

323/06 Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt

Communication 323/06: Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt

Summary of the Complaint

1. This Communication is brought by the Egyptian Initiative for Personal Rights (EIPR) and INTERIGHTS (the Complainants) on behalf of Nawal 'Ali Mohamed Ahmed (the First Victim), 'Abir Al-'Askari (the Second Victim), Shaimaa Abou Al-Kheir (the Third Victim) and Iman Taha Kamel (the Fourth Victim).
2. The Respondent State is the Arab Republic of Egypt (Egypt); a State Party to the African Charter on Human and Peoples' Rights (the African Charter).¹
3. The Complainants submit that on 25 May 2005, the Egyptian Movement for Change (Kefaya) organized a demonstration in front of Saad Zaghloul Mausoleum with respect to the referendum aimed at amending Article 76 of the Egyptian Constitution, allowing multi-candidate presidential elections. They submit that Riot police surrounded the small number of protesters (around fifty) and several journalists reporting the events, and at about 12:00 noon, while public buses were transporting young supporters of President Mubarak and his party called the National Democratic Party (NDP), violence broke out as NDP supporters attacked the supporters of Kefaya. The Complainants allege that Riot police reportedly did not intervene.
4. According to the Complainants, the protesters and the journalists covering the demonstration reconvened in front of the Press Syndicate at around 2:00 PM where they were met by a large group of Riot police and NDP supporters. They allege that further incidents of insults, violence, intimidation and sexual harassment occurred in the presence of high ranking officers of the Ministry of Interior (Mol) and the Riot police.
5. The Complainants state that the First Victim is a female journalist previously employed at *Al Gil* Newspaper, in Cairo. They state that she was not reporting on the events in question or attending the protest action, but was rather proceeding to the Press Syndicate in order to attend an English course. The Complainants allege that she was however, attacked by a group of youth supporters of President Mubarak and the NDP in response to an order from a police officer on the scene.
6. The Complainants allege that, the First Victim was pushed to the ground, her clothes torn, her private parts fondled, and her bag and documents seized from her. According to the Complainants, she recognised members of the NDP as her assailants. They allege that the police officers on the scene failed to intervene, assist or prevent the assaults from taking place.
7. The Complainants further state that, she was then ordered by the Chief of the Mol Greater Cairo Intelligence Unit, Ismai'l Al-Sha'ir, to leave the scene, and that she was unable to reclaim her alleged stolen belongings.
8. The Complainants state that the First Victim was attended to at the Monira Hospital on 25 May 2005, where a medical report indicated one large (10cm) scar, several smaller bruises on her chest, and visible scratches on her legs and feet. It is further submitted by the Complainants that investigators refused to record the statements made by eyewitness when she reported the incident on the same day. They also state that the incident has left her emotionally traumatised as a result of the sexual violations and assaults she incurred.
9. The Complainants also allege that the First Victim received threats from the State Security Intelligence (SSI) officers to withdraw her complaint. They allege that her refusal to do so led to her dismissal from her job at *Al Gil* Newspaper and divorce from her husband.
10. The Complainants state that the Second Victim, a female journalist at *Al Doustour* Newspaper, in Cairo, was covering the events in her capacity as a journalist. They allege that she was hit in the face and stomach during the demonstration whilst attempting to take photographs on the scene.
11. The Complainants allege that when the Second Victim tried to escape the scene, by getting into a taxi with the Third Victim, the Chief of the Intelligence Unit of the Boulaq Abou Al-'Ela Police Station stopped the taxi and an identified SSI officer forcefully dragged her out of the taxi, whilst hitting and kicking her. The Second Victim claims, according to the Complainants, that the SSI officer ordered a group of female supporters of the NDP to tear off her clothes and hit her. She also alleges that she was later dragged to the main street (Ramsis Street) where security and police officers continued to hit, sexually assault, insult, and

slap her face. According to the Complainants, the Second Victim was also allegedly called abusive names such as 'whore' and 'slut'.

12. The Complainants state that, as a result of the above mentioned assaults, the Second Victim was attended at the Hilal Hospital on 31 May 2005 and a medical report confirmed bruises on her left shoulder, left arm and back. They also submit that she is emotionally traumatised as a result of the sexual violations and assaults on her person.

13. The Complainants allege that the Second Victim lodged a Complaint with the Public Prosecution Office (FPO) but investigators refused to take statements from eyewitnesses. They allege that she received anonymous and indirect threats from neighbours and unidentified men to withdraw her complaint.

14. The Complainants further submit that the Third Victim, a female journalist at *Al Doustour* Newspaper, in Cairo, went to the Press Syndicate in both her capacity as a journalist covering the events and as a citizen exercising her right to protest. They allege that, she tried to escape the scene by getting into a taxi with the Second Victim when the Chief of the Intelligence Unit of the Boulaq Abou Al-'Ela Police Station assaulted her and ordered a group of female supporters of the NDP to physically attack and expose her body.

15. It is alleged by the Complainants that the Third Victim was beaten, bitten, her hair pulled and her clothes torn, and was later rescued by people emerging from the Press Syndicate building who took her inside for protection. They add that she is emotionally traumatised and depressed from the assaults.

16. It is also alleged by the Complainants that the Third Victim lodged a Complaint where statements of eyewitnesses were ignored and that she received threatening calls at home and at work to withdraw the complaint.

17. The Complainants allege that the Fourth Victim, a female journalist at *Nahdat Misr* Newspaper, in Cairo, and a member of the Kefaya movement, was also attending the demonstration. They allege that she was attacked by a group of unidentified men who pushed her against the wall and hit her in her lower abdomen several times until she collapsed on the ground. They also allege that she was kicked on her pubic area by one of the men, while the others continued to beat, and tried to tear off her clothes.

18. It is alleged by the Complainants that while the above mentioned assaults were taking place, law enforcement officers on the scene refused to come to her assistance, allow her seek medical assistance, or have access to the Press Syndicate building for protection.

19. The Complainants allege that, the Fourth Victim stayed for two days in the Marg Hospital undergoing treatment for bruises on her right hip, right knee and upper pelvic area, and that a medical report was issued on 31 May 2005. They further allege that she is traumatized by the assaults that have had a detrimental effect on her mental health.

20. The Complainants also submit that the Fourth Victim lodged a complaint on 5 June 2005 at the Qasr Al-Nil PPO and received threats from a group of unidentified men to withdraw the complaint.

21. According to the Complainants, the Victims' cases were classified as misdemeanors in violation of Article 242 of the Penal Code. They submit that an investigation was instituted on 25 May 2005, and was completed on 27 December 2005 when the PPO announced that a decision not to prosecute had been taken due to the inability to identify the perpetrators.

22. The Complainants submit that the Victims appealed the decision of the PPO not to prosecute to the Appeal Misdemeanors Chamber of the First Instance Court of Southern Cairo (the Appeal Chamber). However, on 1 April 2006, the Appeal Chamber dismissed the case. They state that though the Appeal Chamber's decision found that the assaults had taken place on the Victims, it was impossible to identify the perpetrators.

Articles alleged to have been violated

23. The Complainants state that the aforementioned acts and omissions constitute a violation of Articles 1, 2, 3, 5, 7(1)(a), 9(2), 16, 18(3) and 26 of the African Charter by the Respondent State.

Prayers

24. The Complainants state that, in requesting the African Commission on Human and Peoples' Rights (the African Commission) to examine their case, the Victims seek:

a. Recognition by the African Commission of violations of these Articles of the African Charter;

- b. Renewed investigations and effective protection and punishment of the perpetrators of the violations;
- c. Paying compensation to the Victims: In amount of EP57,000 for each Victim.
- d. Enactment of legislation aimed at effecting the state's positive responsibility in defending and protecting human rights;
- e. Amendment of Police Law 109 of 1971 to impose penalties on law enforcement officers for violating human rights and for failing to prevent human rights violations occurring in their presence upon the establishment of malicious intent; and
- f. Amendment to Article 268 of the Egyptian Penal Code to expressly exclude intention as a requirement of offence of assault on honour.

Procedure

- 25.** The present Communication was received by the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) on 18 May 2006.
- 26.** The Secretariat acknowledged receipt of the Communication to the Complainant by letter of 20 May 2006, and informed them that the Communication has been registered as Communication 323/2006 - Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt.
- 27.** At its 39th Ordinary Session, held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the Communication and decided to be seized thereof.
- 28.** On 14 August 2006, the Secretariat received the arguments on Admissibility from both parties.
- 29.** By Note Verbale, dated 16 August 2006, the Secretariat forwarded the Complainants' submissions on Admissibility to the Respondent State and sent the latter's submissions in Arabic for translation.
- 30.** At the African Commission's 40th Ordinary Session, held from 15 to 29 November 2006, in Banjul, The Gambia, both parties made oral submissions on Admissibility.
- 31.** At the 40th Ordinary Session of the African Commission, held from 15 to 29 November 2006, in Banjul, The Gambia, the African Commission declared the Communication Admissible, and both parties were informed accordingly.
- 32.** By letter dated 15 February 2007, the Complainants requested an extension of time to submit on the Merits of the Communication, and the request was granted.
- 33.** By Note Verbale dated 15 March 2007, the Embassy of Egypt also requested an extension of time to submit on the Merits of the Communication. The request was granted by Note Verbale dated 19 March 2007.
- 34.** On 16 March 2007, the Complainants transmitted their submission on the Merits of the Communication to the Secretariat, and by letter dated 22 March 2007, the Secretariat acknowledged receipt.
- 35.** By Note Verbale, dated 22 March 2007, the Secretariat forwarded the Respondent State's submissions on the Merits to the Complainants.
- 36.** By letter, dated 16 July 2007, a copy of the additional submissions on the Merits of the Respondent State was forwarded to the Complainants.
- 37.** During the African Commission's 42nd Ordinary Session, the Respondent State submitted another version of their arguments on the Merits, with the reason that the former had translation flaws. A copy of the revised submission was forwarded to the Complainants.
- 38.** During the African Commission's 44th Ordinary Session, the Respondent State made additional submissions on the Merits, and by Note Verbale, dated 11 December 2008, forwarded them to the Complainants.
- 39.** On 19 March 2009, the Secretariat received additional submissions from the Complainants, and by letter, dated 25 March 2009, forwarded the submissions to the Respondent State.
- 40.** On 22 April 2009, the Secretariat received additional submissions from the Respondent State in Arabic, and by Note Verbale, dated 27 April 2009, forwarded the submissions to the Complainants.
- 41.** The decision on the Merits of the Communication was deferred during the 45th, 46th, 47th, 48th f 49th, and 50th Ordinary Sessions of the African Commission respectively for various reasons, including time constraints.

42. During its 10th Extra-Ordinary Session, the African Commission took a decision on the Merits of the Communication and the Parties were accordingly notified.

The Law on Admissibility

The Complainants' Submissions on Admissibility

43. The Complainants submit that all the criteria of Article 56 of the African Charter are satisfied and that the Communication is Admissible.

44. The Complainants submit that they have complied with Article 56 (1) of the African Charter because the Victims in the Communication have been identified and their relevant details have been provided to the African Commission, along with the details of those individuals and organisations representing them.

45. The Complainants also submit that they comply with Article 56 (2) of the African Charter because the Communication is compatible with the Constitutive Act of the African Union (AU) and with the African Charter.

46. Concerning Article 56 (3) of the African Charter, the Complainants submit that the Communication is presented in polite and respectful language.

47. The Complainants submit further that the Communication complies with Article 56 (4) of the African Charter because it is based on information provided by the Victims and not by media reports.

48. Concerning Article 56 (5) of the African Charter, the Complainants submit that investigations were not properly undertaken by the police which led to a decision not to prosecute from the Cairo PPO on 17 December 2005. The Complainants aver that the Victims reported the alleged incidences to the police after the alleged assault on the 25 May 2005, but the police was unwilling to interview potential witnesses, take down statements, or assist them in any way.²

49. The Complainants submit that three of the four Victims appealed to the Cairo PPO to prosecute the perpetrators, but the Appeals Court rejected the appeals on 1 February 2006. They also submit that the Fourth Victim lost her right of appeal for failing to lodge it within 10 days due to pressure and threats that she allegedly received. They state that all the Victims have been left with no further effective or available remedy.

50. The Complainants submit that available remedies in Egyptian Law are criminal or civil. They aver that none of the Victims pursued solely civil remedies, and two of them asked for temporary civil compensation as part of their criminal proceedings. They also submit that pursuing separate civil action is not necessary and that criminal remedy is the most appropriate for sexual violations and physical assaults allegations.

51. The Complainants refer to *Sir Dawda K Jawara v. The Gambia, (the Jawara Case)*³ to sustain that the *rationale* behind Article 56(5) of the African Charter is to provide the State concerned with an opportunity to remedy alleged violations through its domestic legal system, and that in the current case the Respondent State has been given an opportunity to investigate, prosecute and remedy the alleged violations.

52. They also refer to - *Amnesty International and Others v. Sudan*⁴ to argue that in cases where it is "impractical or undesirable" for the Complainants or Victims to seize the domestic courts, the requirement of local remedies should not be applied literally, and that domestic remedies must be effective and not subordinated to the discretionary power of public authorities.

53. Furthermore, the Complainants refer to similar requirements of exhaustion of local remedies in the context of the European Court of Human Rights (the European Court), where the exhaustion of all possible remedies within the criminal system does not require making another attempt to obtain redress by a civil action for damages.⁵

The Respondent State's Submissions on Admissibility

54. In its submission, the Respondent State argues that the Communication is inadmissible before the African Commission for two reasons. Firstly, that the Complainants have not exhausted local remedies, and secondly, that there has been no violation of the provisions of the African Charter.

55. With regards to the exhaustion of local remedies, the Respondent State submits that the PPO issued a decision on 25 December 2005 ordering the police to stop the inquiry because there was no ground for criminal proceedings. It argues that this decision was justified by three reasons: firstly, the culprits had not been identified, secondly, the police officers accused of beating the alleged victims were not on the scene at the time, and thirdly the medical reports submitted by the victims were contradictory and could not lead to the identification of the culprits.

56. The Respondent State argues that the decision by the PPO was temporary and that the case could be re-opened if new evidences emerge to the effect that the culprits have been identified and the police would be asked to continue with their inquiry. The Respondent State submits that procedures could still be pursued and criminal proceedings could be initiated if new evidences arise.

57. The Respondent State submits that:

o Investigations were carried following the complaints lodged on 25 May 2005;

o Witnesses as well as police officers were interrogated;

o Videotapes and CDs submitted by the Complainants were viewed; and

o Submitted medical reports were examined.

58. The Respondent State submits that the investigations have not established an act of negligence, inaction or incitement from security officers in the present matter.

59. The Respondent State explains that the PPO decided that, in reference to the alleged sexual assaults, there was no ground for the crime of violation of honour, but that evidence of severe beating, in accordance with the Penal Code, was established.

The African Commission's Analysis on Admissibility

60. The only legal issue at stake in the present case is the exhaustion of local remedies. With respect to the Respondent State's submission that there was no violation of provisions of the African Charter, the African Commission notes that those arguments cannot be examined at the Admissibility stage. Determination of violation(s) to the African Charter is made during the Merits stage of a Communication once that Communication has been declared Admissible by the African Commission.

61. The African Commission will therefore only examine Article 56(5) in relation to the present Communication.

62. Article 56(5) of the African Charter requires that Communications should be sent to the African Commission after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. A Complaint pending before the local courts means remedies have not been exhausted. In the present case, the Complainants argue that they have exhausted all the local courts and their case is not pending before them. However, according to the Respondent State, police inquiries have been temporarily stopped and could be reopened when there is new information and evidences.

63. The African Commission has inferred that the initial *onus* to demonstrate that local remedies have been exhausted is on a Complainant. Once a Complainant shows that there are no local remedies available in the Respondent State, the burden then falls on the Respondent State to prove that an effective remedy is available and has not been exhausted.

64. In *Rencontre Africaine pour la Défense des Droits de l'Homme v. Zambia*, the African Commission examined the respective obligation of the parties in terms of exhaustion of local remedies and declared: "When the Zambian Government argues that the Communication must be declared Inadmissible because the local remedies have not been exhausted, the Government then has the burden of demonstrating the existence of such remedies."⁶ Therefore, in the present case, the Respondent State must prove to the African Commission that judicial procedures to remedy the violations are still being pursued, otherwise its submission could be considered a mere statement.

65. The African Commission notes that, pursuing exhaustion of local remedy requires the availability of effective remedies. In the instant matter, the decision of the FPO not to prosecute, as well as the confirmation of that decision following the Victims' appeal, is sufficient evidence that the conditions for the exhaustion of local remedies have been met. The Victims were left with no other remedy because the inquiry procedures have been stopped.

66. It is the African Commission's view that the Respondent State's submission on the temporary halt of inquiry procedures cannot justify the reason why Victims should be left without any recourse until a potential reopening of a matter, following new evidence. The African Commission notes that eighteen (18) months have passed since the alleged violations occurred and probabilities for the inquiry to be re-opened are slim since evidence has already been gathered and examined. The Respondent State, also did not supply the African Commission with any evidence that it has instituted actions to find 'the new evidence.'

67. In view of the above, the African Commission declares the Communication Admissible.

The Merits

The Complainants' Submissions on the Merits

68. The Complainants state that the Respondent State has violated the rights enshrined in the African Charter in several ways. They submit that the Respondent State failed in its obligation to protect the Victims from sexual violence.

Alleged violation of Article 1

69. The Complainants state that the positive obligations imposed under Article 1 of the African Charter are manifested in two ways, including, the duty to prevent others from violating the rights protected, and the duty to protect. They argue that the duty to protect has been elaborated in detail by the European Court, which found that States must not only respect the rights and freedoms that the European Convention on Human Rights (the European Convention) embodies, but that "In order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels."⁷

70. The Complainants submit that, in line with the consistent approach of other regional human rights bodies, the African Commission has found that positive obligations arise not only in respect of violations by state actors, but also by private individuals. They refer to *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria (the SERAC case)*⁸ where it was held that, governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligations under international human rights instruments.

71. The Complainants submit that the second positive duty is to investigate when a violation has occurred. They argue that the Respondent State has an obligation to effectively investigate every situation involving the violation of rights. They refer to the Inter-American Court on Human Rights (the Inter-American Court) which held that if the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such right is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.

72. According to the Complainants, the same is true when the state allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by the African Charter. The Complainants argue that where serious violations have taken place, it is the obligation of the state to ensure that criminal investigations are undertaken and effective prosecutions pursued. The Complainants further note that the European Court in *M.C. v. Bulgaria* held that the investigation must be independent, thorough and effective, and that access to a judicial remedy must be available and the state may be obliged to provide compensation⁹.

73. The Complainants aver that, a state's compliance to its positive obligations towards its citizens is assessed by the due diligence test. They again make reference to the SERAC case where the African Commission recognised due diligence standard as a test for determining compliance by states in protecting the rights of citizens from being violated.

74. The Complainants submit that the Respondent State failed in its positive obligations to prevent and investigate the violations, which is a violation of Article 1 of the African Charter. They cite the African Commission's decision in the *Legal Resource Foundation v Zambia*,¹⁰ where it held that "Article 1 of the African Charter requires that the State not only recognize rights, but requires that they shall undertake... measures to give effect to them."

Alleged violation of Articles 2 and 3

75. The Complainants argue that, according to the Victims, they were discriminated against in the enjoyment of their rights in violation of the African Charter on the basis of their sex and political opinion. They note that the African Commission in *Legal Resource Foundation v. Zambia* noted that, 'the right to equality' is very important.¹¹

76. They submit further that, in *Association Mauritanienne des droits de l'homme v Mauritania*,¹² the African Commission emphasized that "Article 2 of the African Charter lays down principles that is essential to the spirit of this Convention, one of whose goals is the elimination of all forms of discrimination and to

ensure equality among all human beings."¹³

77. The Complainants further allege that, the main reason why the Victims were assaulted by the authorities is due to the fact that they hold particular political views, are women and journalists. According to the Complainants, this is evidenced by the sexual nature of the violations.

Alleged violation of Article 5

78. The Complainants state that the treatment received by the Victims on 25 May 2005 amounted to a violation of their dignity and to inhuman and degrading treatment and that the assaults were severe and gravely humiliating in violation of Article 5 of the African Charter. They cite the case of *Purohit and Moore v. The Gambia*,¹⁴ where the African Commission ascertained the test for violation of human dignity.

79. They also refer to a Canadian Supreme Court (CSC) judgement in *R v. Ewanchuk*,¹⁵ where a link was made between the right to dignity and the right to equality. The CSC established that violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. The CSC further stated that, sexual assault is an assault upon human dignity and constitutes a denial of any concept of equality for women.¹⁶

80. The Complainants argue that the test for defining inhuman and degrading treatment in international, regional and national human rights instruments is whether the treatment complained of is very severe. They aver that inhuman and degrading treatment, as extensively elaborated by the European Court, involves treatment resulting in physical or psychological injuries. They submit that, degrading treatment more specifically is a treatment that grossly humiliates a person, and that, according to the European Court, a treatment of a sexual nature diminishes human dignity.

81. The Complainants refer to the case of *Bekos and Koutropoulos v. Greece*¹⁷ where the European Court held that, in considering whether treatment is degrading, it had to consider whether the object of such treatment is to humiliate and debase the person concerned, and whether it adversely affected his or her personality.

82. The Complainants also submit that the Respondent State failed in its positive obligations to prevent and investigate the violations, which is a violation of Article 1 of the African Charter. They cite the Commission's decision in *Legal Resource Foundation v Zambia*¹⁸ where it held that "Article 1 of the African Charter requires that the State not only recognize rights, but requires that they shall undertake... measures to give effect to them."¹⁹

83. The Complainants further submit that the State authorities failed in their obligation to protect the Victims from sexual harassment, assault, abuse and harm from NDP supporters and members of the Riot police. In this regard, they submit that the Respondent State failed in its positive obligation to prevent cruel, inhuman and degrading treatment and investigate the allegations impartially, in violation of Article 5 of the African Charter.

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

84. The Complainants submit that while it is true that the Victims have lodged their Complaints and appealed to challenge the violations, the remedies available would not have been effective. They state that the Victims did not have a right to an impartial and objective investigation and appeal process. It is the view of the Complainants that this shows lack of independence of the PPO and the Appeal Court.

Alleged violation of Article 9(2)

85. The Complainants argue that the right of the Victims' freedom of expression has been violated by the Respondent State.²⁰ They argue that the Second, Third and Fourth Victims were attempting to assert their political opinions and to disseminate their views during the protest, and were prevented from doing so through assaults and sexual violence.

Alleged violation of Article 16 and 18(3)

86. The Complainants allege that the explicit targeting, intimidation and sexual harassment of the Victims amount to a violation of their rights under Article 18(3) of the African Charter. They submit that these acts have resulted in physical and emotional injury, and have detrimentally affected their physical and mental well-being, contrary to Article 16 of the African Charter.

87. The Complainants also allege a violation of Article 18(3) of the African Charter in the failure of the State to protect the Victims from discrimination against women. They submit that this case represents a critical opportunity for the African Commission to confirm that violence against women can amount to discrimination under the African Charter, and that States therefore have a legal obligation to prevent it, and take measures to thoroughly investigate, prosecute and punish in cases where it occurs. They also refer to Article 1 of the Protocol to the African Charter on the Rights of Women in Africa (the Women's Protocol),²¹ and argue that it strongly underscores violence against women, whether it is physical, sexual or psychological.

88. The Complainants make reference to the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), specifically its Articles 6 and 7. They submit that the CEDAW Committee's General Recommendation (GR) No.19 entitled "Violence against Women," provides a link between violence against women and equality. Furthermore, that paragraph 9 of the same GR specifies that in addition to applying to violence perpetrated by public authorities "Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and for providing compensation."

89. The Complainants submit that, this was also confirmed by the CEDAW Committee's decision in **A.T v Hungary**,²² while the Committee was citing a report presented by the UN Special Rapporteur on violence against women, its causes and consequences on due diligence and the standards expected of State Parties. In the Report, the Special Rapporteur specified that "the concept of due diligence provides a yardstick to determine whether a State has met or failed to meet its obligations in combating violence against women."

90. According to the Complainants, the sexual abuse endured by the Victims is gender-specific and amounts to discrimination on the grounds of sex, which is a violation of Article 18(3) of the African Charter.

The Respondent State's Submissions on the Merits

91. The Respondent State submits that the subject matter of the Complaint does not satisfy the condition of exhaustion of local remedies stipulated in Article 56 of the African Charter.

92. The Respondent State argues that there has been no violation of any of the provisions of the African Charter. It states that the national measures undertaken and stated in the Complaint are not in violation of the African Charter and the rights of the Victims were neither prejudiced nor violated.

93. The Respondent State further provides that investigations carried out by PPO concluded the existence of the crime of sexual molestation. They argue however, that the element of criminal intention was not established in this offence as the injuries sustained by the Victims were as a result of battery and clashes.

94. The Respondent State alleges that the documents containing a narration of the occurrences, incidents and statements submitted to the African Commission by the Complainants are contrary to the statements made under oath before the PPO by the Victims. It submits that new statements were made by the Victims to support their Complaint before the African Commission. It requests the latter to disregard unsubstantiated statements and not allow the assumptions of the correctness of the Complaint to lead to findings contrary to those of the PPO.

95. The Respondent State submits that the investigations of the PPO concluded that the perpetrators were unknown and that those who were accused by the Victims in their testimonies were not present at the scene of the incident at the time of its occurrence.

The Respondent State's Additional Submissions on the Merits

96. The Respondent State submits in its additional submissions that there exist "Several discrepancies between what the Victims submitted in their testimonies before the PPO, and what they allege in their application before the African Commission."

97. The Respondent State outlines three instances of such discrepancies from the three Victims which are summarized as follows:

i. The Second Victim, in her deposition to the African Commission, indicated that the wife of Mr. Mohamed El Deeb, a member of the NDP supporter was leading the demonstrations against them; she did not mention this allegation to the PPO. Furthermore, the Second Victim said the PPO police officer, Nabil

Selim, was the one who dragged her from the taxi with the Third Victim, meanwhile, the Third Victim later retracted her submissions to the African Commission, indicating that she discovered a year later that Nabil Selim was not the officer who dragged them from the taxi. The Second Victim also mentioned in her submissions to the African Commission that she had been sprayed in her face by an assailant, a matter which she never mentioned to the PPO;

ii. The Third Victim also retracted her accusations of Officer Nabil Selim after one year of the incident, and according to the Respondent State, the PPO had established beyond any doubt that he could not have been at the scene at the time of the protest;

iii. The Fourth Victim alleged to the African Commission that she was beaten by Mr. Mohammed, El Deed from the NDP, and this was never mentioned to the PPO. She also alleged in her submissions before the African Commission that when she went to the hospital the following day, doctors insisted on calling the police, and the police refused to investigate based on jurisdictional reasons. This she never mentioned to the PPO.²³

98. On the basis of the above, the Respondent State declares that the Victims' former accusations were unfounded and simply made to support their Complaint. According to the Respondent State, the statements of the Victims are conflicting and show inaccuracy in identifying the persons who allegedly assaulted them.

99. The Respondent State submits further that inconsistency also existed between the medical reports evidencing the injuries, but this is not substantiated.

100. The Respondent State also refutes the allegations that there was discrimination because assaults were inflicted on the Victims because of the "mere fact of being women." It argues that the assembly of the two parties in the riots included men and women other than the Victims.

101. It submits further that the Egyptian Constitution affirms the principle of equality between men and women and the law provides many privileges for women to safeguard their effective participation in the community as a matter of affirmative action for the benefit of women. It states that Egyptian society rejects any form of degrading or inhuman treatment.

102. The Respondent state also outlines the procedures taken by the PPO during investigation of the alleged violations. It explains that:

i. The PPO heard in detail the testimony of all parties, victims, and witnesses concerning the incident;

ii. The PPO referred the injured male and female victims to El-Hilal El-Ahmer Hospital, and attached twelve medical reports to the investigation reports, after confirming that the reports have been reviewed;

iii. The PPO permitted each person who sustained injuries as a result of the crime to institute civil proceedings during investigations in application of Article 199 bis of the Criminal Procedure Law;

iv. On 13 June 2005, the PPO viewed the video tapes and CDs submitted by the Complainants and it was revealed that none of the accused were present in front of the Press Syndicate or Saad Zaghloul Status, except Mohamed El Deeb;

v. The PPO summoned all the accused whose names were included in the investigations and interrogated them in detail;

vi. Investigations carried out by the PPO concluded the crime of sexual molestation (exposing private parts, sexual harassment and touching the genitals).

109. In its additional submissions, the Respondent State disputes the allegation that the investigation undertaken from the Complaints filed by the Victims, before the PPO as well as the decision by the Appeal Chamber upholding the decision of the PPO, lacked impartiality, objectivity or integrity.

110. The Respondent State maintains that the PPO duly investigated the incident. It emphasizes that the investigations carried out have all the specified safeguards for criminal investigation according to the Egyptian legal regime, particularly the impartiality and confidentiality of the investigations, the presence of

all opposing parties and their respective defense counsels, who were also informed about the developments of the investigations.

111. It submits further that the security agencies have also taken all necessary security measures, whether in terms of securing the demonstrations, or disengaging the demonstrators in accordance with the specified rules and providing the Victims with the necessary level of protection. It adds that the police also exercised their duties in receiving Complaints from demonstrators, filing the necessary reports, and immediately referring the case to the PPO.

112. The Respondent State argues that failure to supply the PPO with the information required coupled with the inconsistencies in the account given by the Victims on the incidents that took place during the demonstrations, cannot be a reason for their inability to identify the perpetrators of the misdemeanor of beating them up. According to the Respondent State, this only indicates that "The circumstances surrounding the incident characterized by a large crowd and the psychological and physical conditions of the female journalists did not permit them to precisely recollect the sequence of events, which in turn did not help the investigation authority to identify the perpetrators." The Respondent State submits that notwithstanding the above, the PPO and the police took necessary measures to investigate the incident.

113. Furthermore, according to the Respondent State, the disparities make it evidently clear that the decision reached by the PPO, after its detailed and scrupulous investigations which showed that there were no grounds for initiating criminal proceedings "temporarily" due to the inability to identify the perpetrators was logical and sound. More so, the perpetrators could not be identified and all those accused by the Complainants, including the police and the others, were not present at the scene of the incident at the material time.

The Complainants' Additional Submissions on the Merits

103. In response to the Respondent State's submissions about the "Existence of several discrepancies between what the Victims submitted in their testimonies before the PPO, and what they allege in their application before the African Commission," the Complainants argue that the Respondent State only sets out three discrepancies, while inferring that there are more discrepancies which it does not substantiate. They submit that the instances set out by the Respondent State refer to omissions rather than contradictions.

104. According to the Complainants, the omissions mentioned above are due to the conditions under which the statements before the PPO were taken, and that not all the information that they provided was considered or written down. They further contend that the instances detailed in the Respondent State's submission does not discharge it from its obligation to investigate human rights violations because the omission is not material enough to constitute a bar, by the victims, to an effective investigation.

105. The Complainants submit further that, the Respondent State placed too much reliance on the formal statements that the Victims made to the PPO and failed to have any regard to the context and circumstances within which the statements were made. the Complainants also attempt to clarify the discrepancies mentioned by the Respondent State in their additional submissions on the Merits:²⁴

i. On the discrepancy concerning the Second Victim's omission to mention to the PPO that the wife of Mr. El Deeb led the demonstrations against them and that she was sprayed in the face by an Assailant, the Complainants submit that according to the Second Victim, the PPO did not record all the information provided. The Complainants indicate further that, according to the Second Victim, she spent a lot of time waiting for her statement to be taken by the PPO and that when it was finally taken, they did not make any record of evidence that she submitted; including CDs containing pictures and her torn clothes;

ii. On the discrepancy concerning the Third Victim who refracted her accusations against officer Selim when she realised that she had been mistaken as to his identity, the Complainants state that this retraction was done in good faith. They explain that the Third Victim's colleagues named one of her attackers as Officer Selim, but did not know the name of her attacker, although she could recognise him. The Complainants state that the Third Victim said "I saw the same officer at another demonstration almost a year later and I recognised him. Another officer called out to him, and that is when I discovered that his name was not Nabil Selim;"

iii. On the discrepancy concerning the Fourth Victim who according to the Respondent State, failed to mention to the PPO that she had been assaulted by Mr. El-Deeb and also failed to mention the episode in the hospital and the police, the Complainants explain that the Victim mentioned in her affidavit that she was greatly distressed at the time she was reporting to the PPO. According to the Complainants, the Fourth Victim indicated that she had difficulties recalling all the details and events at the time, and that she was only able to identify Mr. El-Deeb later. Furthermore, according to the Complainants, the Fourth Victim stated: "I feel like I was having a nervous breakdown at the time, and could not focus."²⁵

106. The Complainants aver that the Respondent State uses the discrepancies as a basis that hampered its investigations of the alleged violations, meanwhile, according to them, the statements made by the Victims had no discrepancies whatsoever, but rather omissions due to the particular circumstances of the case. They argue that the omissions have no material bearing on the present Communication.

107. They reiterate that the Respondent State failed in its obligations, in particular in its procedural obligation to investigate. This is because, according to the Complainants, when the Respondent State received the complaints, it failed to institute investigations that could have led to the identification of the perpetrators or established criminal wrongdoing. Rather, it expected the Victims to provide them with the identities of the perpetrators.

108. The Complainants submit that when the PPO provided reasons for its failure to prosecute, they stated that the crime of 'assault on honour' could not be prosecuted because the perpetrators, whoever they are, lacked the requisite intent for committing the crime. In this regard, the Complainants aver that the Respondent State's submission that it failed to investigate, prosecute and punish the perpetrators because of the omitted information by the Victims is incorrect. They argue that the Victims submitted sufficient information, to enable an investigation to take place.

The African Commission's Analysis on the Merits

114. In this Communication, the African Commission is called upon to determine whether the Respondent's State failure to protect the Victims from the alleged acts or omissions is a violation of their rights under the African Charter; specifically Articles 1, 2, 3, 5, 7(1) (a), 9(2), 16, 18(3) and 26.

115. Articles 2 and 18(3) will be considered together, given that both have an element of discrimination.

116. Article 1 of the African Charter will be dealt with after all the other Articles have been analyzed, since a violation of Article 1 can only be established if other Articles in the Charter have been violated.

Alleged violation of Article 2-Right against non-discrimination, and Article 18(3)-Right of Non-discrimination Against Women

117. Article 2 of the African Charter provides that: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status."

118. Article 18(3) of the African Charter provides that "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."

119. The non-discrimination principle generally ensures equal treatment of an individual or group of persons irrespective of their particular characteristics, and the non-discrimination principle within the context of Article 2 and 18(3) of the African Charter ensures the protection from discrimination against women by States Parties to the African Charter.

120. Before the African Commission proceeds to determine whether Articles 2 and 18(3) of the African Charter have been violated in this Communication, it finds it imperative to define discrimination and its relationship with gender-based violence as alleged in this Communication.

121. The Women's Protocol defines discrimination against women as "Any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women [...] of human rights and fundamental freedoms in all spheres of life."²⁶ The same Protocol defines violence against women as "All acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public Life..."²⁷

122. Discrimination as defined by Article 1 of CEDAW is:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.²⁸

123. Furthermore, in its General Recommendation No. 19, the CEDAW Committee established the correlation between discrimination against women and gender-based violence by stating that:

The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention ICEDAWL regardless of whether those provisions expressly mention violence.²⁹

124. The Complainants argue that, in violation of Article 2 of the African Charter, the Victims were discriminated against in the enjoyment of their rights in violation of the African Charter on the basis of their sex and political opinion. They further allege that, there was differential treatment between men and women during the riot and that the main reason why the Victims were assaulted by the authorities is basically because they are women and journalists. According to the Complainants, this is evidenced by the sexual nature of the violations.

125. At this point, the African Commission would like to refer to the Complainants initial submissions in this Communication explaining the incident that took place on 25 May 2005.³⁰

126. In response to the claims made by the Complainants, the Respondent State refutes the allegations submitting that, the assembly of the two parties in the riots included men and women other than the Victims. It contends that there was no discrimination and that assaults were not inflicted on the Victims because they were women.

127. The Respondent State submits further that the Egyptian Constitution affirms the principle of equality between men and women and that the law provides many privileges for women to safeguard their effective participation in the community as a matter of affirmative action for the benefit of women.

128. Since the Respondent State is contesting the allegations of the Complainants, the African Commission is called upon to analyze the arguments of both parties and establish whether the assaults endured by the Victims as alleged, is discriminatory based on sex and political view in violation of Article 2 of the African Charter.

129. At this point in time, the African Commission would like to pose the following questions: Whether the women and male protesters had similar treatment; and whether the treatment was 'fair and just', given that all women and men in the scene were under the same circumstances, that is, exercising their political rights.

130. In finding answers to these questions, paragraphs 3 to 20 of this Communication under 'summary of facts' is crucial to the sexual nature of the violations as purported by the Complainants.

131. The First Victim alleges that she was threatened to be beaten if she insists to enter the Press Syndicate by a police officer. She alleges further that she was harassed by the NDP supporters, stating: "???. Their hands were fondling my breasts and molesting all the sensitive areas in my body. They assaulted me with their hands and tore off my clothes and jewellery³¹ ... I ended up almost naked as a result."³²

132. The Second Victim on her part alleges that, while she was taking pictures of the demonstrations she was attacked by an identified NDP supporter. She states; "He slapped me across the face and called me abusive names, like 'slut' and 'whore'."³³ She further describes incidences which took place while she was trying to leave the Press Syndicate. She states:

Someone dragged me by my hair and pulled me outside.... An identified police officer at the scene told me, 'I'll show you not to go down to the streets again. He called me abusive names, like 'whore' and 'slut.' He also told me 'we'll take your picture and distribute it'.³⁴ ... The officer who was holding me from the back then put his hand up my blouse from the back, as if he was trying to tear off my clothes. His other arm was around me and he fondled my breasts I tried to stop him but couldn't. The two officers in front of me tried to pull off my jeans but they couldn't... The officer behind me started tearing my undershirt and bra.³⁵

133. The Second Victim also alleges that she was intimidated after filing the Complaint at the PPO and pressured to withdraw the same. As a result, she suffered physical injuries, was emotionally traumatized,

faced pressure from her family to quit her job and to cease political participation. She states: "My feelings of personal security have deteriorated...I change my clothes in the dark... scared to see myself naked. I felt like their fingerprints were marked on my body."³⁶ She also allegedly lost her relationship with her partner after her refusal to withdraw the complaint which was perceived as a "scandal" given the public and sexual nature of the violations she endured.

134. The Third Victim alleges that when she was trying to leave the Press Syndicate she was subject to several assaults. She states: "One of the women pulled my hair and brought me to the ground. The next thing I knew I was being beaten... All of the clothes on the upper half of my body were torn off and I ended up with only a bra."³⁷ According to the Third Victim, she also suffered from intimidation after filing the Complaint at the PPO, to the extent that she was threatened and led to her being framed with prostitution accusations.

135. The Fourth Victim on her part alleges that, while she was participating in the demonstration, she was attacked by thugs who beat her up and tried to tear off her clothes. She alleges that she had men following her and also calling her names such as 'slut' and 'whore.' As a result of the incidents, the Fourth Victim alleges that she was severely traumatized to the extent that she had to be on anti-depressants, and suffered from physical injuries for three months.³⁸

136. It is further alleged by the Fourth Victim that while the above mentioned assaults were taking place, law enforcement officers on the scene refused to come to her assistance.

137. Three clear conclusions are obvious from the submissions of the statements made by the Victims;

a. The Victims were exclusively women;

b. The Victims were not protected from the perpetrators and other unidentified actors during the demonstrations; and

c. The violations were perpetrated on the Victims because of their gender.

138. Having said this, the *onus probandi* therefore shifts on the Respondent State to prove that the Victims were in effect protected by the law and that there was no differential treatment given to both male and female protesters on the scene. However, there is no evidence in the submissions of the Respondent State showing that male protesters in the scene were also stripped naked and sexually harassed as the women were.

139. In the absence of any evidence to the contrary by the Respondent State, the Commission finds a violation of Article 2 of the African Charter.

140. In claiming a violation of Article 18(3) of the African Charter, the Complainants submit that the sexual abuse that the Victims endured were gender-specific, amounting to discrimination on the grounds of sex.

141. The Complainants further allege that the State failed to protect the Victims from discrimination, by not taking any measures to thoroughly investigate, prosecute and punish the perpetrators in cases where it occurs.

142. In order for the African Commission to establish that Article 18(3) has been violated by the Respondent State, it is going to analyse 'some of the elements' of the testimonies provided by the Complainants (discussed in paragraphs 131 to 136) above to establish whether the allegations were indeed gender-specific, and discriminatory on the primary basis of gender. This is because the characteristics of violence commonly committed against women and men differ, and it is only by analyzing the nature of the violence that the African Commission can effectively draw its conclusions.

143. Firstly, when looking at the verbal assaults used against the Victims, such as 'slut' and 'whore,' it is the opinion of the African Commission that these words are not usually used against persons of the male gender, and are generally meant to degrade and rip off the integrity of women who refuse to abide by traditional religious, and even social norms.

144. Secondly, the physical assaults described above are gender-specific in the sense that the Victims were subjected to acts of sexual harassment and physical violence that can only be directed to women. For instance, breasts fondling and touching or attempting to touch 'private and sensitive parts'. There is no doubt that the Victims were targeted in this manner due to their gender.

145. Thirdly, the alleged threats against some of the Victims who were accused of practicing prostitution when they refused to withdraw their Complaints can also be classified as being gender-specific.

146. The standard for determining whether discrimination has taken place was canvassed by the Inter-American Court when it made its **Advisory Opinion on the proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica**. The Court stated that "...no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things...."³⁹ This was also reflected by the UN Human Rights Committee when it held that "Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."⁴⁰

147. Can the differentiation of treatment of the Victims in the present Communication be classified as reasonable and legitimate as expressed by the UN Human Rights Committee?

148. It follows that, the principle of equality or non-discrimination does not mean that all differential treatments and distinctions are forbidden because some distinctions are necessary when they are legitimate and justifiable.

149. Looking at the arguments of the parties in this Communication, the African Commission is of the opinion that the treatment was neither legitimate, nor justifiable because there is no reasonable cause behind the discrimination that was inflicted upon the Victims.

150. Furthermore, in addition to the statements made by the Victims, a statement made by a woman named Rabab al-Mandy⁴¹ in the Complainants' submissions corroborated the sexual harassment inflicted on them. She stated: "The thugs started beating and assaulting me. They put their hands up my clothes, and fondled all my sensitive areas under the eyes of the officers."⁴²

151. The experience of another woman, Aida Seif el-Dawla,⁴³ who was also at scene, supports the arguments of the Complainants about the gender-specific nature of the violations. Aida Seif el-Dawla alleges that when she was being assaulted, she tried to ask for help from the police officers, who instead hit her and retorted; "This is so that you stop coming to the areas belonging to men!"⁴⁴

152. It is clear that the incidents alleged took place in a form of a systematic sexual violence targeted at the women participating or present in the scene of the demonstration. Furthermore, perpetrators of the assaults seemed to be aware of the context of the Egyptian society; an Arab Muslim society where a woman's virtue is measured by keeping herself physically and sexually unexposed except to her husband. The perpetrators were aware of the consequences of such acts on the Victims, both to themselves and their families, but still perpetrated the acts as a means of punishing and silencing them from expressing their political opinions.

153. In view of the fact that the Respondent State did not refute the allegations made by the Complainants in the framework of the actual acts of violence that were committed against the Victims, and also following the analysis of the statements from the Victims, the African Commission concurs with the Complainants that the type of violence used during the demonstrations was perpetrated based solely on the sex of the persons present in the scene of the demonstration. In other words, the violence was gender-specific and discriminatory by extension.

154. Furthermore, if the Respondent State failed to protect the Victims from the violations that they incurred, and did not show any evidence of whether the differential treatment was legitimate, it goes without saying that the State has fallen short of its obligations under 18(3) of the African Charter.

155. The Complainants also allege that the Respondent State failed to investigate the sexual assaults that were perpetrated against the Victims. This Commission notes that the concept of human rights is based on a typical recognition that every human being is equal and also recognizes the inherent dignity and worth of every human being. Accordingly, when women are targeted due to their political opinion for the mere fact of being women, and are not assured the necessary level of protection by the State in the face of that violence, a range of their fundamental human rights are at stake, including their right to sexual equality. The State therefore has an obligation to investigate such acts of violence against women, whether committed by state or non-state actors.

156. The African Commission also notes that a State may be in violation of the African Charter, for acts of non-state actors, if it is complicit in the violations alleged, has sufficient control over those actors, or fails to investigate those violations. The jurisprudence of the African Commission has reaffirmed this position in *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*.⁴⁵ In that Communication, the African Commission stated that, "If a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents [sic] are not the immediate cause of the violation."⁴⁶

157. Furthermore, in the *SERAC* case⁴⁷ the African Commission stated that "Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by

protecting them from damaging acts that may be perpetrated by private parties."

158. The Inter-American Commission, in **Maria da Penha and Maia Fernandes v. Brazil**, also warned from impunity concerning acts of violence and underlined that, failure to fulfil the obligation to prevent, protect, and prosecute creates a climate that is conducive to such acts.⁴⁸

159. In the present Communication, the Victims allege that the perpetrators of the sexual assaults they were subject to were police officers, while other identified and unidentified persons were also acting upon orders from the police officers. According to the Complainants, the State failed in its legal obligation to protect against discrimination and take measures to thoroughly investigate, prosecute, and punish in cases where it occurs by leaving the perpetrators unpunished.

160. The Complainants assert that when the Respondent State received the Complaints, it failed to institute investigations that could have led to the identification of the perpetrators or established criminal wrongdoing. Rather, it expected the victims to provide them with the identities of the perpetrators. The Respondent however claims that there were discrepancies and contradictions between what the Victims submitted in their testimonies before the PPO, and what they alleged in their application before the African Commission, which hampered the investigation of the violations.⁴⁹

161. The Complainants argue that the omissions made by the Victims which the State describes as 'discrepancies' are due to the conditions under which the statements before the PPO were taken, and that not all the information that they provided was considered or written down. They further contend that the instances⁵⁰ detailed in the Respondent State's submission does not discharge it from its obligation to investigate human rights violations because the omission is not material enough to constitute a bar, by the Victims, to an effective investigation.

162. Even though the Respondent State maintains that failure to supply the PPO with the information required, coupled with the inconsistencies in the account given by the Victims on the incidents that took place during the demonstrations hampered the investigations, they seem to agree with the Complainants that the Victims made omissions due to the circumstances in which they found themselves. This is seen in the Respondent State's submissions that, "The circumstances surrounding the incident characterized by a large crowd and the psychological and physical conditions of the female journalists, did not permit them to precisely recollect the sequence of events, which in turn did not help the investigation authority to identify the perpetrators."

163. Based on the above, it is the African Commission's opinion that the Respondent State failed to investigate and prosecute the perpetrators who committed gender-specific violations against the Victims. Failure to investigate effectively, with an outcome that will bring the perpetrators to justice, shows lack of commitment to take appropriate action by the State, especially when this lack of commitment is buttressed by excuses such as lack of sufficient information to carry out a proper investigation. Furthermore, failure to investigate compromises an international responsibility on the part of the Respondent State, both in the case of crimes committed by agents of the State and those committed by private individuals.

164. The effects of the violations perpetrated on the Victims were palpable physically, and even from the medical records. The State did not therefore need further information to proceed with the necessary investigation that will bring the perpetrators to justice. As the Inter-American Commission said in **Maria da Penha and Maia Fernandes v. Brazil**, and this Commission agrees, that "Ineffective judicial action, impunity, and the inability of victims to obtain compensation provide an example of the lack of commitment to take appropriate action..."⁵¹

165. The African Commission also holds the same view with the CEDAW which held that, violence against women affects, compromises or destroys the enjoyment and exercise by women of their fundamental and human rights in different spheres of life.⁵² In this regard, the African Commission considers violence against women as a form of discrimination against them.

166. To sum up, it is clear that the sexual assaults against the Victims which occurred on 25 May 2005 were acts of gender-based violence, perpetrated by state actors, and non-state actors under the control of state actors, that went unpunished. The violations were designed to silence women who were participating in the demonstration and deter their activism in the political affairs of the Respondent State which in turn, failed in its inescapable responsibility to take action against the perpetrators.

167. For these reasons, based on the above analysis, the African Commission finds the Respondent State in violation of Articles 2 and Article 18 (3) of the African Charter.

Article 3- Right to Equality before the Law and Equal Protection of the Law

168. Articles 3(1) and (2) of the African Charter on the other hand provide that, "Every individual shall be equal before the law and that every individual shall be entitled to equal protection of the law."

169. The Complainants argue that the Victims were subjected to all the violations alleged basically because the Respondent State did not protect them from the perpetrators.

170. The Respondent State contends that the security agencies have also taken all necessary security measures, whether in terms of securing the demonstrations, or disengaging the demonstrators in accordance with the specified rules, and providing the Victims with the necessary level of protection.

171. The African Commission will at this point explain the principle of equality that underpin equality before the law and equal protection of the law according to its jurisprudence.

172. The African Commission has affirmed the principle of equality before the law and equal protection of the law by explaining the scope of these rights in *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe*.⁵³

173. With respect to 'equality before the law' under Article 3(1) of the African Charter, the African Commission stated in the aforesaid Communication that:

*The most fundamental meaning of equality before the law under Article 3(1) of the Charter is the right by all to equal treatment under similar conditions. The right to equality, before the law means that individuals legally within the jurisdiction of a State should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens... The principle that all persons are equal before the law means that existing laws must be applied in the same manner to those subject to them.*⁵⁴

174. With regard to 'equal protection of the law' under Article 3(2) of the African Charter, the African Commission also held in the same Communication above that "Equal protection of the law means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property and in their pursuit of happiness."⁵⁵

175. Equality and non-discrimination are core principles in international human rights law. Consequently, the premise under Article 3 of the African Charter is that the law shall prohibit any form of discrimination and guarantee to all individuals equal and effective protection against discrimination on any ground, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In this respect, the State has an affirmative duty to prohibit discrimination and ensure that all persons are protected by the law and are equal before the law.

176. The principle of 'equal protection' therefore places all men and women on an equal footing before the law. Furthermore, it indicates that all men and women are entitled to equal protection against any discrimination and against any incitement to such discrimination. The African Commission notes that, parties can only establish that they have not been treated equally by the law, if it is proved that the treatment received was discriminatory, or selective. If a party claims selective protection of the law, then the burden is on the party to show that the laws had discriminatory effects and purposes.

177. This Commission further asserts that equality before the law also entails equality in the administration of justice. In this regard, all individuals should be subject to the same criminal and investigative procedures in the same manner by law enforcement and the courts. On the other hand, for all individuals to have equal protection of the law, the dignity of every individual, whether male or female should be fair, equally safeguarded by the law and this should also be the case when applying or enforcing the law.

178. Although the Respondent State submitted, that the security agencies have "taken all necessary security measures.... providing the Victims with the necessary level of protection," the Respondent State does not mention whether the 'necessary level of protection' was effective or satisfactory to the Victims, or whether the level of protection was the same that was accorded to the men in the scene. It is not sufficient to say that necessary measures were taken when the results of those measures are not palpable.

179. It is the African Commission's view that no logical explanation can be derived from the fact that the Victims were subjected to all the assaults- physical and emotional, they claim, if the State indeed protected them from the assaults. It is also the African Commission's view that inequality based on the ground of sex is an analogous ground for discrimination. Irrefutably therefore, this Commission underscores that freedom from discrimination is also an aspect of the principles of equality before the law and equal protection of the law under Article 3 of the African Charter because both present a legal and material status of equality and

non discrimination.

180. Based on the above, the African Commission concludes that there has been a violation of Article 3 by the Respondent State.

Alleged violation of Article 5 (Prohibition of Torture and Cruel, Inhuman and Degrading Treatment)

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

182. The Complainants argue that the treatment received by the Victims on 25 May 2005 amounted to a violation of their dignity and to inhuman and degrading treatment. They sustain that the Victims were physically and verbally assaulted, sexually assaulted and abused during the protest, adding that there was a violation of their dignity because the assaults were severe and gravely humiliating, in violation of Article 5 of the African Charter.

183. The Complainants further submit that since the State authorities failed in their obligation to protect the Victims from sexual harassment, assault, abuse and harm from NDP supporters and members of the Riot police, it failed in its positive obligation to prevent cruel, inhuman and degrading treatment and investigate the allegations impartially.

184. The Respondent State does not provide any substantial arguments to contend the allegations of the Complainants that the treatment subjected by the Victims was inhuman and degrading. It only submits that "The Egyptian society rejects any form of degrading or inhuman treatment." Concerning failure to investigate, the Respondent State argues that investigations were carried out by the PPO after the incident which concluded the existence of the crime of sexual molestation, which includes exposing private parts, sexual harassment and touching the genitals.

185. They argue that the element of criminal intention was not established in this offence as the injuries sustained by the Victims were as a result of battery and clashes, adding that the PPO investigations concluded that the perpetrators were unknown.

186. Before the African Commission determines whether the acts inflicted on the Victims amounted to inhuman and degrading treatment, and whether there was pain and suffering, it will first of all attempt to define the term 'inhuman and degrading treatment.'

187. The African Commission's jurisprudence has established the scope of inhuman and degrading treatment, which does not only include physical and psychological suffering. In *International Pen and Others v. Nigeria*, for instance, the African Commission held that:

*Article 5 of the African Charter prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience.*⁵⁶

188. The African Commission has also noted that violations under Article 5 of the African Charter should also be established based on the circumstances of each case. In *Curtis Doebbler v Sudan*, the African Commission ruled that: *While ultimately whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case. The African Commission has stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.*⁵⁷

189. Similarly, in *Media Rights Agenda v Nigeria*, the African Commission held that the term "Cruel, inhuman or degrading punishment and treatment is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental."⁵⁸

190. Furthermore, since inhuman and degrading treatment also impacts on the dignity of a person, the African commission held in *Purohit and Moore v. The Gambia* cited by the Complainants that: *Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.*⁵⁹

191. Further, Article 16(1) of the UN Convention Against Torture, calls on States to: *Undertake to prevent in any territory under its jurisdiction other acts of cruel inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or*

with the consent or acquiescence of a public official or other person acting in an official capacity...

192. Article 16(2) of the same Convention adds that "The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment..." Accordingly, the spirit of the UN Convention Against Torture shall apply even in the context of the African Charter, as authorised by Article 61 of the same.

193. Under the European Human Rights System, the European Court has also underscored the determining factor to qualify an act as 'ill-treatment,' which is that; the act must "attain a minimum level of severity". On this ground, the Court has outlined four main criterion:

- i. The duration of the treatment;*
- ii. The physical effects of the treatment;*
- iii. The mental effects of the treatment; and*
- iv. The sex, age and state of health of the victim*

194. This test was substantiated in **Ireland v UK**, where the Court held that:

*As was emphasised by the Commission, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.*⁶⁰

195. Furthermore, in the combined Cases of **Denmark v. Greece**,⁶¹ **Norway v. Greece**,⁶² **Sweden v. Greece**,⁶³ and **Netherlands v. Greece**,⁶⁴ popularly referred to as the **Greek Case**, the European Commission held that ... "The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical which in the particular situation, is unjustifiable..."⁶⁵ In the same case, the European Commission also considered that, for an act to be degrading there must be some form of 'gross humiliation.'⁶⁶

196. Having discussed the principle of inhuman and degrading treatment and indignity, the African Commission will rely on the criterion provided by its jurisprudence that: "Acts of inhuman and degrading treatment "Not only cause serious physical or psychological suffering, but also humiliate the individual..." and 'Can be interpreted to extend to the widest possible protection against abuses, whether physical or mental.'

197. In their submissions, the Complainants give instances of inhuman and degrading treatment that the Victims were subjected to, and which this Commission has analysed above.⁶⁷

198. The Respondent State has not denied the allegations presented by the Complainants. It only states that "the Egyptian society rejects any form of degrading or inhuman treatment." In addition, it argues that the investigation carried out by the PPO concluded the existence of 'sexual molestation.' This raises the question whether sexual molestation is not 'inhuman and degrading' to qualify as a violation under Article 5 of the African Charter. Is it not tantamount to sexual humiliation, especially with the use of degrading references such as whore and slut?

199. In **John K. Modise v Botswana**, the African Commission held that the acts suffered by the Victim "Exposed him to personal suffering and indignity in violation of the right to freedom from cruel, inhuman or degrading treatment guaranteed under Article 5 of the Charter."⁶⁸ Even though the acts in this Communication cannot be compared to the acts in **John K. Modise v Botswana** there is an aspect of indignity.

200. In **Campbell and Cosans v UK**, the European Court stated that, "treatment' itself will not be 'degrading' unless the person concerned has undergone - either in the eyes of others or in his own eyes - humiliation or debasement attaining a minimum level of severity. That level has to be assessed with regard to the circumstances of the case."⁶⁹

201. In the present Communication, the African Commission finds that the treatment against the Victims amount to physical and emotional trauma. The treatment also has physical and mental consequences obvious from the injuries sustained.

202. Furthermore, the level of suffering occasioned by the acts perpetrated on the Victims which amount to inhuman and degrading treatment cannot be overlooked. It is the Commission's view that the acts were debasing and humiliating, sufficiently severe to fall within the ambit of the test provided by **John K. Modise v Botswana** and the European Court to establish inhuman and degrading treatment, and consequently, the scope of Article 5 of the African Charter.. It is also the Commission's view that the Respondent State has conceded that the Victims were subject to inhuman and degrading treatment by admitting sexual

molestation.

203. On the issue of investigation, the African Commission will like to make reference to its "Guidelines and Measures for the Prohibition of Torture, Inhuman and Degrading Treatment or Punishment in Africa (the Robben Island Guidelines)." Article 17 of the Robben Island Guidelines provides that States should "Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment," while Article 19 provides that "Investigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and effectively, guided by the UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)."

204. Furthermore, Article 4(c) of the Declaration on the Elimination of Violence against Women, adopted by the General Assembly provides that States should, "Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."⁷¹

205. The African Commission notes the Inter-American Court's decision in **Velasquez Rodriguez v. Honduras**, which held that:

*An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention (...). What is decisive is... whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible...*⁷²

206. The acts in the present Communication were illegal and unjustifiable. The African Commission will not belabour on analysing the responsibility of the State under this Article since its reasoning will be the same as Article 18(3) discussed above. Suffice to say that the Respondent State has failed to conduct an effective investigation into the alleged acts of inhuman and degrading treatment and no diligent attempts have been made to hold anyone accountable.

207. The African Commission would also like to accentuate the fact that, being a party to the African Charter, the Respondent State has an obligation to prohibit inhuman and degrading treatment under Article 5 of the Charter. Furthermore, since the Respondent State has acceded to the Convention against Torture,⁷³ it has formally accepted the Convention and is therefore bound by it. Even though Article 13 of the Convention Against Torture does not specifically mention inhuman and degrading treatment, it provides that "..... Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

208. The African Commission notes that the Respondent State is also a party to the ICCPR,⁷⁴ whose Article 7 provides that, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Victims in the present Communication were not only subjected to ill-treatment, but intimidated to withdraw their Complaints. The Respondent State therefore owed an obligation to the Victims to effectively investigate the acts of ill-treatment that impacted on their dignity and punish the perpetrators accordingly. Failing to do so only amounted to an infringement of the rights of the Victims under Article 5 of the Africa Charter and other international instruments that the Respondent State is a party to.

209. From the foregoing, the African Commission concludes a violation of Article 5 of the African Charter by the Respondent State because the acts committed amounted to inhuman treatment and investigations were not conducted.

Alleged violation of Article 7(1) (a) and 26 of the African Charter (Right to Fair Trial and Independence of the courts)

210. The Complainants allege a violation of Article 7(1) (a) and 26 of the African Charter respectively.

211. Article 7(1) (a) states that "Every individual has a right to have his cause heard which comprises the right to appeal to competent national organs against acts violating his fundamental rights."

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

213. With respect to the alleged violation of Article 7(1) (a) of the African Charter, the Complainants aver that the Victims did not have a right to an impartial and objective investigation, as well as an appeal

process, which in their view shows lack of independence of the PPO and the Appeal Chamber.

214. The Complainants submit that the Victims lodged their Complaints to the PPO but the remedies available were not effective. The Complainants submit that the Victims appealed to the PPO to review their decision not to prosecute and their appeal was rejected. Subsequently, they appealed the decision of the PPO to the Appeal Chamber which dismissed their appeal on the basis that the assaults had taken place but that it was impossible to identify the perpetrators.

215. The Respondent State agrees with the Complainants' submissions that the PPO refused to prosecute the perpetrators and argues that the decision not to prosecute was based on three reasons.⁷⁵ According to the Respondent State, the PPO and the Appeal Chamber were impartial and independent in their procedures as opposed to the Complainants' submissions.

216. The right to fair trial, protected by Article 7 of the African Charter and complemented by Article 26 of the same Charter is a stronghold for the principle of judicial independence and appropriate justice in the African Human Rights System. In this regard, the African Commission provided an insight to Article 7(1) (a) in *Kenneth Good v Republic of Botswana* where it held that "The right to be heard requires that the Complainant has unfettered access to a tribunal of competent jurisdiction to hear his case. It also requires that the matter be brought before a tribunal with the competent jurisdiction to hear the case."⁷⁶

217. Similarly, the African Commission noted in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*⁷⁷, that "The protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief."

218. To strengthen the spirit of Articles 7 and 26 of the African Charter, the African Commission adopted the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (the Principles and Guidelines on the Right to Fair Trial),⁷⁸ to assist States Parties to the African Charter in their guarantee of the right to fair trial as enshrined in the African Charter. One of the essential elements of a fair hearing under the Principles include; "An entitlement to an appeal to a higher judicial body."⁷⁹ It also provides that, "The right to appeal should provide a genuine and timely review of the case, including the facts and the law...."⁸⁰

219. The African Commission notes that the concerns, needs and interests of victims can only be addressed in judicial proceedings when these proceedings are impartial, taking into consideration facts and appropriate laws. The primary concern should therefore be to ensure that victims of human rights violations are redressed accordingly by given them an opportunity to appeal decisions from other judicial bodies.

220. Particularly, the appeal mechanism must be premised on the recognition that the right to appeal is a fundamental right under international law in which all victims are entitled to. Failing to allow victims appeal decisions in the opinion of the African Commission, is contrary to the guiding principles and spirit of the African Charter and other international and regional instruments.

221. In the present Communication, after the Victims appealed to the PPO and were not and upheld the decision taken by the PPO not to prosecute the perpetrators. Thus, in effect, the Victims had an opportunity to be heard by the Appeal Chamber, and therefore cannot claim that their right to appeal under Article 7 of the African Charter was violated. Furthermore, their appeal was also entertained by the PPO even though the result was not satisfactory to them.

222. The issue of the appeal process being impartial or independent in itself, and as a result, showing the lack of impartiality and independence of the Appeal Chamber and the PPO does not fall within the ambit of Article 7 and 26 of the African Charter.

223. According to the Principles and Guidelines of the Right to Fair Trial, impartial and independent tribunals shall amongst other things: be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner;⁸¹ not have any inappropriate or unwarranted interference with the judicial process nor shall decisions be subject to revision except through judicial review;⁸² independent from the Executive branch;⁸³ and the Government shall respect that independence;⁸⁴ base its decision only on objective evidence, arguments and facts presented before it.

224. In the facts before the African Commission however, apart from alleging that the process of Appeal in the Appeal Chamber and the PPO lacked impartiality and independence due to the reasons provided, the Complainants have not substantiated the extent to which it did so, or given enough reasons to support the allegations that both Institutions were not impartial and independent according to the criteria provided by the Principles and Guidelines of the Right to Fair Trial. Thus in the absence of any information, substantiated by relevant evidences to support the allegations, the African Commission sees no basis to

conclude that the both Institutions lacked impartiality and independence.

225. The Complainants also allege that the Victims did not have an impartial and objective investigation. They aver that the Victims reported the alleged incidences to the police after the alleged assault, but the police was unwilling to interview potential witnesses, take down statements, or assist them in any way. They also submit that the PPO's decision to halt the investigations due to amongst other reasons, discrepancies in the Victims' Statements is immaterial because according to them, these discrepancies were mere omissions which have no material bearing on the present Communication.

226. According to the Respondent State, the investigations carried out by the PPO have all the specified safeguards for criminal investigation according to the Egyptian legal regime, particularly the impartiality and confidentiality of the investigations.⁸⁵ Furthermore, according to the Respondent State, the decision reached by the FPO, after its detailed and scrupulous investigations which showed that there were no grounds for initiating criminal proceedings "temporarily" due to the inability to identify the perpetrators was logical and sound.

227. The UN Human Rights Committee has shown that complaints must be investigated promptly and impartially so as to make the remedy effective. In its General Comment No. 20, the Committee provides that: "Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective."⁸⁶

228. The European Court has also expressed the importance of carrying out thorough investigations that are capable of leading to the identification and punishment of those responsible for any ill-treatment.⁸⁷ Moreover, when examining whether an investigation is effective, the European Court applied the following test in some of its cases: whether the authorities reacted effectively to the complaints at the relevant time;⁸⁸ the length of time it takes for the investigation to commence;⁸⁹ and whether there were delays in taking statements from the victims.⁹⁰

229. In **Assenov & Others v. Bulgaria**, the European Court clearly addressed the notion of effective investigation that is not impartial and independent. In deciding on the alleged police misconduct against the Complainant, the Court noted that "It was necessary to take evidence from independent witnesses," adding that ... "the examination of two further witnesses, one of whom had only a vague recollection of the incidents in question, was not sufficient to rectify the deficiencies in the investigation up to that point."⁹¹ The Court concluded that the lack of a thorough and effective investigation into the applicant's arguable claim that he had been beaten by police officers violates Article 3 of the Convention.⁹²

230. Accordingly, borrowing from the European Court, it follows that where Victims raise arguable claims to have been ill-treated in breach of violations in the African Charter, the investigation carried out must be prompt and impartial to be effective. An impartial investigation should involve a thorough or scrupulous procedure which leads to results that identify the perpetrators and punishes those responsible for the ill-treatment and other violations alleged.

231. The African Commission has noted the arguments presented by the parties to this Communication and concurs with the submissions made by the Complainants that the investigation carried out by the PPO was not impartial, which jeopardised the Victims' right to an effective remedy. Even though the Respondent State describes the steps taken by the PPO during the investigation and concludes that the PPO did not prosecute due to lack of sufficient information from the Victims, and discrepancies in their Statements and medical reports, the African Commission finds that the PPO lacked sufficient evidence on which to decide whether or not the violations took place.

232. Additionally, apart from outlining the discrepancies which are described as omissions by the Complainants, and which the Commission agrees do not have any material bearing on the investigation of the complaints put forward by the Victims, this Commission notes that the Respondent State failed to substantiate its arguments about the discrepancies in the medical reports.

233. In order to be impartial, it would have been of paramount relevance in the investigative processes for the PPO to obtain, if necessary *proprio motu* additional evidence from other sources by giving room for more witnesses in the scene to make illustrative statements that could corroborate the statements made by the Victims. Instead, the PPO gave undue attention to the 'discrepancies' made by the Victims which made it arrive at the tenuous conclusion that it could not proceed with the investigations because the perpetrators could not be identified, creating an appearance of an actual lack of impartiality.

234. According to this Commission, based on the evidence before it, there were procedural deficiencies that affected the final decision that was taken by the PPO in this Communication. This obliges the Commission to conclude that the Victims were indeed deprived of an effective and impartial investigation from the PPO. Having said this however, the African Commission is of the opinion that the impartiality of

the investigative process should be separated from the allegations related to Article 7(1) (a) and 26 of the African Charter. This is because even though lack of impartiality of the investigations amount to a violation of the Victims' right to effective remedies, it cannot be classified as a violation of the Victims' rights under Articles 7(1)(a) and 26 of the African Charter which form the basis of this analysis.

235. The above notwithstanding, the second arm of Article 26 of the African Charter also provides that, States should "allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter". It reads front this provision that "The establishment of national institutions" translate to establishing courts to protect individuals from abuse from the State. However, it could also be interpreted to mean establishing institutions which also have the mandate to create mechanisms for protection. Essentially therefore, the Respondent State has a duty to provide the structures and mechanisms necessary for the exercise of the right to fair trial.

236. This obligation is alluded to, by the Principles of the African Commission in its Principles.⁹³ The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁹⁴ also provides that judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress...⁹⁵

237. The Complainants submit that sexual violations and physical assaults are most effectively dealt with by the criminal process and that the State has an obligation to ensure that there is an efficient criminal law remedy available for vulnerable individuals subjected to violations of a physical and sexual nature. The Respondent State's submissions are only in respect of the reasons why the perpetrators could not be prosecuted, it does not provide any information about mechanisms that were put in place after the incidences to afford protection and redress to the Victims, and even to prevent future occurrences of such violations.

238. Based on the above, the African Commission concludes that there is a violation of Article 26 of the African Charter by the Respondent State. However, there is no violation of Article 7(1) (a) of the African Charter for the mere reason that the Victims had an opportunity to appeal their claims in the Appeal Chamber.

Alleged violation of Article 9(2)- Right to Freedom of Expression and Opinion

239. The Complainants submit that there is a violation of Article 9(2) of the African Charter.

240. Article 9(2) of the African Charter provides that; "Every individual shall have a right to express and disseminate his opinions within the law."

241. The Complainants argue that during the events on 25 May 2005, as journalists, the Victims were only attempting to assert their political opinions and to disseminate these views within the country. They submit that the Victims were prevented from exercising their profession and in the process, assaulted and sexually violated contrary to the protection afforded them under Article 9(2) of the African Charter.

242. The Respondent State did not dispute the Complainants allegations under Article 9(2) of the African Charter. This notwithstanding, based on the evidence before it, the African Commission will still proceed to determine whether this right has been violated by the Respondent State.

243. Freedom of expression under Article 9, read together with Article 27(2), Article 27(2) provides that "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." of the African Charter is the cornerstone of a democratic country, and any violation of the right to freedom of expression impacts on the full realization of other rights and freedoms enshrined in the African Charter and other international instruments.

244. The right to freedom of expression has also been recognized as a fundamental human right under other international human rights instruments, such as the UDHR,⁹⁷ and the ICCPR.⁹⁸ At the Regional level, the African Charter on Democracy, Elections and Good Governance⁹⁹ provides in its Article 27(8) that, "In order to advance political, economic and social governance, State Parties shall commit themselves to promoting freedom of expression, in particular freedom of the press and fostering a professional media."

245. The Declaration of Principles on Freedom of Expression in Africa (the Declaration)¹⁰⁰ which supplements the provisions of Article 9 of the African Charter underscores respect for freedom of expression by providing that "No one shall be subject to arbitrary interference with his or her freedom of expression,"¹⁰¹ and "Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society."¹⁰²

246. The notion of freedom of expression and its link with political participation was expressed by the

African Commission in *Amnesty International and Others v. Sudan*, where it stated that freedom of expression is a fundamental human right, essential to an individual personal development, political consciousness and participation in the public affairs of a country.¹⁰³

247. In view of the fact that political leaders are most often sensitive to expression of opinions that are related to the political affairs of the State, the African Commission stated in the *Kenneth Good v the Republic of Botswana* that "A higher degree of tolerance is expected when it is a political speech and an even higher threshold is required when it is directed towards the government and government officials."¹⁰⁴ The Declaration also requires public figures "to tolerate a greater degree of criticism,"¹⁰⁵ to promote transparency and accountability as tenets of good governance.

248. The African Commission noted in the *Kenneth Good v the Republic of Botswana* that freedom of expression is not an absolute right, and can only be restricted for the reasons mentioned under Principles I(1) and II of the Declaration. That is, if the restrictions serve a legitimate interest and necessary in a democratic society.¹⁰⁶

249. Freedom of expression can also be limited by the clawback clause under Article 9(2) in the context of the phrase 'within the law.' In *Malawi African Association and Others v. Mauritania*,¹⁰⁷ the African Commission stated that "the expression 'within the law' must be interpreted in reference to international norms' which, among others, can also provide grounds of limitation on freedom of expression."¹⁰⁸

250. The African Commission also notes that the right to freedom of expression also carries with it the right to impart information to others, meaning that when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas.

251. The Inter-American Court upon referral from the Inter-American Commission confirmed and expanded on the Inter-American Commission's ruling in the case of **Claude Reyes et al v. Chile**¹⁰⁹ holding that, Article 13 of the American Convention, which specifically establishes the rights to 'seek' and 'receive' information, protects the right of all persons to receive information held by the State. It further asserted that, the information should be provided without a need to demonstrate a direct interest in obtaining it, or personal harm, except where legitimate restrictions apply.

252. Thus, the right to freedom of expression and to receive information is broadly conceived to include information of all types of knowledge including in political terms as expressed in this Communication, and the Respondent State has an obligation to ensure that this information is accessible without impediment. Thus, limiting the right of the Victims to freedom of expression also limits their right to receive information.

253. The above principle was expressed by the African Commission in the *Jawara Case*, where it held that, the politically motivated harassment and intimidation of journalists not only deprived them "of their rights to freely express and disseminate their opinions, but also the public, of the right to information."¹¹⁰

254. In the present Communication, the Victims were all journalists, some of whom were allegedly reporting on the events of the demonstration and taking photographs and were allegedly assaulted and molested for their involvement in the protest to amend Article 76 of the Egyptian Constitution. This restricts their right to freedom of expression and opinion.

255. It is not evident from the evidence presented in this Communication that this restriction falls within the meaning provided by Principle II(2) of the Declaration, that is, 'provided by law', 'serve a legitimate interest', 'necessary', and in a 'democratic society.' Furthermore, the Respondent State has not provided any information indicating that the Victims, in exercising their right to freedom of expression, were threatening national security or public interest.¹¹¹

256. On the bases of the above arguments, there is clearly a violation of Article 9(2) of the African Charter by the Respondent State.

Alleged violation of Article 16- The Right to health

257. The Complainants allege a violation of Article 16 of the African Charter by the Respondent State.

258. Article 16 has two facets to it: Article 16(1) states, "Every individual has a right to enjoy the best attainable state of physical and mental health," and Article 16(2) provides that "States parties to the present Charter shall take all necessary measures to protect the health of citizens and ensure that they receive medical attention when they are sick."

259. The Complainants submit that the acts perpetrated against the Victims included the infliction of physical, mental and sexual harm which has resulted in physical and emotional injury. According to the Complainants, this has detrimentally affected their physical and mental well-being contrary to Article 16 of

the African Charter.

260. The Respondent State does not address Article 16 of the African Charter.

261. The right to health operates directly or indirectly as a prerequisite to all other human rights recognized by the African Charter. This principle was substantiated by the African Commission in *Purohit and Moore v The Gambia* where it stated that, "The enjoyment of the right to health is crucial to the realization of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind."¹¹²

262. The right to health has also been recognized by Article 25 of the UDHR which provides that "Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family..."¹¹³

263. In General Comment No.14 on the right to health, the UN Committee on Economic, Social and Cultural Rights provides that: *...the right to health contains four elements: availability, accessibility, acceptability and quality, and impose three types of obligations on States - to respect, fulfil and protect the right. In terms of the duty to protect, the State must ensure that third parties (non-state actors) do not infringe upon the enjoyment of the right to health.*

264. This Commission therefore underscores the fact that the right to health is an entitlement which is derived from specific obligations claimed by individuals from States, and it is very fundamental to the exercise of other human rights enshrined in the African Charter. In this regard, States have a legal obligation to protect the right to health of its citizens, including *inter alia* taking concrete and targeted steps towards the full realization of the right, and adopting legislation or other measures to ensure equal access to health-related services and health care.

265. In the present Communication, the facts demonstrate that the Victims were physically and emotionally traumatized as a result of sexual violence and assaults on their person. The trauma and injuries sustained has affected their physical, psychological and mental health clearly in violation of Article 16(1) of the African Charter.

266. With respect to Article 16(2), in the Communication in question, it is reported that the Victims all received medical attention after they were assaulted, meaning that the Respondent State fulfilled its obligation under the sub-Article to ensure that the Victims received medical attention after the injuries sustained. As a matter of fact, it is through the medical reports that they were able to confirm the scars, bruises and scratches that were incurred by the Victims.

267. In this regard, it is the view of the African Commission that there was no violation of Article 16(2) of the African Charter.

Alleged violation of Article 1-Obligations of Member States

268. The Complainants allege that the Respondent State has violated Article 1 of the African Charter.

269. Article 1 of the African Charter provides that, "The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."

270. The Complainants submit that the Respondent State violated Article 1 of the African Charter when it failed in its positive obligation to protect the Victims from the violations they incurred. They also raise the issue of non investigation by the Respondent State as a violation of Article 1 of the African Charter.

271. The Respondent State did not make any submissions directly related to Article 1 of the African Charter. Its submissions under the other Articles however touch on the issues of protection and investigation which will not be replicated here.

272. The African Commission has held that Article 1 of the African Charter gives the latter a legally binding character and that a violation of any provision of the Charter automatically means a violation of Article 1.¹¹⁴

273. Following the analyses of the other Articles alleged to have been violated by the Respondent State, it is the view of the African Commission that the violations that have been committed by the Respondent State against the Victims have been prompted by the latter's failure to protect, promote and fulfil these rights as required by the African Charter. In addition, the State's failure to thoroughly investigate the violations and institute mechanisms to protect the Victims from further violations has also demonstrated the State's contravention of Article 1 of the African Charter.

274. It is the opinion of the Commission that in the present Communication, the Respondent State had a responsibility to provide a police force to protect the Victims against violations of their rights during the protest, and to put in place normative systems and institutions to maintain a system of justice that provides remedies for violations and imposes sanctions on violators. It is also the duty of the Respondent State, to

investigate when violations have occurred and ensure thorough investigations. Failure to do all the above, is a violation of Article 1 of the African Charter.

Decision of the African Commission

275. From the above reasoning, the African Commission;

- i. Observes that the Respondent State is in violation of Articles 1, 2, 3, 5, 9(2), 16(1), 18(3) and 26 of the African Charter;
- ii. That there was no violation of Articles 7(1)(a) and 16(2) of the African Charter by the Respondent State;
- iii. Request an amendment of laws in the Respondent State, to bring them in line with the African Charter;
- iv. Request compensation to each of the Victims in the amount of EP 57,000, as requested by the Complainant, for the physical and emotional damages/traumas they suffered;
- v. Urges the Respondent State to investigate the violations, and bring the perpetrators to justice;
- vi. Urges the Respondent State to ratify the Women' Protocol; and
- vii. Urges the Respondent State to report on the steps it has taken to implement these decisions in accordance with Rule 112 (2) of its Rules of Procedure, within one-hundred and eighty (180) days.

Done in Banjul, The Gambia during the 10th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights, 12 to 16 December 2011.

1 Egypt ratified the African Charter on Human and Peoples' Rights on 20 March 1984, and is therefore a State Party.

2 Complainants submission on the Admissibility brief, para 18.

3 Communications 147/95 and 149/96- Sir Dawda K. Jawara v. The Gambia (2000) ACHPR.

4 Communication 48/90, 50/91, 89/93- Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan (1999) ACHPR.

5 The Complainants refer to the judgement of the European Court of Human Rights, *Assenov and Others v. Bulgaria*, (1998), para 86.

6 Communication 71/92- Rencontre Africaine pour la Défense des Droits de l'Homme V. Zambia (2003) ACHPR, para. 13.

7 HJ Steiner & P Alston (2000) *International Human Rights in Context Law, Politics, Morals* (and Edition Oxford University Press) at 797.

8 Communication 155/96- Social and Economic Rights Action Centre and Another v. Nigeria (SERAC Case) (2001) ACHPR.

9 *MC v Bulgaria* [2003] ECHR.

10 Communication 211/98- Legal Resources Foundation v. Zambia (2001) ACHPR.

11 Ibid para 63.

12 Communication 210/98- Association Mauritanienne des droits de l'homme v Mauritania (2000) ACHPR.

13 Ibid para 131.

14 Communication 241/01- Purohit and Moore v. The Gambia (2003) ACHPR.

15 *R v Ewanchuk* [1999] 1 S.O.R. 330.

16 Ibid.

- 17** *Bekos and Koutropoulos v. Greece* (ECHR).
- 18** n 10 above.
- 19** *Ibid* para 62.
- 20** The Complainants cite Communication 104/94, 141/94, 145/95 Constitutional Rights Project and Others v Nigeria (1988) ACHPR, para 36, and Communication 212/98 Amnesty International v Zambia, para 79 to support their arguments.
- 21** *The Protocol to the African Charter on the Rights of Women in Africa* was adopted on 13 September 2000, and came into force on 25 November 2005.
- 22** The United Nations Committee on the Elimination of Discrimination Against Women, Communication No.: 2/2003 (2005).
- 23** See Note Verbale from the Respondent State of 31 October 2008 with attached discrepancies.
- 24** See generally, the Complainants' additional submissions on the Merits, paras 12 to 16, and the affidavits in the Merits submissions of the Complainants of three of the Victims contained in Annexure E: para 21, Second Victim, Abir Al-' Askari', paras 19-25, Third Victim, Shaimaa Abou Al-kheir's, & Para 17-19, Iman Taha Kamel, Fourth Victim.
- 25** Iman Taha Kamel, the Fourth Victim, the submissions of the Complainants on the Merits, Annexure E, para. 19.
- 26** n 21 above Article 1 (f).
- 27** *Ibid*. Article 1 (j).
- 28** CEDAW Article 1.
- 29** The *United Nations Committee on the Elimination of Discrimination against Women*, General Recommendation No. 19 (1992), para. 6.
- 30** See paragraph 3 of this Communication.
- 31** n 24 above, (Nawal's Affidavit) para.
- 32** *Ibid*, para.6
- 33** *Ibid*. para. 9.
- 34** *Ibid*, para. 14.
- 35** *Ibid*. para. 15 & 16.
- 36** *Ibid*. (Abir's Affidavit) para. 29.
- 37** *Ibid*. (Shaimaa's Affidavit) para. 13
- 38** *Ibid* (Iman's affidavit).
- 39** Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion Oc-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984) para 57.
- 40** Human Rights Committee, *General Comment 18, Non-discrimination* (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/ Rev.1 at 26 (1994). Para 13.
- 41** Aida Seif el-Dawla was also participating in the demonstrations.
- 42** Annexure "G", "*Translations of extracts of witnesses' statements made to the prosecutors and to Al-Nadim Center*"- Statement of Rabab al-Mandy to Al-Nadeem Cente.
- 43** Dr Aida Serf el-Dawla is an Egyptian psychiatrist and a prominent human rights activist.
- 44** n 42 above, Statement of Aida Sell el-Dawla to Al-Nadeem Center.
- 45** Communication 74/92, Commission Nationale des Droits de l'Homme et des Libertés v. Chad (ACHPR).
- 46** *Ibid*., para. 20
- 47** n 8 above. Para 57
- 48** *Maria da Penha v. Brazil* (2001) IACHR para.56
- 49** See paragraph 96 above outlining the discrepancies.
- 50** The Complainants clarify these discrepancies in paragraph 104 above.
- 51** n 49 above, para. 57
- 52** The United Nations Committee on Civil and Political Rights
- 53** Communication 294/2004- Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe(ACHPR).
- 54** *Ibid*, para 96.
- 55** *Ibid*, para 99.
- 56** Communications 137/94, 139/94, 154/96 & 161/97- International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria (ACHPR). para. 79.

- 57 Communication 236/2000, *Curtis Doebbler v Sudan*, para 37. See also Communication 225/98 *Huri-Laws v Nigeria* and *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.
- 58 Communication 224/98- *Media Rights Agenda v. Nigeria*, (2000) ACHPR. para 71.
- 59 n 14 above para 57.
- 60 *Ireland v UK* (1978) ECHR (Series A) para 162.
- 61 *Denmark vs. Greece*.
- 62 *Norway vs. Greece*.
- 63 *Sweden vs. Greece*.
- 64 *Netherlands vs. Greece*.
- 65 *The Greek Case* (1969) Yearbook: Eur.Conv. on HR 12 page 186.
- 66 *Ibid*.
- 67 See generally, the Commission's analysis under Articles 2, 3, and 18(3) of the African Charter, and specifically paragraphs 131 to 136 outlining the testimonies of the Victims.
- 68 Communication 97/93- *John K. Modise v. Botswana* (2000) ACHPR, para 91.
- 69 *Campbell and Cosans v UK* (1982) ECHR, para 28.
- 70 Adopted by the African Commission during its 32nd Ordinary Session in 2002.
- 71 *Declaration on the Elimination of Violence against Women*, General Assembly resolution 48/104 of 20 December 1993, UN Doc. A/12175/48/104, 23 February 1994.
- 72 *Velasquez Rodriguez v. Honduras* (1988) IACtHR, para. 173.
- 73 The Respondent State Acceded to the Convention on 25 June 1986.
- 74 The Respondent State Egypt ratified the ICCPR on 14 January 1982.
- 75 See paragraphs 55 to 56 above.
- 76 Communication 313/05 - *Kenneth Good v Republic of Botswana* (ACHPR) para 169.
- 77 Communication 245/2002 - *Zimbabwe Human Rights NGO Forum v Zimbabwe*.
- 78 See also the Recommendation on the Respect and Strengthening of the Independence of the Judiciary adopted by the African Commission during its 19th Session, which took place in Ouagadougou, Burkina Faso in 1996. This Recommendation calls upon States Parties to the African Charter, to meet certain minimum standards to guarantee the independence of judiciaries in the region, including inter alia; the recognition of universal principles of judicial independence; and urging governments to eliminate any legislation affecting judicial independence.
- 79 *Ibid* Section.
- 80 *Ibid* Section N(10)(a)(i).
- 81 Principles and Guidelines on Fair Trial, Section A 4(b).
- 82 *Ibid* Section A 4(1).
- 83 *Ibid* Section A(4)(g).
- 84 *Ibid* Section A(4)(a).
- 85 It explains the investigative procedures carried out by the PPO in paragraph 101 of this Communication.
- 86 *Human Rights Committee, General Comment 20*, Article 7 (Forty-fourth session, 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HR1/GEN/1/Rev.1 at 30 (1994). para 14.
- 87 See *Ilhan V. Turkey* (2000) EC-JR. para 92.
- 88 *Labita v Italy* (2000) ECHR. para. 131.
- 89 *Timurtas v. Turkey* (2001) 33 E.H.R.R. 6 EC-JR. para.89.
- 90 *Assenov & Others v. Bulgaria* (1998) ECHR. para 105.
- 91 *Ibid* Para 105.
- 92 *Ibid* Para 106.
- 93 Section A(4)(u.)
- 94 Adopted by General Assembly resolution 40/34 of 29 November 1985.
- 95 Para 5.
- 97 Article 19.
- 98 Article 19 of the ICCPR provides that "[e]veryone shall have the right to hold opinions without interference" and "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."
- 99 Adopted by the 8th Ordinary Session of the Assembly, held in Addis, Ethiopia, on 30 January 2007.

- 100** Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission during its 32nd Ordinary Session, 17 - 23 October, 2002, Banjul, The Gambia.
- 101** Ibid. Principle II(1).
- 102** Ibid, Principle II (2).
- 103** n 4 above. para 54.
- 104** n 76 above. Para. 198.
- 105** Ibid, Principle XII(1).
- 106** n 76 above, para. 187.
- 107** Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98- Malawi African Association and Others v. Mauritania (2000) ACHPR. para 106.
- 108** Ibid. para. 102.
- 109** Claude Reyes et al v Chile (2003), IACHR.
- 110** n 3 above. para 65.
- 111** The concept of National Security and Public interest was recognised as justifiable grounds to limit freedom of expression under the Charter in the Kenneth Good Case. Para 189.
- 112** n 14 above. para 80.
- 113** See also Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* which also provides that "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."
- 114** n 3 above. para 46.