

Communication 467/14 – Ahmed Ismael and 528 Others v. the Arab Republic of Egypt

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat), received a complaint on 8 April 2014 on behalf of Ahmed Ismael and 528 Others (the Victims), from the **Freedom and Justice Party of Egypt** (the Complainant), who are represented by Lord Ken Macdonald QC, Prof. John Dugard SC, Michael Mansfield QC, Stephen Kamlish QC, Rodney Dixon and Tayab Ali (the Representatives).
2. The Complaint is submitted against the Arab Republic of Egypt (Respondent State), State Party to the African Charter on Human and Peoples' Rights (the African Charter).¹
3. The Complainant alleges that the Victims comprise members or supporters of the Freedom and Justice Party of Egypt (FJP), as well as various secular, liberal and non-aligned groupings.
4. The Complainant submits that on 22 March 2014, the Criminal Court of Minya in the Respondent State conducted a hearing that lasted less than one (1) hour. Five-hundred and forty-five (545) defendants stood accused for various alleged crimes, including the murder of a policeman in August 2013, the attempt to kill two (2) other persons in the alleged incident, damaging public property, illegal public assembly and membership of a banned organisation in Egypt; the Muslim Brotherhood. It adds that on 24 March 2014, the Court found five-hundred and twenty-nine (529) defendants guilty and sentenced them to death.
5. The Complainant argues that the trial that led to the imposition of the death sentences was a complete sham. It states that 'the "trial" lasted less than an hour. Many of the defendants were not even present. Defence lawyers were silenced and unable to present any defences. The prosecution did not present any evidence against each individual accused and the court did not assess the individual guilt of each defendant before sentencing them to death.'
6. The Complainant also argues that only 69 of the defendants, who were in police custody were present in court for the summary hearing on 22 March

¹ Egypt ratified the African Charter on Human and Peoples' Rights (the African Charter) on 20 March 1984.

2014 while 291 others were tried in absentia. It also alleges that the judge handed down the verdict on 24 March 2014 in the absence of all the defendants and their lawyers, and without giving reasons for his findings.

7. According to the Complainant, the Court did not assess the individual guilt of the defendants; instead it merely pronounced on their guilt as a group without hearing any evidence as to their individual criminal responsibility. In the Complainant's own words, "it was as though no judicial proceedings took place at all..."
8. The Complainant avers that several defense lawyers were barred from attending the trial. Those defence lawyers who did attend were not granted, by the judges, the request to cross-examine witnesses. Their request for additional time to review the 3,070 pages of documents was also denied. Further, the Complainant states that 'the defence lawyers have been subjected to threats and harassment and fear for their own safety and security.'
9. The Complainant describes the sentencing of the Victims as collective punishment, completely arbitrary, outside the law, amounting to extra-judicial killings, constituting massive and serious violations of the rights to life, fair trial and due process, and entirely ignoring the Resolution adopted by the African Commission on Human and Peoples' Rights (the African Commission) calling on States Parties to Observe the Moratorium on the Death Penalty.
10. The Complainant avers that the Court announced that it will convene on 28 April 2014 to issue the final verdict, after ratification by the Respondent State's Grand Mufti.
11. The Complainant submits explanations of why the Victims are unable to exhaust domestic remedies, concluding that domestic remedies are unavailable, ineffective and insufficient. It presents major legal and procedural limitations in the Egyptian judicial system.
12. The Complainant requests for provisional measures in accordance with Rule 98 (1) of the African Commission's Rules of Procedure to prevent irreparable harm being done to the Victims. It cites several Communications of similar facts in which the African Commission decided to grant provisional measures.

Procedure:

13. The Secretariat received the Complaint on 8 April 2014 and acknowledged receipt of the same on 17 April 2014.
14. The Commission was seized of the Communication just before its 55th Ordinary Session held from 28 April to 12 May 2014 in order for urgent Provisional Measures to be granted.
15. The Chairperson of the African Commission granted the Complainant's request for Provisional Measures in accordance with Rule 98 (2) of the Rules of Procedure of the Commission. However, because the rules are vague as to whether Provisional Measures can be granted before the Commission is seized of a Communication; the Secretariat opted to transmit the draft seizure decision to the Chairperson of the Working Group on Communications (the WGC) to allow her to seize the Communication on behalf of the WGC.
16. Following the express agreement of the Chairperson of the WGC with the recommendation of the Secretariat to seize the Communication, the Secretariat transmitted a copy of the Complaint, the Seizure Decision and the Provisional Measures Order to the Respondent State by Note Verbale dated 25 April 2014, urging the Respondent State to suspend the death sentences of the 529 Victims while the matter is being considered by the African Commission, amongst other requests. The Complainant was also informed of the decision by letter dated 26 April 2014.
17. The Complainant wrote a follow-up letter dated 2 May 2014, and brought to the Commission's attention further death sentences passed by the Minya Court on 28 April 2014. The letter also indicated that 492 of the death sentences were reversed, and that 37 victims still faced the death penalty. The Secretariat acknowledged receipt by letter dated 9 May 2014, and indicated that the matter would be reviewed by the Commission.
18. On 9 May 2014, the Secretariat received the Respondent State's response to the Provisional Measures Order. The Secretariat acknowledged receipt by Note Verbale dated 26 May 2014.

19. On 3 June 2014, the Complainant made an application for the African Commission to refer Communication 467/14 to the African Court pursuant to Rule 118.
20. On 6 June 2014, the Secretariat forwarded the Respondent State's response to the Provisional Measures Order to the Complainant, for its comments, if any.
21. By email dated 9 June 2014, the Complainant requested a meeting on 26 and 27 June 2014 with the Secretary to the Commission, the Clerk and the Legal Officer working on the Communication. The Secretariat on 10 June 2014, responded by seeking clarification on whether the Complainant was making a request for an Oral Hearing, and if so referred it to Rule 99 of the Commission's Rules of Procedure. The Complainant, via email sent on 10 June 2014 indicated that it sought an informal meeting with the Secretariat on either 26 or 27 June 2014. The Secretariat explained in a letter dated 11 June 2014 that it would be improper and un-procedural for the Secretariat to meet the Complainant at this stage, and that if the Complainant required any clarifications on procedural issues; it could do so through written correspondence, so that the correspondence could easily be availed to the other party.
22. Following the above reply from the Secretariat, the Complainant via email dated 23 June 2014 requested to attend the 16th Extra-Ordinary Session of the African Commission, which was held from 20 to 29 July 2014, in Kigali, Rwanda. The Secretariat once again in a letter dated 26 June 2014 sought clarification on whether the Complainant was requesting an Oral Hearing. The Complainant responded on the same day stating that it was making a formal request for an Oral Hearing.
23. On 24 June 2014, the Secretariat received the Complainant's Submissions on Admissibility, which were forwarded to the Respondent State by Note Verbale dated 30 June 2014 for its observations.
24. The Secretariat acknowledged receipt of the Complainant's Submissions on Admissibility in a letter dated 1 July 2014, and also informed it that its request for an Oral Hearing had not been granted because it did not meet the criteria under Rule 99 of the Rules of Procedure of the Commission.

25. Further to a request by the Complainant to refer the Communication to the African Court, the Secretariat via a letter dated 3 July 2014, informed the Complainant that the Respondent State had not ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (the Court Protocol), and that therefore the matter could not be referred to the African Court.
26. By letter and Note Verbale dated 5 August 2014, the Parties were informed that consideration of the Communication was deferred at the 16th Extra-Ordinary Session held in Kigali, Rwanda, pending submissions on admissibility by the Respondent State, within the stipulated timeline.
27. Through a Note Verbale dated 2 September 2014 and received on 12 September 2014, the Respondent State submitted its Observations on Admissibility.
28. On 15 September 2014, the Complainant indicated that the timeline for the Respondent State to make its Observations on Admissibility had expired, and once again requested for an Oral Hearing at the 56th Ordinary Session which was scheduled to be held in Niger, from 14 to 30 October 2014.
29. By letter dated 18 September 2014, the Secretariat forwarded the Respondent State's Observations on Admissibility to the Complainant and urged it to ensure that its request for an Oral Hearing met the criteria under Rule 99 of the Rules of Procedure of the Commission. In response to a letter dated 25 September 2014 from the Complainant on the same matter, the Secretariat on 7 October 2014 re-sent its letter dated 18 September 2014.
30. On 30 October 2014, the Complainant forwarded its response to the Respondent State's Observations on the Admissibility of the Communication, which was transmitted to the Respondent State for its information on 4 November 2014.
31. In its Response of 30 October 2014, the Complainant re-iterated its request for an Oral Hearing, which was brought to the attention of the Chairperson of the African Commission. The request was declined because it did not meet the criteria for the granting of an Oral Hearing under Rule 99. The Complainant was informed accordingly by letter dated 12 November 2014.

32. In a letter dated 16 December 2014, the Complainant brought several requests before the African Commission, including a new request for an Oral Hearing, a request for joinder and a request for the Commission to pronounce on the Respondent State's non-compliance with Provisional Measures. It further provided information on recent death sentences passed by the Respondent State. The Secretariat acknowledged receipt in a letter dated 26 January 2015.
33. The Complainant's request for an Oral Hearing, together with its other requests were considered by the African Commission at its 17th Extra-Ordinary Session, held in Banjul, The Gambia, from 19 to 28 February 2015.
34. On 23 February 2015, via a letter, the Complainant submitted what it said was forensic evidence in the form of voice recordings allegedly proving the manipulation of legal proceedings. In another letter dated 27 February 2015, the Complainant also requested the Provisional Order for Provisional Measures passed by the Commission.
35. The Secretariat acknowledged receipt of the same in a letter dated 27 February 2015 but disregarded the forensic evidence because it was submitted out of time.
36. The Parties were informed of the decision by the Commission to grant the Oral Hearing at its 56th Ordinary Session, by letter and Note Verbale dated 6 March 2015.
37. On 24 April 2015, the Secretariat received a request from Reprieve, a non-governmental organisation based in the United Kingdom, in line with Rule 99 (16) of the Commission's Rules of Procedure, seeking leave to appear as Amicus Curiae and to make oral presentations at the Oral Hearing Scheduled for 2 May 2015.
38. By letter dated 27 April 2015, the Secretariat informed Reprieve that their request had been submitted late hence the request to make oral presentations was declined. Reprieve responded to this correspondence on 28 April 2015 seeking clarification on whether the Amicus Brief had been admitted and the Secretariat confirmed in the affirmative via a letter dated 30 April 2015.

39. On 2 May 2015 the Commission conducted an Oral Hearing to hear from both parties directly on the circumstances of the passing of death sentences; the implementation of the Provisional Measures; and to enable the Commission to have all available evidence and arguments before it to make its determination on the action to be taken in light of the alleged non-compliance of the Respondent State with the Provisional Measures.
40. On 19 May 2015 following the Oral Hearing, the Secretariat requested the Respondent State to re-submit its initial submissions on account of illegibility in some parts. The Respondent State resubmitted the said Submissions on 15 June 2015 in correspondence dated 26 May 2015 and the Secretariat acknowledged receipt on 23 June 2015.
41. On 9 June 2015, the Commission informed both parties of the Amicus Brief submitted by Reprieve and requested further explanations on the submissions of both parties within 30 days through a questionnaire.
42. On 9 June 2015, the Complainant requested the Commission's ruling on the implementation of Provisional Measures following the Oral Hearing and submitted a new Complaint on new death sentences passed by the Respondent State with a request to join the new case to this Communication.
43. On 11 June 2015, the Complainant acknowledged receipt of the Commission's questionnaire and made several requests for the Commission to report Egypt to the Assembly of Heads of State for non-compliance with provisional measures and to under-take a visit to Egypt. Via email, dated 16 June 2015, the Secretariat acknowledged receipt and informed the Complainant that the matters would be tabled before the Commission at its next session.
44. On 16 June 2015, the Secretariat received the Complainant's responses to the questionnaire. In that correspondence, the Complainant reiterated its requests of 11 June 2015, to which the Secretariat responded by acknowledging receipt on 17 June 2015 and further correspondence of 23 June 2015 in which the Secretariat informed the Complainant that the matters would be tabled before the Commission.
45. On 29 June 2015 the Secretariat received correspondence from the Complainant reiterating its request for urgent provisional measures in the

new case. The Secretariat informed the Complainant on 1 July 2015 that as previously advised the matter had been tabled before the Commission.

46. On 14 July 2015, the Secretariat received responses of the Respondent State to the questionnaire submitted to it and the Secretariat acknowledged receipt on 16 July 2015.

Articles alleged to have been violated:

47. The Complainant alleges violations of Articles 4, 6 and 7 of the Charter.

Prayers:

48. The Complainant requests the African Commission to:
- a. Direct that the carrying out of the death sentences against the 529 defendants is suspended as an urgent provisional measure pursuant to Rule 98 (1) and (2) of the Rules of Procedure of the African Commission, and in particular that the Chairperson of the Commission make urgent contact with the authorities in Egypt to direct that the death sentences are suspended while the proceedings before the Commission are being held;
 - b. Find that Egypt has violated Articles 4, 6 and 7 of the African Charter in its conduct of the present 'trial' proceedings and the summary imposition of the death penalty against the 529 defendants, and direct Egypt to set aside the death sentences and comply in full with the rights and guarantees of the African Charter in the present proceedings in Egypt and any future proceedings; and
 - c. Submit this case, if necessary, to the African Court on Human and Peoples' Rights, pursuant to Article 5 (1) (a) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

Request for Provisional Measures

49. The Complainant requested the Commission to order provisional measures against the Government of the Arab Republic of Egypt in accordance with Rule 98 (1) of the African Commission's Rules of Procedure to prevent

irreparable harm being done to the Victims who faced imminent risk of being executed following the passing of death sentences. It cited several Communications of similar facts in which the African Commission decided to grant provisional measures.

50. The Complainant urged the Commission to request the Government of the Arab Republic of Egypt to:

- Suspend the death sentences while the matter is being considered by the African Commission;
- Fully investigate the circumstances of these allegations of the 529 death sentences;
- Take all necessary measures to implement the African Commission's Resolution ACHPR/Res.136 (XXXX1111)08: Resolution Urging States to observe a Moratorium on the Death Penalty; and
- Fully commit itself to upholding the rights in its own Constitution and its obligations under international human rights law, including granting those sentenced to death an opportunity to appeal against the sentence.

51. The Provisional Measures were granted at the same time as the Commission was seized of the Complaint but in response the Respondent State argued that the Order should not have been made because it was based on erroneous and misleading grounds.

Oral Hearing

52. The Complainant requested an Oral Hearing; which was held on 2 May, during the Commission's 56th Ordinary Session in Banjul, the Gambia. The purpose of the Oral Hearing was to clarify the circumstances of the passing of the death and life sentences and steps taken by the Respondent State to implement the Provisional Measures.

53. The Complainant submitted that the Respondent State was in violation of the Provisional Measures because Egyptian courts were continuing to sentence more people to death. The Complainant also argued that the Respondent State was clearly not observing a Moratorium on the death sentence, had not suspended the death sentences of the Victims as requested by the Commission and had not investigated the circumstances of the sentencing of the 529 Victims.

54. The Respondent State maintained its position as had been communicated in its response to the issuance of the Provisional Measures; that it did not see the need to implement the said Provisional Measures because they had been issued on erroneous grounds. The Respondent State submitted that the Provisional Measures were sought prematurely against a sentence that had not yet been confirmed.
55. The Respondent State also pointed out that only 37 people were sentenced to death and that the trials leading to the final sentencing had lasted for longer than the mere hour as alleged by the Complainant. Further, the Respondent State noted that the Prosecutor General had brought an appeal to the Cassation Court of Egypt as required by Egyptian Criminal Procedure and until this appeal was finalised there was no “imminent irreparable harm” to which the Provisional Measures could justifiably be maintained.

The Law on Admissibility

Submissions of the Complainant on Admissibility

56. The Complainant submits that the Communication meets all the requirements for it to be deemed admissible. In respect of Article 56(1) of the Charter, it makes the point that the Communication clearly indicates that it was submitted by the Freedom and Justice Party of Egypt on behalf of the 529 persons sentenced to death, that it contains the full contact details for both the Freedom and Justice Party and its lawyers and that no question of anonymity therefore arises.
57. The Complainant submits that the Communication is compatible with the Charter as required in Article 56 (2) because the facts contained within it demonstrate prima facie violations of several articles in the Charter including Articles 4, 6 and 7. It also states that the Respondent State has been a party to the African Charter on Human and Peoples’ Rights since 1981 and the matters addressed in the Communication occurred after the Charter became applicable within the territory of the Republic of Egypt.
58. It also submits that the Communication does not contain any disparaging or insulting language in conformance with Article 56 (3) of the Charter.
59. The Complainant submits that the present Communication is not based exclusively on news disseminated through the mass media. It points out

that the Communication draws on numerous sources including reports from internationally recognised non-governmental organisations such as Human Rights Watch and Amnesty International; the statements and assessments of governments, states, the UN, and other international organisations in response to the situation in Egypt; evidence provided to the Freedom and Justice Party by defence lawyers to individuals sentenced to death and imprisonment; and first-hand evidence of crimes committed in Egypt following the unlawful military coup in July 2013.

60. It argues that the rule in Section 56 (4) is not intended to prevent complainants from relying on any material drawn from the mass media but rather to exclude communications which are drawn solely from the mass media. The Complainant cites the Commission's decision in Communication 147/95 and 149/96 - *Sir Dawda Jawara v. The Gambia* in which the Commission held:

*"While it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word "exclusively"."*²

61. The Complainant also urges the Commission to especially consider the same reasoning in this particular instance because of the circumstances surrounding the Communication, where it (the Complainant) has no free access to the records of the proceedings at issue and many defence lawyers of the accused were barred from accessing the same by the Respondent State.
62. Regarding the requirement for the exhaustion of local remedies, the Complainant contends that the victims have exhausted all local remedies that are in reality available to them. It provides information substantiating the compatibility of the Communication with Article 56 (5) of the Charter.
63. The Complainant states that the apparent appeal proceedings provide no genuine, effective and sufficient means of challenging the gross irregularities in the trial proceedings and the mass sentences imposed. It argues further that these local remedies are not available because there are clear impediments to their availability.

² Communication 147/95 and 149/96 - *Sir Dawda Jawara v. The Gambia*, (*Jawara Case*) ACHPR(2000) para 24.

64. It relies on the jurisprudence of the Commission in the *Jawara Case* where it was held that “domestic remedies must be “available, effective and sufficient”³, and that these remedies must be of a judicial nature as set out in Communication 221/98- *Alfred B. Cudjoe v. Ghana*⁴.
65. The Complainant quotes the Commission’s jurisprudence that “A remedy is considered available if the petitioner can pursue it without impediment ... and ...if the applicant can make use of it in the circumstance of his case”⁵.
66. The Complainant also quotes jurisprudence of the European Court of Human Rights to make the point that situations of martial law characterised by severe civil strife and the “risk of reprisals against the applicants or their lawyers” provide no prospect of success of a domestic remedy, and thus amount to an exhaustion of local remedies⁶.
67. It posits that there are clear impediments to the availability of any local judicial remedies, especially in the highly repressive environment outlined above, and that these remedies are not effective and are not sufficient, as defined above.
68. The Complainant avers that the severity of the violations of due process and fair trial rights during the trial proceedings, the extremity of mass sentences imposed, the serious threats against the accused and their defence lawyers as well as the blocking of all challenges made by them (including to appeal during the trial proceedings), demonstrates that any potential appellate remedy is neither available, effective nor sufficient.
69. The Complainant also argues that these fundamental impediments show that any local judicial remedy is not “sufficiently certain not only in theory but in practice”.
70. The Complainant submits that the right to a fair trial is generally not being observed in Egypt by giving examples of other trials in which journalists were sentenced on charges of falsifying news, endangering national security and assisting the banned Muslim Brotherhood. It posits that all the

³ Id paras 31-32.

⁴ Communication 221/98 - *Alfred B. Cudjoe v Ghana*, ACHPR (1998-1999) para 13.

⁵ The *Jawara Case* n 2 above paras 32-33.

⁶ European Court of Human Rights, *Akdivar and Others v Turkey*, Judgment Application No 21893/93, 16 September 1996, paras. 73-75.

trials consisted of gross irregularities and violations to due process and fair trial rights with prosecutors blocking the accused from reviewing or challenging the evidence against them. It also states that in those trials, the prosecution failed to produce solid evidence, they presented irrelevant evidence, witnesses contradicted themselves and technical experts admitted that they were not able to confirm that the journalists were linked to the charges.

71. The Complainant gives examples to establish a pattern of the state abusing the judicial system to quash opposing views from journalists, protestors and opposition leaders. It alleges that those detained have faced “cut-and-paste charges” including “protesting without authorisation, incitement or engaging in violence, ‘thuggery,’ vandalism, blocking roads, and belonging to a banned or terrorist group.”
72. The Complainant further asserts that the risk of reprisals against the accused and their defence lawyers, as well as the fact that one of the defence lawyers representing accused persons in the case in which the 529 persons were sentenced to death was himself put on trial in the same case and sentenced to death shows that there is no prospect of successfully pursuing any apparent appellate avenues, and that it can therefore be concluded that local remedies have been exhausted.
73. Further, the Complainant argues that the sheer scale of the number of death sentences imposed and the fact that over 200 have been confirmed in the absence of any proper judicial proceedings makes it vital that the Commission finds that the present case is admissible.
74. The Complainant submits that the Communication was submitted within a reasonable period from the time that local remedies were exhausted or from the time that the Commission was seized of the matter as is required under Article 56 (6) of the Charter. The Complainant submits that the Charter does not specify a time limit for submitting a Communication but only provides that a complaint must be submitted within a “reasonable period”.
75. The Complainant therefore argues that the time limits specified by other international human rights instruments are relevant to determining the length of a ‘reasonable period’ and that both the European Convention on

Human Rights and the American Convention on Human Rights fix it at six months.⁷

76. The Complainant submits that the Communication was submitted on 7 April 2014, just two weeks after the decision imposing the death sentences was passed on 24 March 2014. It submits that it did so after examining the gross violations to the due process and fair trial rights of the defendants, the threats received by defence lawyers and the continuing crimes committed against members of the Freedom and Justice Party and Muslim Brotherhood and it reached the conclusion that there is a clear impediment to the availability of local remedies to any individual who is a member, or perceived to support, the Freedom and Justice Party and the Muslim Brotherhood.
77. It also submits that these conclusions were confirmed when the death sentences of individuals, who were sentenced in other cases were confirmed on both 28 April and 21 June 2014 after equally arbitrary proceedings which continued to deny the accused the ability to present any defence.
78. The Complainant avers that the Communication has not been settled in terms of Egyptian laws and neither has it been submitted to any other international human rights body in line with Article 56 (7) of the Charter.
79. For all of the reasons above, the Complainant requests the Commission to find the Communication admissible.

Submissions of the Respondent State on Admissibility

80. The Respondent State does not raise any objections to the Complaint with respect to the requirements of Article 56 (1) (2) (6) and (7). It argues, however, that the Communication is inadmissible because it fails to meet the requirements of Article 56 (3), (4) and (5).
81. In respect of Article 56 (3), the Respondent State argues that, the Complainant's attitude towards the domestic judicial system, and its distrust of the appeal process as well as its assertions that the appeal

⁷ European Convention on Human Rights, Article 35; American Convention on Human Rights, Article 46(1) (b).

process is unable to provide safeguards to the victims' right to a fair and just trial, constitutes disparaging and insulting language. The Respondent State argues that the Complainant's assertion that the Public Prosecutor, being the chief accuser cannot at the same time appeal against the case, is an insult as these are procedural safeguards provided by the Egyptian legal system, which give the Public Prosecutor the right to appeal against all sentences handed down by the various criminal courts either in favour of or against a convict in a bid to ensure the proper dispensation of justice.

82. The Respondent State also argues that the powers of the Public Prosecutor are set to ensure a review of the sentence issued in accordance with the law even if the convict fails to appeal against the sentence handed down against him. The Respondent State views the Complainant's objections to this procedure as "unwarranted and baseless distrust and denunciation to the judiciary and vilification of state institutions."
83. With regard to Article 56 (4) of the Charter, the Respondent State argues that the Complaint is based on facts from the mass media, and therefore does not meet the conditions set out under Article 56 (4) of the African Charter.
84. On the requirement for the exhaustion of local remedies, under Article 56 (5) the Respondent State refutes the Complainant's apprehensions on the absence of safeguards provided through local remedies. The Respondent State also raises objections to the Complainant's assertion that the local remedies before the local courts are incapable of giving an effective remedy and therefore need not be exhausted.
85. The Respondent State avers that the subject of the Complaint is still under review in front of the Egyptian Judicial System and that there is not yet a final and irreversible verdict. It explains the procedures underway to illustrate that local remedies have not been exhausted.
86. Firstly, it points out that some of the victims appealed against the sentence. The Court of Al Minya North, (the lower Criminal Court) indicated that the convicts endorsed the appeals to revoke their sentencing from their cells at Wadi Jadeed Prison (where they are currently detained). It also asserts that the revocation appeal files were sent on 25 May 2014 and on 3, 5, 16, and 18 June 2014 to the Criminal Cassation Prosecution Office in Cairo, which is

the competent authority that prepares cases for submission to the Court of Cassation. The decision on the appeals is yet to be made.

87. Secondly, the Respondent State argues that the Public Prosecutor has already begun efforts to contest the sentence and seek a not-guilty verdict for the accused persons before the Cassation Court in order to ensure the correct application of the law and the good function of the justice system. These powers of the Public Prosecution are in accordance with the Egyptian Code of Criminal Procedure, which allows the Public Prosecutor to appeal against rulings issued by criminal courts of various levels either in favour of or against the convicted persons.
88. This role is accorded to the Public Prosecutor given that the Public Prosecution represents the society and seeks to ensure proper dispensation of justice, strict compliance with the law and with standard judicial principles and rules that are in full conformity with all international human rights instruments that Egypt adheres to.
89. The Respondent State submits that the Public Prosecution followed all cassation appeal procedures against the rulings of the 545 namely the 17 acquittals, the 37 death sentences and the 492 life imprisonment sentences.
90. In its application, registered at the Court of Cassation on 7 May 2014 as Case No. 34/2014, the Respondent State argues, that the Public Prosecutor's submissions in the appeal against the decision of the lower Court demanded the revocation of the sentence and a retrial in light of what the Respondent State calls "apparent flaws." The reasons for the appeal were that:
 - a. The court prejudiced itself and hence contravened the law when it disclosed its opinion regarding the partial sentencing which acquitted some of the accused persons on 24 March 2014 thereby losing the authority to continue hearing the case;
 - b. The accused persons' right to a defence was violated given the fact that the state failed to facilitate defence counsel for them and that a request for the direct examination of witnesses was not satisfied;
 - c. The court made a ruling on the case despite the fact that the defence had made a preliminary request that the court could not hear the case; and that by law that preliminary hearing should have suspended the case altogether until a decision was reached; and

- d. The court failed to ascertain the age of one of the accused persons who had not yet attained the age of eighteen and who in accordance with the Juvenile Act, was not supposed to have the death penalty imposed on him because of his age.
91. To this effect, the Respondent State attached a copy of the Public Prosecution's memo appealing against the sentence issued on 28 April 2014. The final decision on this appeal is yet to be determined.
92. Thirdly, with regard to the conviction and sentencing of certain accused in absentia, the Respondent State argues that the sentencing is considered comminatory (retributive/punitive) and without force of law. Once the individual convicted in absentia is caught, or shows up voluntarily in accordance with Article 395 of the Code of Criminal Procedure, the convicted individual has the right to a retrial and the court will have no power to enforce the decision granted in absentia. The Respondent State thus argues that the decision is therefore also not final, and the procedure remains pending until a retrial has been conducted.
93. The Respondent State argues that the Commission should find the Communication inadmissible and should never have been seized of the complaint because it does not satisfy the criteria laid out in Paragraphs 1 and 2 of Rule 93 of the Commission's Rules of Procedure because the facts provided in the Complaint were false and misleading, hence the Complaint is improper.
94. To illustrate that the facts provided by the Complainants are incorrect and that the case is still being adjudicated upon, the Respondent State lays out what it says is a true set of facts on what exactly transpired.
95. It alleges that on 9 January 2014, the case was transferred to the Al-Minya Criminal Court which was the competent criminal court to adjudicate the crimes because that is where the crimes occurred. Following a number of other hearings, the Court, during the hearing of 24 April 2014, acquitted 17 accused persons and referred the files of the other accused persons to the Mufti of Egypt seeking his opinion on the compatibility of the decision with Sharia (Islamic Law).
96. The Respondent State argues that that procedure before the Mufti is procedural as guaranteed in terms of Article 381 of the Egyptian Code of

Criminal Procedure. The Respondent State submits that the hearing for the final sentencing was scheduled for 28 April 2014.

97. The Respondent State avers that at the hearing of 28 April 2014, the Criminal Court in Minya passed death sentences on thirty seven (37) accused persons some of them in absentia, and the other four hundred and ninety-two (492) accused persons were sentenced to life in prison and fined twenty (20) thousand Egyptian pounds each, placed under police supervision and the entire materials and guns seized from them were confiscated.
98. In respect of the Complainants' allegation that appealing will be futile, the Respondent State explains that the Constitution of Egypt in Articles 184-190 guarantees the independence of judicial authorities. These judicial authorities include the Justices, Public Prosecution and State Counsel (Administrative Justice). The Constitution also sets in place mechanisms guaranteeing the independence of the judiciary such as provision of independent budgets, security of tenure of judges, mandatory requirements to seek the opinion of the judiciary regarding bills (proposed laws) regulating its affairs, and criminalisation of any attempts to interfere in judicial affairs in terms of Article (120) of the Code of Criminal Procedure (with these crimes set as crimes without statutory limitations).
99. The Respondent State further argues that judicial authorities operate with a commitment to international standards for a just and fair trial in line with the provisions of international human rights instruments to which Egypt is a party. This is in accordance with Article 93 of the Egyptian Constitution.
100. With regard to the passing of the death penalty, the Respondent State argues that the death penalty is legally instituted in terms of the Constitution and law of the Egyptian legal system for committing the most dangerous, violent and cruel crimes. Among those crimes deserving the death penalty are those set out in Law 137 of 1937 and its amendments, Law 394 of 1954, and the Narcotics Act 182 of 1960 and breaches of Article 26 of the Constitution.
101. These crimes include possession of firearms with a view to interrupt public order, premeditated murder, murder through an ambush, poisoning, complicity in murder and felonies that are prejudicial to external and internal state security, explosives related crimes, disruption of transport,

arson that leads to loss of life, abduction of a female through trickery and having sexual intercourse with her, perjury that leads to the execution of a person and other crimes regarding arms and ammunition such as possessing or displaying arms with intent to disrupt public order, the system of government or the constitution.

102. The Respondent States argues that Egyptian laws set out guarantees relating to inflicting the death penalty. These guarantees include the fact that the death penalty can only be executed when it is the result of a definitive verdict for a crime that carries the death penalty at the time that the crime was committed. The Respondent State also stresses that the death penalty cannot be meted out against an individual who is below eighteen years of age when the crime is committed. It argues that such legal safeguards are in full conformity with the international standards stipulated under Article 6 of the International Covenant on Civil and Political Rights to which Egypt is a party.
103. In response to the Complainant's assertion that it is irregular for the Prosecutor to appeal on behalf of the accused, the Respondent State submits that the powers vested in the Public Prosecution to conduct investigations, to refer cases and level charges as well as to contest verdicts issued by criminal courts safeguards the arbitrary levelling of the death penalty. The Respondent state also speaks to other safeguards in the passing of the death penalty including the Circuit Courts set in the Appellate Court. These Circuit Courts consist of three (3) members among the highest categories of judicial ranks in the Appellate Court, headed by the President of the Appellate Court, who is among the highest echelons of the judicial cadre in appellate courts, which members must assent to the decision in terms of Article 266 of the Code of Criminal Procedure.
104. The Respondent State also avers that the death penalty can only be confirmed after a unanimous decision by the Circuit Court and after obtainment of the Grand Mufti's opinion (which is however not binding on the judiciary) on the compliance of the verdict with Sharia. Failure to follow this procedure will render the decision void despite the fact that the Grand Mufti's recommendation itself is not binding.
105. To buttress this point, the Respondent State posits that the sentence can be appealed against by either the Public Prosecution or the convict (in accordance with Article 46 of Act 57 of 1959 under matters and procedures

pertaining to appeal) or a plea for review can be made before the court that issued the sentence under circumstances stipulated in Article 441 of the Code of Criminal Procedure. The Respondent State avers that in terms of Article 31/1 of Act 57 of 1959, the door is open to appeal before the Court of Cassation against the sentences handed down on 24 March 2013 and 28 April 2014; hence the Complainant's claims that there is no remedy are erroneous.

106. Further to these procedures, the Respondent State argues that once the Cassation Court approves the sentence, the final documents confirming the death sentence should be put to the President of the Republic through the Minister of Justice to give the President the chance to use his constitutionally established right to grant amnesty or to reduce the punishment in line with Article 470 of the Code of Criminal Procedure.
107. The Respondent State concludes that the Complainants have not exhausted all local remedies and hence the Communication should be dismissed.

Submissions of the Complainant in Response to the Respondent's Submissions on Admissibility

108. In its Reply, the Complainant states that it has complied with the requirements of Article 56 and argues that the Respondent State does not present a valid basis to say that it has not. In respect of Article 56 (3) the Complainant states that the Respondent State's argument that, by raising suspicions on and criticising the procedural guarantees of the right to appeal, the Complainant slanders and insults the Egyptian judiciary and Public Prosecution, is invalid. It argues that the Communication does not contain any disparaging or insulting language as these issues were submitted respectfully and professionally. The Complainant also argues that it was only raising legitimate concerns about the quality and genuineness of the judicial system in Egypt in light of several violations that have occurred.
109. Concerning the Respondent State's argument that the Communication should be rejected because it is exclusively based on news disseminated through the mass media, the Complainant argues that this assertion is wrong. The Complainant states that Article 56 (4) was not intended to prevent complainants from relying on any material drawn from the mass

media but operates to exclude communications which are solely drawn from the mass media and no other source.

110. The Complainant avers that although the Communication did refer to some media sources, but a very significant amount of the information came from others sources supported by reports of credible international human rights organisations such as Human Rights Watch and Amnesty International, as well as decisions and communiqués of the Peace and Security Council of the African Union and the evidence that defence lawyers in Egypt were able to submit given the very serious security risks and severe difficulties the Complainant faced in obtaining access to the victims. The Complainant asserts that there is no merit to the Respondent State's argument.
111. Regarding the exhaustion of local remedies, the Complainant insists that all local remedies have effectively been exhausted by the victims because the apparent appeal proceedings provide no genuine, effective and sufficient means of challenging the gross irregularities in the trial proceedings and the mass sentences imposed. Quoting jurisprudence of the European Court of Human Rights, the Complainant asserts that the existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness.⁸
112. The Complainant argues that the fact that Egypt has continued to conduct fundamentally flawed criminal trials which have resulted in further death sentences against political opponents totally undermines the argument that appeal procedures may provide any further tangible and effective remedy. The Complainant argues that the judicial system as a whole has been shown to be unwilling and unable to protect the rights of those accused by the present regime of being its opponents because the trial proceedings have lasted for a few minutes and the accused have no real guarantee that their rights will be upheld because it is not clear when the appeal will be heard and decided or whether the accused will be entitled to consult with their lawyers and present any defence or whether they will be prevented from doing so as happened in the lower court.
113. In response to the Respondent State's argument that it overlooked Egyptian Laws and Procedures in Egypt, the Complainant submits that none of these

⁸ Aksoy v Turkey, European Court of Human Rights, App No 2198793 Judgement 18 December 1996, para 2.

laws, rights and procedures have been respected in practice but have rather been systematically violated. It submits that any purported appellate procedure has no value and cannot in any way provide a genuine and effective remedy to the accused. It avers that those on the death row face the imminent risk of being executed.

114. The Complainant argues that no effective and genuine remedies can presently be pursued in Egypt by the victims. It submits that instead of implementing the Provisional Measures requested by the Commission, Egypt has gone ahead to impose more death sentences following wholly unfair trials. The Complainant argues that no genuine and fair judicial process exists for those accused of opposing the present authorities.
115. The Complainant argues that Egypt's non-compliance with the provisional measures demonstrates that it has no genuine intention of upholding the rights of the accused in the trial proceedings and in any appeal proceedings. It further argues that the victims do not have any sufficient and effective remedy before the National Courts which have continued to ignore the Commission's request to observe a moratorium on the death penalty but have repeated the pattern of irregular and flawed proceedings in which more death sentences have been handed down.
116. To buttress this point, the Complainant states that on 7 June 2014, an Egyptian Court sentenced ten (10) supporters of the Muslim Brotherhood to death on charges of inciting violence and blocking a major road in Cairo. On 18 June 2014, twelve (12) Muslim Brotherhood supporters were sentenced to death on charges of killing a police general in 2013 and membership of a jihadist organisation. On 19 June 2014, an Egyptian Court sentenced fourteen (14) individuals including Muslim Brotherhood Supreme Guide Mohamed Badie to death on charges of involvement in the killing of 10 people in Cairo in 2013. On 22 September 2014, the Giza Criminal Court sentenced five (5) individuals who had opposed the military coup to death on charges of forming a "terrorist" cell and killing a police officer.
117. The Complainant argues that the Egyptian authorities have gone ahead to execute some of the people they sentenced to death including three (3) men and one (1) woman executed on 16 June 2014 and a further four (4) men executed on 19 June 2014.

118. The Complainant points out that the mass death sentences and the complete lack of fair trial guarantees have been criticised by the international community including institutions such as Amnesty International, the United Nations High Commissioner for Human Rights, the European Union , Human Rights Watch and the US Department of State.
119. It also points out that in its submissions, Egypt did not respond to any of these concerns and has failed to provide an answer to the “pervasive and well established violations of fair trial rights and human rights throughout Egyptian society”.
120. The Complainant argues that the Egyptian government’s arguments that; it has not implemented the Provisional Measures because the Public Prosecutor appealed the sentences, that the defendants appealed the sentence in the Cassation Court from their prison in Al-Wadi-Aj Jadeed, that there was no need to take precautionary measures to suspend death sentences because the decision against which the appeal is made is not yet final and can be appealed; and that the accused enjoy legal and judicial guarantees, are without merit.
121. The Complainant submits that the mere fact that an appeal procedure exists does not mean that any of the death sentences have been suspended and that there has been a moratorium on the imposition of death sentences.
122. Further, the Complainant submits that nothing has been done to remedy the flagrant violations of due process and fair trial rights for those whose death sentences have been changed to life sentences. It further states that no reliance can be placed in an appeal procedure in which there is no absolute guarantee that the rights of the accused will be respected and that any effective appeal proceedings could take place.

Complainant’s Responses to the Questionnaire requesting clarification on Oral Hearing and earlier submissions

123. The Complainant submitted its Questionnaire on 16 June 2015. It maintained that the trial began on 22 March 2014 and ended on the same day. It also maintained that the accused persons were not charged individually, that there were no lawyers representing them except for four defendants who were provided with lawyers, that the lawyers were not

allowed to speak, and that the accused persons were not present when the sentence was handed down on 24 March 2014 and when it was confirmed on 28 April 2014. It indicated that 528 and not 529 persons were sentenced on 24 March 2014 and conceded that only 37 of those sentences were confirmed on 28 April 2014. It also indicated that 17 people were acquitted and 376 were sentenced in absentia. By these facts it means 37 people were sentenced to death and are in custody and 98 are serving life sentences.

124. The Complainant noted that 152 of the convicted individuals appealed their sentences in **Case Number 20238/84K** but that the Cassation Court overruled the Judgement on 24 January 2015. The Complainant also indicated that none of the Victims had been executed.

Respondent State's Responses to the Questionnaire requesting clarification on Oral Hearing and earlier submissions

125. In clarifying its submissions, the Respondent State submits that having gathered oral and technical evidence, the Public Prosecution referred the case of the 528 accused persons on 9 January 2014 to the Minya criminal court in the Bani Suwaif appeal area, the legally designated court where the crime occurred. The charges detailed the names of the accused persons and the charges preferred against each one of them. Of the accused persons at the time of referral 63 were under arrest, 175 freed and the remaining accused persons were at large.
126. The sitting of 22 March 2014 was the first hearing although judges had been briefed and given the files and evidence in January. It submits that 22 defence memoranda were presented to the Court the following day in accordance with the Court's previous decision. The case was considered on 24 March 2014 where the court acquitted 17 accused persons in absentia and referred the matter to the Grand Mufti of the Republic for religious opinion on the remaining accused persons in accordance with the law.
127. The Respondent State submits that the pronouncement made by the Court at the 24 March 2014 sitting was not a sentence to execute the 528 accused persons but rather a sentence in absentia acquitting 18 of the accused persons in the case, and seeking the religious opinion of the Grand Mufti of the Republic concerning the crimes attributed to the other accused persons in conformity with Article 381 of the Egyptian Criminal Procedure Code.

128. The Respondent State submits that death sentences were issued at the hearing of 28 April 2014 in respect of only 37 accused persons referred to the criminal court for the case with some of them in attendance and others absent.
129. The Respondent State asserts that each accused person was charged with the crime for which they were being tried in accordance with their role in the crime set out in the referral order on the case and their response in that regard was established.
130. The Respondent State also submits that legal representation is compulsory and where the accused person faces a compulsory prison sentence the state has an obligation to provide defense counsel in line with Article 237 (1) of the Egyptian Criminal Procedure Code. The Respondent State explains that the failure to provide such legal representation to some of the defendants whose lawyers withdrew their services during the trial in the Criminal Court constituted one of the grounds for the Prosecutor's appeal before the Cassation Court. Further, the Respondent State asserts that the lawyers present were allowed to speak during the trial sessions.
131. Regarding the accused persons' attendance, the Respondent State provides that the accused persons whose presence was established were present when the punishment was pronounced during the sitting of 24 March 2014. 17 accused persons were acquitted in absentia while the rest of the accused persons had their cases referred to the Grand Mufti of the Republic for religious opinion on the charges against them, pursuant to article 381 of Egyptian Criminal Procedure Code and that no death sentence was made at that sitting. The Respondent State also posits that both the accused persons and lawyers were in attendance during the pronouncement of judgement at the sitting of 28 April 2014. At the sitting of 28 April 2014 judgment was made on the case for the execution of 37 persons and life sentence for others (some of them present and some other in absentia).
132. In terms of the Appeal Process, the Respondent State submits that because the case papers were presented before a normal rather than an extraordinary or special court, the sentence passed on the accused persons was not final and remained appealable in line with Article 381 of the Egyptian Criminal Procedure Code and Article 30 of the Law of Cassation Appeal Proceedings. The Respondent State submits that the time stipulated for appealing judgments made by Criminal Courts at the Court of

Cassation is 60 days from the date of the Judgment and that the Public prosecution challenged the ruling of 28 April 2014 on 7 May 2014 under Case Number 24 of 2014. The convicted persons endorsed the appeal from El-Wadi El-Gadeed prison on 25 May 2014 where they were being held appeal in exercise of their right under article 34 of the Law of Cassation Appeal Proceedings. The Court of Cassation at the sitting of 26 January 2015 ruled to accept the appeal, of the convicts and the public prosecution and ordered the retrial of the accused persons. The retrial is now being deliberated upon at the sittings, with the judgment of 28 April 2014 having become null and void. In all this, the process of appeal did not take more than 8 months.

133. The convicted persons who were sentenced in their own presence in the judgment in respect of which the complaint is made also challenged the same verdict through and the Court upheld their appeal and ordered a retrial. A large number of those convicted in absentia presented themselves for retrial proceedings pursuant to Article 395 of the Criminal Procedure Code. Some others were arrested resulting in the dropping of the absentia judgment passed on them and being retried. Among them were those who were acquitted while some others got custodial penalties, which are also rulings that can be appealed before the Court of Appeal.
134. In conclusion the Respondent State argues that given that the verdict of 28 April 2014 was nullified and the Cassation Court ordered review at another court, this refutes the Complainant's doubts in the guarantees provided by the national judiciary to provide a remedy. Further, the Respondent State argues that many of those convicted in absentia have surrendered themselves, their trial proceedings repeated, and some of them acquitted.
135. Finally, the Respondent State submits that the complaint therefore concerns a case that is still being considered by the judiciary in Egypt, which makes it impossible for any authority whatsoever to interfere in the work of the judicial authority pursuant to the provisions of the prevailing Egyptian Constitution and laws. The Respondent submits that the Complain does not meet the condition in Article 56 (5) of the African Charter.

The African Commission's Analysis on Admissibility

136. The admissibility of communications brought before the Commission pursuant to Article 55 of the Charter is governed by the conditions

stipulated in Article 56 of the Charter, which lays down seven (7) conditions, to be fulfilled by a Complaint for it to be declared admissible.

137. The Respondent State claims that, of the seven conditions, the Complainants have not fulfilled three, namely: Articles 56(3), 56(4), and 56(5).

138. Upon its analysis, the Commission concludes that Article 56 (1), (2) and (7) have been satisfied as the Communication clearly indicates the authors, is compatible with both the Charter of the Organisation of African Unity(OAU Charter) and the African Charter in so far as it establishes a prima facie cases of violations against the Charter and meets all the aspects of temporal, material, personal and territorial jurisdiction and does not appear to have been settled by any other judicial body in accordance with the principles of the Charter of the United Nations, the OAU Charter or the African Charter.

139. In respect of Article 56 (3), the Respondent State submits that the Communication should be dismissed because it has been written in disparaging or insulting language. Article 56(3) of the Charter provides that:

Communications ... received by the Commission shall be considered if they "Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity."

140. The exact words that the Complainants used which the Respondent State finds contrary to the Charter are as follows;

"Further, the fact that the Public Prosecutor is apparently appealing against the decision is worthless. It is illogical to suggest that the Public Prosecutor who reviewed the case file and brought the case for prosecution would thereafter lodge an appeal to oppose all of the death sentences and guarantee the interests of the accused."

141. The determination, for the Commission, in this case is whether the Complainant's statements regarding the capacity of the Egyptian justice system to deliver justice for the Victims was meant to insult the Respondent State or merely cast aspersions on the justice system. The Complainant argues for the latter, stating that its statements were merely casting aspersions on the procedural provisions of the Egyptian judicial system.

142. It must be borne in mind that determining what constitutes an insulting or disparaging statement is not a subjective test but rather an objective one and as the Commission previously stated in **Communication 266/03 - Kevin Mgwanga Gunme et al v Cameroon**, statements that could be disparaging or insulting to one person may not be seen in the same light by another person.⁹ It is the Commission's mandate to make a determination on a case by case basis.
143. Granted, on the face of it, it is rather unusual for the one who prosecutes (the Prosecutor General) to challenge a verdict that is in their favour on behalf of the one they prosecuted in the first place. The Complainants' concerns on the procedure that the Public Prosecutor, being the chief accuser could at the same time appeal against the case could therefore not be viewed as "unwarranted and baseless distrust and denunciation to the Judiciary and vilification of state institutions" as the Respondent State argued.
144. Further, the Commission affirms its decision in **Communication 260/02 - Bakweri Land Claims Committee v Cameroon**¹⁰ where it found the Respondent State's objections to the Communication on the basis that it cast suspicions and aspersions on the Cameroonian judicial system and hence could be considered insulting, to be unsustainable. In fact, the Commission stated that the Complainant had a right to make any allegations in order to be exempted from exhausting local remedies. Whether the allegations were true or not was irrelevant as the Respondent State could, if it so wished, employ other means to acquaint the African Commission that the situation was indeed otherwise.
145. The circumstances in this case do appear very similar and the Respondent State did, indeed illustrate how the Complainant's assertions were inaccurate. Adducing contrary evidence to what the Complainant alleges is a more befitting response than to declare that such allegations are an insult which should form the basis for the dismissal of this case.
146. The Commission therefore holds that the Respondent State's allegation that the communication be declared inadmissible for incompatibility with Article 56 (3) is untenable.

⁹ Communication 266/03 - Kevin Mgwanga Gunme et al v Cameroon (2009) ACHPR para 75.

¹⁰ Communication 260/02 Bakweri Land Claims Committee v Cameroon (2004) (the Bakweri Case) ACHPR para 48.

147. Article 56(4) of the Charter provides that communications should not be ‘...based exclusively on news disseminated through the mass media’. This requirement was clarified by the Commission in **Communication 147/95-149/96 Sir Dawda K. Jawara v Gambia (The Jawara Case)** in which the Commission stated that,

While it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word “exclusively”.¹¹

148. Further, in the Jawara case, the Commission set the test that should be applied as not being about whether the information was acquired from the media, but whether the information is correct. The Commission also went further to say the question should be about whether the Complainant tried to verify the truth about these allegations and whether the Complainant had the means to do so, given the circumstances of the case.¹²
149. The determination that the Commission needs to address itself to, in this particular case, is whether, the Complainants relied ‘exclusively’ on news from the mass media.
150. Given that the Complaint alleges massive violations of the right to fair trial, it would have been ideal for the Complainant to have cited the specific cases before the courts, to adduce evidence directly from the victims and to also include sworn affidavits from the lawyers involved in the cases at the domestic level. The Complainant however gives what appears to be a legitimate reason, namely serious security risks and severe difficulties in obtaining access to these documents as well as to the victims.
151. Further, as the Complainant rightly argues, the intention of Article 56 (4) is not to prevent complainants from relying on any material drawn from the mass media but rather to deter would-be complainants from relying solely on media sources. In this case the Complainant cites several sources of information including international human rights organisations such as Human Rights Watch and Amnesty International, as well as decisions and communiqués of the Peace and Security Council of the African Union. The

¹¹ Jawara Case n 2 above para 24.

¹² Jawara Case n2 above para 26.

Commission therefore finds that the Communication is compatible with the requirements of the Charter in Article 56 (4).

152. Article 56(5) of the Charter, stipulates that:

“Communications shall be considered if they “are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged...”

153. The rationale behind the requirement to exhaust local remedies is set out in the **Jawara Case** which spelled out that

“...before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matter through its own local system. This prevents the Commission from acting as a court of first instance rather than a body of last resort¹³”.

154. Another rationale is that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal¹⁴.

155. The Commission stated in **Communication 148/96, Constitutional Rights Project v Nigeria**, that the principle of exhaustion of domestic remedies, presupposes existence of effective judicial remedies¹⁵.

156. In **Communication 235/00 Curtis Francis Doebbler v Sudan**¹⁶ the Commission, borrowing from other treaty bodies with the same mandate applied the standard set by the Grand Chamber of the European Court for Human Rights that

“it is incumbent on the Government claiming non-exhaustion of domestic remedies to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time”, and “...that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success¹⁷”.

157. In the present case, the Respondent State claims that the Complainant has not exhausted local remedies because proceedings on this case are still

¹³ Jawara Case n2 above para 31.

¹⁴ Communication 55/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria (2001) ACHPR para 38.

¹⁵ Communication Constitutional Rights Project v Nigeria para10.

¹⁶ Communication 235/00 Curtis Francis Doebbler v Sudan para 95.

See also Jawara Case n 2 above para 31 and 32.

¹⁷ Akdivar v. Turkey para 68.

underway in the domestic courts of Egypt. It stresses that the Complainant has the right to lodge an appeal against the decision of the lower Criminal Court in the Court of Cassation and hence the Communication should be dismissed on this ground.

158. As a general rule, in a situation where a matter is pending before the domestic courts or where the domestic courts are still seized with the matter, as is the case in this matter it cannot be said that local remedies have been exhausted.¹⁸ However there is need to assess, if indeed the appeal procedure is available, accessible and effective.
159. It is not in question that the appeal procedure is available and accessible as there is proof that it has been accessed, both by some of the Victims and the Prosecutor in terms of the Criminal Procedure Code.
160. That Code allows for appeal against decisions in which the death sentence is passed. In fact, the death penalty is both appealable and subject to automatic review before the Cassation Court. This is confirmed in Article 224 of the Egyptian Code of Criminal Procedure (Criminal Procedure Code) which provides that:

“D. If the court issues a death sentence, it must explain to the person given the sentence that his case papers will be sent automatically to the Court of Cassation for review. He may also appeal against the ruling at the Court of Cassation within 30 days, starting from the day after the ruling has been issued.”

161. Further Article 249 (A) of the Criminal Procedure Code gives the Public Prosecution and the accused the right to appeal to the Court of Cassation

“against the provisions, decisions and judgments issued by the Court of Felonies, if the decision was based on a breach of the law or a mistake in the application of the law or in its interpretation, or if there was a fundamental error in the standard procedures or in the assessment of the evidence or of the penalty, and this error influenced the judgment.”

162. The Complainant alleges that the Criminal Court in Minya failed to observe standard procedures of fair trial and due process which failure influenced the Court’s final judgement. It appears these circumstances are among the mischiefs that Article 249 (A) of the Criminal Procedure Code seeks to cure. It is the Commission’s view that appeal procedures exist in order to

¹⁸ Communications 48/90, 50/91, 52/91, 89/93, Amnesty International and Others v Sudan (1999) ACHPR para 37.

provide a chance for errors, occasioned by lower Courts to be rectified. The graver the injustice in the lower Court, the more reason a litigant before any Court should appeal.

163. What is unclear is whether the appeal procedure is effective. In **the case of Communications 48/90, 50/91, 52/91, 89/93, Amnesty International and Others v Sudan**, the Commission noted that the right to appeal, being a general and non-derogable principle of international law, must, where it exists, satisfy the conditions of effectiveness. An effective appeal procedure is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice.¹⁹
164. The Complainant expresses doubt in the appeal procedure's effectiveness and claims that an appeal would be futile as the procedure lacks guarantees of a fair trial and would be prone to the same irregularities and violations of fair trial as the lower court. The Complainant submits that the Cassation Court is not independent and likely to maintain the decision of the Lower Criminal Court and decide in favour of the Respondent State. It also argues that the extent to which the proceedings in the lower Court were flawed is so grave as to make attempts to appeal futile.
165. The Commission notes that the Complainant does not provide evidence to support this claim in its submissions. In the absence of evidence to the contrary, the Complainant's statements merely cast aspersions on the independence of the Cassation Court of Egypt. In the *Bakweri Case*, the Commission stated that the fact that the Complainant strongly feels that it could not obtain justice from the local courts does not amount to saying that the case has been tried in the Courts.²⁰ Without establishing the lack of independence of the Cassation Court as fact, the Commission finds the Complainant's assertions untenable.
166. The test for effectiveness is not about whether the appeal procedure will give the appellant the results they want. It is not in that the procedure guarantees a successful result for the appellant. Rather it is about the system itself operating in a manner that would enable an effective, impartial adjudication of the matter.

¹⁹ Supra n 6 above.

²⁰ The Bakweri Case n10 above para 55.

167. The Complainant's allegations that even if the Victims were to appeal, the process would yield no result, is not supported by any evidence. A Complainant cannot simply make allegations without just cause and expect the onus to fall on the Respondent State to disprove the allegation. The onus falls on the Respondent State to rebut an argument which, the Commission would reasonably rely on if it remained unopposed. The mere fact that Lower Courts allegedly breached standards of fair trial does not presume the incapacity of Appeal Courts to operate differently. Appeal procedures exist exactly for the reason of correcting grave errors by lower courts hence there was every need for the Complainant to take the matter to the Cassation Court before bringing it to the Commission.
168. Further, the additional submissions from the Respondent State have shown that the appeal succeeded and that the cases are being retried. The matter remains pending before the national courts.
169. The Commission is persuaded by the Respondent State's submissions as they give substantive responses to show that a remedy is available and that it is being utilised by the victims, facts it appears the Complainant is unaware of. In **Communication 322/06 Tsatsu Tsikata v Ghana** the Commission found that the Complainant had acted impetuously in bringing a communication before the matter had been concluded, where the trial was on-going and the Complainant had further rights of appeal to the Court of Appeal and Supreme Court of Ghana. ²¹It appears the same subsists in this instance.
170. The Complainant in the alternative submits that the violations are systematic and widespread hence it was not necessary to exhaust local remedies. In its earlier jurisprudence, the Commission held that in situations involving serious and massive violations of human rights, it is impracticable and undesirable to require the Complainant to exhaust local remedies before coming before the Commission.²²The question is whether the present Communication involves serious and massive violations to justify the application of the exception to Article 56(5).
171. Again the jurisprudence of the Commission provides guidance in making such a determination. In *Communication 279/03 Sudan Human Rights*

²¹ Communication 322/06 Tsatsu Tsikata v Ghana (2006) ACHPR para 39 as read with para 35.

²² Communication 25/89, 47/90, 56/91, 100/93 - Free Legal Assistance Group & Others v Zaire (1995) ACHPR.

Organisation & Another v Sudan,²³ the Commission considered both the scale and nature of the alleged violations in determining whether the violations were serious and massive.

172. In terms of the scale, the Commission believes that a violation is massive where a significant number of people are targeted either within a specific area or across the territory of a State Party. In terms of the nature, the Commission considers a violation to be massive where it is the product of a consistent and predetermined action that impacts on a right or a combination of rights guaranteed under the African Charter.²⁴
173. The Complainant argues that the Respondent State, through the judicial system is using the death penalty to target opposition members to the current Egyptian government in particular members of the Muslim Brotherhood. Although the allegation may satisfy the requirement of the nature of violations, it fails on the scale. The Communication alleges the sentencing of 529 individuals whose names are verifiable and known as stated in court records. The Respondent State, through its submissions on admissibility and during the Oral Hearing also pointed out, and the Complainant conceded that in the end, 37 of these individuals had their sentences confirmed, and 492 were given life sentences. The convictions can all be appealed, if the Victims choose to. It does not seem impracticable or undesirable to require the Complainant to exhaust local remedies.
174. In that regard, the Commission finds that the Complaint fails to meet the requirements of Article 56(5).
175. In respect of the question addressed in Article 56(6), the Commission finds that the period within which the matter was brought to the Commission was unreasonable as the Complainant did not make a proper assessment of local procedures before bringing this case. At the very least, the Complainant should have waited to see the outcomes of the review procedure guaranteed in Article 224 before bringing this matter before the Commission.

Ruling of the Commission on the Provisional Measures Order

²³ Communication 279/03 - Sudan Human Rights Organisation & Another v Sudan (2009) ACHPR para 100.

²⁴ *Supra*.

176. In respect of the State's Compliance with the Provisional Measures, the Commission takes note of the following :

i. In respect of the Order to suspend the death sentences while the matter is pending before the Commission

The Respondent State provides that none of the death penalties against any of the 37 convicted persons on 28 April 2014 have been executed. The judgment was not decisive and the legal procedure for execution has not been completed in accordance with the stipulated guarantees for the execution of the penalty. Appeal procedures are underway and furthermore, this ruling has been voided by the appeal as the accused persons are being retried at a designated Criminal Court in another district. The Complainant has not provided any evidence to the contrary.

In that regard, the Commission finds that the State has complied with this Order.

ii. In respect of the Order to fully investigate the circumstances of the allegations of the 529 death sentences

The Respondent State stated that The Egyptian Criminal Procedure Code No. 150 of 1950 promulgated on 3 September 1950 has no legal inhibition to the trial of a large number of accused persons in one case. This is determined in accordance with the nature of the wrongdoing and the number of people involved. The Complainant challenged this and indicated that mass trial is specifically prohibited in terms of the Criminal Procedure Code. However, the Respondent State provided evidence that the very circumstances for which this Complaint was brought are the very same reasons why the case was challenged in the Cassation Court and the Appeal upheld.

The Respondent State submits that independence of the judiciary was guaranteed in ensuring that the process of appeal was respected. Further, the Public Prosecution followed all statutory requirements to guarantee that the judgments of the Lower Criminal Court complied with constitutional provisions guaranteeing the independence of the judiciary, by appealing the violation of such procedures. The Court of Cassation accepted the Public prosecution's appeal and retrial of the defendants is currently underway. The Complainant has not provided evidence to the contrary.

In that regard, the Commission finds that the State complied with this Order.

iii. In respect of observing a moratorium on the death sentence

The Commission notes the Complainant's submissions that the Respondent State has continued to sentence many more individuals to death since the Provisional Measures order was passed. The Respondent State has not refuted these allegations.

In that regard, the Commission urges the Respondent State to take all necessary measures to implement the African Commission's Resolution ACHPR/Res.136 (XXX1111)08: Resolution Urging States to observe a Moratorium on the Death Penalty.

iv. In respect of the request for the Respondent State to uphold its Constitution

The Commission notes that the Respondent State has given those sentenced to death an opportunity to appeal against the sentence. This sentence has succeeded and retrial is underway.

In that regard, the Commission finds that the Respondent State has taken steps to uphold its own constitution and guarantee the rights of the accused individuals. The Commission urges the Respondent State to continue to uphold the Constitution and ensure that the retrial observes all standards of fair trial and due process.

Decision of the Commission on Admissibility

177. In view of the above, the African Commission on Human and Peoples' Rights:

- i. Declares this Communication inadmissible for lack of compliance with the provisions of Article 56(5) of the African Charter;
- ii. Notifies the Parties of its decision in accordance with the provisions of Rule 107(3) of its Rules of Procedure.

Adopted at the 18th Extraordinary Session of the African Commission on Human and Peoples' Rights held from 26 July to 8 August, 2015 in Nairobi, Kenya