 Amnesty International/Mauritania; 98/93 Ms. Sarr Diop, Union Interafricaine des Droits de l’Homme and RADDHO/Mauritania; 164/97 à 196/97 Collectif des Veuves et Ayants-droit/Mauritania; 210/98 Association Mauritanienne des Droits de l’Homme/Mauritania, reported in 13th Annual Activity Report].

80. In *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*,<sup>20</sup> the African Commission stated that its long-standing practice, in cases of human rights violations, is that the burden of proof rests on the government.<sup>21</sup> That is when the Complainant has laid down evidence of having exhausted or attempted to exhaust local remedies. In those Communications, the African Commission had stated that if the government provides no evidence to contradict an allegation of human rights violation made against it, the African Commission will take it as proven, or at the least probable or plausible. The Commission stated that it is well-established jurisprudence of the Commission that where allegations go *entirely unchallenged*,<sup>22</sup> it will proceed to decide on the facts presented.<sup>23</sup>
81. The Commission is of the view that, in the present Communication, it is the duty of the Respondent State to identify the perpetrators of the alleged violations and that it is unreasonable for the authorities to have expected that the protesters identify particular police officers who allegedly assaulted them in the park before filing a complaint. To the extent that the law denies these Victims from accessing the Respondent State's judicial system to seek redress with respect to the human rights violations they have suffered, it is unreasonable and at odds with the duty to investigate serious human rights violations under the African Charter.
82. In *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*,<sup>24</sup> the African Commission held that Complainants are required to exhaust local judicial remedies in accordance with the laws of the country concerned. The laws of the country include laws that govern

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<sup>20</sup> Communication 48/90-50/91-52/91-89/93, 13th Activity Report: 1999 - 2000.

<sup>21</sup> (See, ACHPR/59/91, ACHPR/60/91, ACHPR/64/92, 68/92, 78/92, ACHPR/87/93, ACHPR/101/93).

<sup>22</sup> Italics for emphasis.

<sup>23</sup> See the Commission's decisions in Communications 59/91, 60/91, 64/92, 68/92, 78/92, 87/93 and 101/93. See also Communications 275/03: Article 19 v Eritrea, 22nd Activity Report: Nov 2006 - May 2007. Eritrea did not deny the Complainant's contention that the detainees are being held incommunicado, with no access to legal representation or contact with their families, and as the [African] Commission has enunciated in many of its previous decisions, where allegations are not disputed by the State involved, the Commission may take the facts as provided by the Complainant as a given. Nor does the political situation described by Eritrea excuse its actions, as Article 5, permits no restrictions or limitations on the right to be free from torture and cruel, inhuman or degrading punishment or treatment. The Commission thus finds that Eritrea has violated Article 5, by holding the journalists and political dissidents incommunicado without allowing them access to their families.

<sup>24</sup> Communication 379/09 at para 59

procedural matters. However, the requirement of exhaustion of local remedies is not an absolute rule, it has exceptions put in place to ensure that complainants will not be hindered from bringing potential human rights violations before the Commission as a result of procedural impediments emanating from unjust laws or practices. The requirement by the Respondent State that perpetrators of the alleged violations had not been identified and there were no descriptions of the crimes related to the attack by the Egyptian Security Forces, thus leading to the dismissal of the case is clearly a procedural impediment.

83. Furthermore, the Respondent State in its submissions has not shown that it has taken any measures to investigate the matter and bring those responsible to justice. The Commission has stated that where there is a crime that should be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward. The normal requirements of exhaustion of domestic remedies do not apply when it is up to the State to investigate the facts and bring the accused persons to court in accordance with both domestic and international fair trial standards, and the state fails to take the required steps.<sup>25</sup>
84. The Commission is of the view that the minimum that the State could have done was to take active steps to investigate the allegations, especially as the allegations of assault were levied against the police. It is not in dispute that those responsible for assaulting the protesters were identified as police officers; an internal investigation could have been carried out into which police unit participated in the moving of the protestors, and under whose operational control. The lack of internal investigation demonstrates a lack of meaningful attempt to investigate and provide redress in this case.
85. In such circumstances, the Commission finds that domestic remedies are either not accessible or effective to redress the violations alleged.
86. The Commission also notes that the Respondent State did not address itself to the specific allegations levied against it. The Respondent State merely stated that the Egyptian legal system grants a sufferer the right to seek judicial

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<sup>25</sup> Article 19 v Eritrea the Commission held that “the fact that the State of Eritrea has not taken any action means that domestic remedies are either not available or if they are, not effective or sufficient to redress the violations alleged”.

- remedy and to receive a compensation for the harm he/she has suffered. It further states that the Victims have the opportunity to reopen the investigation where there is new evidence or information.
87. The Commission has in the past acknowledged the difficulty for victims seeking redress when state agents are the alleged perpetrators. While considering a case in which Sierra Leonean asylum seekers and refugees had apparently not exhausted local remedies for breaches by Guinean state agents, it noted that ‘when the authorities tasked with providing protection are the same individuals persecuting victims, an atmosphere in which domestic remedies are available is compromised.<sup>26</sup> In this case the African Commission considered that there were, in practice, no available remedies to be exhausted.
  88. In the present case, when the Victims sought to engage the authorities after the eviction, simply to ascertain basic information or to recover their belongings, they were blocked, harassed and in some cases threatened with physical violence or deportation. Others were directly threatened that there would be serious consequences if they were to “appear at a police station.” The Respondent State did not address this allegation in its rebuttal.
  89. Consequent to the foregoing, the African Commission holds that, in the present Communication, the local remedies in Egypt were not available and effective to the Complainants and hence the Complainants have exhausted local remedies pursuant to Article 56 (5) of the African Charter. The Commission declares the Communication admissible.

## **Merits**

### **Complainants’ submissions on the Merits:**

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<sup>26</sup> Institute for Human Rights and Development in Africa (On behalf of Sierra Leone Refugees) v Guinea 249/2002 para 33.

### **Alleged violation of Article 1**

90. Concerning Article 1 of the African Charter which determines that Member States party to the Charter shall recognize the rights, duties and freedoms enshrined in this Charter, and shall give effect to them, the Complainants allege that failures by the Respondent State to respect the Charter and to ensure its full implementation violate Article 1 directly, and for failing to take necessary and reasonable measures to prevent violations and when serious violations arise, to respond with a thorough, effective and impartial investigation.

### **Alleged violation of Article 2**

91. Article 2 of the Charter protects the right to non-discrimination. The Complainants argue that apart from “national origin”, which is included under “status” for the purpose of Article 2, “immigration status” is also envisaged under the ambit of “other status” in the said provision. The Complainants allege that the subjection of the Victims to assaults and other adverse treatment is closely related to their status as non-national asylum seekers and refugees and constitute a violation of the right to non-discrimination. They further aver that the apparent racist malice underpinning the violence also falls short of the State’s obligations to protect every individual against discrimination.

### **Alleged violation of Article 4**

92. Regarding the right to life as guaranteed under Article 4 of the African Charter, the Complainants aver that the Respondent State’s duty to safeguard the right to life consists of the duty to refrain from unlawful killing, to take measures to protect life and prevent violations and to carry out a thorough, prompt and impartial investigation in the event of such violations. The Complainants allege that the State failed in all three these respects in the circumstances of the death of the wife and child of the First Victim and the other persons killed during the eviction.
93. Regarding the duty to refrain from unlawful killing, the Complainants allege that the wife and son of the First Victim were killed during the police assault on protestors in the Mustafa Mahmoud Park, along with approximately thirty

other deaths. The Complainants allege that these deaths were caused by the disproportionate and deliberate use of force by riot police on unarmed civilians. They further allege that the riot police are agents of the State and that as such the State is responsible for their actions. They argue that legal authority is required for an agent of the State to use force against a person, and allege that no such legal authority had been suggested by the Respondent State. The Complainants argue that such legal authority can also not be implied, since there is no evidence that the people in the park constituted any threat to the police officers or public safety, and furthermore that the Victims were initially told that the level of police presence was to protect them from assault by others.

94. The Complainants submit that the level of force employed by the riot police was plainly excessive and disproportionate, that there is no justification for it in national or international law and that it contravenes international standards on the use of force which require force to be used only as a last resort, to the minimum extent necessary, proportionate to the threat posed and designed to avoid unwarranted pain or injury.
95. Regarding the second part of the right to life, namely to take measures to protect life and prevent violations, the Complainants argue that law enforcement operations must be planned and carried out in a manner which "limits the danger of recourse to the use of force." The Complainants allege that there is no evidence that the police operation was planned with a view to minimizing incidental loss of life. As justification for this point the Complainants submit that the size of the force used, the degree of force used and the failure to give any prior opportunity to allow people in the park to disperse, including in some cases preventing them from doing so, is not compatible with the standard of care perquisite in an operation concerning an unarmed and predominantly peaceful crowd comprising men, women and children. The Complainants argue that the fact that six of the Victims were beaten and assaulted illustrates the deliberate and excessive use of force which was not minimized to any extent.
96. Regarding the third part of the right to life, namely the thorough, prompt and impartial investigation of allegations of violations of the right to life, the Complainants argue that this requires an adequate and effective investigation

- into the circumstances of death at the hands of state agents, responsibility for the deaths and whether they ought to be prosecuted. The Complainants allege that inquiries by the Victims were not responded to, that there is no evidence of any inquiry into who was responsible for the killings and aver that this failure undermines the effectiveness of any criminal law provisions put in place by the State to protect the right to life.
97. The Complainants argue that the duty of inquiry in a case where a person loses their life at the hands of a State agent is triggered automatically without the need for such a request to be made by affected persons. Notwithstanding this, the Complainants allege that steps were in fact taken to seek such an inquiry into the circumstances of the police assaults which led to the death of the wife and son of the First Victim.
  98. The Complainants aver that a petition was submitted on 30 December 2005 by “Egyptian activists” to the District Attorney of North Giza Department on behalf of “all protestors affected by the park events.” The Complainants allege that on 3 June 2006 the District Attorney declared that the case had been closed, since the security officials responsible for the violations had not been identified. According to the Complainants the District Attorney declared that under Egyptian law there is no description of the alleged crime of protestors losing their lives while resisting riot police. The Complainants allege that the District Attorney also stated that the number of dead had not been declared.
  99. The Complainants allege that on 19 June 2006 an application was submitted by Ashraf Ruxi (Representative of the Victims) on behalf of Wada Bin Idris (the Sixth Victim), which was rejected by the District Attorney’s clerk, who allegedly declined to forward it to the District Attorney on the ground that the Victim was not a party to the original complaint of 30 December 2005 and thus the application was inadmissible.
  100. The Complainants aver that on 4 September 2006 a petition was submitted to the District Attorney’s office to reopen the case and conduct investigations on behalf of three protestors injured during the attack. The Complainants allege that the request was rejected on the basis of Procedural Law, which allows only those whose names appear in the initial complaint and have a direct



interest to lodge an appeal. In this case, the Complainants allege that they were informed that since the names of the three protestors were not mentioned in the original complaint, they had no right to object to the decision of the District Attorney.

101. The Complainants allege that to date, no attempts have been made by the Egyptian authorities to bring to account any of the law enforcement officials responsible for the human rights violations which occurred in the park, and that no investigation or independent inquiry into the events has been carried out and thus that the third part of the State responsibility under Article 4 was not complied with resulting in a violation of Article 4.

### **Alleged violation of Article 5**

102. Article 5 of the African Charter protects the right to human dignity and freedom from all forms of exploitation and degradation including torture and cruel, inhuman or degrading punishment or treatment. The Complainants argue that incommunicado detention can amount to inhuman and degrading treatment *per se*. They further aver that it is a well-established principle of international human rights law that when a person is injured under the control of security forces, that there is a strong presumption that the person was subjected to torture or ill-treatment, with the result that the burden shifts to the Respondent State to prove that the allegations of torture are unfounded.
103. The Complainants further argue that, to comply with the prohibition on torture, there must be investigations into the allegations of torture, the torturer must be punished, and the Victims must have access to effective remedies. They further aver that “whatever supposed safeguards against torture and inhuman treatment apply in theory in Egyptian law they have not been applied in this case.” They therefore argue that the absence of any proper inquiry into the treatment of the Victims at the hands of the police and the absence of any attempt to prosecute the perpetrators amounted to a violation of Article 5.
104. The Complainants argue that the way in which all the Victims and the wife and son of the First Victim were treated in the park and in detention afterwards, and the level of force used by the police to break up the protest and force protestors onto the buses amounted to a violation of Article 5 since

the Victims were assaulted, sprayed with high pressure streams of water, separated from family members and dispersed, verbally abused (in the case of the Fourth and Sixth Victims) then dragged and herded onto buses. They allege that the protesters were taken into unexplained and indefinite detention, where they were kept incommunicado, deprived of access to their families or a lawyer, were roughly treated and deprived of medical attention.

105. The Complainants argue that while in the park the Victims were not free to move away without the consent of the armed police officers, and were therefore under the control of the Respondent State's agents, both while surrounded by police officers in the park and afterwards while in detention. Thus, the Complainants submit that the burden is on the Respondent State to show that the physical harm and mental anguish suffered by the Victims were not the responsibility of the agents of the State, and aver that the State has failed to do so.
106. The Complainants submit that (a) the delay in releasing the bodies of the Victims, including the wife and son of the First Victim; (b) being denied access to the bodies of his loved ones, which caused the First Victim acute psychological suffering; and (c) being unable to provide them with appropriate burial in accordance with his culture and traditions, amounted to inhuman and degrading treatment and lack of respect for the dignity of the First Victim and a violation of Article 5.

#### **Alleged violation of Article 6**

107. As regards the right to personal liberty and security of the person guaranteed under Article 6 of the African Charter, the Complainants aver that the random arrest and arbitrary detention of Victims in police training camps and prisons in and around Cairo, with no specific reasons given for the detention, being unable to contact their families and being denied information about their whereabouts and not having access to lawyers or a court to determine the lawfulness of their detention, amounted to a violation of Article 6.

#### **Alleged violation of Article 11**

108. Article 11 of the African Charter protects the right to assemble freely with others, subject to necessary restrictions provided for by law for a legitimate

purpose. The Complainants submit that the protestors were exercising this right by way of peaceful sit-in in the square, and that the onus is on the Respondent State to prove that interference with this assembly was justified. They further submit that no evidence has been provided by the State to demonstrate that the protestors posed a threat to national security or the other interests enumerated as justifying limitations under the Charter and thus that there was a violation of Article 11. In any case, the Complainants argue, the manner of the removal of the protestors, the level of force employed against protestors, the deaths and injuries sustained and the subsequent detention and treatment were unnecessary and disproportionate limitations on the right to assemble.

#### **Alleged violation of Article 14**

109. In relation to Article 14, which guarantees the right to property, the Complainants allege that the protestors were forcibly removed without an opportunity to take any of their belongings, were prohibited by the authorities to recover their property upon their release and have received no justification or compensation for this deprivation and that this severally and cumulatively amount to a violation of Article 14.

#### **Alleged violation of Article 16**

110. Regarding the right to the best attainable standard of physical and mental health pursuant to Article 16, the Complainants argue that this can be violated through direct action by the State or others insufficiently regulated by the State which cause positive harm to health and by failures to supply adequate access to health care. The Complainants submit that the acts of the authorities during the removal and the subsequent denial of adequate medical care violated the right of the Victims to physical and emotional health. Specifically, the Complainants submit that the Fourth Victim was not provided with medical care when his eye was injured and the Seventh Victim's lungs were affected by the beatings at the hands of the riot police, and as a result of on-going lack of medical care, he remains weak and suffers from fainting spells.

#### **Alleged violation of Article 18**

111. Regarding Article 18 on the sanctity of the family, the Complainants submit that the Respondent State violated the duty to protect all families within its jurisdiction through the decision to break up the protest and the manner of its execution, including the method used of dispersing the protestors, which had negative consequences for the family of the First Complainant. The Complainants further submit that the breakup of the protest in the park and the manner of its execution cannot be justified by any pressing need to protect national security, the safety, health, ethics, rights and freedoms of others. Finally, they contend that the incommunicado detention constituted psychological trauma which also constitutes a breach of Article 18.

### **Respondent State's Submission on the Merits**

112. The Respondents State submits that because of the historic and continuing relationship and agreements between Sudan and Egypt, Sudanese nationals enjoy the right of entry into Egyptian territory with any identification document without hindrance, and that as such, the presence of Sudanese in Egypt is based on the agreements, particularly the latest one of 04 April 2004 and not on asylum in its legal and international definition.
113. The Respondent State submits that despite these special agreements, under the UNHCR agreement to which Egypt is a party, UNHCR examines applications in accordance with its standard practice, and thus that some Sudanese nationals have obtained yellow cards (indicating their status as asylum seekers) and blue cards (indicating their refugee status) and are entitled to the treatment specified for these categories under the UNHCR agreement. However, the State avers that "the vast majority of Sudanese nationals, estimated between 2 and 5 million residing in Egypt, are neither refugees nor asylum seekers."
114. The State further avers that "the UNHCR has ascertained that a huge number of the Sudanese asylum seekers are ineligible for refugee status because the requisite criteria for such status were unfulfilled," mainly because they were rather seen to be economic migrants. The Respondent State alleges that the Sudanese nationals vehemently rejected the decisions of the UNHCR and demanded that closed cases be reopened and that they be granted refugee status in countries like the United States, Australia and Canada. According to

the Respondent State, the Sudanese nationals harassed the UNHCR staff on a daily basis on their way in and out of the premises.

115. The Respondent State alleges that the matter escalated into a continued sit-in protest in the park opposite the UNHCR office building, and that the number of protestors swelled from around five hundred to nearly three thousand (3000) over a period of three (3) months as many protestors brought their families. The State alleges that as a result, the park in a residential neighborhood became a permanent shelter for the protestors, who committed many crimes against residents of the neighborhood. The State further alleges that the protest caused health, security and environmental hazards. The State submits that inhabitants were subjected to illegal actions by the protestors who acted in contravention of public order and public morality. The State proceeds to list nine cases where the protestors were involved in quarrels, public alcohol consumption and similar misdemeanors.
116. The State submits that in keeping with its commitment to provide protection to the UNHCR and to avert the harm and danger posed by the protest, the authorities sought diligently to put an end to the protest through peaceful means, including proposing alternatives to the unrealistic demands made by the protestors and bringing in Sudanese and Egyptian government and non-government officials to mediate the stand-off. After three months of initiatives to end the protest, the Respondent State submits that it was left with no option but to break up the unlawful sit-in protest because of (1) the ongoing health, security and social hazards, as well as a park being an inappropriate place to live, (2) the failure of reaching an agreement with of the protestors due to their unrealistic demand and (3) repeated requests from UNHCR to the State to end the protest to protect its Staff. The State in addition submits that the public park is inside one of the main squares in Cairo where many embassies, banks, hospitals and different financial and commercial activities are located.
117. The Respondent State alleges that in a bid to ensure the safety of the protestors as well as the citizens residing in the neighborhood, the operation to remove protestors was carried out gradually. The State avers that many incidents occurred because the protestors resisted and confronted the forces charged with transferring them to another shelter equipped for such a

purpose as well as “their pushing and running”, resulting in deaths and casualties among the protestors, casualties among the police and widespread damage to public property.

118. The State further avers that following the incident, the State has, through senior government and non-government officials on more than one occasion expressed its deep regret at the fatalities and casualties and had reiterated its commitment to its obligations towards its Sudanese brothers.
119. The Respondent State refers the Commission to its submission on admissibility as it already explained in detail that the incidents were part of the Egyptian authorities’ efforts to break up the unlawful assembly by Sudanese nationals in front of the UNHCR Office in Cairo. It further explained the authorities’ efforts to provide care and assistance as well as the criminal and judicial measures which they had taken in connection with the incidents and the evidence which the Public Prosecutor had gathered during the investigations on the incidents.
120. In its submissions on Admissibility, the Respondent State detailed the efforts allegedly made by the Egyptian authorities to end the illegal assembly which included:
  - a. Arranging several meetings between the representatives of the UNHCR and the leaders of the protests, with the presence of representatives of the Egyptian Ministry of Foreign Affairs;
  - b. Many Egyptian civil society organizations made extensive efforts to convince the protestors to end the protest;
  - c. Some Sudanese government officials in cooperation with the Sudanese Embassy officials held meetings and opened many channels to communicate with the protestors, promising to facilitate their voluntary return to their country along with financial and material assistance;
  - d. Some Egyptian public figures held meetings with the protestors and the UNHCR officials to find proper solutions;
  - e. Some Sudanese public figures tried to mediate and form an agreement with the protest leaders in return for concessions by UNHCR which would accomplish most of their demands; and

- f. Officials from the Egyptian Ministry of Foreign Affairs held many meetings with the protestors to convince them to end the protest.
121. According to the Respondent State, the UNHCR finally declared that they are unable to fulfil the demands of the protestors as these demands are beyond the capacity of the UNHCR and the protestors rejected voluntary return, rejected local integration and demanded reopening of all closed files of Sudanese refugees at UNHCR. The State alleges that the Regional Director of the UNHCR made a statement in which he indicated that the protestors included persons who do not meet the refugee criteria as well as illegal migrants, that he was concerned about the security of his staff members and that the protests were impacting on the ability of the UNHCR to assist other refugees and asylum seekers.
122. According to the Respondent State, on the night in question, security forces arrived at the location at around 00:30, and the negotiation team started negotiations using microphones with the protestors at 00:45 on 30 December trying to convince the protestors to take the buses to places where they would be categorized and their legal status checked. The Respondent State alleges that at 01:15 the protestors started chanting hostile slogans and protestors started instigating others among them not to comply with the instructions to disperse. The confirm that at 02:30, 03:20 and 03:35 water cannons were used to disperse people, although it was not aimed directly at people. The shooting of the water cannon was allegedly interspersed with warnings to leave the park. The State avers that at 03:35 another round of negotiations took place in the presence of two representatives from the Sudanese Peoples' Liberation Front. According to the State, at 04:45 some of the protestors threw empty bottles, pans, big wooden sticks, gas cook bottles and fire balls towards the troops, resulting in the troops having to end the protest. The State admits that there was a lot of chaos in the park due to the large number of protestors and their belongings which were crowded into the park. They further assert that some of the protestors were drunk or under the influence of drugs.
123. The Respondent State alleges that the protestors showed violent resistance against the troops during the process of dispersal and that the dispersal occurred under a security cordon around the location, which provided security support to the troops and assisted "in the prevention of protestors

- infiltrating into an area which could cause a disturbance to public security or block the traffic, given the importance of the area in which they were located.”
124. According to the Respondent State the process of ending the assembly had led to the death of twenty-seven (27) Sudanese, including eleven (11) children, in addition to seventy three (73) who were injured and who received immediate medical care, three of whom were admitted to hospital. The Respondent State further avers that there were 108 injuries on the side of the Police. The State submits that police officers opened an official enquiry because of the deaths, injuries and damage to public property, which are crimes under Egyptian penal law, and that the evidence was sent to the General Prosecuting Authority.
  125. The Respondent State alleges that as part of the efforts of the Egyptian authorities to provide care after ending the protests, two thousand one hundred and seventy-four (2174) Sudanese were taken to four camps where they had residency, food and medical care. The State alleges that after the release of persons with legal residence permits, women and children and Sudanese from Darfur, UNHCR staff, upon their request, were allowed to visit those who remained in the shelters. According to the State the remaining hundred and fifty-six (156) detained persons were released on 11 February 2006 following the finalization of the investigations into the occurrences by the General Prosecution Authority (GPA).
  126. According to the State the report of the GPA released on 20 May 2006 concluded that the charges of premeditated murder and use of brutality against the Egyptian police would be dropped, “because the perpetrator is not identified according to the testimony of the victims who did not name the perpetrator”. The report also acquitted the protestors of the crimes of resisting the authorities and premeditated vandalizing of property. Finally, the report instructed the police to continue to investigate the matter internally.
  127. According to the State the report of the General Prosecution Authority following autopsies of the deceased determined that death was due to asphyxia, and the injuries sustained were those generally caused by falling and being trampled on, with their blood samples showing no trace of



chemicals. In addition, the State submits that Sudan had requested the GPA to agree to have the deceased buried in Egypt.

128. According to the Respondent State a Committee of doctors of the Ministry of Health examined the remains of the belongings of the Sudanese protestors and concluded that they were not valid for human consumption, pose a danger to public health and environment, and are a potential source of infectious diseases and epidemics and thus a decision was taken to burn them. The golden and valuable materials were placed in the court safe and other belongings were handed over to the Sudanese Embassy in Cairo to return to their owners.
129. In response to the prayer of the Complainants that the Respondent State conduct a thorough and impartial investigation to ensure the accountability of the alleged perpetrators, the Respondent State alleges that the allegation that Egypt had failed to conduct a proper and impartial investigation is unsound. The Respondent State submits that Egypt complied with all the international standards of breaking up assemblies and that Egyptian law abides by the same standards.
130. The State submits that following the demand from civil society organizations for the Public Prosecutor to investigate the incidents, the latter, which is an integral part of the Judiciary and whose members enjoy independence and judicial immunity, conducted all the legal investigations and measures required, gathered evidence and ascertained the conclusions of the forensic reports, which stated that the corpses of the dead persons had no trace of gas, firearm or rubber bullets. The Respondent State submits that the deaths were attributed to stampede and pandemonium and that as a result the Public Prosecutor, in compliance with the well-established national and international legal principles and rules of justice and standards of criminal justice, temporarily placed the investigation on hold, since the investigations had not been conducted into the culprits. The Respondent State also alleges that the Egyptian authorities gave clearance to Sudanese forensic scientists and the Sudanese Criminal Investigation Department to inspect the corpses of the victims, the site of the sit-in protest and to examine the relevant reports. The Respondent State alleges that subsequently, it was concluded that the “allegation was unfounded and that it should be ignored and rejected.”

131. In response to the prayer by the Complainants to review the national laws of the State relating to use of force, crowd control and demonstrations, the Respondent State stresses that rights in the African Charter, including freedom of assembly in Article 11 must be exercised “with due regard to the rights of others, collective security, morality and common interest”, as provided for in Article 27 of the Charter.
132. The Respondent State submits that the Egyptian Police Act 109 of 1971 in Article 102 stipulates the conditions under which police can use force, that being that it must be “necessary as needed to carry out one’s duty, be the only means of performing such duty in case of an assembly or demonstration that threatens public security and only after warning those concerned.” The State submits that any breach of the law and rules governing crowd or demonstration dispersal or any unwarranted use of force is a crime punishable under the Penal Code.
133. The Respondent State submits that the investigation reports indicate the protestors’ persistent refusal to disperse and resistance to police by using dangerous instruments in their possession. The State alleges that the reports further prove the fact that the police used all the means at its disposal, such as negotiations and mediators to break up the unlawful sit-in and assembly, but to no avail, and that the intervention to end the sit-in was done in accordance with the law and orders to implement such law, which are in line with international standards.
134. The State further submits that failure to comply with national laws that govern the exercise of rights in a host country and a refusal to end the sit-in protest in an orderly manner in compliance with the request of the authorities constitutes a violation of the provisions of the African Charter.
135. The Respondent State indicates that legal reforms following the revolutions of 25 January 2011 and 30 June 2013, resulted in the adoption of a new Constitution which contains many provisions on human rights and safeguards for such rights, which provide a special status for international human rights treaties “that elevate the latter practically above the law” as

well as providing for the setting up of independent and impartial national human rights mechanisms.

136. In response to the Complainant's prayer that the Egyptian Government integrates human rights into the training for security and law enforcement officials, the Respondent State indicates that training initiatives are being taken as part of the new Constitutional and legal realities either through the instruction stages at the Police Academy or through the specialized sessions at various police departments.
137. In response to the Complainant's prayer for compensation, the Respondent State indicates that Victims can resort to the Courts to claim compensation for harm suffered in accordance with the rules of criminal, civil and administrative liability. The Public Prosecutor's statement that no grounds exist for a criminal prosecution because the culprit is unidentified does not constitute an impediment for the Victim when it comes to filing for a reinvestigation if fresh evidence emerges or in a civil claim.

#### **THE AFRICAN COMMISSION'S ANALYSIS ON MERITS**

138. In this Communication the Commission is called upon to determine whether the violent breakup of the sit-in protest, the arrest and detention of the protestors, the conduct of the State in relation to the deceased persons and the property of the protestors as well as the failure of the State to investigate the incidents, violate the rights of the Victims guaranteed under Articles 1, 2, 4, 5, 6, 11, 14, 16 and 18 of the African Charter, as alleged by the Complainants.
139. The actions of the State which according to the Complainants led to the alleged violations can be summarized as follows:
  - The breaking up of the peaceful sit-in protest in the park through the indiscriminate use of violence resulting in injury, death and loss of property;
  - The arrest and detention of all the protestors, as well as the conditions of detention;
  - The failure of the State to inform Victims of the death of family members, and the unduly high cost of having the bodies released; and
  - The failure of the State to investigate the foregoing incidents.

140. There are two preliminary issues for determination which would inform the determination of the alleged violations. The first matter relates to the role of the UNHCR in the events that took place. The second relates to the composition of the group of protestors, which consisted of card-carrying refugees, asylum seekers and undocumented persons.

### *The role of the UNHCR*

141. The work of the UNHCR is based on the 1951 UN Refugee Convention. According to the Convention, States are expected to cooperate with UNHCR in ensuring that the rights of refugees are respected and protected. The protections of the UNHCR apply only to refugees and asylum seekers and not to other migrants. After the agreement between Egypt and Sudan for free movement of people, the UNHCR stopped issuing refugee cards to Sudanese citizens in Egypt, as they were able to enter and live in Egypt freely.
142. The Complainants and Respondent State are in agreement that the UNHCR is at the crux of the events which led up to the unfortunate events of the night of 29 to 30 December 2005. In the first place, it is the failure to resolve the disagreement resulting from the series of demands by the refugees and rejected asylum seekers to the UNHCR which resulted in the three-month sit-in protest. Secondly, it was the UNHCR which had on three different occasions requested the Respondent State to protect it from the protestors, including, according to the Respondent State, requesting for forceful intervention. In addition, the UNHCR was also not able or willing to provide guarantees about the location to which the protestors would be taken, thus making the protestors weary of being removed. The international status of the UNHCR means that the Respondent State cannot be held responsible for any potential violations committed by the UNHCR. In addition, the UNHCR is not itself bound by the provisions of the African Charter. However, the role of the UNHCR may be taken into account when assessing the conduct of both the Respondent State and the Complainants as mitigating circumstances.

### *Refugees, migrants and asylum seekers*

143. In the current case the Complainants allege that the group of protestors consisted of “asylum seekers, card carrying refugees and undocumented persons whose status in Egypt was yet to be determined”. On the other hand the Respondent State avers that the protestors included persons who do not meet the refugee criteria as well as illegal migrants. The group of protestors will thus be taken to have consisted of (1) refugees proper, (2) asylum seekers who had been registered as such, and (3) asylum seekers who are yet to register or who had been denied asylum, and who were thus in the country as irregular migrants. The statuses of these groups under international human rights law are somewhat different. Refugees have all the rights and protections under the Conventions of the United Nations and the African Union governing the status of refugees. Asylum seekers are those that are awaiting a decision on whether they would be granted refugee status, and as such are entitled to certain of the rights and protections under the framework governing refugees. Finally, irregular migrants do not have protection under the international framework protecting refugees, but they still have the protection of the international human rights framework.
144. Who qualifies as a refugee? According to Article 1 of the 1951 UN Convention relating to the Status of Refugees, as modified by the 1967 Protocol relating to the Status of Refugees, a refugee is defined as a person who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.’ The O/AU Convention Governing Specific Aspects of Refugee Problems in Africa which entered into force in 1974 completes the UN Convention. The O/AU Convention defines a refugees as any person compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality.
145. The international framework for the protection of refugees under the 1951 UN Convention, and the 1967 Protocol further provides as follows:

Article 7: Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

Article 13: In relation to movable and immovable property, “the Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto.”

Article 26 of the UN Convention grants the right to choose their residence and to move freely to ‘refugees lawfully in the territory, subject to any regulations applicable to aliens generally in the same circumstances.’

146. In addition to these protections of refugees, Article III of the O/AU Convention further provides that “[e]very refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order.” In addition, Article VIII (1) and (2) provide that Member States shall co-operate with the Office of the United Nations High Commissioner for Refugees; and that the Present Convention shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.
147. Who qualifies as an asylum seeker? According to the UNHCR “an asylum-seeker is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated.”
148. With regard to asylum seekers who are not yet documented, the UN Convention determines in Article 31(1) that entering a state party to the Convention unlawfully does not result in a forfeit of protection, and thus illegal entrants may still qualify as refugees if they fulfil the relevant criteria. However, under Article 31(2) restrictions may be imposed on their movement until their status is regularised. While the UNHCR considers detention of asylum seekers as a last resort measure, there are countries in which it is common practice for irregular migrants to be detained until their status is determined, and some countries also confine refugees to refugee camps and thus limit their freedom of movement.
149. With regards to the rights of refugees and asylum seekers, such rights accrue “incrementally depending on the legality of their situation in their host

- country and the duration of their stay there”, with the right of movement of asylum seekers more restricted than that of confirmed refugees.<sup>27</sup>
150. However, the protection afforded to refugees and asylum seekers would not apply once the application for asylum has been rejected. In such a case the international law relating to refugees ceases to apply, and the migrant becomes subject to the same laws regulating ordinary migrants. If they thus do not comply with the regulations for migration they will be considered as irregular migrants. However, as noted above, even in such cases the protections of international human rights law still apply to all migrants.
  151. Article 12 (3) of the African Charter reads: “Every individual shall have the right, when persecuted to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.” This includes a duty of non-refoulement on the State in which the person seeks asylum, prohibiting the State from returning an asylum seeker to their country of origin if there is a likely danger of persecution based on one of the grounds elaborated in Article 1 of the 1951 UN Convention. This shall be taken as the point of departure in considering whether there were violations of the rights as alleged by the Complainants.
  152. The African Charter in Article 2 provides that every individual is entitled to the enjoyment of the rights and freedoms in the Charter “without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”, and the Commission in its jurisprudence has held that the result is that all persons, be they nationals or non-nationals, have the right to the enjoyment of the rights and freedoms under the Charter.<sup>28</sup> However, this may be an over-simplification, as it is clear that there are limitations which may be placed on certain rights, based on a person’s status. For example, the right to vote and to stand for election are reserved for citizens of the State concerned. Limitations on freedom of movement are also imposed on persons who are held in detention for criminal acts. Thus while they have to be

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<sup>27</sup> <https://epthinktank.eu/2015/10/27/refugee-status-under-international-law/>.

<sup>28</sup> 159/96 Union interafricaine des droits de l’Homme, Fédération internationale des ligues des droits de l’Homme, RADDHO, Organisation nationale des droits de l’Homme au Sénégal and Association malienne des droits de l’Homme v. Angola, para 18.

reasonable, justifiable and proportionate, the State may impose limitations on certain rights, including the rights of non-nationals.

153. In the case of refugees, Article 26 of the 1951 Convention provides that States shall afford refugees the right to choose their place of residence within the territory and to move freely within the State. Article 28 obliges States parties to issue refugees travel documents permitting them to travel outside the State “unless compelling reasons of national security or public order otherwise require.” The position of asylum seekers was already discussed above, and allows States to impose certain limitations on their freedom of movement. Irregular migrants do not have the protections afforded to refugees and asylum seekers, however, the right to freedom of movement, including the right to leave one’s country as protected under Article 12 of the African Charter remains applicable in this case. This approach is also in line with the UN Convention discussed above.
154. Given this background, the Commission will proceed to analyse each of the Articles of the Charter alleged to have been violated. Disputes of fact will be considered as they arise.

### **Analysis of Article 2**

155. Article 2 of the African Charter provides that every individual is entitled to the enjoyment of the rights and freedoms in the Charter “without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”.
156. The Complainant submits that in addition to “national origin”, “immigration status” (considered in the broad sense to include refugees, asylum seekers and irregular migrants) is included under Article 2 as an “other status”, and that the Victims’ subjection to assault and adverse treatment is the result of this status. In this regard they note in particular the “attitudes underpinning the violence to which the group was subject, as revealed in the subsequent insults and derogatory statements, including that the protestors were ‘not human beings’.” In addition, they submit that there is also “apparent racist malice” in the treatment of the Victims, and also aver that the failure to



investigate this is in itself a violation. The Respondent State did not specifically comment on this allegation.

157. The Commission in *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe* defined discrimination as: “any act which aims at distinction, exclusion, restriction or preference which is based on any ground such as race, colour [...] or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms”.<sup>29</sup> The Commission has further held in the *Nubian* case that “non-discrimination is a general principle which permeates the enjoyment of all rights guaranteed in the Charter”.<sup>30</sup>
158. In *Kenneth Good v Botswana*, the Commission established the following comparator test to determine whether a violation of the right to non-discrimination occurred: (a) equal cases are treated in a different manner;<sup>31</sup> (b) a difference in treatment does not have an objective and reasonable justification; and (c) if there is no proportionality between the aim sought and the means employed.<sup>32</sup>
159. Before dealing with the possibility of “other status” under Article 2, it is possible to first confirm whether there was discrimination based on the existing grounds of race, ethnic group, colour or national origin through the harassment faced by some of the Victims.<sup>33</sup> On the facts, all of the Victims were Sudanese nationals. Furthermore, the Fourth Victim gave testimony about being verbally abused while being transported to the camps,

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<sup>29</sup> Communication 29/04 - ZLHR & IHRDA v Zimbabwe (2006) ACHPR para 91.

<sup>30</sup> Communication 317/06 - The Nubian Community in Kenya vs The Republic of Kenya, para 123.

<sup>31</sup> The different treatment should be less favourable, which is determined through a comparison between the alleged victim and another person, who does not possess the protected characteristic under Article 2, in a similar situation. Where, as in the case of refugees and asylum seekers there are reasonable limitations imposed on their rights through international law, this would not amount to discrimination. This distinction is further justified by the provision in the Convention on the Elimination of Racial Discrimination, 1965, which explicitly provides that “This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.” Clearly justifiable distinctions between nationals and non-nationals are allowed under international law.

<sup>32</sup> Communication 313/05- Kenneth Good v Botswana (2010) ACHPR para 219.

<sup>33</sup> Under European Law harassment as a form of discrimination is treated separately. See European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law* (2018) p64, at [https://www.echr.coe.int/Documents/Handbook\\_non\\_discrim\\_law\\_ENG.pdf](https://www.echr.coe.int/Documents/Handbook_non_discrim_law_ENG.pdf).

particularly including references to the protestors not being human, having had a “nice shower” from being blasted with a water cannon and being a “black spot in the square”.

160. Because harassment is in itself wrongful and may result in a violation of human dignity (dealt with under Article 5 below), under the European human rights system no comparator is required in such cases to prove harassment. Drawing inspiration from the European system through the application of Article 60 of the African Charter, the Kenneth Good test would thus not be applicable to the assessment of harassment amounting to discrimination on one of the listed grounds.<sup>34</sup> The reference to not being human is clearly explicitly racist, whereas the other examples also have implicit racist connotations of being dirty, unwelcome and objectionable.
161. This verbal abuse amounts to insulting language and can be characterized as hate speech which includes “offensive, derogatory, abusive and negative stereotyping remarks.”<sup>35</sup> The Commission finds that these statements thus amount to hate speech which is meant to impair the dignity of the Victims, in addition to being derogatory and abusive, and is thus discriminatory.
162. There is however, no indication on the facts that the verbal abuse was reported to the police or the authorities, and thus the failure to investigate does not constitute a distinct violation of this right.
163. In terms of whether there was discrimination based on another status, namely immigration status broadly, the Commission affirmed above that refugees, asylum seekers and irregular migrants each have a different status within

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<sup>34</sup> See the Handbook on European non-discrimination law, id, p66.

<sup>35</sup> See footnote 16 of Case of Delfi As v. Estonia 16/06/2015, decision of the Grand Chamber of the European Court on Human Rights which states that: “Hate speech” remains undefined. “There is no universally accepted definition of ‘hate speech’. The term encompasses a wide array of hateful messages, ranging from offensive, derogatory, abusive and negative stereotyping remarks and comments, to intimidating, inflammatory speech inciting violence against specific individuals and groups. Only the most egregious forms of hate speech, namely those constituting incitement to discrimination, hostility and violence, are generally considered unlawful” (Report of the Special Rapporteur on minority issues, Rita Izsák (A/HRC/28/64), Human Rights Council, Twenty-eighth session). According to the European Commission against Racism and Intolerance, hate speech is “the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatisation or threat with respect to such a person or group of persons, as well as the justification of such types of expression.

their host state. The Commission acknowledges it is possible that there may be discrimination against people because they are refugees, asylum seekers or irregular migrants, and affirms that these may constitute separate categories as “other statuses” under Article 2. This is also closely related to the right under Article 12 to leave one’s country, and there can thus be no discrimination against a person because they decide to exercise their right of movement.

164. If the Kenneth Good test is applied, in terms of the manner in which the removal was carried out, including the use of violence and the conditions to which the Victims were subjected in the camps, in order for the Commission to find that this was discriminatory, the Complainant would have to show that similarly placed persons were treated differently and that the difference in treatment resulted in a violation of their rights, based on their refugee, asylum seeker or migrant status, national origin or race, which does not have a reasonable justification and finally that there was no proportionality.
165. The first action to be assessed is the breaking up of the protest. In this case the refugees, asylum seekers and irregular migrants were treated in the same way, and there was thus no discrimination between the groups. Furthermore, since the Complainants have not given evidence as to how the State has gone about breaking up protests by Egyptian citizens, there is thus no way in which to confirm whether equal cases were treated differently and that they would have received more favourable treatment if they were Egyptian nationals. The Commission cannot find that their treatment in this regard was discriminatory on the basis of immigrant status.
166. The second action to be assessed is the detention and the conditions of detention. Under the provisions of the UN Convention in Articles 26 and 31(2), quoted above, the State was not acting outside of its power in removing the refugees, asylum-seekers and undocumented persons to the camps. This is confirmed in the decision of the Commission in *Institute for Human Rights and Development in Africa v Republic of Angola*, in which the Commission reaffirmed that “governments have the right to regulate entry, exit and stay of foreign nationals in their territories”.<sup>36</sup> It can thus not be said that the

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<sup>36</sup> Communication 292/04: Institute for Human Rights and Development in Africa / Angola Para 79.

differentiated treatment based on refugee status in being taken to the camps instead of the protest simply being ended, amounted to discrimination, as it is specifically provided for under international law as falling within the discretion of a host State, and thus has a rational basis.

167. Furthermore, according to the facts, while the card-carrying refugees were released the following day, once their status was confirmed, asylum seekers and irregular migrants were held in detention for a longer period. This distinction in treatment does not, however, amount to discrimination, because of the principles of refugee law discussed above, which allow limitations on freedom of movement of irregular migrants and asylum seekers and provides for more freedom of movement for refugees. It thus has a rational justification grounded in law. In relation to the time which they were kept in the camps, on the facts the protestors who were documented refugees were released the next day following their arrest, once their status had been confirmed, and all other persons were released once their status had been confirmed. It can thus not be said that the detention was disproportional, and the test for discrimination is thus not met.
168. In relation to the conditions under which the Victims were held in detention, there is no indication that there was a distinction in treatment between the three groups, nor is there any evidence provided that conditions of detention for Egyptian detainees are any different, and there is thus no evidence of discriminatory actions.
169. The Commission thus finds a violation of the right to non-discrimination only in relation to the verbal abuse suffered by the Fourth Victim and other Victims at the hands of law enforcement officers.

#### **Analysis of Article 4**

170. Article 4 of the African Charter provides that human beings are inviolable, that every human being is entitled to respect for his life and the integrity of his person and that no one may be arbitrarily deprived of this right. This is elaborated in the Commission's General Comment No. 3 on the Right to Life, which in the introduction provides that:

“The Charter imposes on States a responsibility to prevent arbitrary deprivations of life caused by its own agents, and to

protect individuals and groups from such deprivations at the hands of others. It also imposes a responsibility to investigate any killings that take place, and to hold the perpetrators accountable.”

171. Specifically in the context of law enforcement, the General Comment provides that: “The primary duty of law enforcement officials – meaning any actor officially tasked with exercising a law enforcement function, including police, gendarmerie, military or private security personnel – is to protect the safety of the public. The State must take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents, including but not limited to the provision of appropriate equipment and training as well as, wherever possible, careful planning of individual operations.”<sup>37</sup>
172. Furthermore, “[f]orce may be used in law enforcement only in order to stop an imminent threat”<sup>38</sup> of death or serious injury. Force in this context includes deadly force but also any other lesser form, and while preference should be given to weapons less likely to cause death or serious injury, even such weapons can cause death or serious injury if they are abused.<sup>39</sup> Because the right to assemble and demonstrate is integral to democracy and human rights, the General Comment provides that “[e]ven if acts of violence occur during such events, participants retain their rights to bodily integrity and other rights and force may not be used except in accordance with the principles of necessity and proportionality.”<sup>40</sup> The Commission has held that “[a]rbitrary killings committed or tolerated by the State are a matter of utmost gravity”.<sup>41</sup>
173. The Egyptian Police Act 109 of 1971 in Article 102 stipulates the conditions under which police can use force, namely that it must be “necessary as needed to carry out one’s duty, be the only means of performing such duty in case of an assembly or demonstration that threatens public security and only after warning those concerned”. In relation to the necessity requirement, the provision 3 (c) (ii) of the Commission’s Guidelines on the Conditions of

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<sup>37</sup> Para 27.

<sup>38</sup> As above.

<sup>39</sup> Para 30

<sup>40</sup> Para 28

<sup>41</sup> Para 5 of the General Comment No. 3 on the Right to Life.

Arrest, Police Custody and Pre-Trial Detention in Africa, provides that use of firearms should be limited to where a person presents “an imminent threat of death or serious injury; or to prevent the perpetration of a serious crime involving grave threat to life.” The provision of the Police Act with its focus on necessity to maintain *public security* therefore falls short in a serious manner of these stringent grounds of necessity of *grave* threat to life or *imminent* threat of death or serious injury. The Act further does not engage with the proportionality aspect of the use of force. This is another serious shortcoming from a human rights perspective, since it allows a wide discretion to the police in the type of force to be used, and does not account for the right to bodily integrity or the right to life.

174. While the number of deaths is not clear, the estimates provided by the State at twenty-seven deaths and the Complainants of “at least 30 deaths” are close enough to not constitute a vast disagreement on the facts. However, the Complainants and the State have different versions of the cause of death. The Complainants aver that the deaths were “caused by the disproportionate and deliberate use of force by riot police on unarmed civilians”, that “there is no evidence that the people in the park constituted any threat to the police officers or public safety” and further that “there is no evidence that the police operation was planned with a view to minimizing incidental loss of life”. The first Victim, who lost both his wife and child during the protest, indicated that when he identified their bodies at the mortuary he noted injury marks on their bodies, and that the death certificates indicated death from asphyxia and injuries.
175. The State on the other hand states that the incidents occurred because the protestors resisted and confronted the forces charged with transferring them to another shelter equipped for such a purpose as well as “their pushing and running”, resulting in deaths and casualties among the protestors and casualties among the police. The State further asserts that the protestors threw empty bottles, pans, big wooden sticks, gas cook bottles and fire balls towards the troops and showed violent resistance against the troops during the process of dispersal. According to the State the report of the General Prosecution Authority following autopsies of the deceased determined that death was due to asphyxia, and the injuries sustained were those generally caused by falling and being trampled on.

176. The Parties agree that the death was as a result of asphyxia and injuries. The first question for determination is whether the injuries causing death were sustained as a result only of being trampled on during the stampede, or also resulted from direct use of force by the police. According to the State the autopsy reports determined that the injuries were as a result of falling over and being trampled on. However, the State did not submit any evidence to support this assertion. On the other hand, the Complainant submits that the first Victim was informed by another protester that he saw the Victim's wife and son beaten to death, and all the Victims also testified that they were beaten by the police armed with batons and sticks. It is a well-established principle of the Commission's jurisprudence that where a human rights violation is asserted by a Victim, the burden of proof is on the State to disprove it.<sup>42</sup> In this case the State has failed to discharge the burden of proof, and the Commission finds that the deaths were at least partially as a result of deliberate use of force by riot police.
177. The next question is whether the use of force by the police was necessary and proportionate. The "resort to force must only be made if and when other, less harmful means of de-escalation have failed" and should thus be viewed as an exceptional measure.<sup>43</sup> On the one hand the sit-in protest was a peaceful assembly. The Commission, on the other hand, takes note of the length of the sit-in, the inconvenient location, and the various and drawn out engagements and negotiations between the State and the protesters, which did not result in an agreement to end the protest. However, before resorting to forceful removal, there are other, less harmful steps which the State could have taken to end the protest.<sup>44</sup> The Commission thus finds that the State had not exhausted less harmful ways of de-escalation, and that the use of force was thus not necessary or unavoidable.

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<sup>42</sup> See ACHPR/59/91, ACHPR/60/91, ACHPR/64/92, 68/92, 78/92, ACHPR/87/93, ACHPR/101/93; Communication 48/90-50/91-52/91-89/93 Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan, para 52.

<sup>43</sup> Para 20.5 of the Guidelines for the Policing of Assemblies by Law Enforcement officials in Africa.

<sup>44</sup> For example, following the attempts at mediation, the State could have given a deadline to the protesters by which they must disperse. In addition, if that failed, the police could have been deployed, but without blocking people in, and the protesters could have been given the order to disperse during the daylight hours and be given a reasonable period to remove themselves from the park.

178. A second question is whether the police, through insufficient planning of the operation, could be held accountable for the deaths even in the cases where death was caused solely by trampling as well as asphyxiation, based on the State's duty to protect. As provided in the General Comment, the State has a duty to take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents, including careful planning of individual operations. The Commission's Guidelines for the Policing of Assemblies by Law Enforcement officials in Africa further provide that priority should be given to de-escalation tactics and that "[d]e-escalation tactics must also take into account the potential adverse influence that the visible escalation of law enforcement tactics can have on the way in which an assembly develops".<sup>45</sup>
179. The State has submitted that there was a lot of chaos in the park due to it being cramped by the protesters and their families as well as all their belongings. In addition, it had not contested the assertion by more than one of the Victims that when they enquired about the police presence in the park during the day, they had been told it was for their protection, as a counter-protest against them was being planned. The police then waited until the middle of the night to tell the protesters that they would immediately be removed, but would not provide any guarantees as to where they would be removed to. It should come as no surprise if under such circumstances the protestors would insist on receiving information on where they would be taken.
180. Furthermore, by cordoning off the area and not providing any means of escape, the police should have foreseen that this may result in people resisting, and attempting to defend and protect themselves. This is also contrary to a de-escalation strategy.<sup>46</sup> By using water cannons which not only served as a warning but which also caused pain and confusion in the crowd, the law enforcement tactics were clearly escalated. When the State moved in to "end the protest", they were aware that there were women and children among the protesters. It is also not clear from the submissions of the State whether there was any proper chain of command which ensured that the rounding up of the protesters happened in an orderly fashion. While the weapons used by the police were of a lesser fatal nature than firearms, it is

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<sup>45</sup> Para 20.1.

<sup>46</sup> Para 20.4 of the Guidelines for the Policing of Assemblies by Law Enforcement officials in Africa.



clear from the evidence of the Victims that its use was indiscriminate, resulting in abuse. For all these reasons, the Commission finds that even in instances where death resulted from asphyxiation and trampling only, the State still bears the responsibility for this as they had not taken sufficient steps to prevent such a situation from developing and protect the lives of the protesters.

181. The third duty in relation to the right to life is the duty to investigate killings. The General Comment provides that the State must take steps to “conduct prompt, impartial, thorough and transparent investigations into any such deprivations that may have occurred, holding those responsible to account and providing for an effective remedy and reparation for the victim or victims, including, where appropriate, their immediate family and dependents”.<sup>47</sup>
182. The Complainants allege that to date, no attempts have been made by the Egyptian authorities to bring to account any of the law enforcement officials responsible for the human rights violations which occurred in the park, and that no investigation or independent inquiry into the events has been carried out. While noting that there is no responsibility on affected persons to request for an inquiry as it should be triggered automatically by the events, they refer to three separate occasions on which petitions were made, first on behalf of all the protesters and thereafter on behalf of specific persons. The Complainants allege that the initial case was declared closed on the basis that the security officials responsible for the violations had not been identified, and that under Egyptian law there is no description of the alleged crime of protestors losing their lives while resisting riot police. The further submissions were not considered since the specific people had not been identified in the original request which had been brought on behalf of “all the protesters affected”.
183. The State in response asserts that the allegation that Egypt had failed to conduct a proper and impartial investigation is unsound. They state that police officers opened an official enquiry into the deaths, injuries and damage to public property and that the evidence was sent to the GPA. According to the State the report of the GPA concluded that the charges of premeditated

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<sup>47</sup> Paras 7 & 17 of the General Comment No. 3 on the Right to Life.

murder and use of brutality against the Egyptian police would be dropped, “because the perpetrator is not identified according to the testimony of the victims who did not name the perpetrator” and instructed the police to continue to investigate the matter internally.

184. The Respondent State in addition submits that the deaths were attributed to stampede and pandemonium. In response to the Complainant’s prayer for compensation, the Respondent State indicates that Victims can resort to the Courts to claim compensation for harm suffered in accordance with the rules of criminal, civil and administrative liability, and that the Public Prosecutor’s statement that no grounds exist for a criminal prosecution because the culprit is unidentified does not constitute an impediment for the Victim to filing for a reinvestigation if fresh evidence emerges or in a civil claim.
185. Firstly, the Commission has to note that particularly in relation to the right to life, the duty is on the State to initiate investigations and ensured that they are carried through. There is thus no duty on the Victim to institute such proceedings. Nevertheless, in this case the Complainants had in fact made various attempts to follow legal procedures, but the process did not result in effective remedies. Additionally, while nothing prevents the Victims from instituting civil proceedings, these can never replace or be considered a substitute for a criminal process.
186. The steps taken by the State should be assessed against the need for prompt, impartial, thorough and transparent investigations into the killings. While the investigations undertaken by the GPA are a positive step, it falls short of that which is needed to prevent and punish extra-judicial killings. The first shortcoming is the finding at the end of the inquiry that because the specific culprits could not be identified, the charges would be dropped. The Commission’s Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa provide that “[l]aw enforcement agencies must establish a clear, transparent and single command structure for the policing of assemblies” and that “operational commanders must be held responsible if they knew, or should have known, that law enforcement officials under their

command resorted to the unlawful use of force or firearms, and if they did not take all measures to prevent, suppress or report such unlawful activity".<sup>48</sup>

187. The Commission acknowledges that it may not be possible to identify the specific police officers who committed the violations. Further it is inappropriate to expect the protesters to identify the specific perpetrators of acts that happened under such chaotic circumstances. However, failure to identify the specific persons responsible does not mean that the investigation should be closed. The Commission finds it hard to envisage a situation where an operation of this magnitude would be undertaken without operational commanders directing the proceedings and the Complainants make mention of orders being given by a specific officer. Where it is not possible to identify the perpetrators in a command structure, such as the police, the commander who issued the orders should be held accountable. Failure to do so allows total impunity to ensue, and violations to go unpunished.
188. The second shortcoming in the process followed by the GPA is the recommendation that the police should continue to investigate the matter internally, after the official investigation was closed. The Commission in *Communication 48/90-50/91-52/91-89/93 - Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan* held that:

Constituting a commission of the District Prosecutor and police and security officials [...] overlooks the possibility that police and security forces may be implicated in the very massacres they are charged to investigate. This commission of enquiry, in the Commission's view, by its very composition, does not provide the required guarantees of impartiality and independence.
189. Similarly, in the current case, leaving violations as grave as killings to internal investigation, clearly does not provide the required guarantees of impartiality and independence of process. There is also no indication on the side of the State as to any steps which had been taken to undertake such an internal investigation and if it had been done, what the conclusions were and whether such findings had been made public.

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<sup>48</sup> Para 5.1 and 5.2.

190. The Commission thus finds that there was a failure by the State to undertake prompt, impartial, thorough and transparent investigations into the killings. Based on the foregoing, the Commission therefore finds a violation of Article 4 on the right to life.

### **Analysis of Article 5**

191. Article 5 of the African Charter provides that every individual shall have the right to the respect of the dignity inherent in a human being, and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment shall be prohibited.
192. The Complainants submit four arguments to support their submission that the State had violated the human dignity of the Victims and ill-treated them. Firstly, they argue that in the park and during their subsequent detention the Victims were under the control of the State, and suffered physical harm and mental anguish. Secondly, they assert that incommunicado detention can amount to inhuman and degrading treatment *per se*. Thirdly, they submit that the way in which the State dealt with the bodies of the deceased, including in providing access to the family, release and burial amounted to inhuman and degrading treatment and lack of respect for the dignity of the families. Finally, they submit that the failure of the State to properly inquire into the treatment of the Victims at the hands of the police and prosecute the perpetrators also resulted in a violation of Article 5.
193. In relation to the first argument, the Complainants refer to the level of force used by the police to break up the protest and force protestors onto the buses, including assault, spraying with water cannons, separation from family, verbal abuse and that they were then taken into unexplained and indefinite detention. They state that because through all of this they were under the control of the State, the onus is on the State to prove that their physical and mental suffering was not caused by the State. The Commission already found above that the State had not provided sufficient evidence to disprove the submission that some victims were assaulted by police. The State has further not made any submissions denying the separation of families, verbal abuse, or that the location of detention was undisclosed, and they confirmed the use of water cannons. The Commission should now determine whether the

treatment amounted to a violation of dignity or inhuman or degrading treatment.

194. Under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “cruel, inhuman or degrading treatment or punishment” include lesser acts, “which do not amount to torture as defined in article I,<sup>49</sup> when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>50</sup> Under the definition of torture there is a limitation, which also applies here, namely that “[i]t does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”
195. The Commission above found that the use of force by the police in breaking up the protest was unjustifiable, and thus the treatment cannot be justified as being a consequence of lawful actions/sanctions. There is further no requirement under the definition for cruel, inhuman or degrading treatment above which suggests that the person concerned must have been under control of the State, only that it must be “committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. It is thus not necessary to determine whether the people in the park were under the control of the State.
196. The Commission in *Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt*<sup>51</sup> quoted the European Court’s test for ill-treatment, as having to attain “a minimum level of severity”, taking into account (i) the duration of the treatment; (ii) the physical effects of the treatment; (iii) the mental effects of the treatment; and (iv) the sex, age and state of health of the victim. The European Court further held that: “The notion of inhuman treatment covers

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<sup>49</sup> Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

<sup>50</sup> Article 16.1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>51</sup> Communication 323/06, para 193.

at least such treatment as deliberately causes severe suffering, mental or physical which in the particular situation, is unjustifiable".<sup>52</sup> The Commission in the *Egyptian Initiative* case held that assault of protesters by the police, including being hit, sexually assaulted, insulted, and slapped "amounted to physical and emotional trauma. The treatment also has physical and mental consequences obvious from the injuries sustained."<sup>53</sup>

197. In the present case, the Victims were also assaulted and verbally abused, and in addition were separated from their families and taken to undisclosed places of detention. Considering that the Victims were both male and female, and ranged from all ages, both children and adults, as well as the additional mental effect of losing their families in the confusion, and the physical wounds sustained by the Victims, the Commission cannot but find that in this case the treatment amounted to ill-treatment falling under the violations envisioned in Article 5.
198. In relation to the treatment of the protesters in detention, the Complainants and the State differ on the facts. While the State asserts that the detainees were provided with residency, food and medical care, the Complainants assert that detainees were denied essential medical treatment, food, access to information regarding family members who were also arrested and taken to different locations and access to lawyers or the NGOs representing them.<sup>54</sup> The State submits that UNHCR staff were allowed to visit those who remained in the shelters. There is agreement between the State and the Complainants that the card carrying refugees were released on 31 December, the day after the incident in the park, and that by 11 February 2006 all remaining detainees had been released.
199. The arguments on lack of access to medical care, food, etc. appear to be based on the evidence of the Victims. On the evidence of the Victims they were provided with some medical treatment,<sup>55</sup> although at times insufficient. It can thus not be said that they were denied medical treatment. In addition, the

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<sup>52</sup> Combined Cases of Denmark v. Greece, Norway v. Greece, Sweden v. Greece, and Netherlands v. Greece.

<sup>53</sup> Para 201.

<sup>54</sup> This is corroborated by the evidence from Victims Three, Five, Six and Seven above.

<sup>55</sup> The Second Victim was given a bandage for her head wound; the Third Victim was taken to hospital for treatment of his eye and the head injuries sustained by the Seventh Victim were stitched.

- Victims who testify on access to food indicate that it took between twelve and fourteen hours from the time of their arrest until they were provided with food.<sup>56</sup> While this is a long time, it cannot be said that they were denied food. The Commission finds that this treatment thus does not meet the severity threshold under Article 5.
200. With regard to the submission that they were denied access to information regarding family members, it is clear that a person separated from their family in the night and who has no information on where they are or even whether they are alive, will be suffering considerable anguish. However, it should also be considered whether the information was withheld intentionally, or whether, given the chaos in which the removal took place, as well as the number of people in custody (more than two thousand), it is realistic to expect that the State would be able to inform each person about the whereabouts of their family in the one day period before most of them were released.
201. Yet, the Commission held in *Curtis Doebbler v Sudan*, that: "ultimately whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case. The African Commission has stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses."<sup>57</sup> Therefore, given that the separation of families was as a result of the process followed by the State in removing the protesters; the trauma caused by the separation; as well as the fact that the State had not responded to this submission; and the need for a wide interpretation, the Commission finds that this amounts to inhuman treatment.<sup>58</sup>
202. The Complainant further submits that the detainees were denied access to lawyers. The State does not refute this claim. However, the right to defence including the right to be defended by counsel of his choice is a separate right, which is protected under Article 7 of the Charter. The Commission does not,

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<sup>56</sup> See submissions of Fifth and Sixth Victims.

<sup>57</sup> Para 37.

<sup>58</sup> See also 48/90-50/91-52/91-89/93 Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan.

however, see how this amounts to cruel, inhuman or degrading treatment, and the Complainants had not elaborated on the argument. The Commission can thus not make a finding of a violation of Article 5 in this regard.

203. In relation to the second argument that incommunicado detention can amount to inhuman and degrading treatment the Commission wishes to dwell for a moment on the definition of incommunicado detention. According to the Merriam-Webster's Law Dictionary, incommunicado is defined as being "in a situation or state not allowing communication". The Association for the Prevention of Torture and Human Rights Watch give a broader definition, including cases where "the detainee has some contact with judicial authorities but cannot communicate with family, friends, independent lawyers or doctors", under incommunicado detention.<sup>59</sup> In the current case, while not being given access to their families, lawyers or in some cases medical services, the detainees did have access to UNHCR staff. Given that the mandate of UNHCR is the protection of refugees, that it is an independent organization, and despite the tension between the UNHCR office in Cairo and these specific refugees, access to the UNHCR would mean that the detention does not constitute incommunicado detention. The second argument is thus rejected on the facts of the case.
204. Thirdly, the Complainants submit that the delay in releasing the bodies of the Victims, including the wife and son of the First Victim; being denied access to the bodies of his loved ones, which caused the First Victim acute psychological suffering; and being unable to provide them with appropriate burial in accordance with his culture and traditions, amounted to inhuman and degrading treatment and lack of respect for the dignity of the First Victim and a violation of Article 5. The State made no submission in relation to the submission on access to and release of the bodies. In *Campbell and Cosans v UK*, the European Court stated that, "treatment' itself will not be 'degrading' unless the person concerned has undergone - either in the eyes of others or in his own eyes - humiliation or debasement attaining a minimum level of severity". The Commission is of the view that not being able to access the bodies of your loved ones would result in a feeling of helplessness, and would amount to feelings of severe humiliation. The Commission thus finds

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<sup>59</sup> See [https://www.apt.ch/content/files\\_res/secret\\_detention\\_apt1-1.pdf](https://www.apt.ch/content/files_res/secret_detention_apt1-1.pdf); Human Rights Watch, *Setting an Example: Counter-terrorism Measures* (January 2005), p. 23.



that denial of access to the bodies of loved ones has resulted in a violation of Article 5.

205. In relation to the burial, there are three aspects to be considered, namely the cost, timeliness and the location of the burial. In relation to the price imposed for the release of the bodies (USD 450), the Complainants did not give any further information as to the reason why this amount was charged, what was covered by this price and why they consider it to be exorbitant. The Commission is thus not able to find that this constitutes inhuman and degrading treatment. On the location aspect, the Commission submits that refugees, because of the status which they had been granted in their host country, are not supposed to travel back to their country of origin, as the basis for the granting of refugee status is that they are unable to return.
206. Thus in relation to the assertion of the Complainants that the first Victim was not allowed to take the bodies to Sudan for burial, the Commission finds that the request from Sudan that the deceased be buried in Egypt is not unreasonable, and does thus not amount to a violation of Article 5. However, the Commission notes from the submissions of the Complainant that timely burial is an important aspect of the Muslim religion and culture, and thus agrees that this delay would have resulted in anguish for the First Victim, and other similarly placed Victims, and is a violation of Article 5.
207. Finally, the Complainants submit that the failure of the State to properly inquire into the treatment of the Victims at the hands of the police and prosecute the perpetrators also resulted in a violation of Article 5. The Commission's Guidelines and Measures for the Prohibition of Torture, Inhuman and Degrading Treatment or Punishment in Africa (the Robben Island Guidelines) in Article 19 provides that "[i]nvestigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and effectively." As was noted above, the State submits that the police opened an official enquiry into the deaths, injuries and damage to public property and that the evidence was sent to the GPA, but that the investigation was eventually closed since they failed to identify the perpetrators.

208. It is a well-known maxim in law that where there is a right there must also be a remedy. As the Commission held in *Communication 295/04 - Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe*, "Human rights law and the international law on State responsibility require that individuals should have an effective remedy when their rights are violated, and that the State must provide reparations for its own violations. States must ensure that victims' families are able to enforce their right to compensation through judicial remedies where necessary."<sup>60</sup> Given the finding above in relation to the investigations into the killings, the Commission finds that the investigations into the other violations were also not sufficient or non-existent. Particularly, there is no evidence given of investigations in relation to the separation of the families.
209. For these reasons, the Commission finds that the State had violated its obligations in relation to Article 5 of the Charter.

#### **Analysis of Article 6**

210. Article 6 of the Charter reads: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".
211. The Complainants aver that the random arrest and arbitrary detention of Victims in police training camps and prisons in and around Cairo, with no specific reasons given for the detention, being unable to contact their families and being denied information about their whereabouts and not having access to lawyers or a court to determine the lawfulness of their detention, amounted to a violation of Article 6.
212. The submissions of the State are set out under the discussion on Article 5 above, and include that the removal was carried out to provide care to the persons after the breakup of the protest, and that persons with legal residence permits, women and children and Sudanese from Darfur were released on the day following the arrest. In relation to those remaining in detention, they

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<sup>60</sup> Para 127.

were granted visits from UNHCR and were released on 11 February 2006 following the finalization of the investigations into the occurrences by the General Prosecution Authority. The State in addition alleges that the Regional Director of the UNHCR made a statement in which he indicated that the protestors included persons who do not meet the refugee criteria as well as illegal migrants and that he was concerned about the security of his staff members.

213. As discussed above, under international law, governments do have a right to detain non-citizens for migration-related reasons in certain limited circumstances, but only if the detention complies with international and regional human rights standards related to the restriction of movement.<sup>61</sup> The principles which apply in relation to the detention of asylum seekers include the principle of national sovereignty, the right to seek and enjoy asylum and the right to be protected against arbitrary and unlawful detention. It is within the prerogative of the State to decide where refugees and asylum seekers may reside, and it can confine their movement, particularly in cases where their status has not yet been ascertained.
214. UNHCR has further held that “[i]f necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents [...] or to protect national security or public order”.<sup>62</sup> In addition, the case law of the UN Human Rights Committee provides that detention of non-citizens may be arbitrary under the International Covenant on Civil and Political Rights if “it is not necessary in all the circumstances of the case and proportionate to the ends sought.”<sup>63</sup>

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<sup>61</sup> International Detention Coalition ‘What is immigration detention? And other frequently asked questions’ <https://idcoalition.org/aboutus/what-is-detention/>. In its Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (1999), UNHCR defines detention as follows: “Confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.”

<sup>62</sup> Detention of Refugees and Asylum-Seekers No. 44 (XXXVII) – 1986 Executive Committee 37th session. Contained in United Nations General Assembly Document No. 12A (A/41/12/Add.1).

<sup>63</sup> A. v. Australia. (1997) 560/1993; Danyal Shafiq v. Australia (2006) 1324/2004.

215. In relation to the assertion of the Complainant that the arrest was “random” and the detention “arbitrary”, the Commission has to determine whether the arrest was necessary, reasonable, and proportionate to a legitimate government objective. One of the grounds given by the State for why the people were rounded up is the belief on the part of the State, based on the declaration by UNHCR, that the protestors included persons who do not meet the refugee criteria as well as illegal migrants. This is supported by the actions of the State, which included the release the following day of all people with legal residence permits and persons from Darfur, a region which at the time was known to be in crisis. Given that initial identification is one of the circumstances in which detention may be justified, and that women and children, in addition to people with legal residence permits and persons from Darfur were released the following day, the Commission finds that taking the protesters into detention was not arbitrary, as it served a legitimate government purpose and was not disproportionate.
216. Besides the proper justification of detention, the right to liberty also includes procedural components. However, immigration detention proceedings are often accompanied by fewer procedural safeguards than criminal proceedings, since it is considered to be an administrative procedure. The main procedural safeguards include the right to review of detention; and right to communicate and consult with legal counsel of his choice. According to the UN Body of Principles (§13), “[any] person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.” However, the UNHCR document on ‘Detention of Refugees and Asylum-Seekers’ does not require legal counsel, but merely that “refugees and asylum-seekers who are detained be provided with the opportunity to contact the Office of the United Nations High Commissioner for Refugees or, in the absence of such office, available national refugee assistance agencies.”
217. The Commission finds that not being able to contact their families is not a violation of the procedural rights under Article 6, as it does not affect their liberty or security. The remaining arguments of the Complainants is that the Victims were not given specific reasons for their arrest nor were they given

access to lawyers or a court to determine the lawfulness of their detention. In *Abdolkhani and Karimnia v. Turkey*, a case of the European Court of Human Rights, the court held that because the reasons for their arrest was not communicated to them, the right to review was effectively denied, and found a violation under Article 5 of the European Convention on Human Rights. This clearly shows that the right to reasons for the arrest is not an independent right, rather it is related to the right to review, and is only a violation if it results in the denial of effective review. As noted above, in the case of detention of asylum-seekers and refugees, international standards do not require access to a lawyer or a court for purposes of review, only that they be granted access to UNHCR, which was in fact done in the present case. Commission thus finds that being granted access to UNHCR is sufficient and that they did not in addition have to be provided with legal counsel, since the UNHCR could have sufficiently supported them in any administrative review processes. The Commission thus finds that there was no violation of Article 6.

#### **Analysis of Article 11**

218. The African Charter provides in Article 11 that “[e]very individual shall have the right to assemble freely with others.” It further contains an internal limitation, namely that “the exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.”
219. The Complainants submit that they were exercising this right by way of peaceful sit-in in the square, and that the onus is on the Respondent State to prove that interference with this assembly was justified, based on the limitations on this right in the Charter, through providing evidence to demonstrate that the protestors posed a threat to national security or the other interests enumerated as justifying limitations under the Charter. In addition they argue that the manner of their removal, the level of force employed against protestors, the deaths and injuries sustained and the subsequent detention and treatment were unnecessary and disproportionate limitations on the right to assemble.

220. The Respondent State in return submits that after three months it was left with no option but to break up the unlawful sit-in protest for the reasons set out in paragraph 116 above. In addition they make reference to illegal actions by the protestors who acted in contravention of public order and public morality.<sup>64</sup> The State's justification for the manner in which the protest was broken up has been sufficiently elaborated in discussions above.
221. The facts which are agreed on between the parties is as follows: the protestors were allowed to have a sit in protest for three months, during which there were negotiations between the protesters, the State and UNHCR, but they were not able to reach a resolution to the disagreement. The State then decided to end the sit-in protest and the police were deployed to end the protest and remove the protesters from the park. During the removal process, people were injured and some succumbed to their injuries.
222. It is clear from this exposition that for three months the Victims were allowed to exercise the right to assemble peacefully, without any interference from the State in this right. This tolerance by the Respondent State should be commended, particularly given, as submitted by the State, that the park in which the sit-in took place was inside one of the main squares in Cairo where many embassies, banks, hospitals and different financial and commercial activities are located; the various attempts made by the State to bring the protest to a peaceful conclusion through arranging talks and mediations; and additionally the various calls by UNHCR to end the protest.
223. There are thus two issues for determination which remain: (a) was the breakup of the protest justified in terms of the reasonable limitations under Article 11 and (b) was the manner in which the protest was broken up in line with the right to assemble as protected in Article 11.

**(a) Was the breakup of the protest justified?**

224. The Charter provides that the restrictions on the right to peaceful assembly must be provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others. The Commission had in its jurisprudence held that where the Government

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<sup>64</sup> Including involvement in quarrels, public alcohol consumption and similar misdemeanors.

cannot show that the reasons for limiting protests “had any foundation in the ‘interest of national security, the safety, health, ethics and rights and freedoms of others’”, this resulted in a violation of Article 11.<sup>65</sup>

225. The Commission’s Guidelines on Freedom of Association and Assembly in Africa further provides that “[a]ny limitations imposed shall be in accordance with the principle of legality, have a legitimate public purpose, and be necessary and proportionate means of achieving that purpose within a democratic society, as these principles are understood in the light of regional and international human rights law.” In addition, “The law shall not allow assemblies to be limited based on overly broad or vague grounds.” Furthermore, while “[c]onduct of an assembly will often temporarily hinder, impede or obstruct the activities of third parties, and may have economic consequences; the assembly shall not be dispersed or prevented on such grounds”. Finally, according to the Commission’s Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, the dispersal of assemblies should be a measure of last resort.
226. As rightly pointed out by the Complainants, the onus is on the State to prove that the limitation imposed on the assembly, in this case ending the assembly, was justified. In this case the State has made it clear that every effort had been made to end the protests through mutual agreement, but that because of the high demands by the protesters, they were not able to reach an agreement. Thus, given that the sit-in protest had been ongoing for several months and there was no indication that it would be resolved, the State was left with no option but to end the protest. They thus meet the requirements of necessity and measure of last resort. In addition, while assemblies may “temporarily hinder, impede or obstruct the activities of third parties” it cannot be said that three months is a reasonable time for the activities of others to be impeded by a protests. Furthermore, the State gives reasons related to the ongoing health, security and social hazards, as well as a park being an inappropriate place to live, as further justification for ending the sit-in. The Commission is of the view that ending the sit-in was the only proportionate means of protecting

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<sup>65</sup> Communication 54/91-61/91-96/93-98/93-164/97\_196/97-210/98 Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme / Mauritania, para 111.

these interests. The Commission thus finds that the State had proved that they were justified in ending the protest.

**(b) Was the manner in which the protest was broken up in line with the right to assemble?**

227. The Commission in its Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (the Guidelines) gives detailed and clear guidance as to what is expected of police officials in ending or dispersing a protest, with the following being the main tenets:

- If assembly participants are generally behaving peacefully, law enforcement officials must avoid the use of force to disperse the assembly;
- Where participants in an assembly are acting non-peacefully or in violation of the law, law enforcement officials should use, to the extent possible, communication and de-escalation strategies and measures for the containment of individuals committing or threatening violence or, if necessary and proportionate, the arrest of individuals who are committing or preparing to commit violent acts, before attempting to disperse an assembly;
- When the dispersal is unavoidable, lawful, proportionate and necessary, law enforcement officials must clearly communicate an intention to disperse the assembly to participants, and provide participants with a reasonable opportunity to disperse voluntarily, before taking any action. Force must never be used against peaceful demonstrators who are unable to disperse from the assembly;
- The authority to issue an order for dispersal should be limited to operational commanders who are present at the operation or to well-informed officers on the ground.

228. In relation to de-escalation, the Guidelines provide that:

- All action taken by law enforcement officials during the management of assemblies where participants are not acting peacefully must satisfy the requirements of legality, necessity, proportionality, freedom from discrimination and equality before the law, and accord with regional and international human rights standards;
- Crowd control strategies, such as containment, should be implemented with caution, be lawful and proportionate, and never amount to collective



detention. Containment tactics must allow for exit routes for assembly participants and observers who want to leave the assembly;

- Resort to force must only be made if and when other, less harmful, means of de-escalation have failed;
- De-escalation tactics must also take into account the potential adverse influence that the visible escalation of law enforcement tactics can have on the way in which an assembly develops.

229. Finally, in relation to the use of force, the Guidelines stipulate that:

- The use of force is an exceptional measure. In carrying out their duties, law enforcement officials shall, as far as possible, apply non-violent methods before resorting to the use of force and firearms. Force and firearms may only be used if other means of achieving a legitimate law enforcement objective are ineffective or unlikely to be successful. Law enforcement officials must, as far and for as long as possible, differentiate between peaceful assembly participants and those who engage in violent acts;
- Where the use of force is unavoidable, law enforcement officials must minimise damage and injury, respect and preserve human life, and ensure at the earliest possible moment that assistance is rendered to any injured or affected person and that their next of kin is notified.

230. The Complainants submit that thousands of riot police and plain clothed policemen arrived at around 19:00 and informed them that they were there for their protection against a counter-protest. However, according to the State security forces arrived at the location at around 00:30. Either way, there is no indication from either Party that there was any prior warning that this was the particular night during which the protesters had to leave the park. There is agreement between the Parties that between midnight and 01:00 on 30 December 2005 the police had gathered around the park, and informed the protesters that they had to leave. According to one Victim, they were told that they had “five minutes” to get onto the waiting buses and be taken to an undisclosed location. The Complainants submit that the protesters were not informed of where they would be taken, and the State does not deny this assertion.

231. There is further agreement that from between 02:00 and 02:30 in the morning, the police started firing water cannons and interspersed this with orders to

- leave the park. However, the Parties are also in agreement that the dispersal occurred under a security cordon around the location, which prevented the protestors from infiltrating into the area. Therefore, there was nowhere for the protesters to go in leaving the park apart from the waiting buses. According to the Complainants because there was no guarantee from UNHCR on where they would be taken to, the protesters refused to board the buses provided. The Respondent State alleges that protestors started instigating others among them not to comply with the instructions to disperse and started chanting hostile slogans.
232. According to the State, at 04:45 some of the protestors threw empty bottles, pans, big wooden sticks, gas cook bottles and fire balls towards the troops, resulting in the troops having to end the protest, and according to the Complainants by 05:00 riot police armed with sticks and truncheons charged into the park and attacked the protesters, forcibly removing them from the park. The Complainants aver that gas canisters were also used to control the crowd. In all probability, given that there was nowhere for them to go apart from onto the buses, and being drenched by the water cannons, it is possible that the protesters had taken up any makeshift weapons at their disposal to defend themselves.
233. The Commission is of the view that the tactics employed by the riot police, including starting negotiations in the middle of the night, blasting peaceful protesters with water cannons to disperse them, not providing any means of escape, not giving a reasonable time for people to pack up their belongings in a place where they had lived for three months, all resulted in an escalation of the situation rather than a de-escalation. The Commission is of the view that had people been given a reasonable amount of time within which to disperse, and had been warned in advance that they would be removed with force if they do not comply, if there had been ways for old people, children, and other vulnerable people to leave the park, and then the protesters had still proceeded to attack the riot police with sticks, bottles, and other means, the police may have been justified in using limited, non-lethal force to arrest the specific persons who continue to resist removal. But under the circumstances as described, the use of indiscriminate force with no view to minimizing damage and injury and respecting and preserving human life, was neither necessary nor proportionate. In addition, even under circumstances where

some level of force would have been justified, it would be necessary for the police to distinguish between the people who were acting violently and those who were fleeing, had surrendered, or were defenseless. The Commission finds that the State had violated the right to assembly under Article 11 of the African Charter.

#### **Analysis of Article 14**

234. Article 14 guarantees the right to property, and states that it “may only be encroached upon in the interest of the public need or in the general interest of the community and in accordance with the provisions of appropriate laws”.
235. In relation to Article 14 the Complainants allege that the protestors were forcibly removed without an opportunity to take any of their belongings, were prohibited by the authorities to recover their property upon their release and have received no justification or compensation for this deprivation. According to the Respondent State a Committee of doctors of the Ministry of Health examined the remains of the belongings of the protestors and concluded that they were not valid for human consumption, pose a danger to public health and environment, and are a potential source of infectious diseases and epidemics and thus a decision was taken to burn them. The golden and valuable materials were placed in the court safe and other belongings were handed over to the Sudanese Embassy in Cairo to return to their owners.
236. The Commission is of the view that given the chaotic circumstances under which the Victims were removed, it was not possible for them to take their belongings with them, and they were thus forced to leave them behind. The Commission finds that the Respondent State failed to allow the Victims the opportunity to deal with their belongings before being removed.<sup>66</sup> Given that the vast majority of people were released on the day following their arrest, one would presume that they would then have been given the opportunity to return to the park to salvage their possessions. This would be in line with the Commission’s finding in *Media Rights Agenda and Others v Nigeria*, in which it was held that “the right to property necessarily includes a right to have access

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<sup>66</sup> This is in line with the finding of the Commission in Communication 292/04: Institute for Human Rights and Development in Africa v. Angola, para 73.

to property of one's own and the right not for one's property to be removed".<sup>67</sup>

237. In reality, they were prohibited from returning to the park and their possessions, apart from the valuables, were burnt. While the State submits that the valuables had been placed in the Court safe and given to the Sudanese Embassy to be returned to their owners, they do not make mention of ever informing the Victims that their valuables were with the Court and Embassy, nor do the Complainants make any mention of being aware that the valuables were kept at the Court and Embassy. There is thus no indication that the valuables were ever returned to their owners, and thus the Commission finds that the protestors were permanently deprived of these valuables.
238. The provision on property makes allowances for a limitation on this right, were it is necessitated either by public need or community interest. The State submits that the reason why the remaining property had to be burnt was that it was not valid for human consumption, posed a danger to public health and environment, and was a potential source of infectious diseases and epidemics. The Commission finds that this is a valid justification for the burning of the property.
239. Since in relation to the valuables there is no indication that they were ever returned to their owners, as well as the permanent destruction of the remaining property through burning, the Commission has in the past held that there was a duty on the State to provide the Victims with adequate compensation determined by an impartial tribunal of competent jurisdiction.<sup>68</sup> Given that there has been no submission to this effect, the Commission finds that the right to property had been violated and thus finds the State in violation of Article 14.

### **Analysis of Article 16**

240. Article 16 of the Charter provides that every individual has the right to enjoy the best attainable state of physical and mental health, and that there is a duty

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<sup>67</sup> Para 77.

<sup>68</sup> As above; ACHPR Principles And Guidelines On The Implementation Of Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights, para 55(e).

on the State to protect the health of people and ensure that they receive medical attention when they are sick.

241. The Commission in its Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights determines that individuals have the right “to be free from unwarranted interference [with their health], including [...] inhuman and degrading treatment”.<sup>69</sup> Further, in General Comment No.14 on the right to health, the UN Committee on Economic, Social and Cultural Rights provides that: “[...] the right to health imposes three types of obligations on States – to respect, fulfil and protect the right.” In the *Interrights v Egypt* case,<sup>70</sup> the Commission held that because the Victims had been submitted to acts which resulted in physical and emotional injury, which has detrimentally affected their physical and mental well-being, there is a violation of Article 16 (1).
242. In relation to the duty to respect and protect, the Commission had already found above that the treatment of the protesters resulted in inhuman and degrading treatment. The Commission in addition found above that the State was responsible for the injuries suffered as a result of the removal. The Complainants argue that the right to health can be violated though direct action by the State or others insufficiently regulated by the State which cause positive harm to health. While the Commission considers the police to be part of the State, it finds that the State can be directly held accountable for actions of the police, nevertheless, based on the duty to protect, the State would also have a duty to ensure that third parties do not interfere with the enjoyment of the right to health. Based on the above, the Commission finds that the right to health has been violated in regard to unwarranted interference with their health. The Commission thus finds a violation of Article 16 (1).
243. In relation to the duty to fulfil the right to health, the Charter places a duty on States to ensure that people receive medical attention. In the *Interrights v Egypt* case,<sup>71</sup> the Commission held that since the Victims all received medical attention after they were assaulted, the “Respondent State fulfilled its

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<sup>69</sup> Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para 65.

<sup>70</sup> Communication 323/06: Egyptian Initiative for Personal Rights and INTERRIGHTS v Egypt.

<sup>71</sup> Communication 323/06: Egyptian Initiative for Personal Rights and INTERRIGHTS v Egypt.

obligation under the sub-Article to ensure that the Victims received medical attention after the injuries sustained”.

244. In its jurisprudence the Commission has further held that “the responsibility of the government is heightened in cases where the individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the activities of the authorities”.<sup>72</sup> This is further confirmed by the Guidelines and Principles on Economic, Social and Cultural Rights, which provide that the minimum core obligations of the right to health include “the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups” and that “that prisoners and other persons deprived of their liberty, under any form of detention, have access to conditions of detention consistent with human dignity and the highest attainable standard of health”.<sup>73</sup> The Luanda Guidelines further provide for a duty on the State to provide adequate standards of physical and mental healthcare in detention.<sup>74</sup>
245. In *Communication 379/09 Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan* the Commission held that while the Victim who was in jail was provided with medical care, it was inadequate to guarantee his health and thus found that “the treatment still left him in a situation which was both life threatening and jeopardized his health. The Commission considers that the State in this circumstance violated his right to health by failing to take the necessary measures to protect his health especially given that he was in the custody of State authorities.”
246. In relation to access to medical care the Complainants argue that the State failed to supply adequate access to health care. In particular they make reference to the Fourth Victim who was not provided with medical care when his eye was injured and the Seventh Victim whose lungs were affected, and as a result of on-going lack of medical care, he remains weak and suffers from

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<sup>72</sup> Communication 105/93-128/94-130/94-152/96 Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria, para 91; Communication 54/91-61/91-98/93-164/97\_196/97-210/98 : Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v. Mauritanie, paras 121-122.

<sup>73</sup> Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para 67(a), (kk).

<sup>74</sup> Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, para 25 (g).

fainting spells. The State on the other hand avers that seventy-three (73) protesters were injured, but that they received “immediate medical care”, and that three were taken to hospital. In addition, they submit that at the camps people were also provided with medical care.

247. The Commission finds that there is proof in the submissions of both Parties that some medical care was provided, however that in relation to the Fourth and Seventh Victim the State had not provided them with sufficient and adequate medical care, and given that they were in State detention, the State thus failed to meet its obligations under Article 16 (2) in respect of these two Victims.

### **Analysis of Article 18**

248. Article 18 (1) of the African Charter provides that the family is the natural unit and basis of society, and shall be protected by the State which shall take care of its physical and moral health.
249. The Complainants contend that the incommunicado detention constituted psychological trauma which also constitutes a breach of Article 18. The Commission found in paragraph 203 above that the detention did not constitute incommunicado detention, and the argument in this regard is thus dismissed.
250. Furthermore, the Complainants submit that the method used of dispersing the protestors had negative consequences for the family of the First Victim, and that the State thus violated the duty to protect all families within its jurisdiction through the decision to break up the protest and the manner of its execution. The State made no submission in relation to Article 18.
251. In its jurisprudence the Commission has held that Article 18 imposes a positive obligation on the State towards the family, to assist the family towards meeting its needs and interests and to protect the family institution from abuse of any kind by its own officials and organs and by third parties.<sup>75</sup> In addition, the State has a negative obligation to refrain from violating the

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<sup>75</sup> Communication 313/05 Kenneth Good v Republic of Botswana, para 212.

rights and interests of the family.<sup>76</sup> The jurisprudence of the Commission which had found a violation of this right has dealt mostly with cases of deportation, where family members are permanently separated and deprived of each other's support,<sup>77</sup> in cases of incommunicado detention<sup>78</sup> or where movement of the Victims was severely restricted within the country, thus preventing them from seeing their families.<sup>79</sup>

252. The Commission finds that in the process of breaking up the protest and forcing the protesters onto the buses, the State had no regard for the preservation of family units and the police did not take any care to ensure that families were allowed to get onto the buses together. In addition, as is illustrated by the case of the First Victim, there was no proof that once the family was separated they would be reunified again. The Commission thus finds that the State violated the negative obligation on it to refrain from violating the rights and interests of families.

### **Analysis of Article 1**

253. In terms of the Commission's jurisprudence, a violation of any of the provisions of the Charter automatically means a violation of Article 1.<sup>80</sup> In the present Communication, the Commission has reached the conclusion that the Respondent State's conduct is in violation of Articles 2, 4, 5, 11, 14, 16 and 18 of the Charter. The Commission therefore as a consequence also finds a violation of Article 1 of the Charter.

### **Remedies**

254. Paragraphs 130 to 137 above set out the Respondent State's response to the Complainants' prayers (in paragraph 25 above). In relation to the submissions that the State had undertaken a thorough and impartial investigation into the

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<sup>76</sup> As above.

<sup>77</sup> Communication 159/96 Union interafricaine des droits de l'Homme, Fédération internationale des ligues des droits de l'Homme, RADDHO, Organisation nationale des droits de l'Homme au Sénégal and Association malienne des droits de l'Homme v. Angola, para 17; Communication 313/05 Kenneth Good / Republic of Botswana, para 213-215 ; Communication 212/98 Amnesty International / Zambia, para 59' ; Communication 97/93\_14AR John K. Modise / Botswana, para 93.

<sup>78</sup> Communication 143/95-150/96 Constitutional Rights Project and Civil Liberties Organisation v Nigeria, para 29.

<sup>79</sup> Communication 318/06 Open Society Justice Initiative v. Côte d'Ivoire, para 179

<sup>80</sup> Sir Dawda Jawara v. The Gambia para 56; Nubian Community v Kenya, para 169; Interights & Ditshwanelo v. The Republic of Botswana, para 97;



incidents in the park and that Victims can resort to the Courts to claim compensation for harm suffered in accordance with the rules of criminal, civil and administrative liability, the Commission had already held above that the investigation undertaken was insufficient, and that since the duty is on the State to undertake the investigations, there is no obligation on the Victims to seek separate compensation from the Courts (see paragraph 185 above).

255. In relation to the submission that the Egyptian Police Act 109 of 1971 in Article 102 stipulates the conditions under which police can use force, the Commission takes note of the quoted provisions of the Act, but finds that these provisions are not in line with the African Charter in relation to the use of force since it does not provide for measures to minimize damage and injury and respect and preservation of human life, among other principles of necessity and proportionality of the use of force, as well as respect for the right to dignity, right to freedom from discrimination, among other human rights protected under the African Charter as stipulated in paragraph 173 above. The Commission takes note of the submission by the State that training initiatives for police officers are being undertaken.

#### **Decision of the African Commission**

256. In view of the foregoing, the African Commission on Human and Peoples' Rights:
- i. Finds a violation of Articles 1, 4, 5, 11 and 14 of the African Charter by the Arab Republic of Egypt;
  - ii. Finds a violation of Article 2 only in relation to the fourth Victim;
  - iii. Finds a violation of Article 5 in relation to the denial of access to the Victims to the bodies of their loved ones as well the failure to provide an effective remedy;
  - iv. Finds a violation of Article 16 only in relation to the fourth and seventh Victims;
  - v. Finds a violation of Article 18 as it relates to the negative obligation on the State;
  - vi. Does not find a violation of Article 6 by the Arab Republic of Egypt;
  - vii. The Commission finds the following remedial actions to be necessary for addressing the violations above:

1. To reopen the investigations into the violations and hold the commanding officers who were conducting the breakup of the protest accountable for the human rights violations that were committed,
  2. To provide compensation to all the Victims, including the Victims in this Communication for the violations suffered, in accordance with national laws; and
  3. To revise the laws in relation to police and regulation of assemblies to bring it in line with the rights in the African Charter, and in particular to review the Egyptian Police Act 109 of 1971 to bring it in line with the various Guidelines of the Commission cited in the analysis above, as well as the principles of necessity and proportionality;
- viii. Requests the Respondent State in line with Rule 125 of the Commission's 2020 Rules of Procedure to report to the Commission within 180 days on the measures it intends to adopt for the above purpose, as well as detailed submissions on the training initiatives being undertaken for police officers on human rights and crowd control.

**Adopted during the 66<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, held virtually, from 13 July to 07 August 2020**