

**Communication 396/11 – Mohammed Abderrahim El Sharkawi (represented by  
EIPR and OSJI) v. the Republic of Egypt**

**Summary of the Complaint:**

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 4 March 2011 from the Egyptian Initiative for Personal Rights (EIPR) and Open Society Justice Initiative (OSJI) (the Complainants) on behalf of Mr Mohammed Abderrahim El Sharkawi (the Victim) against the Arab Republic of Egypt (the Respondent State).<sup>1</sup>
2. The Complainants allege that the Victim, a Pakistani National of Egyptian origin, was detained by the Respondent State without charge or trial from 26 May 1995 to 17 March 2011.
3. The Complainants state that on 29 July 1994, Pakistani officials arrested and detained the Victim for approximately ten months before transferring him to the Respondent State on 26 May 1995. On 13 November 1996, the Public Prosecutor's Office in the Respondent State ordered the Victim's release, but the order was ignored by the Ministry of Interior, which placed the Victim in administrative detention under Law No. 162 of 1958 (the Emergency Law). The Complainants explain that since 1981, the Respondent State has been under a continuous state of emergency, and Article 3 (1) of the Emergency Law allows for the arrest and administrative detention of any individual who is deemed to be 'dangerous to public security and order'. They add that government officials have the discretion to decide which individuals could be arrested and detained under the Emergency Law.
4. The Complainants aver that, while in detention, the Victim made numerous applications for his release before the Emergency State Security Courts (Emergency Courts), which are the only domestic courts with jurisdiction to oversee detention under the Emergency Law. They state that the Victim had obtained at least 15 court orders for his release, all of which were ignored by the Ministry of Interior. They allege that the Ministry of Interior immediately issued a new detention order, effectively ignoring the courts' rulings.
5. The Complainants argue that the Victim's treatment by the Respondent State is consistent with a pattern and practice of indefinitely detaining individuals without charge or trial under the Emergency Law and of widespread torture of those detained.
6. The Complainants submit that while in detention, the Victim was transferred to various prisons, including El Aqrab, Damanhour, Fayoum, Wadi Natroun, Liman Tora, Istiqbal Tora and Abu Za'abal, where he was subjected to torture, denied adequate medical treatment and imprisoned under harsh conditions.
7. The Complainants aver that the Victim's case was reported by the United Nations (UN) Working Group on Arbitrary Detention in 2007 as arbitrary detention in contravention of Article 9 of the International Covenant on Civil and Political Rights (ICCPR), and as such, the Working Group requested the

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<sup>1</sup> Egypt ratified the African Charter on Human and Peoples' Rights (the African Charter or Charter) on 20 March 1984.

Respondent State to remedy the situation and observed that this would entail the immediate release of the Victim, among other individuals. The Complainants add that the Victim was featured in the 2008 Annual Report of Amnesty International.

8. The Complainants state that in July 2008, prison authorities found a number of complaints which the Victim had written in his cell in Liman Tora and which he intended to send to the Prosecutor. They allege that as punishment the Victim was transferred to El Wadi El Gadid prison, 730 km from the Victim's family home in Cairo, where he was tortured.
9. The Complainants state that on 17 March 2011, the Victim was released after a court ordered his release, following the change of government in the Respondent State.
10. The Complainants aver that the Respondent State failed to provide an explanation, apology, compensation or other redress for the harm caused to the Victim from 26 May 1995, until his eventual release on 17 March 2011.
11. The Complainants submit that following his release, the Victim questioned the Public Prosecutor's Office about the complaints he had filed about his torture, mistreatment and lack of medical attention while in detention only to be told that the Office no longer had copies of any complaints from before the 2011 revolution.

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

12. The Complainants allege violation of Articles 1, 5, 6, 7, 18 and 26 of the African Charter.

#### **Prayers**

13. The Complainants request the African Commission on Human and Peoples' Rights (the Commission) to:
  - i. Declare that the Respondent State has violated the Victim's rights guaranteed under Articles 1, 5, 6, 7, 18 and 26 of the African Charter;
  - ii. Urge the Government of Egypt to acknowledge the unlawful and arbitrary nature of the Victim's detention and the role of the Respondent State in his torture and inhuman detention; publish the decision of the Commission; and issue a public apology to the Victim and his family for the violations of his rights;
  - iii. Request the Government of Egypt to ensure the payment of adequate compensation for the Victim of no less than 1 million Egyptian Pounds (approximately \$140 000 USD at the time of filing);
  - iv. Urge the Government of Egypt to create an independent commission of inquiry with the participation of international experts to investigate the circumstances of the detention, torture and other abuses of the Victim; to ascertain the full extent to which the Victim's treatment was part of a broader pattern and practices of torture under the Emergency Law and to determine command responsibility for such abuses;
  - v. Urge the Government of Egypt to introduce legislative reforms and safeguards to prevent similar violations from happening in the future, in particular to:
    - a. Reform Article 126 of the Egyptian Penal Code to bring it in line with the definition of torture in the UN Convention Against Torture;

- b. Reform Law 162/58, the Emergency Law, to ensure the abolishment of administrative detention, the protection of the rights of detainees to be promptly brought before an impartial and independent court, the dissolution of the State Security Emergency Courts’;
  - c. Harmonize the Emergency Law with a view to bringing it in conformity with the Charter and other international legislation and regional norms and standards, in implementation of the decision of the Commission in Communication 334/06: *EIPR and Interights v Arab Republic of Egypt* decided in 2011; and
  - d. Take legislative and other measures to ensure that its law enforcement organ particularly the police respect the rights of suspects detained, in line with Article 5 of the Charter.
14. The Complainants request to be allowed to submit separately on remedies and reparation or alternatively to be allowed a hearing on reparation, if the Commission finds the Respondent State to be in violation of the African Charter.

### **Procedure**

- 15. The Communication was received by the Secretariat on 4 March 2011, and the Commission was seized of the matter at its 49<sup>th</sup> Ordinary Session, held from 28 April to 12 May 2011 in Banjul, The Gambia.
- 16. On 24 May 2011, the Secretariat wrote to the Complainants and the Respondent State informing them of its decision to be seized and transmitted a copy of the Complaint to the Respondent State. The Secretariat requested the Complainants to forward their submissions on Admissibility by 24 July 2011.
- 17. At its 50<sup>th</sup> Ordinary Session held from 24 October to 5 November 2011 in Banjul, The Gambia, the Commission considered the Communication and decided to defer its decision on Admissibility, as the Secretariat had not received submissions on Admissibility.
- 18. On 18 November 2011, the Secretariat wrote to the Complainants informing them of the Commission’s decision to defer the Communication, and reminding them to forward their written submissions on Admissibility.
- 19. On 12 December 2011, the Complainants forwarded their submission on Admissibility to the Secretariat.
- 20. On 11 April 2012, the Secretariat acknowledged receipt of the Complainant’s submission and transmitted same to the Respondent State and requested it to forward its written submission on Admissibility to the Secretariat within two months.
- 21. At its 51<sup>st</sup> Ordinary Session, held from 18 April to 2 May 2012 in Banjul, The Gambia, the Commission considered the Communication and decided to defer its decision on Admissibility pending submissions from the Respondent State.
- 22. On 10 July 2012, the Ambassador of the Respondent State to Senegal wrote to the Secretariat requesting the transmission of the Complainants submissions on Admissibility to enable the Respondent State respond appropriately.

23. On 19 July 2012, the Secretariat re-transmitted the Complainant's submission on Admissibility to the Respondent State, and requested it to forward its written submissions on Admissibility to the Secretariat within two months.
24. On 20 September 2012, the Secretariat received the submissions of the Respondent State on Admissibility. On 25 September 2012, the Secretariat acknowledged receipt of the submissions and forwarded the same to the Complainants.
25. On 25 October 2012, the Complainants forwarded their comments on the Respondent State's submissions.
26. On 2 November 2012, the Secretariat informed the Parties that it was not able to consider the Communication during the 52<sup>nd</sup> Ordinary Session, held from 9 to 22 October 2012 because the deadline given for the Complainants' submissions extended beyond the period of the Session.
27. On 22 February 2013, the Secretariat received supporting documents to supplement the Complainants' submissions on Admissibility. The Secretariat acknowledged receipt of the documents and forwarded the same to the Respondent State.
28. The Commission considered and declared the Communication admissible at its 15<sup>th</sup> Extra-Ordinary Session, held in Banjul, The Gambia, from 7 to 14 March 2014. The Parties were informed of the Commission's decision by letter and Note Verbale dated 26 March 2014. The letter to the Complainants also requested them to forward their submissions on Merits within sixty days of receipt of notification.
29. The Secretariat received a letter dated 30 April 2014 from the Complainants, requesting extension of time to submit on Merits, in accordance with Rule 113 of the Rules of Procedure of the Commission. Both parties were notified of the Commission's decision to grant the request by letter and Note Verbale dated 7 May 2014 and 8 May 2014, respectively.
30. The Complainants forwarded their Submissions on Merits by letter dated 26 June 2014, and requested the grant of a subsequent hearing on reparations under Rule 99 (3) of the Rules of Procedure of the Commission, if the Commission finds violations under the Charter.
31. By letter dated 30 June 2014, the Secretariat acknowledged receipt of the Merits Submissions and noted the request for an Oral Hearing on reparations if violations of the African Charter are found. The Submissions were forwarded to the Respondent State by Note Verbale dated 30 June 2014. The State was requested to submit its observations within sixty days of receipt of the notification.
32. On 30 July 2014, the Parties were informed that the Commission deferred consideration of the Communication during its 16<sup>th</sup> Extra-ordinary Session pending receipt of the Respondent State's Submission on Merits.
33. By Note Verbale dated 2 September 2014, the Respondent State requested for extension of time in accordance with Rule 113 of the Rules of Procedure of the Commission, 2010. Both parties were notified of the Commission's decision to grant the request by letter and Note Verbale dated 4 September 2014.
34. The Respondent State submitted its Observations on Merits by Note Verbale dated 1 October 2014, registering preliminary reservations to the Admissibility

decision and requesting the Commission to reverse the same in line with Article 56 of the Charter. The State's submission was transmitted to the Complainants by letter dated 13 October 2014.

35. The Complainants submitted their response to the Respondent State's Submissions by letter dated 21 November 2014. The Complainants reiterated their request for a hearing on reparations under Rule 99(3) of the Commission's Rules of Procedure in order for the Commission to fully consider the complex and systemic dimensions of the violations and required relief.
36. The Complainants' response to the submission of the Respondent State on the Merits was forwarded to the Respondent State through Note Verbale dated 4 December 2014.

### **The Law on Admissibility**

#### **Submissions of the Complainants on Admissibility**

37. The Complainants submit that they have fulfilled all the requirements of Admissibility provided under Article 56 of the African Charter. They aver that the Communication: clearly indicates the authors; is compatible with the African Charter; is written in a polite and respectful manner; is not based exclusively on news disseminated through the mass media; is submitted after exhausting local remedies; is submitted within a reasonable period of time after local remedies were exhausted; and does not deal with a case that has been settled internationally or regionally.
38. The Complainants state that they have exhausted all local remedies as required under Article 56(5) of the African Charter. They argue that the Respondent State ignored 15 court orders for the release of the Victim, demonstrating the futility of the Victim's attempt to seek justice domestically. The Complainants cite *Media Rights Agenda v Nigeria*, where the Commission stated that the government's refusal to respect the decisions of two different courts was 'a dramatic illustration of the futility of seeking a remedy from the Nigerian courts.'<sup>2</sup>
39. The Complainants aver that the Victim and his sister had made a number of complaints to the public prosecutor regarding his torture in detention and his lack of access to medical treatment but to no avail.
40. The Complainants submit that the change of government in the Respondent State has not changed the situation. They state that after his release in March 2011, the Victim asked the public prosecutor about the complaints he had filed while in detention, only to be told that the files were lost.
41. The Complainants state that the Commission has exempted applicants from exhausting domestic remedies where the State had sufficient notice of a possible

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<sup>2</sup> Communications 105/93, 128/94, 130/94 and 152/96 - *Media Rights Agenda and Others v Nigeria* (1998) ACHPR para 51.

violation but failed to take action.<sup>3</sup> They add that the Commission has noted that international attention around an alleged violation places the State on notice and provides more than sufficient opportunity to rectify the situation.<sup>4</sup>

42. The Complainants further allege that Egypt's national laws do not provide sufficient remedy for torture. Article 126 of the Penal Code of Egypt limits the definition of 'torture of an accused person with a view to inducing him to make a confession.' They submit that the definition excludes victims who are not formally accused or charged, similar to the case of the Victim. They add that Egyptian law limits the definition of torture to physical abuse, excluding mental or psychological abuse.
43. The Complainants contend that to require the Victim to take further steps to exhaust domestic remedies would be counter to the principles of justice given that his attempts to exhaust domestic remedies and to obtain his freedom have already been unduly prolonged.
44. The Complainants assert that in *Civil Liberties Organisation v Nigeria*, the Commission observed that '[e]ven if the situation has improved, such as leading to the release of the detainees, repealing of the offensive laws and tackling of impunity, the position remains that the responsibility of the present government...would still be engaged for acts of human rights violations which were perpetrated by its predecessors.'<sup>5</sup>
45. The Complainants aver that in *Organisation mondiale contre la torture et al. v Rwanda*, the Commission stated that even where a situation has 'undergone dramatic change in the years since the communications were introduced....the Commission has to rule on the facts which were submitted to it.'<sup>6</sup>
46. The Complainants further submit that in *Law Office of Ghazi Suleiman v Sudan (I)*,<sup>7</sup> complainants who challenged their illegal detention and torture were released some months after the Commission seized the case. Although Sudan argued that the release of the Victims represented the closure of the matter, the Commission found the case admissible, noting that '[t]he fact that the victims were released does not amount to compensation for violation.'<sup>8</sup>
47. The Complainants refer to *Achutan and another v Malawi*, in which the Commission stated 'that a new government inherits the previous government's international obligations, including the responsibility for the previous government's mismanagement.'<sup>9</sup>

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<sup>3</sup> Communications 147/95 and 149/96 – *Dawda Jawara v The Gambia* (2000) para 31.

<sup>4</sup> Communication 155/96 – *Social and Economic Rights Action Centre and Another (SERAC) v Nigeria* (2001) ACHPR para 38.

<sup>5</sup> Communication 218/98 – *Civil Liberties Organisation and Others v Nigeria* (2001) ACHPR para 23.

<sup>6</sup> Communications 27/89, 46/91, 49/91 and 99/93 – *Organisation mondiale contre la torture et al v Rwanda* (1996) ACHPR.

<sup>7</sup> Communications 222/98 and 229/99 – *Law Office of Ghazi Suleiman v Sudan* (2003) ACHPR.

<sup>8</sup> *Id.*, para 39.

<sup>9</sup> Communications 64/92, 68/92 and 78/92 – *Krischna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* ACHPR (1994) ACHPR.

### **Submissions of the Respondent State on Admissibility**

48. The Respondent State contends that the Communication should not be Admissible because the Complainants have failed to exhaust all local remedies.
49. The Respondent State argues that its domestic laws on torture, including the Constitution, the Egyptian Penal Code and the Egyptian Criminal Proceedings Code is consistent with the African Charter and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and therefore sufficient to address complaints concerning torture. The Respondent State further lists national laws and decisions on state of emergency<sup>10</sup> and adds that the African Charter does not address instances of states of emergency.
50. The Respondent State avers that the Victim did not provide any evidence of submission of his previous complaints, including the reference numbers of the complaints. The State adds that the Victim failed to re-submit his complaint after being told that copies of his previous complaints went missing during the January 2011 Revolution, as required by the provisions of the Legal Proceedings Act in instances of loss of documents.

### **Supplementary Submissions of the Complainants on Admissibility**

51. The Complainants submit that the Communication was submitted to the Commission while the Victim was in detention, having exhausted all adequate and potentially effective remedies available at that time. They state that the Admissibility of the case should be determined on the facts that existed at that time.
52. The Complainants further contend that there is no requirement in the African Charter which requires Victims to re-exhaust the same remedies that have already been exhausted, and found to be ineffective. They submit that it would unjustly penalise the Victim for the Respondent State's failure to promptly investigate those complaints when they were made, and to maintain proper and secure copies of complaints regarding torture and poor conditions of detention.
53. The Complainants add that the Victim attempted to recover copies of his complaints, court orders and medical records after his release, but was informed that all the records were destroyed or lost during the revolution.
54. The Complainants contend that the Respondent State's reference to general legal provisions fails to show how those legal provisions provide an adequate and effective remedy which is available to the Victim. They state that in *Article 19 v Eritrea*,<sup>11</sup> the Commission held that it is insufficient for States to challenge the admissibility of a complaint by 'merely list[ing] *in abstracto* the existence of remedies without relating them to the circumstances of the case, and without

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<sup>10</sup> These include the 1958 Act No. 162 on State of Emergency, and judgments of the High Administrative Tribunal (Appeal No. 401, 17/7 of 1991 and No. 3, 22, sitting of 13/1/1990).

<sup>11</sup> Communication 275/03 – *Article 19 v Eritrea* (2007) ACHPR para 73.

showing how they might provide effective redress in the circumstances of the case.'

55. The Complainants aver that the Respondent State failed to address, in its submissions, the particular deficiency of the narrow definition of torture in Egyptian law which would preclude any claim for torture by the Victim, and which makes it impossible to exhaust domestic remedies. The Complainants submit that the Commission, in *SERAC v Nigeria*, notes that where a right is not well provided for, there cannot be effective remedies, or any remedy at all.<sup>12</sup>
56. The Complainants assert that compensation alone is not an adequate remedy for the allegations of torture, and so an application for compensation is not necessary to exhaust domestic remedies, either during detention or after it. They aver that torture as an international crime requires investigation and criminal punishment.
57. The Complainants argue that there is no obligation to further exhaust domestic remedies at this stage, because it would unduly prolong the procedure. They state that given the length of time the Victim had already spent seeking justice any requirement to exhaust additional remedies would lead to those remedies being unduly prolonged.

#### **Analysis of the Commission on Admissibility**

58. Article 56 of the African Charter governs the Admissibility of individual Communications.
59. The Complainants in this Communication state that all the requirements of Admissibility under Article 56 have been met. The Respondent State argues that the Complainants have not exhausted local remedies as required by Sub-Article 56(5) of the African Charter, but does not refute any of the factual allegations by the Complainants.
60. After considering the submissions of the Complainants, the Commission is satisfied that the conditions in the undisputed sub-articles have been met and thus only analyses the contended sub-article based on the submissions of both Parties.
61. The Respondent State avers that the Victim failed to re-submit his Complaint and proceeds to list domestic laws and rulings which could have been used to exhaust local remedies without relating them to the facts of the case. The Complainants argue that there is no *onus* on the Victim to re-submit his complaint and that the Respondent State should have initiated an investigation since it had ample notice of the violations.
62. Article 56(5) of the African Charter embodies the principle of exhaustion of local remedies, if any, unless the procedure would be unduly prolonged.
63. The Respondent State contends that the Complainants have not exhausted local remedies because the Victim has not re-submitted his complaint after being told that copies of his previous complaints went missing during the January 2011

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<sup>12</sup> *SERAC v Nigeria* (n 4 above), 37.



Revolution. However, it should be noted that the local remedies any Complainant is required to exhaust under Article 56(5) of the Charter are only the ones that were available, effective and sufficient in the State concerned at the time the alleged violation(s) occurred.<sup>13</sup>

64. In *Jawara v. The Gambia*, the Commission stated that a 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>14</sup> The Victim in this Communication had filed for and attained at least 15 court orders for his release during a period of almost 16 years, all of which were disregarded by the Respondent State, a fact which is not contested by the Respondent State. He was placed under administrative detention under the Emergency Law without any charge or trial, was subjected to torture and kept under poor conditions of detention. Hence, the local remedies available to the Victim were neither effective nor sufficient.
65. Furthermore, even if the Victim failed to re-submit his complaint, the Respondent State, of its own volition should have investigated the Victim's allegations of illegal detention, torture and ill treatment. In *Law Office of Ghazi Suleiman v Sudan*, the Commission stated that 'obligations of states are of an *erga omnes* nature and do not depend on their citizens.'<sup>15</sup>
66. Similarly, in *Article 19 v. Eritrea*, the Commission noted that: whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion. In such cases, one cannot demand that the Complainants, or the Victims or their family members assume the task of exhausting domestic remedies when it is up to the State to investigate the facts and bring the accused to court in accordance with both domestic and international fair trial standards.<sup>16</sup>
67. In addition, one of the alleged violations is the torture of the Victim while in detention. The Complainants aver that the Victim, and his sister, on his behalf had brought several complaints before the public prosecutor regarding the allegations of torture. The Robben Island Guidelines of the Commission require states to ensure that prompt, impartial and effective investigations are conducted whenever allegations of torture and ill-treatment are brought before competent authorities.<sup>17</sup> The prohibition of and protection from torture has now evolved into a peremptory norm or *jus cogens*, and become a fundamental standard in the international arena, whereby states cannot derogate from their responsibility to

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<sup>13</sup> Communication 355/07 - *Hossam Ezzat & Rania Enayet v. Egypt* (2007) ACHPR para 70.

<sup>14</sup> *Jawara v The Gambia* (n 3 above), 32.

<sup>15</sup> *Law Office of Ghazi Suleiman v Sudan* (n 7 above), 39.

<sup>16</sup> *Article 19 v. Eritrea* (n 11 above), 72.

<sup>17</sup> ACHPR/Res. 61(XXXII)02: Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) (2002) para 18 and 19. See also Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 23 November 2007, UN doc. CAT/C/GC/2/CRP.1/Rev.4, para. 1 (excerpted in the Annex); International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Furundzija 10 December 1998, case No IT-95-17/1-T, paras 153-154 (excerpted in the Annex).

ensure protection from torture.<sup>18</sup> In the instant Communication, the Respondent State, even after the change of government in 2011, failed to initiate the kind of investigation required to respond to allegations of torture, in line with the Robben Island Guidelines, and other regional and international standards.

68. The competent authorities in the Respondent State had ample notice of the violations against the Victim. There were 15 court orders for his release during his almost 16 years of detention and he had also filed complaints with the public prosecutor concerning his torture and poor conditions of detention. Furthermore, bodies such as the UN Working Group on Arbitrary Detention, Amnesty International as well as the International Federation for Human Rights (FIDH) had featured the Victims' arbitrary detention in their reports and urged his immediate release.<sup>19</sup> A petition for his release was also brought before the United Kingdom (UK) House of Commons in July 2010, and the Secretary of State for Foreign and Commonwealth Affairs stated the commitment of the UK Government to ensure the release of Mr El Sharkawi, as well as other arbitrarily detained individuals.<sup>20</sup> In light of the above, it is possible to deduce that the Respondent State had ample notice of the violations, but failed to act. In *El Hadj Boubacar Diawara v. Benin*, a Communication concerning the detention and torture of the complainant for more than seven years without charge or trial, the Commission held that in such circumstances it is clear that the state has had ample notice of the violations and should have taken steps to remedy them.<sup>21</sup>
69. Similarly, in *Article 19 v. Eritrea*, the Commission stated that in cases where the state is properly informed, but fails to act, it means that domestic remedies are either not available or if they are, not effective or sufficient to redress the violations alleged.<sup>22</sup>
70. Although the Commission appreciates the release of the Victim from detention following the fall of the Hosni Mubarak regime, it however does not absolve the current regime from liability for human rights violations perpetrated by its predecessors.<sup>23</sup> In *Achutan and another v. Malawi*, the Commission stated that 'a

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<sup>18</sup> See Vienna Convention on the Law of Treaties adopted on 23 May 1969, Article 53; ABI-SAAB Georges, "The 1977 Additional Protocols and General International Law: Preliminary Reflexions", in *Humanitarian Law of Armed Conflict Challenges Ahead, Essays in Honour of Frits Kalshoven*, Dordrecht, M. Nijhoff, 1991, pp. 115-126; KASTO Jalil, "Jus Cogens and Humanitarian Law", in *International Law Series*, Vol. 2, Kingston, Kall Kwik, 1994, 95 pp 23-26.

<sup>19</sup> See, UN Working Group on Arbitrary Detention, Opinion No. 3/2007, U.N. Doc. A/HRC/7/4/Add. 1 at 59 (2007); Amnesty International, *Egypt - Systematic Abuses in the Name of Security* (2007) 16; and FIDH, *Egypt: Counter-terrorism Against the Background of an Endless State of Emergency* (2010) 25 - 26.

<sup>20</sup> Foreign and Commonwealth Office Observations "Petitions: Mohammed El Sharkawi" 1 July 2010 <<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100701/petntext/100701p0001.htm>> (accessed on 27 June 2013).

<sup>21</sup> Communication 18/88 - *El Hadj Boubacar Diawara v. Benin* [Comité Culturel pour la Démocratie au Bénin and Others v. Benin] (1994) ACHPR. See also, *Article 19 v. Eritrea* (n 11 above), para 78, footnote 21.

<sup>22</sup> *Article 19 v. Eritrea* (n 11 above), 77.

<sup>23</sup> In *Law Office of Ghazi Suleiman v Sudan*, the Commission held that although it took note of the changes introduced by the Respondent State for the better protection of human rights, the changes

new government inherits the previous government's international obligations, including the responsibility for the previous government's mismanagement' and the change of government in the Respondent State does not extinguish a claim before the Commission. The Commission further stated that even if the present government did not commit the human rights abuses complained of, it is responsible for the reparation of the abuses.<sup>24</sup>

71. In line with its previous decisions, the Commission in this Communication holds that it makes its ruling by considering the alleged facts as at the time of submission of the Complaint.<sup>25</sup> Therefore, the release of the Victim from detention as well as other positive steps taken by the Respondent State after submission has no bearing on the decision of the Commission.
72. Lastly, the Respondent State makes references to various laws and rulings without demonstrating how they would have contributed to the availability of an effective and sufficient remedy for the Victim. In *Article 19 v. Eritrea*, the Commission noted that the Respondent State merely listed *in abstracto* the existence of remedies without relating them to the circumstances of the case, and without showing how they might provide effective redress in the circumstances of the case.<sup>26</sup> Therefore, merely stating domestic laws and rulings without illustrating how they would have redressed the Complainants allegations is not enough to illustrate the existence of available, effective and sufficient remedies.
73. In view of the foregoing, the Commission declares the Communication admissible.

## **Merits**

### **Complainants' Submission on the Merits**

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

##### *Abuse of the Victim constitutes torture*

74. The Complainants submit that while in detention, the Victim was regularly subjected to physical and psychological pain during his interrogations and for the purpose of punishment in violation of Article 5 of the Charter. The Complainants aver that the Victim suffered repeated beatings including with fists and rubber sticks, electroshocks, and was hung by his wrists and ankles.
75. The Complainants submit that the psychological impact of the torture was amplified by the helpless condition of the Victim as he was often handcuffed and blindfolded during questionings and beatings. The Complainants submit that the

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have no effect whatsoever on past acts of violation and that, under its mandate of protection, it must make a ruling on the communication. See, *Law Office of Ghazi Suleiman v Sudan* (n 7 above), 39

<sup>24</sup> *Achutan and another v. Malawi* (n 9 above), 12.

<sup>25</sup> See, *Law Office of Ghazi Suleiman v Sudan* (n 7 above), 40 and *Organisation mondiale contre la torture et al v Rwanda* (n 6 above), 21.

<sup>26</sup> *Article 19 v. Eritrea* (n 11 above), 73.

prolonged or unnecessary use of such restraints can of itself constitute cruel, inhuman or degrading treatment or punishment (hereinafter referred to as other ill-treatment).

76. The Complainants submit that the Victim was in constant fear of torture and was unable to sleep as he never knew when the authorities would come to interrogate and beat him.
77. The Complainants aver that the authorities ensured that the Victim was in a state of maximum vulnerability during his interrogations and torture, such as when he was forced to strip to his underwear before being electrocuted or beaten.
78. The Complainants further aver that the psychological pain and suffering inflicted by the State as well as the sense of helplessness was so severe as to cause the Victim to go on a hunger strike and to attempt suicide twice.
79. The Complainants submit that the torture inflicted on the Victim is corroborated by his injuries, medical evidence, and reports from human rights organisations. The Complainants highlight the 2007 opinion by the UN Working Group on Arbitrary Detention which *inter alia* confirmed that the Victim among other individuals was held in *incommunicado* detention, tortured and kept in conditions which amounted to ill-treatment. The Complainants highlight the reports of Amnesty International from 2008 and 2011, and the report of FIDH from 2010, all of which allege torture specifically of the Victim.

*Incommunicado detention constitutes torture*

80. The Complainants aver that the Victim was held in *incommunicado* detention for a prolonged period of time including the first six weeks of his detention in 1995 and later for three months in 2008, such as to amount to torture or other ill-treatment in violation of Article 5. The Complainants submit that during this time, the family members of the Victim and an advocate received permission from the public prosecutor to visit the Victim, but were denied access when they arrived at the prison. The Complainants further submit that the fact that the Victim was handcuffed and blindfolded during much of the time he was held in *incommunicado* detention, rendered the Victim particularly vulnerable to Article 5 violations.
81. The Complainants add that the Commission has often found that *incommunicado* detention constitutes a violation of Article 5, and could be a form of ill-treatment.
82. The Complainants refer to the reports of the UN Special Rapporteur on Torture and other Ill-treatment and Human Rights Watch which allege torture in the detention sites where the Victim was held. The Complainants draw the attention of the Commission to an alleged broader pattern of torture in Egypt, as evidenced by these reports, against security detainees.

*Conditions of detention violated the right to dignity*

83. The Complainants further allege that the Victim's conditions of detention violated his right to dignity under Article 5, and amounted to ill-treatment. The Complainants submit that the cells where the Victim was detained were small (150cm x 75cm at Abu Za'bal) and frequently overcrowded (30 prisoners in cells so small, they had to take shifts sleeping at Damanhour). The Complainants submit that many of the cells had no access to sanitary facilities, lacked proper ventilation and were at times filled with sewage water. The Complainants add that the Victim had at times no access to fresh water, and that for a significant portion of his detention, the Victim was blindfolded and handcuffed.

### **Alleged violation of Articles 5 and 1**

#### *Failure to provide safeguards against torture*

84. The Complainants submit that the Respondent State failed to provide adequate safeguards against torture, including by denying the Victim access to medical assistance and a lawyer; preventing his family from knowing where he was or from visiting him; failing to properly register his detention and failing to bring him promptly before an effective judicial authority.

85. The Complainants submit that the obligation to provide effective safeguards against torture is contained in Article 1 of the Charter. The Complainants allege that the above-stated failures and denials by the Government left the Victim exceptionally vulnerable to the torture and constitute a violation of the State's positive obligations under Articles 1 and 5 of the Charter.

#### *Failure to conduct prompt, impartial and effective investigation of torture*

86. The Complainants allege that no prompt, impartial and effective investigation has been undertaken into the torture of the Victim as required by Articles 1 and 5 of the Charter. The Complainants allege that this failure occurred despite the Egyptian authorities being on ample notice of the allegations of torture, following numerous complaints by the Victim and his sister to the Public Prosecutor. The Complainants submit that those complaints related to the Victim's torture in detention and the lack of access to medical treatment for injuries he suffered as a result of the torture and other conditions of detention. The Complainants submit that none of the complaints were effective in obtaining redress, as they were simply ignored and no investigation was undertaken.

87. The Complainants allege that not only did the authorities fail to take basic investigative steps, the reaction of the authorities was to retaliate by beating the Victim and sending him to an isolated jail where he was tortured on arrival.

88. The Complainants aver that following the release of the Victim in March 2011, the Victim asked the public prosecutor about the complaints that had previously been filed, only to be told that the files no longer existed.

#### *Systematic deficiencies in domestic law and accountability structure*

89. The Complainants allege that the failure to investigate the torture of the Victim is part of a pattern of impunity for perpetrators of torture in Egypt. The Complainants allege that systemic impunity, in substantial part, is the product of deficiencies in Egypt's legal structure that regulates the accountability of officials in cases of torture, in particular, the narrow definition of torture and restrictions on the rights of victims when the alleged perpetrator is a public official. The Complainants allege that these deficiencies continue to exist.

#### Narrow definition of torture

90. The Complainants aver that the narrow definition of torture under Article 126 of the Penal Code of Egypt (the Penal Code) does not conform to the definition of torture under the UNCAT, which Egypt has ratified.
91. The Complainants aver that this definition of torture fails as it requires the tortured person to be an accused. The Complainants submit that in cases similar to that of the Victim's, where the person is not officially charged with a crime but rather held in administrative detention, abuses committed do not qualify as torture under the Penal Code. The Complainants submit that the definition only criminalises the act of torture if it was inflicted with the intention of forcing a suspect to confess. The Complainants submit that torture may also be inflicted as a form of punishment and intimidation.
92. The Complainants further submit that Article 126 of the Penal Code does not extend criminal responsibility to all persons who are involved in torture, such as officials or any other person acting in an official capacity when they consent or acquiesce to torture or other ill-treatment, or persons who are complicit or participate in torture.
93. The Complainants submit that other articles in the Penal Code which may be used to complain against acts of torture or ill-treatment exhibit structural flaws that deprive the Victim of appropriate redress. The Complainants submit that Article 129 classifies cruelty by a public official or any person charged with performing a public service as a low level offence, carrying a possible sentence not exceeding one year or a fine not exceeding 200 Egyptian pounds (less than 30 USD). The Complainants aver that such punishment falls short of the necessary measures the State is obliged to take under the Charter.

#### Restriction on the rights of victims

94. The Complainants submit that Articles 63 and 232 (2) of Egypt's Criminal Procedure Code (the Criminal Procedure Code) give the Office of the Public Prosecutor exclusive authority to investigate allegations of torture and ill-treatment; to bring charges against public officials; and to appeal court verdicts. Where the prosecution decides there are no grounds for a case it issues a "no grounds order", which could be appealed to a judicial organ if the alleged perpetrator is a civilian, but cannot be appealed if the alleged perpetrator is a

public official/civil servant or an impounding officer.<sup>27</sup> The Complainants aver that victims of state abuse are therefore left without any redress if the Public Prosecutor decides not to proceed with a case.

95. The Complainants further submit that while civilian plaintiffs generally have the option of filing a request in court for an “investigative judge” to take charge of investigations, this option is not available if the accused person is a public official.<sup>28</sup> The Complainants submit that the laws in Egypt have left the Victim with no avenue to challenge the Prosecutor’s refusal to act on the Victim’s complaints of torture and ill-treatment.

#### Pattern of impunity for allegations of torture

96. The Complainants submit that the case of the Victim is emblematic of the structural deficiencies in Egypt’s legal system as evidenced by the pattern of prosecutorial failure to deal with allegations of torture made against the police and security officials and the resulting impunity. The Complainants submit that the Egyptian criminal justice system creates substantial barriers to any effective accountability for security officers for torture.
97. The Complainants submit that there is no independent entity responsible for investigating crimes committed by security officers and no functional monitoring mechanism to oversee the work of the police and prosecutors.

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

##### *Detention was not in accordance with law*

98. The Complainants allege that the bulk of the Victim’s detention was in violation of approximately 15 court orders for his release. The Complainants submit that the pattern of detaining the Victim in the face of orders for his release began in November 1996, when the Public Prosecutor’s Office ordered his release, but the Minister of Interior ignored the release order and placed him in administrative detention under the Emergency Law.
99. The Complainants further submit that from July 1997, the Victim obtained repeated court orders for his release, which were subverted or ignored by the authorities who would often transfer the Victim to a different site for a short period of time before returning him to prison. The Complainants submit that the authorities would issue false release documents, allowing the Victim to be falsely rearrested on baseless allegations of new criminal activities. The Complainants submit that this pattern of Egyptian authorities subverting release orders by issuing prison release forms while moving detainees to a different detention site has been widely reported.

##### *Detention was arbitrary*

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<sup>27</sup> Criminal Procedure Code of Egypt, Article 210.

<sup>28</sup> As above, Article 64.

### Detention not under the control of effective judicial authority

100. The Complainants allege that at least from November 1996, when the detention of the Victim was ordered under the Emergency Law, the Victim's detention was never authorised by, reviewed, or under the control of any effective judicial authority. The Complainants submit that the Victim was detained solely on the orders of the Minister of Interior.
101. The Complainants submit that although the detention was based on an administrative rather than judicial decision, the review was not automatic but had to be initiated by the Victim or his lawyer. The Complainants further submit that even this nominal review of the Victim's detention was wholly ineffective as the Victim was never physically brought before a judge.
102. The Complainants submit that the repeated disregard of court release orders demonstrates that the judiciary was not competent and did not have effective control over the detention of the Victim. The Complainants submit that the lack of judicial control renders the detention arbitrary.

### Detention was unjust and not based on any predictable legal regime

103. The Complainants submit that the detention of the Victim was not based on any legitimate purpose set out in law, but was unpredictable and lacked any due process. The Complainants submit that the Victim was never informed of the reasons behind his detention, neither charged with any offence, nor provided with the opportunity to answer the claims against him.
104. The Complainants highlight the vague and overbroad definition of persons who may be detained under the jurisdiction of the Emergency Law as the core problem. The Complainants point to Article 3(1) of the Emergency Law which provides for the arrest and detention of criminal suspects, but also of "persons who are dangerous to security and order". The Complainants point out that such detention does not require law enforcement officials to identify specific reasons that lead them to believe that a person is dangerous. The Complainants submit that detention under the emergency law is rather often used as a "preventative measure".
105. The Complainants allege that the vague definitions under the Emergency Law have allowed the State to repeatedly use the law as a weapon to silence or punish political dissidents or citizens who expressed views diverging from the mainstream.
106. The Complainants allege that the Emergency Law, not requiring a detainee to be officially charged or brought to trial, is an administrative detention system which is not tied to judicial holding or procedure.
107. The Complainants aver that the Emergency Law does not define a maximum limit for administrative detention of an individual considered to be a national security threat, and that in practice an individual may be detained indefinitely.



The Complainants submit that the Victim had no idea how long he would be detained and if he would ever be released.

108. The Complainants allege that while detainees should be able to challenge the legality of their detention before the State Security Emergency Courts (the Emergency Courts), in practice detainees have little access to lawyers or legal services.
109. The Complainants submit that authorities sought to conceal the Victim's detention by misleading the family as to whether he was detained at all, and systematically transferring him between different detention sites, with no indication that his detention at these sites was registered, to avoid complying with release orders.

### **Alleged violation of Articles 7(1)(a) and 26**

110. The Complainants submit that the Victim was denied access to an independent and competent tribunal, in violation of Articles 7 and 26 of the Charter. They add that the Government's refusal to respect at least 15 court orders for his release occurred within a legal framework that systematically undermined the independence, authority and competence of these courts.

#### *Lack of enforcement of court release orders*

111. The Complainants aver that the Commission has found violations of Articles 7 and 26 where governments failed to implement court orders against them, including orders for release of a detainee.
112. The Complainants submit that Article 123 of the Penal Code holds that "any public official who uses the authority of his position to [...] obstruct the execution of a ruling or order issued by a court or any competent authority" shall be detained and removed from office. The Complainants add that "every time the Ministry of Interior refused to implement any of the [Victim's] court release orders, it was violating Egyptian law as well."

#### *Lack of independence of State Security Emergency Courts*

113. The Complainants allege that the Ministry of Interior's disregard for at least 15 court release orders was a product of the Executive's control over the Emergency Courts and the Court's systematic lack of independence. They aver that the Emergency Courts, which presided over the Victim's case, fall far short of the Commission's standards on impartiality and independence, particularly as outlined under the Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the Principles and Guidelines on the Right to Fair Trial).
114. The Complainants allege that the Commission has previously assessed these courts in *Communication 334/06 - Egyptian Initiative for Personal Rights and Interights v. Egypt*, and described them in the following terms: "The victims were

tried before the Supreme State Security Emergency Court, whose competence and procedures fall far short of the above standards [the Principles and Guidelines on the Right to Fair Trial]”.

115. The Complainants allege that the judgments of these courts fall completely under the authority of the President of the Republic, who through the Emergency Law, has the power to: suspend a case before it is submitted to the Emergency Court or order the temporary release of the accused person before referral of the case to the Emergency Court; declare decisions of the Emergency Court as final through his approval and these decisions may then neither be appealed nor challenged before any other court in Egypt once approved by the President; and commute, change, suspend or cancel any decision, or order the release of defendants or the retrial of the case before another court.
116. The Complainants further submit that the composition of the Emergency Court and the procedure for appointments to it, illustrate its lack of independence. The Complainants submit that while the Court is normally composed of three judges of the Court of Appeal, the President of the Republic may order that the Court be formed of one judge of the Court of Appeal and two officers of the army, or simply decide that it be formed of three military officers.

#### **Alleged violation of Articles 7(1)(b), (c) and (d)**

117. The Complainants aver that the Victim’s detention for 15 years without bringing him to trial violated his right to be tried within a reasonable time by an impartial court or tribunal under Article 7(1)(d) and his right to be presumed innocent under Article 7(1)(b). They add that during that period he was also prevented from meeting with his lawyer to prepare any defence in violation of Article 7(1)(c).
118. The Complainants submit that the Victim was detained without any charges against him, much less an opportunity to answer them. The Complainants submit that this amounts to a violation of the right to be presumed innocent under article 7(1)(b) of the Charter.
119. The Complainants submit that throughout the 15 years of administrative detention, the Victim was denied adequate access to his lawyer to prepare his defence in violation of article 7(1)(c) of the Charter. The Complainants submit that the Victim was only afforded the most limited opportunities to see a lawyer during his initial 18 months in detention, and then was not permitted to see a lawyer at all. The Complainants allege that when an advocate attempted to visit the Victim in prison in late 2008, the prison authorities denied the advocate entry and confiscated the authorisation to visit.

#### **Alleged violation of Article 8**

120. The Complainants allege that the authorities denied the Victim on multiple occasions the right to practice his religion while in detention, contrary to Article 8. The Complainants submit that the prolonged periods of being handcuffed and

blindfolded meant that the Victim was unable to pray correctly, as prayer required a washing ritual (ablution) which he was unable to perform.

121. The Complainants submit that the extent of these restraints was not justified by security concerns, especially given their duration and their continuation while the Victim was in solitary confinement.
122. The Complainants allege that the guards mocked the Victim for his religious manner and sought to distress and incite him by destroying pages or verses from the Holy Qu'ran in front of him, and once violently pulling him from the ground in the midst of his prayers.

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

123. The Complainants submit that the Victim was repeatedly treated in a manner detrimental to his health. The Complainants allege that many of the health issues during his time in detention resulted from the abuse he suffered at the hands of the prison and security officials.
124. The Complainants submit that the authorities failed to provide medical care to the Victim, even where the latter proactively requested medical attention.
125. The Complainants submit that during the first three years in detention, when some of the most regular torture was inflicted and he suffered from torn ligaments and damage to his ribs, neck, and spinal discs, the Victim received no medical care at all. The Complainants submit that thereafter, medicines were often confiscated as punishment. The Complainants aver that the Victim raised complaints about the obstruction of medical treatment and confiscation of medicines in complaints to the Public Prosecutor and prison authorities.
126. The Complainants submit that the health of the Victim was placed at further risk when the Victim was confined in crowded and poorly ventilated cells with prisoners suffering from contagious diseases such as tuberculosis, in violation of the States' obligation to take the necessary measures to protect the health of their people. The Complainants allege a violation of Articles 5 and 16 of the Charter.

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

127. The Complainants aver that the State denied the Victim his right to family life. The Complainants submit that the Victim was not permitted to receive any family visits while detained at Abu Za'bal, al-Aqrab and Lazoghli. The Complainants add that although his family were formally granted access to visit him at al-Wadi al-Gadeed by the Public Prosecutor's Office, they were denied access to the Victim.
128. The Complainants submit that while the Victim was allowed brief visits at Damanhour, detainees were beaten before and after the visit, often to the great distress of visiting family members.

129. The Complainants submit that in 2008, Egyptian authorities transferred the Victim to a prison in a remote area in the Western Desert, hundreds of kilometres away from his family's home in Cairo.
130. The Complainants aver that the unlawful and arbitrary detention of the Victim for over fifteen years meant that he was also unable to see his children in Pakistan, one who was newly born and another who was about three years old when he was first detained. The Complainants add that his enforced separation from his children was unjustifiable and thus a violation of his right to family life as protected under Article 18 of the Charter.

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

131. The Complainants submit that the Respondent State has not taken steps to provide compensation or rehabilitation for the violations that the Victim has suffered, in violation of Article 1 in conjunction with the above Articles.
132. The Complainants aver that having failed to acknowledge the violations of the Victim's rights and failing to initiate an investigation based upon the Victim's complaints, the Government has not provided the Victim with proper redress
133. The Complainants further aver that the Victim does not receive rehabilitation despite continuing to suffer the impact of torture and extended detention.

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

#### **Preliminary Observations**

#### **Exhaustion of local remedies**

134. In its Merits submissions, the Respondent State submits that the Victim did not exhaust local remedies.
135. The Respondent State submits that following the events in January 2011 where prisons, police stations and courts were stormed and destroyed, it is impossible for the authorities to be sure of the authenticity of the Victims' complaints and of any follow-up to those complaints. The Respondent State submits that the Victim can still follow up his claims before the Egyptian legal system as there is no statute of limitation for the crime of torture.
136. The Respondent State submits that although this avenue is still open to the Victim, the Victim has not resorted to the administrative court to appeal his detention and request for compensation.
137. The Respondent State submits that the Victim should have brought his case before the National Council for Human Rights, a national independent mechanism which operates in accordance with the Paris Principles. The Respondent State submits that the National Council for Human Rights is competent to receive complaints, to orient them to the competent authorities and to effect follow-up.

138. The Respondent State submits that regardless of who is in power, the judicial and constitutional protection guaranteed by the Egyptian legal system remains available to the Victim who may still resort to competent judicial authorities.
139. The Respondent State avers that legislation in contradiction with the Constitution should be challenged before the Supreme Constitutional Court.
140. The Respondent State submits that the submission of the Complainants do not point out the local remedies available to the Victim. The Respondent State alleges that instead of advising the Victim, the aim of the Complainants was to achieve political gains against Egypt.

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

141. The Respondent State submits that the allegations of torture are unsupported by evidence and their veracity is impossible to verify. The Respondent State submits that the evidence presented by the Complainants on torture is lacking, as they provided dispersed paper cuttings with no link to the complaints submitted.
142. The Respondent State submits that human rights reports cannot be used as evidence of torture.
143. The Respondent State highlights that the complaint contains data and reports that do not directly touch on the allegations.
144. The Respondent State highlights that the complaint does not explain the Victim's background nor does it set out the reasons for the Victim's presence in Pakistan and why he obtained Pakistani nationality. The Respondent State submits that the Victim is a dangerous member of a terrorist organisation aimed at undermining and disturbing the stability and security of the state. The Respondent further submits that in light of the continuity of his threat and danger, and his attempt to implement criminal plans, some precautionary and legal actions were taken during the state of emergency in accordance with the Emergency Law. The Respondent adds that the Victim was released on 17 March 2011.

#### **Alleged violation of Articles 5 and 1**

145. The Respondent State submits that it is absolutely impossible for the competent authorities to verify the authenticity of the Victim's allegations regarding the submission of complaints, and the State is therefore unable to provide the Commission with information on the matter. The Respondent State refers to the loss of information following the revolution of January 2011 which led to the storming of most Egyptian prisons and the burning and looting of Public Prosecution headquarters and police stations.
146. The Respondent State submits that since 1971, successive Egyptian constitutions have included articles on the prevention of torture and ill-treatment in accordance with the international human rights instruments to which Egypt is a party. The Respondent State submits that the commitment of Egypt is reflected

under its 2014 Constitution which guarantees the right to dignity, and prohibits all forms of torture, and ill-treatment of arrested or detained persons.

147. The Respondent State further contends that the 2014 Constitution provides that there is no statute of limitation for torture. The Respondent State submits that the Constitution further provides that there is no statute of limitation for both civil and criminal proceedings for an assault on the personal freedoms or sanctity of the life of citizens, along with other general rights and freedoms guaranteed by the Constitution and the law. The provision further adds that the state guarantees just compensation for those who have been assaulted. The Respondent State submits that this ensures that no criminal goes unpunished and that the victim accesses compensation for damages inflicted, even when the complaint occurs at a later stage due to fear of the victim. The Respondent State submits that Article 302 of the Criminal Procedure Code also stipulates that there is no statute of limitation for acts of torture.
148. The Respondent State avers that in addition to Articles 126 and 282 of the Penal Code, other provisions also criminalise torture. The Respondent State therefore submits that if any violation is proven, the fault cannot be attributed to a legislative failure as the violation is punishable according to the Egyptian legal system.
149. The Respondent State submits that the Penal Code criminalises imprisonment without reason and the punishment of a person more than necessary under Articles 127 and 280. The Respondent State submits that the Criminal Procedure Code provides that the courts may not consider a statement issued by an accused or a witness under duress.
150. The Respondent State submits that Egypt is committed to its international obligation to eradicate torture as evidenced by its laws and the judicial pronouncements of the Egyptian judiciary.
151. The Respondent State argues that the Penal Code does not contain a definition of torture but generally mentions it, allowing for a broader interpretation to include all forms of torture.
152. The Respondent State avers that there is no direct and confirmed link between the Victim's allegations of torture and Article 126 of the Penal Code related to torture.
153. The Respondent State argues that the Victim did not renew his application by forwarding his complaints when he learned that his previous complaints went missing during the events of January 2011, in accordance with the rules regulating cases of missing documents under the Criminal Procedure Code. The Respondent submits that as a result, investigations on the allegations of torture have not been carried out by the competent authorities. The Respondent adds that the Victim however still has the right to renew his claims by forwarding all available evidence and arguments, and taking legal action under the above-mentioned legislative and constitutional regime.

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

154. The Respondent State rejects the argument that the arrest and detention of the Victim was in violation of Article 6 of the Charter and submits that the Victim was arrested and detained in accordance with the lawsuit No<sup>o</sup> 502 of 1994 for endangering the security of the state.
155. The Respondent State submits that the Victim was provisionally detained until the completion of the investigations and was later released on 14 November 1996. The Respondent State further submits that the Victim was however arrested on 21 November 1996 in accordance with the Emergency Law, due to his continued security threat. The Respondent adds that the Victim was released and rearrested numerous times until he was definitively released on 17 March 2011. The Respondent State submits that the arrest of the Victim was motivated by legal and judicial precautionary measures and was not arbitrary. The Respondent State submits that there were factual motivations and legal reasons pertaining to the detention of the Victim due to the continuing threat he posed to the security and public order of the State. The Respondent State submits that the Victim was accused of having joined an underground extremist group, which aimed to disrupt the rule of law and overthrow the country's institutions.
156. The Respondent State avers that as the detention was not related to criminal offences, it did not require the transfer of the case to a criminal court.
157. The Respondent State submits that the arrest was permitted by the Emergency Law, which was in effect at that time.
158. The Respondent State submits that although the African Charter does not provide for a state of emergency, under articles 60 and 61 of the African Charter, the Commission may refer and apply the internationally established and acceptable norms and practices provided for in the instruments adopted by the UN. The Respondent State submits that this should apply to state of emergencies.
159. The Respondent State submits that the Emergency Law respects the conditions mentioned under Article 4 of the International Covenant on Civil and Political Rights (ICCPR) on state of emergencies and permissible derogations. The Respondent State submits that the Emergency Law does not compromise the right to life, the right to be protected from torture and other ill-treatment, slavery or forced labour and the right to freedom of religion among others. The Respondent State submits that the procedure to declare a state of emergency follows the procedure established by international human rights standards in that respect.
160. The Respondent State avers that the current framework surrounding the state of emergency in Egypt reflects the evolution of the Egyptian vision and is compatible with the developments and regional efforts connected to human rights. The Respondent State submits that the state of emergency is motivated by the nature of the risks faced, which may not be dealt with through measures and actions taken by the State in a regular situation. The Respondent State refers to a 1993 judgment of the Supreme Constitutional Court where the Court held that the state of emergency, although an exceptional regime, is not equivalent to totalitarian rule. The Court had held that the (state of emergency) regime is

compliant with a law whose foundation, rules, limits and norms have been established by the Constitution, and so its actions must be directed within the relevant prescribed rules, conditions, norms and limits.

161. The Respondent State submits that the state of emergency has been contested many times before courts, which is indicative of the stability and continued functioning of the State's institutions, the rule of law and the independence of the judiciary. The Respondent State highlights a judicial precedent of the Court in 1990 which provides that where arrests under the Emergency Law are conducted without good reason, the decision is illegal and the administration must compensate the victim. The Respondent State submits that, as such, the Victim in the instant case could have challenged the legality of his arrest and requested compensation for the damages he suffered.

#### **Alleged violation of Articles 7 and 26**

162. The Respondent State refutes the allegations that Egypt has violated Article 7(1) in conjunction with Article 26 of the Charter.

163. The Respondent State agrees that release orders were pronounced in favour of the Victim by courts staffed by judges from the ordinary judiciary. The Respondent State however submits that due to the continuing threat the Victim posed to the security and public order of the country, the arrest decision came successively, all based on the Emergency Law in effect at that time. The Respondent State thus submits that the Victim was not prevented by the authorities to have recourse to the courts.

164. The Respondent State submits that the Victim in contesting his detention as well as in seeking damages, could have had recourse to the administrative courts as arrests decisions under the Emergency Law are administrative decisions.

165. The Respondent State submits that while the Victim was provisionally detained in connection with lawsuit No<sup>o</sup> 502 of 1994, the Victim was called from time to time for interrogations before the Public Prosecutor in the presence of his lawyer. The Respondent State alleges that the Victim was released after the interrogations and permitted to meet and task his lawyer to defend him and to submit applications to the competent courts. The Respondent State further submits that the Victim was always in touch with his lawyer, who was present in courts where the arrest and detention of the Victim was debated.

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

166. The Respondent State submits that the Victim benefited from health care and was going repeatedly to the hospital where he underwent analysis and X-ray tests, and a lumbar and sacral cartilage slippage was uncovered. The Respondent State points out to a visit at the hospital on 8 February 2010. The Respondent State submits that the Victim was then offered the opportunity of being operated on, but refused. In support of this allegation, the Respondent State attaches the medical reports issued by the hospital where the Victim was treated.



## **Complainants' Observations on the Merits Submissions of the Respondent State**

### **Exhaustion of local remedies**

167. The Complainants argue that the Respondent State's arguments on the exhaustion of local remedies are neither necessary nor appropriate at this stage. The Complainants aver that the Commission has already determined the issue.
168. The Complainants submit that even if the Commission was to re-examine the admissibility of the Communication, there is nothing in the submission of the Respondent State which undermines the admissibility determination of the Commission.
169. The Complainants submit that the Respondent State's claim that the Victim should have applied to the administrative courts ignores that these courts could not bring about the release of the Victim, but could only order compensation which is an insufficient remedy. The Complainants point to the alleged inadequacy of administrative courts, referring to the unsuccessful attempt in 2008, when the Victim's lawyers brought a case before the Administrative Courts challenging the illegal detention of the Victim and demanding his release and compensation. The Complainants further submit that the claim of the Respondent State ignores the core issue in this case which is the fact that the Government for over 15 years has refused to implement the decisions of its own courts and that remedies have already become unduly delayed.
170. The Complainants urge the Commission to reject the Respondent State's contention that the Victim did not re-file his complaint regarding his torture.

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

171. The Complainants refute the Respondent State's argument as to the lack of evidence to corroborate the allegations of torture. The Complainants submit that the Victim provided the Commission with substantial, direct, credible and consistent evidence, together with additional corroborating material, proving his torture and related abuses. The Complainants refer to the detailed and signed statement of the Victim; medical examinations, documents, and photographs; report of the UN Working Group on Arbitrary Detention; and non-governmental human rights reports.
172. The Complainants allege that the abuses described by the Victim and the evidence are consistent with a pattern and practice of abuse to which other detainees held under Egypt's Emergency Law were regularly subjected, including the types of torture methods applied to other Emergency Law detainees, the detention conditions to which the Emergency Law detainees were subjected, the location where other Emergency Law detainees were held, and the time at which abused Emergency Law detainees were held. The Complainants further allege that most of the abuses suffered by the Victim are consistent with

previous findings of the Commission, particularly in its decision relating to abuses committed under the Emergency Law in 2004 and 2005.

173. The Complainants further submit that the Victim's injuries occurred while in detention, and evidence of ill-treatment has been presented, hence the burden of proof shifts to the Government to convince the Commission that the allegations of torture are unfounded. The Complainants submit that the Respondent State made no attempt to give a satisfactory explanation as to how the Victim sustained the various documented injuries. The Complainants allege that the Government recognises that the Victim suffers from lumbar and sacral cartilage slippage, but provides no explanation for how those injuries occurred. The Complainants conclude that in view of the available evidence, the injuries were inflicted by the Respondent State.

### **Alleged violation of Articles 5 and 1**

#### *Failure to provide safeguards against torture*

174. The Complainants aver that the Respondent State has not provided any information to contest or explain its failure to put in place safeguards which could have prevented the torture of the Victim such as access to medical assistance, access to counsel, preventing his family from knowing where he was or from visiting him, failing to properly register his detention, exposing him to incommunicado detention and failing to bring him promptly before an effective judicial authority.

#### *Failure to investigate allegations of torture*

175. The Complainants submit that the Government has provided no indication that it undertook any investigation into the torture and related abuses which the Victim has suffered throughout his detention.
176. The Complainants further submit that the Government has not addressed the flaws in its legal system which prevent accountability for torture.
177. The Complainants reject the Respondent State's argument that it failed to investigate the Victim's complaint due to lack of information and his failure to resubmit his claims after his release in March 2011. The Complainants aver that both the Victim and his family have made a number of complaints during his detention, any one of which should have triggered the Government to investigate his allegations. The Complainants further submit that the wealth of information which the Victim has been able to compile after his release discredits any claim that the Government could not carry out an investigation after the January 2011 revolution.
178. The Complainants submit that the Government having ample notice of the claims of torture was obliged to investigate, independently of the complaints of the Victim.

*Systemic deficiencies in domestic law and accountability structure*

179. The Complainants allege that while Egypt claims its new Constitution prohibits torture, the Government has neither modified the domestic offences criminalizing torture nor shown how these are compliant with international human rights law.
180. The Complainants submit that the Government did not address or dispute the pattern of impunity for torture or the restrictions on the rights of victims where the perpetrator is an official.
181. The Complainants submit that while the Government claims that torture is punished by other provisions in the Penal Code, it did not explain which provisions it is referring to. Moreover, the Complainants submit that a reference to other unspecified provisions cannot correct the deficiencies identified in Article 126.
182. The Complainants reject the Respondent State's argument that the crime of torture in Egypt is in compliance with the African Charter. The Complainants submit that the new Constitution continues to fail to set out a full definition of torture and other ill-treatment. The Complainants submit that the new Constitution did not apply during the period the Victim was tortured, requested investigations of his torture, and lodged his complaint with the Commission. The Complainants submit that the changes to the Constitution do not remedy the lack of criminal provisions under which those who committed torture against a detainee could be prosecuted and held accountable.

**Alleged violation of Article 6**

183. The Complainants submit that the Government has not addressed the detailed account by the Victim that he was actually never released in response to numerous court orders, the evidence of a pattern of failing to release people in similar positions, or the arguments for why this constituted a violation of rights. The Complainants reject the claim by the Respondent State that the Victim was released, and point out that the Government presented no evidence to support this claim. The Complainants add that the Victim was merely moved from one detention facility to another when a court ordered his release, to avoid complying with the court order.
184. The Complainants submit that the continuous cycle of release and re-arrest under the Emergency Law based on the Executive's discretion and without judicial authorisation only highlights the arbitrary nature of his detention and the system that authorised it.
185. The Complainants submit that the Ministry of Interior's disregard of 15 court release orders only highlights the Executive's control over the Emergency Courts and the Courts' systematic lack of independence. The Complainants further submit that in practice a person may be held indefinitely under the regime of the Emergency Law. The Complainants aver that none of these characteristics are disputed by the Government other than in the broadest of terms.

186. The Complainants urge the Commission to reject as unfounded the Respondent State's reliance on the ICCPR derogation clause to justify the lawfulness of the Emergency Law. The Complainants submit that applying the ICCPR's derogation provision to the African Charter would alter the Charter's purposeful character and goes far beyond the allowance for the Commission to draw inspiration from international law on human and peoples' rights under Article 60 of the Charter.

187. The Complainants aver that the attempt by the Government to portray the Emergency Law as a limited system which operates under effective judicial oversight is at odds with reality. The Complainants state that Egypt was formally in a state of emergency for the entirety of the Victim's detention, and more broadly from 1967 to May 2012, with a brief suspension from May 1980 to October 1981.

#### **Alleged violation of Article 7**

188. The Complainants submit that the Respondent State's argument that the fair trial rights of the Victim were not violated as Emergency Law detainees are not entitled to a criminal trial, proves that the Victim's rights under Article 7 were violated.

189. The Complainants submit that the Government's argument as to the Victim's access to counsel relates only to the period when the Victim was under investigation for criminal charges i.e. the first 18 months of detention.

190. The Complainants submit that the Respondent State did not address the restrictions placed on the Victim when he was able to meet his counsel, which are all incompatible with the right to access counsel under the Charter.

191. The Complainants submit that the Respondent State does not dispute the total lack of access to counsel for the 15 years of administrative detention.

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

192. The Complainants submit that the limited access to medical attention provided to the Victim 15 years into his detention in 2010 and the two medical reports in 2011, do not meet the State's obligations under the African Charter. The Complainants aver that the Respondent State has ignored both its responsibility for the damage to the Victim's health through its abuse and the conditions of detention, and the specific instances where the requests of the Victim for medical attention was denied.

#### **Decision of the Commission on the Preliminary Observations of the Respondent State**

193. In line with Rule 117(4) of its Rules of Procedure 2010, before dealing with the Merits of the Communication, the Commission would like to pronounce itself on the preliminary objection of the Respondent State to the Admissibility of the

Communication and its attendant request for the reversal of the decision on Admissibility.

194. The Commission declared the present Communication admissible at its 15<sup>th</sup> Extra-Ordinary Session, held from 7 to 14 March 2014.
195. In its Merits Submissions, the Respondent State argues that local remedies were not exhausted by the Complainants. It states that the Complainants should have sought remedies either from the Administrative Court or the National Council for Human Rights.
196. While the Commission takes note of the Respondent State's submissions on exhaustion of local remedies, it is of the view that the Respondent State has not presented new evidence that would alter the decision which the Commission made during the admissibility stage of this Communication (see paragraphs 62 to 72 of this Communication). Moreover, the Commission's Rules of Procedure do not provide for the review of a decision to declare a Communication admissible. It is also not in the practice of the Commission to reconsider a decision declaring a Communication admissible as highlighted in *Zegveld v Eritrea*.<sup>29</sup>
197. Furthermore, the Commission reiterates the position that it makes rulings on the basis of the facts alleged at the time of submission of a complaint. In the instant Communication, at the time of receipt of the Complaint on 4 March 2011, the Victim was still in detention at El Wadi El Gadid Prison. In light of the above, the Commission declines to revisit its decision on admissibility. The Commission will proceed to determine this Communication on its Merits.

## **Analysis of the Commission on Merits**

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

198. The Complainants allege that the Respondent State violated Article 5 of the African Charter.
199. Article 5 of the Charter states that "[e]very 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 and treatment shall be prohibited."
200. The prohibition of and protection from torture has also evolved into a peremptory norm or *jus cogens*, and become a fundamental standard in the international arena, whereby states cannot derogate from their responsibility to ensure protection from torture.<sup>30</sup>
201. The Complainants contend that the Respondent State violated Article 5 of the African Charter in the following regards:

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<sup>29</sup> Communication 250/2002 - *Liesbeth Zegveld and Mussie Ephrem v Eritrea* (2003) ACHPR para 45.

<sup>30</sup> See para 67 of this Communication and footnotes 17 and 18.

- i. That abuse, conditions of detention and incommunicado detention of the Victim constituted torture
  - ii. The failure to provide safeguards against torture
  - iii. The failure to conduct prompt, impartial and effective investigation of torture
  - iv. Systematic deficiencies in domestic law and accountability structure
- i. *Whether the alleged abuse, conditions of detention and incommunicado detention of the Victim constituted torture*

202. The Complainants allege that the Respondent State violated Article 5 of the African Charter by subjecting the Victim to torture and other ill-treatment during his detention; holding the Victim in *incommunicado* detention; and due to the poor conditions of detention in violation of the Victim's right to dignity.

203. The Complainants allege that while in detention, the Victim was regularly subjected to physical and psychological pain by state officials during his interrogations and for the purpose of punishment. The Complainants add that, the beatings served to diminish his spirit and render him more compliant in interrogations.

204. The Complainants submit that the Victim was beaten with fists and sticks; suspended from the ceiling by his wrists and ankles for extended periods; electrocuted including on his genitals after water had been poured on him; forced to strip down to his underwear; deprived of sleep; handcuffed and blindfolded for prolonged periods resulting in sensory deprivation; and that he was in constant fear of torture. The Complainants submit that the psychological pain, sense of helplessness and mistreatment was so severe that the Victim went on hunger strike and attempted to commit suicide twice.

205. The Complainants aver that the Victim was held in *incommunicado* detention for a prolonged period of time including the first six (6) weeks of his detention in 1995 and later for three months in 2008. They add that the Victim was handcuffed and blindfolded during much of the time he was held in *incommunicado* detention.

206. The Complainants also allege that the cells where the Victim was detained were small and frequently overcrowded, with up to 30 persons in a cell, which forced prisoners to sleep in shifts. The Complainants allege that many of the cells did not have access to sanitary facilities, lacked proper ventilation and were at times filled with sewage water. The Complainants add that the Victim at times had no access to fresh water.

207. The Respondent State does not address the specific allegations of torture and other ill-treatment by the Complainants, and only focuses on the alleged lack of evidence to corroborate the allegations.

208. In order to determine whether the alleged abuse, conditions of detention and *incommunicado* detention of the Victim took place in violation of Article 5, the Commission would first have to identify whether the alleged acts amount to

torture and other ill-treatment, and if so, whether there is sufficient evidence to prove the allegations.

209. In line with paragraph 4 of its Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines)<sup>31</sup> and its jurisprudence,<sup>32</sup> the Commission's understanding of torture is founded on the definition of torture established under Article 1 of UNCAT from which it is enjoined to draw inspiration<sup>33</sup> and which provides that:

"Torture means 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."

210. The definition of torture under UNCAT contains four (4) cumulative elements: that severe mental or physical suffering must be inflicted; that an act or omission must be inflicted intentionally; that the infliction of such or omission must be for a specific purpose; and that the act or omission must be by a public official or with the consent or acquiescence of a public official. For torture to have occurred all these elements must be present cumulatively.

211. The Complainants aver that the Victim suffered severe mental and physical pain which was inflicted intentionally by agents of the Respondent State for the purpose of punishment, to diminish his spirit, and to render him more compliant in interrogations.

212. The Commission notes that the Complainants have adduced evidence in the form of the Victim's extensive affidavit,<sup>34</sup> excerpts from complaints submitted to the Public Prosecutor regarding the Victim's treatment and health condition, forensic medical examination reports from different medical institutions, photographs of the Victim's scars from torture,<sup>35</sup> as well as reports issued by the

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<sup>31</sup> (n 17 above).

<sup>32</sup> The Commission has previously adopted the definition of torture provided under Article 1 of UNCAT in its jurisprudence. See e.g. Communication 245/2002 - *Zimbabwe Human Rights NGO Forum/Zimbabwe* (2006) ACHPR, para.180, Communication 334/06 - *Egyptian Initiative for Personal Rights and Interights v Egypt* (2011) ACHPR, para 162 & Communication 368/09 - *Abdel Hadi, Ali Radi and Others v. Sudan* (2013) ACHPR para 70.

<sup>33</sup> Articles 60 and 61 of the African Charter establish the importance of international and regional human rights instruments and standards as benchmarks for the application and interpretation of the African Charter.

<sup>34</sup> The Victim, in his Affidavit of 18 June 2014, details the alleged torture and other ill-treatment he was subjected to while he was in detention for 15 years, including the places where the alleged torture occurred, and in some instances, the names of the alleged perpetrators. Annex 1 - The Applicant's Affidavit dated 18 June 2014, *Annex to Merits Submissions*, paras 19 - 26, 28 - 29, 31, 37 - 43, 47 - 52, 54 - 58, 65 - 67, et al.

<sup>35</sup> See Annexes 9-13 and 20-21. The details of the referenced annexures are as follows: Annex 9 - Forensic medical examination conducted on 25 July 2011 and report concluding that the Victim has

UN Working Group on Arbitrary Detention and other human rights organisations.

213. The Respondent State argues that the allegations of torture are unsupported by evidence, and adds that the evidence submitted by the Complainants amounts to dispersed paper cuttings that do not show any link with the allegations of the Complainants. The Respondent State further submits that human rights reports cannot be used as evidence of torture.

214. In *Gabriel Shumba v. Zimbabwe*, the Commission noted that in seeking to refute allegations of torture, it is not sufficient for the Respondent State to simply argue that the allegations are unsubstantiated when they are supported by a range of documentation.<sup>36</sup> The Respondent State must provide evidence to the contrary.<sup>37</sup>

215. Additionally, in *Egyptian Initiative for Personal Rights and Interights v. Egypt*, the Commission held that when a person is injured in detention or while under the control of security forces, there is a strong presumption that the person was subjected to torture or ill-treatment.<sup>38</sup> Under such circumstances, it is incumbent on the State to provide a plausible explanation of how the injuries were caused.<sup>39</sup> The Commission observed that the Respondent State made no attempt to give a satisfactory explanation of how the injuries were sustained, nor took any steps to investigate and address the surrounding circumstances,<sup>40</sup> or provide contrary evidence to that of the Complainant. Accordingly, in line with its jurisprudence, the Commission concluded, based on its analysis of the facts and evidence before it, as set out in paragraph 212 above, that the marks on the victims evidenced the use of torture.<sup>41</sup>

216. To this end, the Commission observes in the instant Communication, that the Respondent State has not provided contrary evidence to rebut the medical and other primary evidence presented by the Complainant showing, *inter alia*, injuries and scars during detention, and as well, that the allegations of the Victim are similar to the pattern and practice of abuse revealed by the various (corroborative) reports submitted by the Complainant. Without pronouncing itself on the evidentiary weight of each of the documents presented, the Commission, following its analysis, is of the view that the combined weight of the submitted

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been tortured at the time of his detention (Arabic version); Annex 10 – English version of Annex 9; Annex 11 – MRI report dated 27 November 2006 indicating “combined developmental and discogenic spinal canal stenosis most evident at L-3 and L-4 disc” (English); Annex 12 – MRI reports of the cervical and the lumbosacral spine dated 4 July 2011; Annex 13 – 2 photographs of the Applicant’s visible scars, indicating torture; Annex 20 – MRI report from the Qasr Al Aini Hospital dated 24 October 2005 (English); and Annex 21 – Medical report by the Medical Centre of the Arab Contractors dated 25 July 1985, showing that the Victim was medically fit (Arabic and English).

<sup>36</sup> Communication 288/04 - *Gabriel Shumba v. Zimbabwe* (2012) ACHPR para 159.

<sup>37</sup> As above.

<sup>38</sup> Communication 334/06 - *Egyptian Initiative for Personal Rights (EIPR) and Interights v. Egypt* (2011) ACHPR paras 168 & 169.

<sup>39</sup> As above.

<sup>40</sup> As above, 170.

<sup>41</sup> As above, 171.



materials<sup>42</sup> provides compelling, credible and consistent evidence corroborating the allegations of torture and ill-treatment of the Victim.

217. The acts of torture inflicted on the Victim were observed to be synonymous with the methods of torture identified in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)<sup>43</sup> which include:<sup>44</sup>

- blunt trauma, such as a punch, kick, slap, a beating with truncheons;
- positional torture, using suspension, stretching limbs apart, prolonged constraint of movement, forced positioning; and
- electric shocks.

218. Notably, the Commission has, in its jurisprudence, found that acts characterised amongst other things by severe beatings, credible threats and sleep deprivation resulted in severe physical and mental pain and suffering.<sup>45</sup>

219. Consequently, in consideration of the cumulative elements for an act of torture to take place, the methods of torture described under the Istanbul Protocol, and its jurisprudence on Article 5 of the Charter, the Commission finds that the Victim's beatings, suspension from the ceiling, and electrocution amounted to torture.

220. The Commission recognises that distinguishing between acts of torture and acts of cruel, inhuman or degrading treatment or punishment (ill-treatment) raises difficulties. It notes in this regard that the UN Committee against Torture has observed that the definitional threshold between ill-treatment and torture is often not clear.<sup>46</sup> Thus, whilst noting that each situation is distinct, the Commission endorses the common understanding that ill-treatment is differentiated from torture by the degree of suffering involved, the intention of the perpetrator, and the victim's vulnerability and powerlessness.<sup>47</sup>

221. In light of the above and since, in the instant case, the Commission has made a finding that acts of torture were inflicted on the Victim, it considers it unnecessary to make a finding on the lesser violation of ill-treatment.

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<sup>42</sup> Fn 35 above.

<sup>43</sup> The 1999 Istanbul Protocol was developed to serve as an international guideline for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture, and reporting findings to the judiciary or any other investigative body. The Manual includes principles for effective investigation, and minimum standards for effective documentation of torture.

<sup>44</sup> Istanbul Protocol, para 145.

<sup>45</sup> Communication 379/09 - *Monim Elgak, Osman Hummeida and Amir Suliman v. Sudan* (2015) ACHPR para 99.

<sup>46</sup> See UN Committee against Torture, General Comment No. 2: Implementation of Article 2 by State Parties (2008), para 3.

<sup>47</sup> See UN Voluntary Fund for Victims of Torture "Interpretation of Torture in the light of the practice and jurisprudence of international bodies" (2011) pp. 6 - 8; Redress "The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Guide to Reporting to the Committee against Torture" (2018) pp. 10 - 11.

222. Regarding the issue raised by the Respondent State as regards the sufficiency of evidence to prove the allegations of torture and ill-treatment, and as already set out in the Commission's analysis leading to its conclusion as set out in its analysis in paragraphs 215 and 216 above, the Commission observes that the Victim did not only provide corroborative reports but also primary medical evidences – the details of which are contained in this decision, and as well that the Respondent State has not provided satisfactory explanation of how the Victim's injuries were sustained, nor presented contrary evidence to rebut the submissions of the Complainants. The Respondent State simply argues that the allegations of torture are unfounded. Consequently, based on the facts and evidence presented before it and in light of its aforesaid jurisprudence, the Commission, following its analysis as set out in paragraphs 215 and 216, is satisfied that the Complainants have provided sufficient evidence to support the allegations of torture and ill-treatment of the Victim during his detention.

ii. *Whether there was failure to provide safeguards against torture*

223. The Complainants allege a violation of Articles 5 and 1 of the Charter due to the Respondent State's failure to provide safeguards against torture including by denying the Victim access to medical assistance and a lawyer, preventing his family from knowing his whereabouts or from visiting him, failing to properly register his detention, and failing to bring him promptly before an effective judicial authority.

224. The Commission agrees that the above are basic procedural safeguards necessary for the prevention of torture, and are recognized as such by the Robben Island Guidelines.<sup>48</sup> The Commission however finds it more appropriate to defer its analysis on these allegations to its broader discussion under Articles 6, 7, 16 and 18 of the African Charter.

iii. *Whether there was failure to conduct prompt, impartial and effective investigation of torture*

225. The Complainants allege that the Respondent State failed to conduct prompt, impartial and effective investigation into the allegations of torture. The Complainants submit that the Respondent State had ample notice of the allegations of torture following the numerous complaints by the Victim and his sister to the Public Prosecutor alleging torture, lack of medical care to treat the injuries, and the poor conditions of detention. The Complainants state that instead of taking investigative steps, the authorities retaliated by torturing the Victim further and isolating him. The Complainants add that following his release in March 2011, the Victim asked the Public Prosecutor about his complaints, but was told that the files no longer existed.

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<sup>48</sup> Robben Island Guidelines (n 17 above), paras 20, 24, 27, 30, and 31. In its jurisprudence, the Commission has also held that State Parties are under an obligation to put in place certain procedural safeguards in order to prevent detainees from being subjected to abuse. See, *Abdel Hadi and Others v. Sudan* (n 32 above), para 75.

226. The Respondent State on the other hand submits that it was absolutely impossible for the competent authorities to verify the authenticity of the Victim's allegations that he submitted complaints, and that it was therefore unable to provide the Commission with information on the matter. The Respondent State further submits that information was lost following the revolution of January 2011 which led to the storming of prisons, and the destruction of the Public Prosecution headquarters and police stations.
227. The Respondent State argues that the Victim did not renew his application by forwarding his complaints when he learned that his previous complaints had gone missing, in accordance with the requirement under the Criminal Procedures Code. The Respondent State contends that as a result, investigations into the allegations of torture had not been carried out by competent authorities. The Respondent State adds that the Victim still has the right to renew his claims by forwarding all available evidence and arguments, and taking legal action under Egypt's legislative and legal regime, so that an investigation can take place.
228. The UNCAT, which the Respondent State is party to, provides that a State Party should ensure that any individual who alleges he has been subjected to torture in its territory has the right to complain to and to have his case promptly and impartially examined by, its competent authorities.<sup>49</sup> Further, the Robben Island Guidelines, state that investigations into all allegations of torture or ill-treatment shall be conducted promptly, impartially and effectively, guided by the Istanbul Protocol.<sup>50</sup>
229. According to the Istanbul Protocol, the broad purpose of investigation is to establish the facts relating to alleged incidents of torture in order to identify perpetrators and facilitate their prosecution, and to obtain redress for victims.<sup>51</sup> The Protocol adds that those carrying out investigations must at a minimum, seek to: obtain statements from victims of alleged torture; recover and preserve evidence related to the alleged torture; identify possible witnesses and obtain statements from them concerning the alleged torture; and determine how, when and where the alleged incidents of torture occurred and any pattern or practice that may have brought about the torture.<sup>52</sup>
230. Furthermore, the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Principles on Effective Investigation and Documentation), which form an integral component of the Istanbul Protocol, provide that States shall ensure that "[e]ven in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have

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<sup>49</sup> UNCAT, Article 13.

<sup>50</sup> Robben Island Guidelines, Guideline 19.

<sup>51</sup> Istanbul Protocol, para 77. The Commission in its jurisprudence has also held that where there are allegations of torture, the State is under the obligation to initiate a prompt, impartial and effective investigation in order to determine the veracity of the allegations and to bring the perpetrators to justice if the allegations are founded, as well as to afford redress to the victims (*Monim Elgak and others v. Sudan* (n 45 above), para 100).

<sup>52</sup> Istanbul Protocol, para 77.

occurred.”<sup>53</sup> The UN Committee against Torture, in its jurisprudence, has also held that the formal lodging of a complaint of torture or an express statement of intent to sue is not necessary and it is enough for the Victim to bring the facts related to the allegation of torture to the attention of the authorities.<sup>54</sup>

231. The facts presented in the instant Communication reveal that the Respondent State had ample notice of the alleged torture of the Victim, including the numerous complaints submitted to the Public Prosecutor on the matter, which are corroborated by reports issued by the UN Working Group on Arbitrary Detention (2007), Amnesty International (2008), and the FIDH (2010). Additionally, other regional and international bodies, including the Commission, found that persons detained under the Emergency Law have been susceptible to various human rights violations, including to acts of torture and other ill-treatment, revealing a pattern of allegations which should have drawn the Respondent State’s attention for action.<sup>55</sup> Specifically, the UN Committee against Torture, in its Concluding Observations on the State Report of Egypt in 2002, recommended that Egypt should:

“[e]liminate all forms of administrative detention [...] The premises controlled by the State Security Investigation Department should be subject to mandatory inspection, and reports of torture or ill-treatment committed there should be investigated promptly and impartially.”<sup>56</sup>

232. Following his release, the Victim also presented himself before the Office of the Public Prosecutor to follow up on his previous complaints, and the Respondent State then had the opportunity to obtain a statement from the Victim.<sup>57</sup> Moreover, even if the Office of the Public Prosecutor was not in a position to initiate investigations, the Office should have referred the Victim to a competent body to investigate the allegations of torture.

233. The Commission reiterates that freedom from torture is a cardinal rule in international law that cannot be derogated from at any time and under any conditions and circumstances including in times of war and emergency.<sup>58</sup> As held

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<sup>53</sup> Principles on Effective Investigation and Documentation, Principle 2.

<sup>54</sup> Communication 187/2001 - *Mr Dhaou Belgacem Thabti (represented by non-governmental organisation Vérité-Action) v Tunisia*, CAT/C/31/D/187/2001, para 10.6.

<sup>55</sup> *EIPR and Interights v. Egypt* (n 38 above), paras 177, 183, 187, 189, 190, 207, 210, 219, 223, and 224. See also, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism *Mission to Egypt* (14 October 2009), paras 19 – 21, 23; UN Committee against Torture *List of issues prior to the submission of the fifth periodic report of Egypt (CAT/C/EGY/5)* (13 July 2010) paras 6, 40 – 42; and UN Committee against Torture *Conclusions and recommendations of the Committee against Torture on Egypt* (23 December 2002) paras 5 (c), 5 (f), 5 (h), 6 (a), 6 (f), and 6 (g).

<sup>56</sup> UN Committee against Torture *Conclusions and recommendations on Egypt* (23 December 2002) para 6 (f).

<sup>57</sup> The Istanbul Protocol provides that witness and survivor testimony are necessary components in the documentation of torture. It adds that to the extent that physical evidence of torture exists, it provides important confirmatory evidence that a person has been tortured. See Istanbul Protocol, para 161.

<sup>58</sup> Communication 431/12 – *Thomas Kwoyelo v. Uganda* (2018) ACHPR para 200.

in the Commission's own jurisprudence and clearly stated in the Principles on Effective Investigation and Documentation, "[e]ven in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred."<sup>59</sup>

234. The Commission finds that the allegations of torture in the present Communication were duly brought to the attention of the Respondent State. However, the Respondent State, failed to initiate prompt, impartial and effective investigations into the Victim's allegations of torture, contrary to its obligations under the African Charter and UNCAT.

*iv. Whether there are systematic deficiencies in the domestic law on torture and accountability structure*

235. The Complainants allege that the Respondent State's failure to investigate the Victim's allegations of torture is, in substantial part, a result of deficiencies in the country's legal structure, particularly the narrow definition of torture, and restrictions on the rights of victims when the alleged perpetrator is a public official.

*a. Narrow definition of torture*

236. The Complainants aver that the definition of torture under Article 126 of the Egyptian Penal Code does not conform to the definition under Article 1 of UNCAT.

237. In response to this allegation, the Respondent State submits that the 2014 Constitution of Egypt guarantees the right to dignity and prohibits all forms of torture and other ill-treatment. The Respondent State argues that the Penal Code does not contain a definition of torture, allowing for a broader interpretation to include all forms of torture. The Respondent State submits that Articles 126 and 282 of the Penal Code criminalise torture.<sup>60</sup> The Respondent State adds that there are also other articles which criminalise torture, and if any violation is proven, fault cannot be attributed to legislative failure, as torture is punishable under the Egyptian legal system.

238. Article 126 of the Penal Code states:

"Any public official/civil servant or public employee who orders the torturing [of] an accused person or does the torturing personally, in order to force him/her to confess, shall be punished with strict imprisonment or imprisonment for a period of three to ten years. If the tortured victim dies, the penalty as prescribed for deliberate murder shall be imposed".

239. Article 1 of UNCAT defines torture as:

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<sup>59</sup> Principles on Effective Investigation and Documentation, Principle 2.

<sup>60</sup> Article 282 of the Penal Code of Egypt provides that "... A penalty of temporary hard labour shall in all cases be ruled against whoever arrests a person without any legitimate claim, and threatens him with killing, or torments him with physical torture."

“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 or incidental to lawful sanctions.”

240. As indicated under paragraph 211, the definition of torture under UNCAT contains four (4) cumulative elements.
241. A comparison of Article 126 of the Penal Code and Article 1 of UNCAT shows that the former provision does not sufficiently capture the elements enshrined under the latter provision. In particular, Article 126 does not mention severe mental or physical suffering; it limits the purpose of torture to the attainment of forced confession while UNCAT is open-ended; and it limits responsibility for torture to those who order the act or those who carry out the act, whereas UNCAT includes public officials who consent or acquiesce to the act.
242. The Commission’s Robben Island Guidelines require States to ensure that acts, which fall within the definition of torture, based on Article 1 of UNCAT, are offences within their legal systems.<sup>61</sup> The UN Committee against Torture, in its General Comment No. 2 requires State Parties to criminalise torture, in accordance, at a minimum, with the elements of torture as defined in Article 1 of UNCAT.<sup>62</sup> The Committee further states that “[s]erious discrepancies between the [UNCAT’s] definition and that incorporated into domestic law create actual or potential loopholes for impunity.”<sup>63</sup> The Committee adds that “[n]aming and defining [torture] will promote [UNCAT’s] aim [...] by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture.”<sup>64</sup>
243. In addition to adopting a definition of torture which is in line with the above criteria, UNCAT also requires State Parties: to explicitly affirm the absolute prohibition of torture (Article 2); criminalise torture as a separate and specific crime (Article 4(1)); and ensure that the penalty for torture is commensurate to the grave nature of the crime (Article 4(2)).<sup>65</sup>
244. The Commission aligns itself with the position of the UN Committee against Torture, that, the definition of torture (at domestic levels) must at a minimum include all the elements enshrined under Article 1 of UNCAT, and that

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<sup>61</sup> Robben Island Guidelines, Guideline 4.

<sup>62</sup> General Comment No. 2 (n 46 above), para 8.

<sup>63</sup> As above, para 9.

<sup>64</sup> As above, para 11.

<sup>65</sup> See also, Association for the Prevention of Torture (APT) & the Convention against Torture Initiative (CTI), Guide on Anti-torture Legislation (2016), p. 22.

disparities between UNCAT's definition and that incorporated into domestic law create actual or potential loopholes for impunity."<sup>66</sup>

245. The Commission acknowledges that unlike the Penal Code, the 2014 Constitution of Egypt includes the element of "physical and mental harm" under Article 55. However, both the Penal Code and Constitution do not provide a definition of torture, nor capture the cumulative elements enshrined under Article 1 of UNCAT. Furthermore, while the constitutional prohibition of torture is necessary, appropriate enabling laws are essential to ensure victims' access to judicial redress. The absence of enabling legislation that clearly criminalises torture and other ill-treatment obstructs victims capacity to access their right to redress.<sup>67</sup>
246. The Commission finds that as a result of this shortcoming, the Respondent State's legal framework fails to ensure that all acts of torture and involvement in acts of torture are offences under its criminal law, hindering victims' capacity to obtain redress. The Commission also finds that this is a violation of the State's obligation under Guideline 4 of the Robben Island Guidelines.

*b. Classification of ill-treatment as a low-level offence*

247. The Complainants also point out that Article 129 of the Penal Code classifies cruelty by a public official or any person charged with performing a public service as a low level offence, carrying a possible sentence not exceeding one year or a fine not exceeding 200 Egyptian pounds (less than 30 USD).<sup>68</sup>
248. As compared to the above, the Commission notes that the Respondent State's sanctions for acts of torture are higher. Article 126 of the Penal Code provides for strict imprisonment or imprisonment for a period of three to ten years. It adds that "[i]f the tortured victim dies, the penalty as prescribed for deliberate murder shall be imposed." The Commission however observes that the penalty for acts of ill-treatment is conversely lower, as evidenced by Article 129 of the Penal Code.
249. As noted by the UN Committee against Torture, the definitional threshold between cruel, inhuman or degrading treatment or punishment (ill-treatment) and torture is not often clear.<sup>69</sup> However, the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment.<sup>70</sup>

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<sup>66</sup> General Comment No. 2 (n 46 above), para 9

<sup>67</sup> UN Committee against Torture, General Comment No. 3: Implementation of Article 14 by State Parties (2012) para 19.

<sup>68</sup> Article 129 of the Egyptian Penal Code states that "any public official or employee/civil servant or any person charged with performing a public service who employs cruelty with people, depending on his position, such that he/she commits a breach of their honor, or incurs bodily pains to them, shall be punished with detention for a period not exceeding one year or paying a fine not exceeding two hundred pounds."

<sup>69</sup> General Comment No. 2 (n 46 above), para 3.

<sup>70</sup> As above.

250. In light of this reasoning, the Commission is of the view that acts of ill-treatment should not be classified as low level offences. The penalty under Article 129 of a maximum of 1-year imprisonment and a fine of approximately 30 USD cannot be seen as severe and sufficiently reflective of the grave nature of the crime and discouraging of acts of ill-treatment.

*c. Restrictions on the rights of victims*

251. The Complainants state that Articles 63 and 232(2) of the Criminal Procedure Code restrict the rights of victims by giving the Public Prosecutor exclusive authority to investigate allegations of torture and ill-treatment and to bring charges against public officials. The Complainants submit that the prosecution can issue a “no grounds order” and the decision cannot be appealed if the alleged perpetrator is a public official/civil servant.<sup>71</sup> The Complainants further submit that a victim cannot file a request to court for an “investigative judge” to take charge of investigations if the accused person is a public official, leaving the victim without any avenue to challenge the Prosecutor’s refusal to investigate.<sup>72</sup>

252. The Respondent submits that both the Constitution and the Criminal Procedure Code stipulate that there is no statute of limitation for acts of torture, ensuring justice and compensation for victims.

253. The Commission notes the obligation of States to combat impunity by “[ensuring] that those responsible for acts of torture or ill-treatment are subject to legal process”.<sup>73</sup> The Commission’s General Comment No. 4 on the Right to Redress for Victims of Torture and Other Ill-treatment in Africa states that failure to provide prompt access to redress, which includes justice for victims, constitutes *de facto* denial of redress.<sup>74</sup>

254. The Commission further endorses the view of the UN Committee against Torture that “[...] impediments which preclude prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability of the prohibition of torture. They would constitute an intolerable obstacle for victims seeking redress, and contribute to a climate of impunity.”<sup>75</sup>

255. The Commission notes that the Respondent State cites provisions in its Constitution, Penal Code and Criminal Procedure Code but fails to specifically address the provisions which restrict investigation into allegations of torture and prosecution, where the alleged perpetrators are public officials.

256. The Commission observes that the referenced provisions are indeed restrictive of victims’ right to access redress.

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<sup>71</sup> Criminal Procedure Code, Article 210.

<sup>72</sup> As above, Article 64.

<sup>73</sup> Robben Island Guidelines, Guideline 16(a).

<sup>74</sup> ACHPR, General Comment No. 4 on the Right to Redress for Victims of Torture in Africa (2017), para 26.

<sup>75</sup> UN Committee against Torture, Concluding observations on the third periodic report of Senegal (2013) para 9. See also, General Comment No. 2 (n 46 above), paras 5 - 7.



257. To conclude, the Commission finds a violation of Article 5 of the African Charter due to: the Victim's abuse, conditions of detention and *incommunicado* detention; the Respondent State's failure to conduct prompt, impartial and effective investigation into the allegations of torture; and shortcomings in the legislative framework of the Respondent State including the absence of a definition of torture that is compliant with UNCAT, appropriate sanctions for acts of ill-treatment, and restrictions on the right to redress for victims of torture when the alleged perpetrator is a public official.

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

258. The Complainants allege that the detention of the Victim was arbitrary and unlawful in violation of Article 6 of the African Charter, which states that "[e]very 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."

259. The Complainants contend that the Respondent State violated Article 6 of the African Charter in the following regards:

- i. Detention was not in accordance with law
- ii. Detention was arbitrary
  - a. Detention not under the control of effective judicial authority
  - b. Detention was unjust and not based on any predictable legal regime
- i. *Whether the detention was in accordance with law*

260. The Complainants submit that since July 1997, the Victim obtained at least 15 court orders for his release, but that he was never actually released. The Complainants allege that the Victim was instead transferred to a different site where he was held illegally until a new detention order was issued by the Minister of Interior. The Respondent State argues that the release orders were implemented and the Victim was released, but that he was rearrested each time because of his continued threat to the peace and security of the state.

261. To prove their allegations, the Complainants provide the Commission with pleadings before the Courts in 2008 and 2009 requesting implementation of the release orders. The Complainants also highlight reports from the UN Working Group on Arbitrary Detention and other human rights organisations, as well as the 2009 Report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (the UN Special Rapporteur on Human Rights and Countering Terrorism), in which the Special Rapporteur urged the Government of Egypt to discontinue the renewal of administrative detention when a person has been granted a release order by a court.

262. The Commission notes the importance of maintaining an up-to-date official register on all persons deprived of their liberty, including information on any transfers, as well as information on release orders.<sup>76</sup> The Commission further notes that maintaining an official register with the above-stated information is one of the safeguards against torture during the pre-trial process as stipulated under Guideline 30 of the Robben Island Guidelines.

263. The Respondent State provides no evidence to support its contention that the Victim was actually released and subsequently re-arrested, nor does it present any evidence to show that the Victim continually engaged in acts that endangered the peace and security of the state.

264. The Commission observes that in addition to the testimony of the Victim, the Complainants have provided documentation to support their allegations that court release orders were never implemented. Failing the submission of contrary evidence to rebut the Complainants' submissions, the Commission finds that the court release orders were never implemented, and the Victim's detention was therefore unlawful and arbitrary.<sup>77</sup>

ii. *Whether the detention was arbitrary*

a. Detention not under the control of effective judicial authority

265. The Complainants submit that the detention of the Victim was arbitrary as it was not under the control of an effective judicial authority. The Complainants argue that a judicial authority did not determine the lawfulness and necessity of his detention, and that the Victim was detained solely on the order of the Minister of Interior.

266. The Respondent State argues that the arrest was permitted by the Emergency Law, and that since the detention was not related to criminal offences, it did not require the transfer of the case to a criminal court.

267. The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines),<sup>78</sup> provide that "[a]ll persons in police custody and pre-trial detention shall have the right, either personally or through their representative, to take proceedings before a judicial authority, without delay, in order to have the legality of their detention reviewed. If the

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<sup>76</sup> The official register should also include information on the detainees' identity; the arrest or detention; notification of rights upon arrest or detention; place of detention; observations on the detainees mental or physical health; any complaints raised by an arrested or detained person; name of authority supervising the pre-trial detention; and time of the detainee's first appearance before a judicial authority, amongst others. See Principles and Guidelines on the Right to Fair Trial, M (6) and the Luanda Guidelines, Guidelines 16 - 19.

<sup>77</sup> Communication 856/1999 - *Alex Soteli Chambala v. Zambia* (2003) Human Rights Committee (CCPR/C/78/D/856/1999), para. 7.3.

<sup>78</sup> The Luanda Guidelines were adopted by the Commission in 2014, to supplement Articles 2, 3, 4, 5, 6, 7, and 26 of the African Charter.

judicial authority decides that the detention is unlawful, individuals have the right to release without delay.”<sup>79</sup>

268. In *Patrick Okiring and Agupio Samson v. Uganda*, the Commission stressed that “[s]uch a right would be ineffective if the decision of the judicial authority was not binding on the executive.”<sup>80</sup>

269. Moreover, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the Principles and Guidelines on the Rights to Fair Trial),<sup>81</sup> provides that “[a]ny form of detention and all measures affecting the human rights of a person arrested or detained shall be subject to the effective control of a judicial or other authority”<sup>82</sup>

270. The submissions in the instant Communication reveal that the Courts of the Respondent State requested the release of the Victim in at least 15 instances, but the Minister of Interior circumvented the release orders issued by the Courts.

271. The Commission has previously held that “[w]here a suspect is released on bail contrary to the wishes of the State, the State should not be allowed to deny bail and detain the individual by again arresting the suspect and bringing the latter under different charges before a different court. To allow the State to do so defeats the powers of the Court to grant bail and removes any judicial oversight over arrests and detentions.”<sup>83</sup> The Commission further stated that the subsequent arrest and detention of the victims after they had been granted bail was arbitrary and unlawful and outside the permissible limitation to the right to personal liberty.<sup>84</sup>

272. In the present Communication, the Commission is of the view that the Victim’s detention was not under the effective control of a judicial authority, as the Minister of Interior could order the detention of the Victim as well as get round the court release orders. In effect, although the Minister was a member of the Executive, the Minister was acting in lieu of the appropriate judicial authority.

b. Detention was unjust and not based on any predictable legal regime

273. The Complainants submit that the detention of the Victim was not based on any legitimate purpose set out in law, but was unpredictable and lacked due process. The Complainants submit that the Emergency Law: is vague and overbroad in defining persons who may be detained under the law; does not require officials to identify specific reasons for arrest and detention, nor require the detainee to be officially charged or brought to trial; and there is no maximum time limit for administrative detention.

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<sup>79</sup> Luanda Guidelines, Principle 35.

<sup>80</sup> Communication 339/2007 - *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v. Uganda* (2017) ACHPR para 105.

<sup>81</sup> The Commission adopted the Principles and Guidelines on the Right to Fair Trial in 2001, to supplement Articles 5, 6, 7, and 26 of the African Charter.

<sup>82</sup> Principles and Guidelines on the Right to Fair Trial, M (2) (h).

<sup>83</sup> *Patrick Okiring and Agupio Samson v. Uganda* (n80 above), para 110.

<sup>84</sup> As above, para 111.

274. The Respondent State argues that there were factual motivations and legal reasons pertaining to the detention of the Victim, particularly his continued threat to the security and public order of the State.
275. The Respondent State submits that while states of emergency and the permissible derogations are not mentioned in the African Charter, the Commission under Articles 60 and 61 of the Charter may refer to the rules governing states of emergency under the ICCPR. The Respondent State adds that its Emergency Law does not compromise fundamental human rights standards.<sup>85</sup>
276. The Commission agrees that the right to liberty as enshrined under Article 6 does not grant complete freedom from arrest or detention, given that deprivation of liberty is one of the legitimate forms of state control over persons within its jurisdiction.<sup>86</sup> The Commission however notes that any arrest or detention must be carried out in accordance with the procedure established by domestic law,<sup>87</sup> which must meet the requisite international standards in order for it to be considered valid.<sup>88</sup>
277. Article 3 (1) of the Emergency Law provides that the President of the Republic may, whenever the state of emergency is declared, take the appropriate measures to preserve security and public order, particularly the arrest of suspects or persons endangering security and public order, and administrative detention, without adherence to the regulations set down in the Criminal Procedure Code.
278. The Commission observes that the Law is indeed broad in that it does not indicate which actions can be considered as endangering security and public order, conferring a wide degree of discretion to law enforcement officials. The Commission is aware of the practical difficulty of drafting laws that will cover the wide range of possible human activities. However, in this case, the Commission finds that the contested section does not provide a fair warning.
279. The Commission refers to *Rafael Marques de Morais (represented by the Open Society Institute and Interights) v. Angola*, in which the UN Human Rights Committee defined arbitrariness in the context of arrest and detention as more than an action that goes against the law. The Committee noted that arbitrariness also includes “elements of inappropriateness, injustice, lack of predictability and due process of law.” The Commission’s Luanda Guidelines also provide that the

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<sup>85</sup> The Commission notes that since the submission of this Communication, the 2014 Constitution of Egypt has introduced some limitations on the President’s power to declare a state of emergency, including the requirement to specify the period of its application for not more than three (3) months. The Commission also notes that the Emergency Law has been lifted and reinstated by the Respondent State a number of times since the submission of this Communication. However, in line with its previous decisions, the Commission in this Communication holds that it makes its ruling by considering the alleged facts as at the time of submission of the Complaint. See, Constitution of Egypt (2014), Article 154. See also, *Law Office of Ghazi Suleiman v Sudan* (n 7 above), para 40 and *Organisation mondiale contre la torture et al v Rwanda* (n 6 above), para 21.

<sup>86</sup> *Abdel Hadi and others v. Sudan* (n 32 above), para 79. Article 27 (2) of the Charter accommodates certain restrictions in the exercise of the rights and freedoms enshrined in the Charter.

<sup>87</sup> Communication 241/01 - *Purohit v The Gambia* (2003) ACHPR, paras 64 - 65.

<sup>88</sup> *Abdel Hadi and others v. Sudan* (n 32 above), para 79.

laws on detention must be clear, accessible and precise, consistent with international standards and respect the rights of the individual.<sup>89</sup>

280. Due to its broad nature as well as the lack of clarity on what constitutes acts which endanger security and public order, the Emergency Law lacks predictability and precision.

281. The Commission however rejects as unfounded the Complainants' argument that the Emergency Law does not require a detainee to be officially charged and brought to trial. The Commission finds that Article 3(bis) of the Emergency Law provides that those arrested or detained shall be provided in writing with the reasons for their arrest or detention. Article 3(bis) also provides for the judicial process whereby an arrest or detention may be challenged before the Courts.

282. The Commission is nonetheless cognizant of the fact that law and practice may differ. The Commission observes that the Complainants allege that the Victim was not availed with basic procedural rights of arrested and detained persons including: the right to be informed of the reasons for his arrest and the charges against him; the right to be brought promptly before a judicial authority which can determine whether sufficient legal reasons existed for his arrest and whether detention before trial was necessary; the right of freedom from torture and other ill-treatment; and the right to fair trial, amongst others.<sup>90</sup> The Commission notes that these allegations are consistent with the practices highlighted by the UN Special Rapporteur on Human Rights and Countering Terrorism following his mission to Egypt in 2009 and other reports by human rights bodies.

283. The Commission also observes that the Emergency Law sets aside the regulations stipulated in the Criminal Procedure Code, thus removing some of the safeguards provided in the Criminal Procedure Code, in effect allowing law enforcement officials to bypass some of the basic protections afforded to arrested and detained persons.<sup>91</sup> For example, while the Emergency Law allows detainees to challenge or appeal an arrest or detention, it does not provide for the

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<sup>89</sup> Luanda Guidelines, (n 78 above), Guideline, 2 (a).

<sup>90</sup> The Commission has previously held that: a person may not be arrested for vague reasons and upon mere suspicions; a prolonged detention without trial is arbitrary; detention for an indefinite period of time is a violation of Article 6 of the Charter; the detention of individuals without charge or trial is a clear violation of Articles 6 and 7 (1) (a) and (d). See respectively Communication No. 48/90, 50/91, 52/91, 89/93 - *Amnesty International and Others v. Sudan* (1999) ACHPR para 59; Communication 416/12 - *Jean-Marie Atangana Mebara v. Cameroon*, (2015) ACHPR, para 119; Communications 25/89, 47/90, 56/91 and 100/93 - *Free Legal Assistance Group and others v. DRC* (1995), para 42; Communications 143/95-150/96 - *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* (1999) ACHPR, para 28.

<sup>91</sup> The Special Rapporteur on Human Rights and Countering Terrorism states that Article 3 of the Emergency Law authorizes the conduct of counter-terrorism operations without restrictions by ordinary legislation which would guarantee, for example, that arrest and detention require judicial authorization, and that detention is limited in accordance with specific legal criteria that regulate its duration. See Report of the Special Rapporteur on Human Rights and Countering Terrorism (n 52 above), para 7.

automatic review of a detainee's detention.<sup>92</sup> The Law also does not provide for a maximum time period that a detainee may be held under administrative detention.<sup>93</sup>

284. Furthermore, the Commission has held that detention must always be an exceptional measure of last resort.<sup>94</sup> While the Respondent State submits that the state of emergency applies in instances which do not qualify as regular situations, the Special Rapporteur on Terrorism, in his report 2009 noted that "Egypt has been almost continuously governed by emergency law, which includes far-reaching restrictions on fundamental rights and freedoms, for more than 50 years."<sup>95</sup> The Commission agrees with the Special Rapporteur's opinion that "[a] state of emergency almost continuously in force for more than 50 years in Egypt is not a state of exceptionality; it has become the norm, which must never be the purpose of a state of emergency."<sup>96</sup> The Commission reiterates its holding that a State has the right and duty to guarantee its security, but that the State remains subject to the provisions of the Charter.<sup>97</sup> The exigencies of fighting terrorism cannot invalidate the protection afforded under Article 6 of the Charter.<sup>98</sup>

285. The Commission observes that short-comings in the Emergency Law as well as the conditions created by the Emergency Law have allowed derogations from the ordinary procedures of the Criminal Procedure Code, resulting in Article 6 violations. The Commission finds that the Emergency Law does not conform to the African Charter, and fails to fully respect the rights of arrested and detained persons.

286. The Commission further finds that Article 6 violations that took place in the application of the Emergency Law have been substantiated by the Complainant's submissions, and documented by various human rights bodies.<sup>99</sup> To conclude, the Commission finds the Respondent State in violation of Article 6 of the African Charter, due to its failure to comply with court release orders making the Victim's detention unlawful; the Victim's detention was not under the effective control of a judicial authority; and short-comings in the Emergency Law which adversely affect the rights of arrested and detained persons.

### **Alleged violation of Article 7**

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<sup>92</sup> Review of detention shall be automatic, not requiring any action by the detainee and occur at regular interval. *See* UN Commission on Human Rights, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1984), Article 70(b).

<sup>93</sup> The length of an administrative detention is to be limited in time: indefinite detention even in emergencies is prohibited. *See*, Siracusa Principles, Article 70(b).

<sup>94</sup> Luanda Guidelines, (n 78 above), 1 (b).

<sup>95</sup> Report of the Special Rapporteur on Human Rights and Countering Terrorism (n 55 above), para 5.

<sup>96</sup> As above.

<sup>97</sup> *Patrick Okiring and Agupio Samson v. Uganda* (n 80 above), para 109.

<sup>98</sup> As above. *See also*, ACHPR, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, (2015), Part 1(I).

<sup>99</sup> *See* Complainants' submissions and the Victim's affidavit, Reports of the UN Working Group on Arbitrary Detention (2007), Amnesty International (2008), UN Special Rapporteur on Human Rights and Countering Terrorism (2009), and FIDH (2010).

287. The Complainants allege a violation of the Victim's right to be presumed innocent until proven guilty by a competent court or tribunal under Article 7 (1) (b); the right to defence, including the right to be defended by counsel of one's choice under Article 7 (1) (c); and the right to be tried within a reasonable time by an impartial court or tribunal under Article 7 (1) (d).
288. The Complainants allege that the right to presumption of innocence under Article 7 (1) (b) has been violated. The Commission reaffirms that "presumption of innocence constitutes a fundamental principle which protects everybody against being treated by public officials as if they were guilty of an offence even before such guilt is established by a competent court."<sup>100</sup> The Commission has previously held that prolonged imprisonment without conviction violates the right to be presumed innocent in that it was meant as a sanction prior to the delivery of the judgment.<sup>101</sup>
289. In the instant Communication, following his arrest in November 1996, the Victim was not charged with an offence, nor afforded the opportunity to defend himself in trial, but was instead held in administrative detention on the orders of the Minister of Interior for over 15 years due to the alleged security threat he posed to the State. It is clear that the Minister of Interior, who is a public official, treated the Victim as if he were guilty without the Victim being charged or brought to trial before a competent court. The Commission therefore finds a violation of Article 7 (1) (b) of the African Charter.
290. The Complainants further allege that the Victim's right to counsel under Article 7 (1) (c) of the Charter was violated. The Complainants submit that the Victim was only afforded the most limited opportunities to see a lawyer during his initial 18 months in detention. The Complainants submit that while the Victim was detained under the Emergency Law, he was not permitted to see a lawyer. These allegations are denied by the Respondent State which points out that the Victim was called for investigation in the presence of his lawyer and was permitted to meet and task his lawyer in connection to case No. 502 of 1994. As for the period in which the Victim was held in administrative detention, the Respondent State generally states that the Victim was treated like those provisionally imprisoned under the Emergency Law.
291. The Commission notes that the Respondent State only specifically addresses the period before the Victim's detention under the Emergency Law. The Commission's Principles and Guidelines on the Right to Fair Trial stipulate that the right to counsel applies at all stages of the criminal process, including [...] periods of administrative detention, trial and appeal proceedings. The Commission finds that the Respondent State has not rebutted the Complainants' allegations with regards to the violation of the right to counsel during the Victim's detention under the Emergency Law. In light of the absence of contrary arguments, the Commission concludes that the Respondent State failed to guarantee the Victim's right to access counsel during his administrative detention,

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<sup>100</sup> Communication 301/05 - *Haregewoin & IHRDA v. Ethiopia* (2011), para 186.

<sup>101</sup> As above, para 209.

in violation of Article 7 (1) (c) of the Charter. The Commission further finds that by denying the Victim access to counsel, the Respondent State also failed to provide one of the basic procedural safeguards against torture, contrary to the State's obligations under Guideline 20 (c) of the Robben Island Guidelines.

292. The Complainants allege a violation of the Victim's right to be tried within a reasonable time under Article 7 (1) (d) of the Charter. The Commission observes that the Victim was held in administrative detention for over 15 years, without being charged or tried. The Commission notes that "no circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial."<sup>102</sup> The Commission has previously held that detention of individuals without charge or trial is a clear violation of Articles 6, 7 (1) (a) and 7 (1) (d) of the African Charter.<sup>103</sup> The Commission therefore concludes that the Respondent State has violated Article 7 (1) (d) by failing to try the Victim within a reasonable time.

293. In view of the above, the Commission finds a violation of Articles 7(1)(b), 7(1)(c), and 7(1)(d).

#### **Alleged violation of Articles 7 and 26 of the Charter**

294. The Complainants allege that the failure of the government to enforce the court release orders and the lack of independence of the State Security Emergency Courts violates Articles 7 (1) (a) and 26 of the Charter. Article 7(1)(a) of the Charter states every individual shall have the right to have his cause heard, including the right to an appeal to competent national organs against acts of violating ones fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

295. Article 26 of the Charter states that "State Parties to the [Charter] shall have the duty to guarantee the independence of the Courts [...]."

#### *Lack of enforcement of court release orders*

296. The Principles and Guidelines on the Right to Fair Trial provide that "[e]very State has an obligation to ensure that: any remedy granted shall be enforced by competent authorities."<sup>104</sup> In *Antonie Bissangou v. Congo*, the Commission held that the right to be heard guaranteed by Article 7 of the African Charter includes the right to the execution of a judgment.<sup>105</sup> The Commission has also previously held that "[a] combined reading of Articles 7 and 26 brings to the fore two core issues - having access to appropriate justice and the other relating to the independence of the justice system. These two issues constitute the bedrock of a sound justice delivery system. The African Commission believes that the right to a fair trial is

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<sup>102</sup> Principles and Guidelines on the Right to Fair Trial, R.

<sup>103</sup> *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* (n 90 above), para 28.

<sup>104</sup> Principles and Guidelines on the Right to Fair Trial, C (3).

<sup>105</sup> Communication 253/02 - *Antonie Bissangou v. Congo*, (2006) ACHPR para 75.



analogous with the concept of access to appropriate justice and requires that one's cause be heard by efficient and impartial courts."<sup>106</sup>

297. In *Zimbabwe Lawyers for Human Rights and IHRDA v. Zimbabwe*, the Commission held that "[i]t is a vital requirement in a state governed by law that court decisions be respected by the State, as well as individuals. The courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure."<sup>107</sup> The Commission found that by refusing to comply with court orders, the Respondent State undermined the independence of the courts, in violation of Article 26 of the Charter.<sup>108</sup>

298. In its analysis under Article 6, the Commission has already found that the Victim's detention was not under the effective control of a judicial authority, as the Minister of Interior was able to circumvent the release orders issued by the courts. The Commission therefore finds that the Respondent State failed to execute court orders and undermined the independence of courts, in violation of Articles 7 and 26 of the African Charter.

#### *Lack of independence of State Security Emergency Courts*

299. The Complainants aver that the lack of independence of the State Security Emergency Courts is systematic, highlighting the composition of and the procedure of appointment to the Court. The Complainants further highlight the powers of the President over the cases submitted to and the decisions reached by the Court in violation of Article 26.

300. The Complainants allege that the Commission has previously assessed these courts in *Communication 334/06 - Egyptian Initiative for Personal Rights and Interights v. Egypt*, and described them in the following terms: "The victims were tried before the Supreme State Security Emergency Court, whose competence and procedures fall far short of the above standards [the Commission's Principles and Guidelines on Fair Trial]."<sup>109</sup> In the said Communication, the Commission found that "[it] is of the view that the degree of control which the President of the Republic exercises over the composition, conduct and outcome of proceedings before the State Security Court is antithetical to the notion of an independent and impartial judicial process."<sup>110</sup>

301. The Commission finds it unnecessary to pronounce itself again on the independence or not of the State Security Emergency Courts in the Respondent State, in view of its above-referenced decision. Moreover, in the above paragraphs, the Commission has already found that by failing to execute the

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<sup>106</sup> *EIPR and Interights v. Egypt* (n 38 above), para 195.

<sup>107</sup> *Communication 294/04 - Zimbabwe Lawyers for Human Rights and IHRDA v. Zimbabwe* (2009) ACHPR para 119.

<sup>108</sup> As above, para 120.

<sup>109</sup> *EIPR and Interights v. Egypt* (n 38 above), para 199.

<sup>110</sup> As above, para 200.

courts' orders and undermining the independence of the courts, the Respondent State has violated Articles 7 and 26 of the African Charter.

### **Alleged violation of Article 8**

302. The Complainants allege a violation of Article 8 of the African Charter.
303. Article 8 of the Charter guarantees freedom of conscience, the profession and free practice of religion. Article 8 further states that no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.
304. The Complainants submit that the handcuffs and blindfolds used on the Victim for prolonged periods left the latter unable to perform ablutions and other religious traditions in violation of Article 8 of the Charter. The Complainants also allege that the guards sought to distress and incite the Victim by destroying pages or verses from the Holy Qu'ran in front of him, and once violently pulling him from the ground in the midst of his prayers. The Commission notes that the Respondent State has not addressed these allegations.
305. "The freedom to practice one's religion entails all outward manifestations or observance of religious faith or belief, privately or in community with others. An act of practice or manifestation of a religion is one that in the adherent's perception is required or prescribed by the precepts of the religion that form part of the belief freely held in the *forum internum*."<sup>111</sup>
306. The Commission notes that "one of the pillars of Islam is that Muslims pray five times a day. Before those prayers, they are expected to perform a purification ritual called Wudu [or ablution], requiring that they wash their faces, hands, arms, and feet."<sup>112</sup> The Commission finds that the use of handcuffs and blindfolds on the Victim for prolonged periods would have made it impossible for the Victim to perform ablution.
307. The Commission observes that the right to free practice of religion is subject to law and order. The Commission recalls that in *Nigeria Constitutional Rights Project v Nigeria*, it stated that the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.<sup>113</sup>
308. The Commission has already found that the prolonged use of handcuffs and blindfolds constitutes a violation of Article 5. It is therefore unnecessary for the Commission to analyse the lawfulness or necessity of the restriction.
309. In *Amnesty International and others v. Sudan*, the Commission held that the government failed to respond in any convincing manner to the allegations made against it and cases where the government does not respond on allegations of

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<sup>111</sup> *Hossam Ezzat & Rania Enayet v. Egypt* (n 13 above), para 132.

<sup>112</sup> PBS *Wudu: Islamic Washing Before Prayer* 25 November 2016, available at <https://www.pbs.org/wnet/religionandethics/2016/11/23/february-12-2016-wudu-islamic-washing-prayer/29054/>.

<sup>113</sup> Communications 140/94-141/94-145/95- *Constitutional Rights Project and others v. Nigeria* (1999) paras 41, 42.

which it is notified, the Commission shall consider the facts as probable.<sup>114</sup> In the absence of any submissions by the Respondent State on these allegations, the Commission is inclined to accept the Complainants allegations as fact.

310. The Commission finds the Respondent State in violation of Article 8 of the African Charter by unlawfully restricting the Victim's right to freely practice his religion.

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

311. The Complainants submit that the Respondent State violated Article 16 of the Charter.

312. Article 16 of the Charter states that:

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. State Parties [...] shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

313. The Complainants submit that although the Victim was abused at the hands of prison and security officials, the Victim was not provided with medical care and his requests for medical attention were denied. The Respondent State disputes these allegations and refers to a visit to the hospital in February 2010, and medical reports dated 27 January 2011 and 21 February 2011.

314. Guideline 4 (g) of the Luanda Guidelines state that an arrested person has the right to urgent medical assistance, to request and receive a medical examination and to obtain access to existing medical facilities.

315. The Commission notes that the responsibility of the government in relation to Article 16 of the Charter is heightened in cases where the individual is in the State's custody and where a person's physical integrity and well-being is completely dependent on the activities of the authorities.<sup>115</sup> In *Monim Elgak and others v. Sudan*, the Commission specified that in the event of detention, the State's responsibility is even more evident to the extent that detention centres are its exclusive preserve.<sup>116</sup>

316. In the present Communication, the Commission has found that the Victim was subjected to acts of torture and other cruel, inhuman and degrading treatment or punishment while in detention. As a result, the Victim's health and physical condition deteriorated. The Complainants have adduced evidence in the form of the Victim's extensive affidavit, excerpts from complaints submitted to the Public Prosecutor regarding the Victim's treatment and health condition, and forensic medical examination reports from different medical institutions. The Commission observes that the Respondent only refers to hospital visits by the

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<sup>114</sup> *Amnesty International and Others v. Sudan* (n 90 above), para 75.

<sup>115</sup> *Media Rights Agenda and Others v Nigeria* (n 2 above), para 91.

<sup>116</sup> *Monim Elgak and others v. Sudan* (n 45 above), para 136.

Victim in 2010 and 2011, while the Victim has been under the custody of the Respondent State since November 1996.

317. Finally, the Commission has previously established that were it finds that detainees have been subjected to torture and other forms of ill-treatment, resulting in physical and psychological harm, this constitutes an unjustified interference with the detainees right to health.<sup>117</sup>
318. In view of the foregoing, the Commission finds a violation of Article 16 of the Charter. The Commission also finds that this constitutes a failure of the State to provide one of the safeguards against torture, namely access to medical services.<sup>118</sup>

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

319. The Complainants allege that the right of the Victim to family life under Article 18 (1) of the Charter was violated by the Respondent State. Article 18 (1) of the Charter provides that “[t]he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.” The State has the obligation to assist the family towards meeting its needs and interests and to protect the same institution from abuse of any kind by its own officials and organs and by third parties.<sup>119</sup>
320. The Complainants allege that the Victim was not permitted to receive any visit while detained at Abu Za’bal, al-Aqgrab and Lazoghli. While the Victim was detained at al-Wadi al Gadeed, although his family had the necessary authorisations, they were denied access. At Damanhour, the Victim did receive brief visits, but detainees were beaten before and after the visits, often to the great distress of the visiting family members. In 2008, the Victim was also transferred as punishment to a remote prison hundreds of kilometres from his family home in Cairo.
321. The Complainants submit that for the duration of his entire detention which was unlawful and arbitrary, the Victim was unable to see his children in Pakistan, one who was newly born and another who was about three years old. The Respondent State does not address the allegations relating to Article 18 of the African Charter.
322. The Luanda Guidelines provide that detainees in police custody or pre-trial detention shall be provided with appropriate facilities to communicate with, and receive visits from, their families at regular intervals, subject to reasonable restrictions and supervision as are necessary in the interests of security.<sup>120</sup> It adds that such contact shall not be denied for more than a few days.<sup>121</sup> The Principles and Guidelines on the Right to Fair Trial, also provides that “[a]nyone who is

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<sup>117</sup> As above, para 135.

<sup>118</sup> Robben Island Guidelines, Guideline 20 (b).

<sup>119</sup> Communication 313/05 - *Kenneth Good v. Republic of Botswana* (2010) para 212.

<sup>120</sup> Luanda Guidelines, (n 78 above), Guideline 27.

<sup>121</sup> As above.

arrested or detained shall be given reasonable facilities to receive visits from family and friends, subject to restriction and supervision only as are necessary in the interests of the administration of justice and of security of the institution.”<sup>122</sup>

323. Although detention inherently entails limitations, detainees retain the right to family life. Authorities must enable and if need be assist the detainee in maintaining contact with his close family.<sup>123</sup>
324. The Commission has held that “[e]nsuring protection of the family also requires that States refrain from any action that will affect the family unit, including arbitrary separation of family members [...]” Therefore, *incommunicado*, arbitrary, or unlawful detention, in violation of Article 6 of the African Charter, constitutes arbitrary and unlawful interference with the family unit. In *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, the Commission held that by holding the Victims in *incommunicado* detention, the State violated Articles 6, 7, and 18 of the African Charter.<sup>124</sup>
325. Additionally, the Commission has held that “[b]eing deprived of the right to see one’s family is a psychological trauma difficult to justify, and may constitute inhuman treatment.”<sup>125</sup> In *Law Ghazi Suleiman v. Sudan*, the Commission held that “detaining individuals without allowing them contact with their families and refusing to inform their families of the fact and place of the detention of these individuals amounts to inhuman treatment both for the detainees and their families.”<sup>126</sup> The Istanbul Protocol also lists the deprivation of social contacts and loss of contact with the outside world, as a method of torture.<sup>127</sup>
326. The Respondent State does not address the Complainant’s allegations with regards to the State’s interferences with the Victim’s right to family life. In the absence of contrary arguments, the Commission will accept the allegations as facts.
327. The Commission has found that the Respondent State violated Articles 6 and 7 by arbitrarily and unlawfully detaining the Victim, and denying his right to fair trial. The Commission therefore finds that the Respondent State arbitrarily and unlawfully interfered with the Victim’s family unit. Furthermore, by unlawfully restricting the Victim’s right to family life, the State has also violated Article 5, also failing to uphold one of the basic procedural safeguards against torture.<sup>128</sup>

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

328. The Complainants allege a violation of Article 1 in conjunction with the other articles allegedly violated by the Respondent State, particularly because the State failed to provide compensation or rehabilitation for the violations the Victim has

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<sup>122</sup> Principles and Guidelines on the Right to Fair Trial, M(2)(g).

<sup>123</sup> *Piechowicz v Poland* (2012) ECHR (Application No. 20071/07) para 212.

<sup>124</sup> *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* (n 90 above), para 28 – 29.

<sup>125</sup> Communication 151/96 – *Civil Liberties Organisation v. Nigeria*, (1999) ACHPR para 27.

<sup>126</sup> *Law Office of Ghazi Suleiman v Sudan* (n 7 above), para 44.

<sup>127</sup> Istanbul Protocol, para 145 (n).

<sup>128</sup> Robben Island Guidelines, Guideline 20 (a).

suffered. The Complainants also submit that having failed to acknowledge the violations and failing to initiate investigations based on the Victim's complaints, the State failed to provide the Victim with redress.

329. Article 1 of the Charter requires State Parties to recognise the rights, duties and freedoms enshrined in the Charter and undertake to adopt legislative or other measures to give effect to them.
330. In considering the alleged violation of Article 1, the Commission notes its decision in *Jawara v The Gambia* where it held that "Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of Article 1."<sup>129</sup> The Commission similarly held that if a State Party fails to respect, protect, promote or fulfill any of the rights guaranteed in the Charter, this constitutes a violation of Article 1 of African Charter.<sup>130</sup>
331. The Commission also notes its decision in *Abdel Hadi and others v. Sudan*, in which it held that the Respondent State violated Article 1 of the Charter, because it failed to: protect the victims from torture and other ill-treatment, respect their right to liberty and fair trial, investigate the allegations of wrongdoings by its agents, take measures to afford adequate remedy to the victims, and put in place adequate legislative framework to protect the physical integrity of individuals within its jurisdiction.<sup>131</sup>
332. In line with the above reasoning, the Commission finds the Respondent State in violation of Article 1 of the African Charter.

## Reparations

333. The Complainants request that in addition to finding the Respondent State in violation of the Victim's rights under the Charter, the State should acknowledge the violations and publish an apology, provide compensation and rehabilitation, investigate the violations through an independent commission of inquiry, and introduce legislative reforms and torture safeguards to prevent future violations.
334. The Complainants request the Commission to allow for a hearing on reparation because of the nature of the violations over an extended period, the systemic flaws in Egypt's legal structure, the fact that the Commission has previously found the State in violation of the Charter in a similar case, and because those deficiencies continue to date.

### *Adequate Compensation and Rehabilitation*

335. The Complainants submit that the Respondent State should pay adequate compensation in the amount of no less than one (1) million Egyptian Pounds at the time of filing (approximately USD 140, 000). The Complainants submit that

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<sup>129</sup> *Jawara v. The Gambia* (n 3 above), para 46.

<sup>130</sup> *Abdel Hadi and Others v. Sudan* (n 32 above), para 92.

<sup>131</sup> As above.

this amount reflects moral or non-pecuniary damages which ought to be proportionate to the gravity of the violation and the suffering of the Victim. They state that any award should also include material damages, including past and potential future costs for medical treatment, medical, psychological and social services, legal or other expert assistance; loss of earnings and loss of earning potential; and lost opportunities, including employment.

336. The Complainants submit that the Victim suffered serious violations of non-derogable rights, including the right to be free from torture for a period of over 15 years. In addition to the physical pain, the Victim suffered severe psychological pain, humiliation and injustice. They add that he could not be a father to his young children and see them grow into adults, which the Complainants aver is a particularly egregious harm that resulted from his unlawful, arbitrary and unjustifiable detention.
337. The Complainants submit that the requested monetary compensation is consistent with comparable awards from other human rights bodies and international bodies, taking into consideration the prolonged duration of the violations and the serious rights at issue, as well as awards from Egyptian domestic courts.
338. The Complainants aver that in 2010, the ECOWAS Community Court of Justice awarded USD 200, 000 to a man who was arrested, detained and tortured by Gambian agents for 22 days in violation of the African Charter.<sup>132</sup> The Complainants state that in 2012, the International Court of Justice awarded USD 85, 000 in non-pecuniary damages, in a case involving the unlawful arrest and detention for 72 days, as well as expulsion of a Guinean national by DRC in violation of the African Charter and the ICCPR.<sup>133</sup>
339. The Complainants also submit that in a case involving the arbitrary detention of an applicant for almost 13 years, during which time he was tortured and separated from his family, the Inter-American Court of Human Rights awarded the applicant USD 100, 000.<sup>134</sup> The Complainants add that the European Court of Human Rights has also awarded 100, 000 Euros (USD 124, 000) in two cases involving torture, unlawful detention of less than one year, and illegal transfer of applicants suspected of terrorism offences.<sup>135</sup> It has also awarded 60, 000 Euros (USD 74, 550) for non-pecuniary damages resulting from torture, unlawful detention of 23 days, and illegal transfer.<sup>136</sup>
340. The Complainants submit that the requested sum is consistent with awards by Egyptian domestic courts in cases of torture and unlawful detention. The Complainants aver that in 2012, a Cairo Court of Appeal fined the Ministry of

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<sup>132</sup> *Musa Saidykhan v. The Gambia* (2010) ECOWAS Community Court of Justice (Suit No, ECW/CCJ/AAP/11/07), paras 45 - 47.

<sup>133</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. DRC)* (2012) ICJ Compensation Judgment, para 25.

<sup>134</sup> *Bayarri v. Argentina* (2008) IACtHR, paras 168 - 170.

<sup>135</sup> *Al Nashiri v. Poland* (2014) ECHR (Application No. 28761/11), para 595 and *Husayn (Zubaydah) v. Poland* (2014) ECHR (Application No. 7511/13), para 566.

<sup>136</sup> *El Masri v. Macedonia* (2012) ECHR (Application No. 39630/09), para 270.

Interior 1 million Egyptian Pounds (approximately USD 140, 000) for torturing a woman for eight days before she confessed to murder.<sup>137</sup>

#### *Legislative reforms*

341. The Complainants submit that the Respondent State should reform its laws to prevent similar violations from recurring. The Complainants specifically request that the Respondent State:

- Harmonises the Emergency Law to conform to the Charter and other international and regional standards, including by abolishing administrative detention and dissolving the State Security Emergency Courts;
- Revising Article 126 of the Egyptian Penal Code to align it, at a minimum, with the definition of torture under Article 1 of UNCAT;
- Revise Article 129 of the Egyptian Penal Code so that it does not treat acts of torture or cruel, inhuman or degrading treatment as low level offences;
- Amending the Code of Criminal Procedures to ensure that torture victims have the same rights regardless of whether the accused is an official or not.

#### *Safeguards against torture*

342. The Complainants request the Respondent State to put in place safeguards to ensure non-repetition of the violations. The requested safeguards include independent oversight of detention facilities; proper registration of detention and release; an effective complaints mechanism for detainees; access to a lawyer throughout the period of detention; and immediate access to a doctor, as well as contact with their families.

#### *Acknowledgment, publication and apology*

343. The Complainants request acknowledgment of and apology for the violations by the Respondent State.

### **Analysis of the Commission on reparations**

344. In accordance with the established jurisprudence of the Commission, the violation of rights protected by the Charter entitles victims to damages, including monetary remedy.<sup>138</sup> The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Guidelines on the Right to Remedy and Reparation) also state that full and effective reparations include restitution, compensation, rehabilitation, and

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<sup>137</sup> Al-Masry Al-Youm, "Interior Ministry fined LE1 million for torturing detained actress," *Egypt Independent*, 2 October 2012.

<sup>138</sup> Communication 318/06 – *Open Society Justice Initiative v. Côte d'Ivoire* (2015) ACHPR, para 198.



satisfaction and guarantees of non-repetition.<sup>139</sup> The Guidelines as well state that compensation should be provided for any economically assessable damage, such as physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.<sup>140</sup>

345. In addition to the above and more specifically in relation to this case, the Commission's Luanda Guidelines provide that "[a]ll persons who are victims of illegal or arbitrary arrest and detention, or torture and ill-treatment during police custody or pre-trial detention have the right to seek and obtain effective remedies for the violation of their rights."<sup>141</sup> This position is also affirmed in the Commission's jurisprudence.<sup>142</sup>
346. In its General Comment No. 4 on the Right to Redress for Victims of Torture in Africa, the Commission noted that the right to compensation for torture and other ill-treatment is multi-layered and compensation awarded to a victim shall be sufficient to compensate for any economically assessable damage resulting from violation, including, where applicable, reimbursement for medical expenses and provision of funds to cover future medical or rehabilitative services needed by the victim to ensure as full rehabilitation as possible; material and non-material damage resulting from the physical and mental harm caused; loss of earnings and earning potential due to disabilities caused by the torture or other ill-treatment; and lost opportunities such as employment and education.<sup>143</sup>
347. The Commission observes that the Victim in the instant Communication suffered serious human rights violations for over 15 years, in the form of torture and other ill-treatment, arbitrary and unlawful detention, denial of the right to fair trial, unlawful interference with his right to practice religion, lack of medical care, and violation of his right to family life. It is impossible to ensure full restitution for the Victim due to the grave nature of the violations he suffered.
348. The Commission has previously held that in assessing the manner and mode of payment of compensation, it is important to consult victims and their legal representatives, and to be guided by international norms and practices relating to payment of compensatory damages.<sup>144</sup> The Victim's legal representatives in the present Communication (the Complainants) have indicated that the requested amount should not be less than 1 million Egyptian Pounds (approximately USD 140,000) at the time of filing.
349. The Complainants also refer the Commission to comparable awards granted by regional, international and national mechanisms, to justify the amount they

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<sup>139</sup> Guidelines on the Right to Remedy and Reparation, para 18.

<sup>140</sup> As above, para 20.

<sup>141</sup> Luanda Guidelines, (n 78 above), Guideline 38.

<sup>142</sup> See n 45 above (*Monim Elgak and others v. Sudan*, para 100).

<sup>143</sup> General Comment No. 4 on the Right to Redress for Victims of Torture in Africa (n 74 above), para 38.

<sup>144</sup> Communication 290/04 - *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v. the Republic of Cameroon* (2019), para 212 (V).

have requested as compensation. Specifically, the Commission notes the reference (in paragraph 340 above) to the consistency of the reparations amount requested in this case with awards by Egyptian domestic courts in cases of torture and unlawful detention., citing as an example, a 2012 Cairo Court of Appeal fine of the Ministry of Interior in the sum of one (1) million Egyptian Pounds (approximately USD 140, 000) for torturing a woman for eight days.

350. The Commission agrees with the Complainants that it is necessary to consider the nature of the violations suffered by the Victim, the prolonged duration of the violations, as well as the regional and international norms and practices relating to payment of compensatory damages for similar violations.
351. With regards to the Complainants' request for acknowledgment, publication and apology, the Commission notes that one of the elements of satisfaction is an acknowledgment of the facts and acceptance of responsibility, as well as a public apology.<sup>145</sup>
352. The Commission also agrees with the Complainants that legislative as well as other preventive measures are required as guarantees of non-repetition.
353. The Commission finds that the Complainants have submitted sufficient evidence to support their requests on reparations, and therefore declines to grant the request for oral hearing.
354. The Commission is guided by its analysis on reparations in making the below determination and requests.

### **Decision of the Commission on the Merits and Reparations**

355. In light of the foregoing, the African Commission on Human and Peoples' Rights:
- I. Finds the Respondent State in violation of Articles 1, 5, 6, 7 (1) (a), 7(1) (b), 7 (1) (c), 7 (1) (d), 8, 16, 18 (1), and 26 of the African Charter;
  - II. Requests the Respondent State to take all necessary measures to put in place preventive safeguards to avoid the recurrence of similar violations, and ensure that *Emergency Law No. 162 of 1958, Articles 126 and 129 of the Egyptian Penal Code, and the Egyptian Criminal Procedure Code*, and all other relevant laws and practices are brought into conformity with the African Charter, UNCAT, the Robben Island Guidelines, the Principles and Guidelines on the Right to Fair Trial, the Luanda Guidelines, and General Comment No. 4 on the Right to Redress for Victims of Torture and other Ill-treatment in Africa;
  - III. Requests the Respondent State to acknowledge the violations suffered by the Victim, accept responsibility, and issue a public apology;
  - IV. Requests the Respondent State to pay adequate compensation to the Victim in the amount of 1 million Egyptian Pounds (approximately USD 140, 000 at the

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<sup>145</sup> Guidelines on the Right to Remedy and Reparation, para 22 (a).

time of filing), being the minimum found to be a reasonable quantum regarding the harm and damage caused to the Victim;

- V. Urges the Respondent State to investigate the violations through an independent commission of inquiry, and prosecute those responsible;
- VI. Requests the Parties to inform the Commission, within one hundred and eighty (180) days, of the measures taken to implement the present decision in accordance with Rule 112 (2) of the Rules of Procedure of the Commission (2010); and
- VII. Avails its good offices to facilitate the implementation of this decision.

**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**

AACHPR