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# The prohibition of torture and arbitrary detention: The African Commission on Human and Peoples' rights assesses the consistency of Egypt's legal system with the obligations under the African Charter\*

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**Abstract [En]:** This paper analyses the recent decision by the African Commission on Human and Peoples' rights on the communication n. 396-2011 filed by the Egyptian Initiative for Personal Rights and the Open Society Justice Initiative, on behalf of Mr. El-Sharkawi, against the Republic of Egypt. The decision at stake provided a deep investigation of the consistency of the respondent State's legal system with the obligations stemming from the prohibition of torture and arbitrary detention under the African Charter on Human and Peoples' Rights and the other relevant international instruments.

**Titolo:** Il divieto di tortura e di arbitraria detenzione: la Commissione africana dei diritti dell'uomo e dei popoli si esprime sulla compatibilità del sistema giuridico egiziano con gli obblighi derivanti dalla Carta africana.

**Abstract [It]:** Il contributo analizza la recente decisione della Commissione Africana dei diritti dell'uomo e dei popoli sulla comunicazione n.396-2011, inoltrata dalle ONG Egyptian Initiative for Personal Rights e Open Society justice, per conto di El-Sharkawi, contro l'Egitto. La decisione in commento offre un'ampia valutazione dei problemi strutturali e delle carenze sistemiche dell'ordinamento egiziano rispetto agli obblighi derivanti dalla proibizione della tortura e delle detenzioni arbitrarie derivanti dalla Convenzione africana dei diritti dell'uomo e dei popoli.

**Parole chiave:** Tortura- articolo 5 della Carta Africana dei diritti dell'uomo e dei popoli- Convenzione delle Nazioni Unite- Linee guida per la repressione e prevenzione della tortura in Africa- detenzioni arbitrarie-articolo 6 della Carta africana dei diritti dell'uomo e dei popoli-violazioni strutturali

**Keywords:** Prohibition of torture; article 5 of the African Charter on human and peoples' rights; UN Convention against torture; Robben Island Guidelines for the prohibition and prevention of torture in Africa; arbitrary detention; article 6 of the African Charter on human and peoples' rights-systematic violations.

**Contents:** 1. Introduction. 2. The prohibition of torture under the African Charter. 3. Domestic structural issues and compliance with the African Charter's obligations. 4. The Emergency Law and the right of freedom under the African Charter. 5. Concluding remarks.

Nota a [African Commission on human and peoples' rights, Mohammed Abderrahim El-Sharkawi \(represented by EIPR and OSJI\) v. The Republic of Egypt](#)

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\* Articolo sottoposto a referaggio.

## 1. Introduction

At its 66th Ordinary Session, held from July 2020 to August 2020, the African Commission on Human and Peoples' Rights issued its decision on the merit of the communication n. 396-2011 filed by the Egyptian Initiative for Personal Rights and the Open Society Justice Initiative, on behalf of Mr. El-Sharkawi, against the Republic of Egypt. The decision was published on 20 October 2021. In the light of the factual background of the case and the legal issues involved, the communication at stake is of great interest.

From May 1995 to March 2011, Mr. El-Sharkawi was held in detention in the territory of the Respondent State under the Emergency Law without any charge or trial. As the complainants alleged before the Commission, while in detention, Mr. El-Sharkawi was subject to several physical and psychological pains and sufferings amounting to torture and ill-treatment, such as repeated beatings, electroshock and other heinous practices. The impact of torture would have been amplified by the helpless and harsh conditions of his detention, as he was handcuffed and blindfolded as he was handcuffed and blindfolded in several occasions and for prolonged periods. Further, State officials denied him access to medical assistance. Moreover, the respondent State held Mr. El-Sharkawi in incommunicado detention for an extended period of time, preventing family members and his lawyer from visiting and communicating with him. As argued by the complainants, “the Victim’s treatment by the Respondent State is consistent with a pattern and practice of indefinitely detaining individuals without charge or trial under the Emergency Law and of widespread torture of those detained”.<sup>1</sup> The communication attempted to put the case into a broader context, emphasizing the shortcomings and structural deficits of the respondent State's legal system in complying with the international obligations deriving from the African Charter on Human and Peoples’ Rights and other relevant international law provisions. In particular, the complainants highlighted that the Egyptian legal framework and practice do not harmonize with the international legal standards relating to the prohibition of both torture and arbitrary detentions.

## 2. The prohibition of torture under the African Charter

The complainants asserted that, as a consequence of the acts inflicted by State officials on Mr. El-Sharkawi during his detention, the respondent State breached the prohibition of torture and cruel, inhuman, or degrading treatment established under Article 5 of the African Charter. According to that provision, “every individual shall have the right to respect the dignity inherent in a human being and to

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<sup>1</sup> ACHPR, *Mohammed Abderrahim El-Sharkawi (represented by EIPR and OSJ) v. The republic of Egypt*, par. 5.

the recognition of his legal status, and all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”. In this regard, the Commission firstly reminded that Article 5 of the African Charter has central importance in the African Charter system of Human rights protection, as it lays down the fundamental principle of the prohibition of torture and cruel, inhuman or degrading treatment. As stressed by the Commission, under international law, torture’s prohibition achieves the status of a peremptory norm or *jus cogens*,<sup>2</sup> representing “a fundamental standard in the international arena, whereby states cannot derogate from their responsibility to ensure protection from torture.”<sup>3</sup> In other words, this prohibition is absolute, and thus States cannot invoke any particular circumstance as a justification for torture.<sup>4</sup> After having recalled the central place of torture’s prohibition under international law, the Commission assessed whether the alleged acts constitute torture through a twofold test: ascertaining whether those acts entail a form of torture or inhuman treatment under the African Charter and then whether sufficient evidence corroborates those allegations. In this regard, it is necessary to underline that Article 5 of the Charter does not contain a definition of torture or cruel, inhuman and degrading treatment.<sup>5</sup> As is well known, the Commission fills this gap, employing the definition of torture provided by Article 1 of the 1984 United Nations Convention against torture and other cruel, inhuman, degrading treatment or

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<sup>2</sup> According to Article 53 of the 1969 Vienna Convention on the Law of treaties, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

<sup>3</sup> Par. 200.

<sup>4</sup> “The prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency[...]. This is linked to the fact that prohibition on torture is a peremptory norm or *jus cogens*. [...] The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.”, *ICTY, prosecutor v. Anto Furundžija*, Judgment of 10 December 1998, para. 144-146. See also J. H. BURGERS, H. DANELIUS, *The United Nations Convention against torture. A handbook on the Convention against torture and other cruel, inhuman or degrading treatment or punishment*, Martinus Nijhoff, London, 1988, pp. 3 ss.; H. HAUG, *Efforts to eliminate torture through International Law*, in *International Review of the Red Cross*, 1989, 29 pp. 9-25; O. A. HATHAWAY, *The promise and limits of the international law of torture*, in (eds) S. LEVINSON, *Torture: A collection*, OUP, Oxford, 2002, pp. 199-212; D. KRETZMER, *Torture, Prohibition of*, in *MPEPIL*, 2010; J. D. MUJUZI, *An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples’ Rights*, in *AHRLJ*, vol. 6, n.2, 2006; R. MURRAY, *Article 5: respect of dignity; Prohibition of Slavery and Torture and other Forms of Ill-treatment*, in *The African Charter on Human and Peoples’ Rights. A commentary*, OUP, Oxford, 2019, pp. 132 ss; M. NOWAK, *What practice constitute Torture ? : US and UN standards*, in *Human Rights Quarterly*, vol. 28, n. 4, 2006, pp. 809-841; N. RODLEY, *The prohibition of torture: Absolute means absolute*, in *Denver Journal of International Law and Policy*, vol. 34, 2006, pp.145-160.

<sup>5</sup> Similarly, the other regional charters on human rights do not contain a definition of torture. See N. RODLEY, *The definition(s) of torture in International Law*, in *Current Legal Problem*, 55/2002, pp. 467-493; T. SCOVAZZI, *Corso di diritto internazionale. Parte III. La tutela internazionale dei diritti umani*, Giuffrè, Milano, 2013, pp. 330 ss.

punishment (UNCAT)<sup>6</sup>. In the instant case, the Commission confirmed that its understanding of torture rests on the definition established under the UNCAT,<sup>7</sup> which requires four cumulative elements: an act or omission intentionally inflicted; severe mental or physical suffering; the specific purpose of the infliction of pains; the performance of those acts or omissions by a public official or with the consent or acquiescence of a public official.<sup>8</sup> According to the Commission, the alleged harmful and abusive conducts perpetrated by Egyptian officials fall within the definition of torture upheld in its jurisprudence, as those acts meet the four cumulative elements listed under Article 1 UNCAT. In particular, the Commission found that agents of the respondent State have inflicted on the victim severe beatings, credible threats and sleep deprivation to punish him and obtain information and that these conducts have resulted in severe physical and mental pain and suffering. As underlined by the Commission, the Istanbul Protocol specifically lists the acts inflicted on the victim as a method of torture.<sup>9</sup> Having evaluated the allegations filed by the complainants as extensively supported by compelling evidence, the Commission found that the Republic of Egypt has breached the substantive obligation not to commit torture under Article 5 of the African Charter.

Furthermore, the Commission found that the conditions of detention and the incommunicado detention imposed on the victim gave rise to a violation of Article 5 of the African Charter. From this point of view, the decision of the Commission is of particular importance, having stigmatized the practice of incommunicado detention. In this regard, it is necessary to underline that the expression incommunicado detention describes a condition of isolation of detainees subject to a deprivation of any contact with the world outside the place of detention.<sup>10</sup> In its jurisprudence, the Commission has pointed out that being deprived of the right to see family members for a prolonged time causes psychological trauma, which may amount to torture or cruel, inhuman or degrading treatment. Accordingly, in the instant case, the

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<sup>6</sup> ACHPR, Communication 245/2002, *Zimbabwe Human Rights NGO Forum/Zimbabwe*, 2006, para.180; Communication 334/06, *Egyptian Initiative for Personal Rights and Interrights v. Egypt*, 2011, para 162; Communication 368/09, *Abdel Hadi, Ali Radi and Others v. Sudan*, 2013, para 70.

<sup>7</sup> Par. 209.

<sup>8</sup> Article 1 of the UNCAT: Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

<sup>9</sup> Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (the Istanbul Protocol).

<sup>10</sup> N. RODLEY, M. POLLARD, *The treatment of prisoners under International Law*, Oxford, OUP, 2011, p. 334.

Commission found that "by unlawfully restricting the victim's right to family life, the respondent State has also failed to uphold one of the basic procedural safeguards against torture."<sup>11</sup>

The Commission also found that the respondent State has violated the procedural obligations deriving from the prohibition of torture, having failed to conduct a prompt and effective investigation of the facts at stake. Notwithstanding the several allegations of torture submitted by the victim and his family, the respondent State did not undertake any step to conduct a prompt and impartial investigation. Instead of addressing the complaints by the victim and investigating the facts reported, State officials reiterated and aggravated the infliction of pain on him. According to the Commission, the facts alleged in the instant communication unequivocally reveal that the respondent State had ample notice of the victim's complaints. In this light, the Commission noted that evidence of the perpetration of torture on persons detained or arrested under Egypt's jurisdiction was corroborated by the 2007 United Nations Working Group on Arbitrary detention Report.<sup>12</sup> Moreover, as reminded by the Commission, several other regional and international bodies found that persons detained under the Emergency Law have been susceptible to human rights violations, including to acts of torture, "revealing a pattern of allegations which should have drawn the Respondent State's attention for action."<sup>13</sup> The Commission stressed that, even in the absence of a formal complaint, States must initiate a prompt examination of suspected cases of torture or ill-treatment when other indicators suggest that torture or ill-treatment might have occurred.<sup>14</sup> In this regard, the Commission remarked that "freedom from torture is a cardinal rule in international law that cannot be derogated from at any time and under any conditions and circumstances including in times of war and emergency."<sup>15</sup> This assumption aims at emphasizing the interconnections between the absolute character of the prohibition of torture and the procedural obligations flowing from it. Indeed, as affirmed by the International Criminal Tribunal for the former Yugoslavia, the fact that torture is prohibited by a peremptory norm of international law has an impact at both the inter-state and the domestic levels.<sup>16</sup> As is well known, at the domestic level, acts of torture give rise to the State's obligation to investigate, prosecute and punish<sup>17</sup>. In the light of the paramount importance of the prohibition of torture, States are called to promptly conduct an effective investigation to ensure

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<sup>11</sup> Par.327.

<sup>12</sup> UN Working Group on Arbitrary Detention, Opinion No. 3/2007, U.N. Doc. A/HRC/7/4/Add. 1 at 59 (2007).

<sup>13</sup> Par. 231.

<sup>14</sup> Par. 233.

<sup>15</sup> Par. 233.

<sup>16</sup> ICTY, judgment, *cit.*, para. 156.

<sup>17</sup> A. CASSESE, *International Law*, 2<sup>nd</sup> Edition, 2005, p. 445; E. De WET, *The prohibition of torture as an international norm of jus cogens and its implications for national and customary law*, in *EJIL*, Vol. 15, 2004, pp. 97-121; J. MENDEZ, *How International Law can eradicate torture: A response to cynics*, in *Southwestern Journal of International Law*, 2016, pp. 247-266.

accountability for all acts of torture. Consequently, the obligation to conduct prompt and effective investigations enhances the effectiveness of the prohibition of torture.

### **3. Domestic structural issues and compliance with the African Charter's obligations**

The complainants claimed that the infringements on the victim's human rights resulted from the structural shortcomings of the respondent State's legal system and that its failure to investigate and address the facts at stake is part of a broader pattern of impunity for State officials and Police officers.

In the first place, the communication highlighted the narrow definition of torture under Article 126 of the Egyptian Penal Code. According to this provision, "any public official/civil servant or public employee who orders the torturing [of] an accused person or does the torturing personally, in order to force him/her to confess, shall be punished with strict imprisonment or imprisonment for a period of three to ten years. If the tortured victim dies, the penalty as prescribed for deliberate murder shall be imposed."

According to the complainants, this provision does not conform with the definition of torture under the UNCAT, granting impunity for several harmful acts constituting torture under international law. By contrast, the respondent State contended that Article 126 of the Criminal Code does not provide a definition of torture in order to allow for a broad interpretation including all forms of torture. In addition, it observed that the 2014 Constitution enshrines the right to dignity and the prohibition of torture and other ill-treatment. In this regard, it is necessary to underline that States enjoy a certain degree of discretion in complying with the obligation to criminalize torture at the domestic level.<sup>18</sup> For instance, the UNCAT's obligation to criminalize torture at domestic level does not require State parties to incorporate exactly the definition of torture provided by Article 1. However, as stressed by the Commission, "the definition of torture (at domestic levels) must at a minimum include all the elements enshrined under Article 1 of UNCAT."<sup>19</sup> This conclusion rests on the fact that, pursuant to Article 4 of the UNCAT, each State party shall ensure that all acts of torture are offences under its criminal law. It is worth noting that the Robben Island Guidelines on the prohibition and prevention of torture in Africa

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<sup>18</sup> See A. CLAPHAM, P. GAETA, Torture by private actors and "Gold-Plating" the offence in International Law. An exchange of emails in honor of William Schabas, in (eds) M. deGUZMAN, D. M. AMANN, *Arcs of Global Justice*, Oxford, OUP, 2018, pp. 287-295; A. MARCHESI, *Implementing the UN Convention Definition of Torture in National Criminal Law (with Reference to the Special Case of Italy)*, in *Journal of International Criminal Justice*, vol. 6, 2008, pp. 195-214; M. POLLARD, *Panel 1: Are Adequate Legal Frameworks in Place at the Domestic Level? Torture as a Specific Criminal Offense in Domestic Laws*, in *Human Rights Brief*, 16/4, 2009, pp. 15-18; D. STEIGER, *Ex-iniuria ius oritur? - Norm Change and Norm Erosion of the prohibition of torture*, KFG Working Papers Series No. 55, Berlin Potsdam Research Group "The International Rule of law - Rise or decline ?", Berlin, March 2022, pp. 6-24.

<sup>19</sup> Par. 244.



recall this obligation, encouraging States to criminalize under their domestic law all acts falling within the UNCAT's definition of torture.<sup>20</sup>

In the instant case, the Commission tested the consistency of Article 126 of the Egyptian Penal Code with the obligation to punish torture, comparing the latter provision with Article 1 UNCAT in order to assess whether Article 126 of the Penal Code contains all the four cumulative elements of torture listed in Article 1 UNCAT. According to the Commission, Article 126 of the Penal Code significantly deviates from the notion of torture established under the UNCAT. Article 126 of the Penal Code exclusively refers to acts of torture inflicted on an accused person, whereas Article 1 UNCAT does not require any personal status or condition of the victims. In addition, the domestic criminal provision provides that the acts of torture have been committed by State officials with the specific intention to obtain from the victim a confession, "while UNCAT is open-ended."<sup>21</sup> Furthermore, Article 126 criminalizes the conduct of those agents that have ordered or personally committed torture. By contrast, Article 1 UNCAT also addresses the responsibility of State officials that have consented or acquiesced to the act of torture. As a result, the Commission concluded that Article 126 does not sufficiently capture the essential elements of torture established under the UNCAT, emphasizing that "disparities between UNCAT's definition and that incorporated into domestic law create actual or potential loopholes for impunity."<sup>22</sup>

The second issue, pointed out by the complainants, concerns the classification of cruel, inhuman or degrading treatment as a low-level offence under the domestic law of the respondent State. In particular, Article 129 of the Penal Code provides that "any public official, employee/ civil servant, or any other person charged with performing a public service which employs cruelty shall be punished with detention not exceeding one year." The Commission observed that the penalty established by the latter provision does not sufficiently reflect the grave nature of that crime. Interestingly, the Commission noted that the classification of ill-treatment as a low-level offence is inconsistent with the obligation to repress cruel treatment and the duty to prevent torture. More specifically, the Commission underlined that the conditions of ill-treatment frequently facilitate torture. Therefore, deterring ill-treatment by imposing severe sanctions against this crime is a fundamental step toward preventing the crime of torture.

Lastly, the complainants claimed that the Respondent State's domestic system creates substantial barriers for victims of torture. In particular, the complainants affirmed that the Criminal Procedure Code restricts the right to redress of victims by conferring to the Public Prosecutor exclusive authority to investigate

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<sup>20</sup> ACHPR, Resolution on Guidelines and Measures for the Prohibition and Prevention of torture, cruel, inhuman or degrading treatment and punishment in Africa. See also L. DEBRA, R. MURRAY, *Ten years of the Robben Island Guidelines and prevention of torture in Africa: for what purpose?*, in *AHRLJ*, vol. 12/2, 2012, pp. 311-347.

<sup>21</sup> Par. 241.

<sup>22</sup> The Commission relied on the clarifications provided for by the UN Committee Against Torture in its General Comment no. 2; Par. 244.

allegations of torture. Moreover, the Criminal Procedure Code precludes the review of the Public Prosecutor's decisions when the accused person is a public official. According to the Commission, the alleged provisions of the Criminal Procedure Code determine detrimental to the protection of victims of torture. In this regard, the Commission reminded that a failure to provide prompt access to redress entails a denial of justice. More importantly, the Commission, aligning its reasoning with the position of the UN Committee against Torture, highlighted that “impediments which preclude prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability of the prohibition of torture”<sup>23</sup>.

#### **4. The Emergency Law and the right of freedom under the African Charter**

The complainants claimed that the respondent State violated the victim's rights under Article 6 of the African Charter, which provides that “no one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”. As contended by the complainants, the imprisonment of Mr. El-Sharkawi resulted in the arbitrary deprivation of his freedom, as any judicial authority has not established it. The detention of Mr. El-Sharkawi rested on the sole order issued by the Minister of Interior according to the Emergency Law. In this regard, the complainants underlined that the Emergency Law allows the Egyptian authorities to indefinitely hold under administrative detention persons considered as a threat to public security. Moreover, the complainants claimed the vague and overbroad scope of the Emergency Law, as it does not sufficiently define the conditions under which State authorities may legitimately adopt coercive measures. Notably, Article 3 of the Emergency Law provides that “under a state of emergency, the President of the Republic may take any appropriate measure to preserve security and public order, particularly the arrest of suspects or persons endangering security and public order and administrative detention, without adherence to the regulations set down in the Criminal Procedure Code”.

Against this background, the respondent State objected that “the current framework surrounding the state of emergency in Egypt reflects the evolution of the Egyptian vision and is compatible with the developments and regional efforts connected to human rights.”<sup>24</sup> Although the African Charter does not provide for a general regime of human right derogation, derogations from the obligations imposed by the African Charter would be permissible in accordance with other relevant human rights instruments.<sup>25</sup> The Commission shed light on the issues at stake, clarifying that the right enshrined under Article 6 is not absolute. Restrictions on freedom represent legitimate and ordinary forms of State control over

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<sup>23</sup> Par. 254.

<sup>24</sup> Par. 160.

<sup>25</sup> Para. 158-159 and par. 275.

persons within its jurisdiction. However, as explained by the Commission, on the one hand, restrictions on personal freedom must comply with procedures and rules established by domestic law, and on the other, these restrictions must meet the international standards in the matter. Despite the right and duty to guarantee security and to adopt extraordinary measures in facing emergencies, States parties cannot override the protection afforded under Article 6 of the African Charter.<sup>26</sup> By having reminded this general principle, the Commission rejected the argument raised by the respondent State. In other words, States parties shall abide by the African Charter's provisions in all circumstances. In this respect, it is remarkable that the African Charter does not provide for a general derogation regime and, thus, "limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies and special circumstances"<sup>27</sup>.

In the instant case, the Commission found that the detention of Mr. El-Sharkawi constituted an arbitrary deprivation of his right to freedom. According to the Commission, Article 3 of the Emergency Law grants law enforcement officials a wide degree of discretion, as it does not indicate the conditions endangering public order and security that justify arrest or detention. From this point of view, the coercive measure imposed on the victim rested on an unpredictable legal regime. As assessed by the Commission, the respondent State did not provide any evidence regarding the reasons underpinning the imposition of the coercive measure on the victim and justifying its extension for a prolonged period. Indeed, it did not demonstrate that the victim continually engaged in acts threatening State security. Furthermore, as noted by the Commission, the respondent State did not avail the victim of the procedural safeguards for arrested or detained persons, such as the right to be informed of charges against him and the right to be brought promptly before a judicial authority. In this regard, the Commission highlighted that the Emergency Law sets aside some procedural rights guaranteed under the Criminal Procedure Code. In particular, the Emergency Law does not provide the automatic review of executive orders concerning arrests and detentions. By contrast, the Luanda Guidelines, that clarify the scope of the obligations of State parties to the African Charter in the context of police custody and Pre-Trial detention, make clear that all forms of administrative detention should be automatically reviewed by the competent judiciary authority.<sup>28</sup> The Commission also observed that "Egypt has been almost continuously governed by emergency law, which includes far-reaching restrictions on fundamental rights and freedoms, for more

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<sup>26</sup> "The Commission agrees that the right to liberty as enshrined under Article 6 does not grant complete freedom from arrest or detention, given that deprivation of liberty is one of the legitimate forms of state control over persons within its jurisdiction. The Commission however notes that any arrest or detention must be carried out in accordance with the procedure established by domestic law, which must meet the requisite international standards in order for it to be considered valid", par. 276.

<sup>27</sup> *ACHPR, Media rights Agenda and Constitutional Rights Project v. Nigeria*, par.68.

<sup>28</sup> Guidelines on the conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), adopted by the Commission in accordance to Article 45, par. 1, of the African Charter.

than 50 years”<sup>29</sup>. Under this perspective, the issues highlighted in instant communication give rise to serious concerns regarding the consistency of the respondent State’s legal framework with international obligations and standards on human rights. The violation of Article 6 of the African Charter, assessed by the Commission, directly relates to several structural shortcomings of Egypt’s legal system, disclosing a broader pattern of inconsistencies in the domestic legal system with the obligations deriving from the African Charter and the other relevant human rights instruments.

## 5. Concluding remarks

In conclusion, the Commission found that the respondent State has breached its obligation under Articles 5 and 6 of the African Charter. As highlighted above, these violations form part of a broader pattern of shortcomings and deficiencies in Egypt's domestic system. In other words, the facts at stake disclose several structural violations of human rights resulting not just from isolated incidents but from defective legislations and generalized administrative practices. From this point of view, the decision at stake is particularly significant, opening a valuable perspective on the role of the Commission in the context of structural violations of the Charter's provisions.<sup>30</sup> As is self-evident, the Commission's assessment of the facts at stake aimed at identifying the structural dysfunctions of the respondent State's legal framework, creating a situation of continuing non-compliance with the African Charter's provisions which may give rise to other similar violations.

Interestingly, the Commission found that the respondent State has also violated the obligation established by Article 1 of the Charter. Under this provision, States parties shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them. As is well known, according to the well-established jurisprudence of the Commission, a violation of any Charter's provision automatically implies a breach of the general obligation to respect, protect and promote under Article 1. However, in the instant case, the Commission stressed that a violation of the obligation under Article 1 might also flow from the failure to adopt legislative and administrative measures to fulfil the rights and duties under the African Charter. In particular, the Commission assessed that Egypt violated its obligations under Article 1, as it failed: to protect the victim, to investigate the allegations of wrongdoings by its agents, to take measures to afford an adequate remedy to the victims, to harmonize its legislative framework with the duty deriving from the Charter and ensure the physical integrity of individuals within its jurisdiction.

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<sup>29</sup> Par. 284.

<sup>30</sup> In this regard, it is necessary to note that the African Charter does not provide any specific procedure for assessing structural violations resulting from legislative and administrative dysfunction.

More remarkable, the assessment of these structural dysfunctions led the Commission to recommend to the respondent State the adoption of general measures and legislative reforms. Notably, the Commission stressed that “legislative as well as other preventive measures are required as guarantees of non-repetition.”<sup>31</sup> In particular, the Commission requested the respondent State, on the one hand, to acknowledge the violations suffered by the victim, accept responsibility, issue a public apology and compensate the victim, and on the other hand, to adopt all necessary measures to prevent the recurrence of similar violations. In order to achieve this result, Egypt should bring the Emergency Law, Articles 126 and 129 of the Penal Code and the Criminal Procedure Law into conformity with the African Charter, the UNCAT, the Robben Island Guidelines, the Principles and Guidelines on the Right to Fair Trial, the Luanda Guidelines, and General Comment No. 4 on the Right to Redress for Victims of Torture and Other Ill-treatment in Africa<sup>32</sup>. Hence, the Commission shed light on the practical modalities to harmonize the respondent State's legal system with the obligations deriving from the prohibition of torture and arbitrary detention specifically indicating the reforms required to address the structural dysfunctions. As is self-evident, the general measures recommended by the Commission aim at preventing the repetition of similar human rights violations. In this perspective, the decision at issue reflects an unexpected proactive approach of the Commission in the assessment of structural or systemic violations. As several legal scholars observed,<sup>33</sup> in its early stages, the Commission appeared reluctant to indicate general measures as forms of reparation for the human rights violations assessed. In particular, according to some opinions, “the Commission’s view on this issue may still be said to be overly narrow and relating only to the righting of an individual wrong.”<sup>34</sup> By contrast, the instant decision marks a different trend aimed at handling situations of structural inconsistencies between State parties' domestic systems and the Charter's provisions.<sup>35</sup>

Besides the above, the decision provides far-reaching clarifications concerning the scope of the obligations under the African Charter regarding the prohibition of torture and arbitrary detention. As regards the prohibition of torture and the obligations deriving from it, the Commission elucidated the scope of the obligation to criminalize torture under the African Charter, clarifying that definitions of torture under the criminal law of State parties must comply with the notion of torture under the UNCAT.

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<sup>31</sup> Par. 352.

<sup>32</sup> Par. 355, II.

<sup>33</sup> G. J. NALDI, *Reparations in the Practice of the African Commission on human and peoples' rights*, in *Leiden Journal of International Law*, vol. 14, 2000, pp.681-693.

<sup>34</sup> G. BEKKER, *The African Commission on human and peoples' rights and remedies for human rights violations*, in *Human Rights Law Review*, 2013, vol. 13, p.512.

<sup>35</sup> See ACHPR, Communication 290/004, *Open Society Justice Initiative (on the behalf of Pius Njave Noumeni) v. Cameroon*; Communication 224/98 *Media rights Agenda and Constitutional Rights Project v. Nigeria*; Communication 317/06, *The Nubian community in Kenya v. Kenya*.



The Commission highlighted the interrelation between the peremptory character of the prohibition of torture and the procedural obligations stemming from it, stressing that States shall adopt all necessary measures to prevent and repress torture and cruel, inhuman or degrading treatments. As regards the prohibition of arbitrary detention, the Commission underlined some relevant aspects of the duties to respect and protect the right to freedom and security, reminding that any restriction on the rights protected by the Charter must be consistent with the domestic legal framework and with the rights and duties enshrined in the African Charter.