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Communication 341/2007

Equality Now and Ethiopian Women Lawyers Association (EWLA)

v.

Federal Republic of Ethiopia

*Adopted by the
African Commission on Human and Peoples' Rights
during the 19th Extra-Ordinary Session, from 16 to 25 February 2016
Banjul, The Gambia*

F. Tlakula

Hon. Commissioner Faith Pansy Tlakula
Chairperson of the African Commission
on Human and Peoples' Rights



[Signature]

Dr. Mary Maboreke
Secretary to the African Commission on
Human and Peoples' Rights

Communication 341/2007 - Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Federal Republic of Ethiopia

SUMMARY OF THE COMPLAINT

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received the Complaint from Equality Now and Ethiopian Women Lawyers Association (EWLA) (hereinafter collectively referred to as the "Complainants") on behalf of Woineshet Zebene Negash, against the Federal Republic of Ethiopia (the Respondent State).
2. The Complaint is submitted pursuant to Articles 55 and 56, read with rule 102 of the Rules of Procedure of the African Commission on Human and Peoples' Rights, 1998.
3. The Complainants allege that on 12 March 2001, a man named Aberew Jemma Negussie (hereinafter, "Aberew") came to the residence of Woineshet Zebene Negash (hereinafter "Woineshet") then aged 13, and together with several accomplices, abducted her and raped her. The abduction was reported to the police who rescued her and arrested Aberew. They state that the police who rescued her testified to seeing blood on the pyjamas she was still wearing since her abduction. They allege that a medical report also showed many scratches and bruises around her vagina and confirmed that penetration had taken place.
4. The Complainants allege that Aberew was later freed on bail, after which he once again abducted Woineshet again and hid her in his brother's house. She was held there for a month and was forced to sign a marriage contract. The Complainants allege that a month later, she managed to escape and ran to a police station. The Complainants state that on 22 July 2003, Aberew was sentenced to 10 years imprisonment without parole and his four accomplices were each convicted of abduction and sentenced to 8 years imprisonment, by the Guna Woreda Court. The Complainants added that during the trial, a police officer who provided witness testimony attested that Aberew admitted to having abducted Woineshet.
5. The Complainants state that Aberew and his accomplices lodged an appeal, and that on 4 December 2003, the High Court of the Arsi Zone, sitting on appeal quashed the decision of the lower court on the basis that the "evidence suggests that the act was consensual", and released the five men from prison. They also allege that neither Woineshet nor the Ethiopian Women Lawyers Association who were providing her with legal advice, were present at the hearing or informed of the appeal.



6. Furthermore, the Complainants state that from the judgement, it is shown that instead of supporting Woneishet's case, the Zonal Prosecutor recommended that the verdict of the lower court be reversed, and stated that he had no objection if the defendants were set free.
7. The Complainants claim that upon a further appeal made by the Complainants against the ruling of the High Court on 3 December 2004, the Oromia Supreme Court held that there were not sufficient grounds to reconsider the case and dismissed the appeal. This, the Complainants say, was later reviewed by the Cassation Bench of the Oromia Supreme Court on 10 October 2005, which held that there had been no fundamental error of the law in the case.
8. The Complainants further allege that a final appeal made to the Cassation Bench of the Federal Supreme Court by the Oromia Prosecutor's office was rejected by the Federal Cassation Court on 12 January 2006, on the basis that it had no jurisdiction to hear the case because no error of law had been committed.
9. The Complainants further state that there was no further avenue of domestic appeal for the Victim, and that the Government had failed in its obligation under the African Charter to provide her (Woineshet) equal protection of the law and respect for her rights to security of person, dignity and freedom from cruel, inhuman or degrading treatment, as evidenced by the Ethiopian courts.
10. The Complainants allege that under Ethiopian law, if a person is forced to enter a contract against her or his will, that contract is rendered invalid. They state that apart from the Complainant being forced to sign the marriage contract, she was below the legal age for marriage in Ethiopia.
11. The Complainants argue that due to the above mentioned facts, the rights of Woineshet which are guaranteed by the African Charter have been violated by the government of Ethiopia. They allege that there is a violation of Articles 3, 4, 5, 6, and 18(3) of the African Charter, and Article 24(3) of the Convention on the Rights of a Child.
12. The Complainants argue that under Article 589 of the Ethiopian Penal Code, the rape of a child under fifteen year of age was punishable by imprisonment of up to fifteen years, and yet courts in Ethiopia denied justice to the Victim and failed under international law to provide equal protection of the law.
13. The Complainants aver that by failing to impose any sanction on those responsible for the abduction and rape of a 13 year old girl, the Respondent State was in



violation of its obligations to provide equal protection of the law, protection from discrimination against women, as well as the right to the integrity and security of the person as guaranteed by the African Charter.

ARTICLES ALLEGED TO HAVE BEEN VIOLATED

14. The Complainants allege violations of Articles 3, 4, 5, 6 and 18(3) of the African Charter by the Respondent State.

PRAYERS OF THE COMPLAINANT

15. The Complainants request the African Commission on Human and Peoples' Rights (the Commission) to:
- (i) Give recourse to Woineshet under the Charter for the violation of her rights, and to ensure equal protection of the law, and end discrimination for girls subjected to abduction and rape in the Respondent State;
 - (ii) Request the Respondent State to mandate comprehensive training in human rights for all law enforcement officials, including all levels of the judiciary, on the law against rape in Ethiopia and to take appropriate remedial action in this case;
 - (iii) Award compensation to Woineshet for the violations she has endured because of the Respondent State's failure to provide equal protection of the law, protection from cruel, inhuman or degrading treatment, and protection from discrimination against women, as well as the right to the integrity and security of the person guaranteed by the African Charter; and
 - (iv) Request the Respondent State to file charges against Aberew, as indicated in its submissions to the Commission.

THE PROCEDURE

16. The present Complaint was received by the Secretariat of the African Commission on 16th May 2007, and the Commission became seized of the same at its 41st Ordinary Session, held from 16th - 30th May 2007, in Accra, Ghana.



17. On 18 July 2007, the Secretariat of the Commission informed the Respondent State of the Seizure decision, and requested it to forward its written submissions on Admissibility within two months from the date of notification.
18. On 20 July 2007, the Secretariat of the Commission also informed the Complainants of the Seizure decision, and requested them to forward their written submissions on Admissibility within two months from the date of notification.
19. On 10 October 2007 and 29 October 2007 respectively, the Secretariat received the Complainants' and Respondent State's submissions on Admissibility.
20. At the 42nd Ordinary Session of the Commission, held from 15 - 28 November 2007, in Brazzaville, Congo, the Secretariat gave each party's Admissibility brief to the other party.
21. On 5 December 2007, the Complainants acknowledged receipt of the Admissibility brief submitted by the Respondent State, and on 8 February 2008, they submitted additional comments in response to the Admissibility brief by the State.
22. On 10 May 2008, during the 43rd Ordinary Session of the Commission, the Complainants informed the Secretariat of the Commission that the Respondent State wanted an amicable settlement of the matter; and on 13 May 2008, during the said Session, both the Complainant and the Respondent met in the presence of the Secretariat to discuss the terms of the amicable settlement.
23. Further to a request from the Complainants, the Secretariat and Commissioner Rapporteur for the Communication convened meetings of the Parties and the Victim, on 17 and 18 November 2008, during the 44th Ordinary Session of the Commission, and requested the Parties to provide an update regarding the amicable settlement. Following this meeting, it was agreed that the Respondent State would provide an update about the situation of the case.
24. On 26 November 2008, the Complainants informed the Secretariat of the Commission that no progress had been made in reaching an amicable settlement, despite efforts to dialogue with the Respondent State.
25. On 23 January 2009, the Secretariat of the Commission requested for an update on the amicable settlement process.
26. On 28 January 2009, the Secretariat of the Commission received a correspondence from the Complainants, addressed to the Respondent State, stating that contrary to the submission by the Respondent State to the Commission that the "amicable



settlement [was] progressing in a satisfactory manner”, there was a lack of progress in reaching an amicable settlement. The Complainants also indicated that they had never received any formal written response from the Government addressing the conditions that were expected to be met in an amicable settlement, and called upon the Respondent State to complete addressing the terms of settlement and provide written confirmation of this, backed by documentary evidence, by 1 April 2009.

27. Between 01 April 2009 and 21 April 2009, the Secretariat received correspondences that were exchanged by both Parties, indicating that the Parties held a meeting regarding the amicable settlement on 09 April 2009, and that the Complainants were not satisfied that the Respondent State had taken any concrete steps towards meeting the terms of the amicable settlement.
28. On 13 November 2009, the Complainants provided an update to the Secretariat of the Commission regarding the steps taken by the Respondent State in meeting the terms of the amicable settlement, indicating that these efforts did not sufficiently meet their requests and that a settlement had not been finalized despite their frequent writings to and meetings with the Respondent State. The Complainants therefore requested the Commission to use its good offices to facilitate and finalize an amicable settlement during the 46th Ordinary Session of the Commission.
29. On 17 November 2009, a meeting of the Parties was facilitated by the Commissioner Rapporteur for the Communication, following which: (i) on 18 November 2009, the Complainants elaborated the key issues for consideration by the Commissioner Rapporteur, to charter an amicable settlement in the matter; and (ii) the Respondent State agreed to respond to the terms of settlement by May 2010.
30. Between 22 April 2010 and 24 August 2010, the Complaints informed the Commission that they had failed to reach an amicable settlement with the Respondent State, and therefore requested the Commission to advise them on the next course-of-action, as well as to re-open the matter on Admissibility.
31. On 7 September, 2011, the Victim informed the Secretariat of the Commission that she no longer wished to be represented by EWLA.
32. During the 50th Ordinary Session of the Commission which held from 24 October to 7 November 2011, the Respondent State gave a copy of a correspondence to each of the Secretariat and the Complainants indicating that: (i) the Respondent State was constructing a house for the Victim which would be handed over to her by 27 October, 2010; the Victim had left the job which the Respondent State had offered



her; and the Respondent State had initiated a case to take disciplinary measures against the prosecutors who committed fault in the trial process of the case.

33. On 5 October, 2012, the Complainants requested the Commission to proceed to determine the Admissibility of the Communication. On 15 November 2012, the Secretariat informed the Respondent State of the request from the Complainants that the matter should proceed to Admissibility, and on the same date, it acknowledged receipt of the Complainants' request, and also informed the latter that the Respondent State had been duly informed.
34. The Secretariat received further Admissibility submissions from the Complainants dated 15 January 2013, receipt of which was acknowledged on 5 April 2013. On the same date, the Secretariat transmitted the Complainants' Admissibility submissions to the Respondent State, requesting the latter to submit on the Admissibility of the matter within two months of the notification, in accordance with Rule 105(2) of the Rules of Procedure of the Commission (2010).
35. On 26 April 2013, the Complainants requested the Secretariat to provide an update on the matter, and on 31 May 2013, the Secretariat informed the Complainants that their Admissibility submissions had been sent to the Respondent State, and once again requested the Respondent State to submit on the Admissibility of the Communication.
36. On 13 September 2013, the Complainants requested the Commission to provide information as to whether the Respondent State had sent in its Admissibility submission, and that if not, the Commission should apply Rule 105(2) of its Rules of Procedure, and proceed to make a determination on Admissibility.
37. At its 15th Extra-Ordinary Session, held from 7 to 14 March 2014, in Banjul, The Gambia, the Commission considered the Admissibility of the Communication and declared the same admissible.
38. On 17 March, 2014, the Secretariat informed the Complainant and the Respondent State, respectively, of the decision on Admissibility, and the Complainant was requested to forward its arguments on the Merits within sixty (60) days of notification, in accordance with Rule 108 (1) of the Commission's Rules of Procedure.
39. On 15 May 2014, the Secretariat received the Complainant's submissions on the Merits of the Communication, which was duly acknowledged and transmitted to the Respondent State on 26 May 2014. The State was also requested to forward its



written submissions on the Merits and/or observations on the Complainant's submission within sixty (60) days of notification, in accordance with Rule 108 (1) of the Commission's Rules of Procedure.

40. On 06 August 2014, the Secretariat received the submissions on the Merits of the Communication by the Respondent State, dated 27 July, 2014, which was duly acknowledged and transmitted to the Complainant on 18 September 2014. On 14 October 2014, the Complainant forwarded its additional submissions on the Merits of the case in response to the submissions of the Respondent State.
41. On 10 October 2014, the Secretariat received a letter from the Victim – Woineshet, regarding the Communication and her representation before the Commission by Equality Now, receipt of which was duly acknowledged.
42. On 10 March 2015, the Secretariat informed the Complainant and the Respondent State, respectively that at its 17th Extra-Ordinary Session held from 19 to 28 February 2015, the Commission decided to defer the consideration of the Communication to a later Session due to time constraints.

Amicable Settlement of the Matter

43. As set out above, at the 43rd Ordinary Session of the Commission, the Parties expressed the desire to resolve the issues amicably. Consequently, the Commission lent its good offices through one of its members to facilitate the amicable settlement process, which was indicated to have finally broken down, on 05 October 2012. Following repeated requests from the Complainants to have the matter re-opened for Admissibility on the ground that the Respondent State had reneged on all its promises, to which the Respondent State has not provided any response, the Commission concludes that the amicable settlement of the Communication has failed for reasons that the State has failed to honour its undertakings, and would thus now proceed to examine the Communication on Admissibility.

ADMISIBILITY

Initial Submissions of the Complainants on Admissibility

44. The Complainants submit that the Respondent State has failed in its obligation under the Charter to provide the Victim equal protection of the law and respect for her rights to security of person, dignity and freedom from cruel, inhuman or



degrading treatment, as evidenced by the conduct of the zonal prosecutor and by the judicial responses to her allegations of abduction and arranged marriage – allegations substantiated by the trial court of first instance.

45. They argue that the High Court of the Arsi Zone overturned the trial court's findings of rape on the basis of consents, suggesting that a thirteen year-old girl can legally consent to sexual intercourse and marriage. They state that in finding that there was no error of law in overturning a rape conviction on this basis, the Federal Supreme Court has sanctioned statutory rape and child marriage in Ethiopia at the highest level, in violation of the State Party's obligations under international law, including Articles 3, 4, 5, 6 and 18(3) of the Charter.
46. The Complainants argue that domestic remedies were exhausted as there were no further domestic legal proceedings that could have been undertaken by the Victim once her case was denied a hearing by the highest court of appeal, which is the Cassation Bench of the Federal Supreme Court. Moreover, they argue that the Complainants were in frequent communication with officials from the Ministry of Justice and the Justice Bureau of Oromiya throughout the appeal of the case, including the Cassation Bench of the Federal Supreme Court, which specifically informed them that no further avenues of appeal were available in the case.

Admissibility Submissions by the Respondent State

47. The Respondent State argues that the case was originally instituted against six defendants including the principal defendant, Aberew, whom the Guna Wereda Court found guilty of the alleged crimes and for violating Articles 32(1) (a) and 571 of the 1957 Penal Code for violation of privacy of domicile, and Articles 32(1) (a) and 558 of the Penal Code for committing the crime of abduction. A third count was separately instituted against Aberew for committing rape against Woineshet in violation of Article 589 of the Penal Code. Aberew was sentenced to ten years of hard labor, and the remaining defendants were also found guilty of violating provisions of Articles 571, 558 and 589 as accomplices, and each sentenced to eight years in prison, by the Guna Woreda Court.
48. The Respondent State avers that Aberew and his accomplices lodged an appeal, and that on 4 December 2003, the High Court of the Arsi Zone, sitting on appeal quashed the decision of the lower court and released the six men from prison on the grounds, inter alia, that the prosecution did not prove the case beyond reasonable doubt and that the victim had consented to sexual solicitations from one of the defendants, being Aberew.



49. The Respondent State submits that the Public Prosecutor appealed to the Oromiya Supreme Court, which is the highest Court at the regional level, which rejected the appeal on the ground that there were no legal and factual reasons for entertaining the same; and subsequently, to the Cassation Bench of the Oromiya Supreme Court, alleging that there was an error in law in the decisions of the lower Court, but that the Cassation Bench of the Oromiya Supreme Court also rejected this appeal.
50. The Respondent State also submits that the Public Prosecutor made a final appeal based on an error of law to the Cassation Bench of the Federal Supreme Court, which is the highest judicial organ in the country but unfortunately, the latter also upheld the 4th December 1998 decision, and acquitted the defendants.
51. The Respondent State avers that still dissatisfied with the judgments of the judiciary, the Oromiya Justice Bureau decided to institute a different criminal charge against the principal offender, for violation of Article 595 (1) of the Penal Code. The Respondent State argues that the Arsi Zonal Justice Bureau of the Oromiya Regional State, although it failed to prove the case on the rape count, is pressing criminal charges against the offender as per Article 595 (1) of the Penal Code, for commission of sexual outrage on infants between 15 and 18 years of age, who are assumed to be incapable of giving free and full consent to sexual intercourse. It says that the case is still pending before the Criminal Bench of the Arsi Zonal Court, and argues that the prosecution has been relentless in trying to affirm justice.
52. The Respondent State, thus, wants the matter dismissed by the Commission for non-exhaustion of local remedies. It argues that the appropriate judicial organs in Ethiopia are still entertaining the case and that it is clear that local remedies have not been exhausted. It states that the Complainants do not have locus standi to bring the Communication to the Commission, and that entertaining it might interfere with the jurisdictional sovereignty of Ethiopia and result in contradictory decisions, which would have undesirable effects.
53. The Respondent State further avers that the Complainants have failed to comply with the requirement of the Commission's 'Guidelines on the Submission of Communications', wherein Applicants are expected to attach copies of Court judgments and other relevant documents.
54. It further avers that the Government is doing its utmost, within available resources, to raise awareness of the general public, the judicial organs, as well as the law enforcement bodies, regarding the rights of women and girls in Ethiopia; and that



tireless efforts are being made to ensure equal protection of women with men as per the African Charter. It therefore requests the Commission to dismiss the matter.

Additional Submissions of the Complainants on Admissibility

55. In response to the arguments of the State, the Complainants submit that domestic remedies were exhausted once the Victim's case was denied by the highest Court of Appeal, which is the Cassation Bench of the Federal Supreme Court. They state that the initiation of new legal proceedings against the principal suspects as an alternative means of punitive measures against Aberew – has no bearing on the issue of exhaustion of domestic remedies by Woineshet, as she had exhausted all domestic remedies available to her prior to filing the Communication with the Commission. They state that any new proceedings by the Government, which to date have not commenced, do not negate this fact and should be considered in the context of a review on the merits.
56. The Complainants further submit that the fact that the case of Woineshet on the charges of her abduction and rape by Aberew went up to the highest court, the Federal Supreme Court's Cassation bench, which declined to hear the matter, was not disputed by the Respondent State. They also state that there are no further remedies under Ethiopian law that can be exercised by the Victim, and that she has no legal right to seek further action by the Government against Aberew.
57. Whilst the Complainants appreciate and applaud the efforts that have since been made by the Respondent State to protect and promote the human rights of women in Ethiopia, including through the amendment of the Ethiopian Constitution and the ratification of international and regional human rights instruments, they maintain that the protection offered by the laws and standards to which the Respondent State is bound was not extended to Woineshet, that the Courts did not correctly implement the law and that the legal system therefore failed to provide to Woineshet the legal protection to which she was entitled.
58. They further aver that the Government's submission itself implicitly recognizes this failure in highlighting the dissatisfaction of the Justice Bureau of Oromiya with the judgments, and by indicating its intention to bring a charge of statutory rape against Aberew.
59. In response to the Respondent State's contention in its submission of October 2007, that it had initiated a new case against Aberew, which was allegedly pending as at the time of the State's submission in 2007, the Complainants, in rebuttal, state as follows:



- (i) In an interview with the Africa Regional Director of Equality Now on 9 January 2008, the Head of the Justice Bureau of Oromiya stated that no new charges had been filed by the Arsi Zone Prosecutors office against Aberew, and to date no one has been charged and no case pending;
- (ii) The Respondent State's own submission states that the Justice Bureau of Oromiya wrote to the Arsi Zonal Justice Department on 10 October 2007, regarding the institution of a further charge against Aberew - nearly two years after the Cassation Bench of the Federal Supreme Court gave its final decision, and almost three months after the Respondent State received notice of the Communication before the Commission;
- (iii) This is not a procedure within the powers of the Victim - Woineshet to pursue or not to pursue and it is not an effective remedy within the meaning of Article 56 (5) of the African Charter; and
- (iv) There has been undue delay in bringing the perpetrators to justice since Woineshet was raped nearly "seven" years ago when she was only 13 years old.

60. The Complainants further argue that they were in frequent communication with officials from the Ministry of Justice and the Justice Bureau of Oromiya throughout the appeal of the case, including the Cassation Bench of the Federal Supreme Court, who specifically informed them that no further avenues of appeal were available in the case.

61. They therefore contend that the initiation of new legal proceedings might be considered by the Respondent State as an alternative means of applying punitive measures to the perpetrator for the violation suffered by Woineshet, so as to correct the miscarriage of justice acknowledged in its submissions; but however, that, such proceedings have no bearing on the issue of whether Woineshet exhausted domestic remedies prior to filing a communication with the Commission.

62. Furthermore, the Complainants note that the Respondent State's submission indicates that the criminal charge against Aberew would be for violation of the provisions of Article 595 (1) of the Penal Code [of 1957], which stipulates that: "Whosoever has sexual intercourse or performs an analogous act with a minor of the opposite sex of more than fifteen and of less than eighteen years of age is punishable with simple imprisonment".



63. They argue that the Victim was 13 years old at the time of the rape, as indicated: in the decision of the Guna Court of 15 July 2003 (Ethiopian Calendar, 9 July 1995), which stated her age as 15 years old when she gave testimony two years after the offence was committed; and her school record, which states she was 14 years old at the end of the academic year 2002 (Ethiopian Calendar, 1994).
64. Therefore, they aver that, if the Respondent State were to charge Aberew, he should be charged under Article 594(1) of the Ethiopian Penal Code which deals with sexual outrage on infants or young persons, which provides that: "Whosoever causes an infant or young person under fifteen years of age, other than his own child, to have sexual intercourse, or to perform an act corresponding to the sexual act, with him, is punishable with rigorous imprisonment not exceeding five years"; as the offence relevant to her case. The Complainants state that they are puzzled as to why the Justice Bureau of Oromiya is considering a charge against Aberew that does not fit the facts and which carries a lesser penalty.
65. The Complainants, on 15 January 2013 made further submissions on Admissibility. In the same, they argue that the Communication fulfills all seven requirements stipulated in Article 56 of the African Charter, and also attached Exhibits A and B, which they argue, satisfy all the requirements for Admissibility.
66. In terms of Articles 56(2) and 56(3), the Complainants submit respectively, that, the Communication raises *prima facie* violation of the Charter, and that the Communication is not written in disparaging or insulting language directed at the Respondent State.
67. In terms of Article 56(5), the Complainants submit that the Communication was sent after exhausting local remedies. They state that copies of all referenced Court proceedings and judgments were attached to the original Communication, and consequently argue that they have no further avenue of domestic appeal to pursue. They also state that this fact was not disputed by the Respondent State in its submission on Admissibility.
68. On Article 56(6), the Complainants submit that the Communication was submitted within a reasonable period from the time local remedies were exhausted. They aver that the Complainant's appeal was rejected by the Cassation Bench of the Federal Supreme Court on 12 January 2006 and that they submitted to the Commission in May 2007. In explaining the timeline between the exhaustion of domestic remedies and the filing of the Communication, they state that upon receiving the decision of the Cassation Bench of the Federal Supreme Court, they applied for an official copy of the decision in preparation for submission to the Commission, and that it took



over six months to get the same. They also stated that while awaiting the official copy of the said decision, they hired a local lawyer to collect all official Court decisions from all the relevant Courts that heard this matter, including the Guna Woreda Court, the Arsi Zone High Court, and the Oromiya Supreme Court whose language of instruction is Oromiya. They state that getting all the official records in all these Courts took time due to Government bureaucracy.

69. Furthermore, the Complainants submit that once these documents were received towards the end of 2006, they had to be officially translated from Oromiya and Amharic into English, for purposes of analysis and presentation to the Commission. They argue that given the circumstances mentioned above, the Communication was filed before the Commission within reasonable time, and also that they have subsequently met all deadlines for submissions since the filing of the Communication.
70. In terms of Article 56(7), the Complainants submit that the Communication does not deal with a case involving the Respondent State that has already been settled in accordance with the principles of the United Nations or the Charter of the OAU or the African Charter, and also that the Communication has not been brought before another international or regional mechanism for consideration.
71. The Complainants submit that in 2008, at the request of the Respondent State, the Commission facilitated an amicable settlement between the Parties, whereupon the Complainants, on behalf of the Victim, raised concerns and conditions for settlement. They state however that despite several discussions and communications on behalf of the Victim over a period of five years, the Respondent State failed to meet the conditions laid out for settlement, and in fact failed to respond in writing to the Complainants' concerns. They therefore requested the African Commission to make a determination on the Admissibility of the matter.

THE AFRICAN COMMISSION'S ANALYSIS ON ADMISSIBILITY

72. The Admissibility of Communications submitted before the African Commission in accordance with Article 55 of the Charter, is governed by the requirements of Article 56 of the same Charter, which sets out seven conditions which must be cumulatively complied with, for any Communication to be Admissible. Failure to satisfy any one or more of the above requirements renders the Communication inadmissible, unless the Complainant provides sufficient justifications as to why any of the requirements could not be met.



73. The Complainants submit that all of the requirements of Article 56 have been met, while the Respondent State on the other hand, contests the Admissibility of the Communication on the basis that it does not meet the requirement of Articles 56 (5).
74. Upon careful examination of the facts and submissions by the Parties, the Commission considers that other than the contested Article 56 (5), the other requirements for Admissibility set out in Article 56 of the African Charter have been adequately substantiated, raise no potentially contentious issues and require no further examination. Accordingly, the Commission's analysis will focus on the examination of only that contentious provision.
75. Articles 56 (5) provides that Communications should be 'sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.
76. This requirement is premised on the principle that "the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual" , before the matter is brought before an international treaty body. This provision also enables the Commission to avoid playing the role of a court of first instance, a role that it cannot under any circumstances arrogate to itself.
77. In its jurisprudence, the African Commission has articulated a framework for allocating the burden of proof between Complainants and Respondent States, by holding that, the initial burden to prove the availability of effective and sufficient remedies within its legal system rests on the Respondent State. Only once this burden of proof has been met does the petitioner have to establish that the local remedy "was in fact exhausted or for some reason inadequate or ineffective in the particular circumstances."
78. Furthermore, in its jurisprudence, the Commission has held that where a State Party fails to submit its observations in accordance with the Rules of Procedure, the Commission has no option but to proceed to consider Communications on the basis of the submission of the complainant(s) and the information at its disposal. In this regard, the Commission notes that the Respondent State has not reacted to the new Admissibility submission of the Complainants , and would therefore, with respect to the Respondent State, rely only on its October 2007 Admissibility brief and its oral submission to the 43rd Ordinary Session of the Commission.
79. The Commission recalls that it has expounded on the principle of exhaustion of domestic remedies in its jurisprudence and has held that "the generally accepted meaning of local remedies, which must be exhausted prior to any



communication/complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice” , and that “the internal remedy [to] which article 56(5) refers entails remedy sought from courts of a judicial nature...” Furthermore, the Commission’s Information Sheet No. 3 , also states that “[t]he author [of a Communication] must have taken the matter to all the available domestic legal remedies. That is, he or she must have taken the case to the highest court of the land.”

80. The Commission further recalls its jurisprudence that in order for the rule of exhaustion of local remedies to apply, remedies in the Respondent State must be available, effective and sufficient. A “remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint”.
81. On their part, the Complainants argue and the Commission agrees, that the case of Woineshet went up to the highest court in the Respondent State – the Federal Supreme Court’s Cassation bench, which declined to hear the matter. This fact has not been disputed by the Respondent State. Indeed, the Commission notes that the Respondent State, in its own submission, avers that the Federal Supreme Court’s Cassation bench is “the final judicial body in the hierarchy of the Ethiopian judicial system”.
82. The Commission also agrees with the contention of the Complainants that the initiation of new legal proceedings against against Aberew, has no bearing on the issue of exhaustion of domestic remedies by Woineshet, prior to filing the Communication with the Commission, on the basis that the Respondent State’s own submission states that the Justice Bureau of Oromiya wrote to the Arsi Zonal Justice Department on 10 October 2007 regarding the institution of the further charge against Aberew - almost three months after the Respondent State received notification of the Communication before the Commission.
83. Furthermore, the Commission observes that the Respondent State has also not denied the contention by the Complainants that there are no further remedies under Ethiopian law that can be exercised by Woineshet, and that she has no legal right to seek further action by the Government of the Respondent State against Aberew. To this end, the Commission holds the view that the steps taken by the Complainants constitute exhaustion of domestic remedies, as the alleged discretionary procedure of initiating a new charge of statutory rape against Aberew by the Arsi Zone Prosecutor’s office is not within the power of the Victim to pursue



or not to pursue, and thus could not be termed as an effective remedy for her within the meaning of Article 56 (5) of the Charter. In this regard, the Commission refers to its position in *Law Offices of Ghazi Suleiman vs. Sudan* where it held that the domestic remedies, contemplated by Article 56(5) are of a judicial nature, effective and are not subordinate to the discretionary power of the public authorities.

84. The Commission has also held that a "remedy is considered available if the petitioner can pursue it without impediment", and can make use of it in the circumstances of his case. It has also stressed that, remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant ..."; and that the existence of a remedy must be sufficiently certain, not in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness.
85. The alleged discretionary procedure of initiating a new charge of statutory rape against Aberew by the Arsi Zone Prosecutor's office, would therefore in view of the Commission, not satisfy the requirements of "availability", as contemplated under Article 56(5) of the Charter.
86. On the basis of the foregoing, the Commission is persuaded to conclude that the Respondent State has not discharged the burden of proof that the Complainants have adequate and effective remedies that have not been exhausted. Rather, the Commission finds that: there are no such available and effective remedies, as the Complainants' appeals, even to the highest courts of Ethiopia, have been denied; and the remedy which the Respondent State contends to exist, is a discretionary one, which is outside of the nature of remedies contemplated by Article 56(5).
87. In view of the foregoing, the Commission declares this Communication admissible in accordance with Article 56 of the Charter.

MERIT

Summary of Parties' Submissions on the Merits

Complainant's submissions

88. The Complainant states that the judge of Arsi High Court which discharged the convicts was influenced by his personal belief that rape could only be committed on a virgin. Further, the judge drew the wrong conclusion that the medical evidence was inconclusive on whether the victim was a virgin. By failing to recognise that virginity is not a prerequisite of the offence of rape, and that the law should protect



every woman from rape, the Court acted arbitrarily in violation of Ms Negash's rights to: equal protection of law (Article 3); protection from cruel, inhuman or degrading treatment (Art. 5, Art. 4); protection from discrimination (Art. 2); and integrity and security of person (Art. 6, Art. 4).

89. Similarly, the judge drew the wrong inference that Ms Negash had consent to the principal offender's sexual solicitations. Ms Negash or her legal representative were not notified of the appeal hearing and thus had no opportunity to provide information that she had been abducted, raped and forced to sign a purported marriage certificate, which demonstrate that she had not consented. In addition, the zonal prosecutor failed to raise relevant points of law which could have sustained the convictions and sentences against the perpetrators if they had been raised on appeal. For example, virginity is not a legal prerequisite for the offence of rape. Rape of a child under 15 years of age was punishable by imprisonment of up to 15 years. Sexual intercourse with a minor was punishable with up to 5 years imprisonment. The purported subsequent marriage between the principal offender and the victim from which the judge probably inferred consent was invalid under domestic law on two grounds: (a) the victim signed the purported marriage contract under duress; and (b) in any event the victim, being a minor, had no capacity to enter a valid legal contract under domestic law. The legal age of marriage was 15 years, and the victim was only 13 years old at the time.
90. By failing to raise relevant points of law and present relevant evidence, and by abdicating his duty to support the convictions and sentences, the prosecutor denied Ms Negash equality before the law and equal protection of the law. Similarly, by drawing the wrong inference that the victim had consented to sexual solicitations, the court acted arbitrarily and failed in its duty to diligently examine the case. By these failures the Respondent State also violated Ms Negash's right to inherent dignity guaranteed under Article 5 of the Charter.
91. Further, the abduction and rape of Ms Negash, coupled with being forced to sign a marriage certificate, caused her physical and psychological suffering and humiliated her. These acts were in violation of her rights to integrity of her person, to respect for her inherent dignity, to be free from all forms of cruel, inhuman and degrading treatment, to liberty and security of the person and to be protected from discrimination as guaranteed under Articles 4, 5, 6, and 18(3) of the Charter. By failing to diligently investigate these acts, examine all aspects of the case, and to punish the perpetrators the Respondent State violated Ms Negash's rights under the Charter.
92. Further, the Respondent State's superior courts failed to correct the decision of the Arsi High Court on further appeals which culminated in the decision of the



Cassation Bench of the Federal Supreme Court in January 2006. The complainant contends that this amounts to violation of the victim's rights guaranteed under Articles 3, 4, 5, 6, 7(1)(a) and 18(3) of the Charter. By the same acts and omissions, the Respondent State also sanctioned a climate that is conducive to violence and discrimination against girls and women which also amounts to violation of the stated rights including Article 2 of the Charter.

93. Furthermore, at the time of the impugned events, the law absolved the perpetrator from prosecution for rape if he subsequently married his victim. The Complainant contends that this regularised the traditional practices of abduction, rape and forced marriage. The law also amounted to violation of the right of rape victims to equal protection of the law. Despite repeal of this law in 2005 and campaigns by non-governmental organisations, the practice of abduction, rape and forced marriage thrives to date.
94. The Complainants also maintains that by failing to protect the victim from violations of her rights guaranteed under the Charter, the Respondent State failed to eliminate discrimination against women which include violence against women. The Respondent State also propagated the message to the general public that girls and women can be abducted, raped, and forced into marriage with impunity. They contend that this is contrary to State's obligations and amounts to violation of several other rights guaranteed under other international human rights instruments¹¹, including Articles 4, 5 and 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Women's Protocol) in Africa, which the Respondent State has signed.
95. In terms of remedies, the Complainant reiterates the prayers at paragraph 15 above. Regarding compensation, the Complainant submits that the sum of between \$250,000 - \$500,000 should be awarded for economically assessable damage, and for the moral, material, and other forms of harm suffered as a result of the violations. The Complainant also requests the Charities and Societies Proclamation should be repealed so that charities are allowed to work without State interference except as it may concern public benefit. Additionally, the Respondent State should be required to periodically account to the Commission on implementation of the recommendations. Lastly, the Complainant prays that the Respondent State should be requested to ratify, domesticate and implement the Women's Protocol.

¹¹ In this regard the Complainants cites: Articles 3, 21(1) and (2) of the African Charter on the Rights and Welfare of the Child (Children's Charter); Articles 5, 15(1) and 16(b) of the Convention on the Elimination of Discrimination Against Women (CEDAW); CEDAW General Recommendation No. 19 on Violence against women; International Covenant on Civil and Political Rights (ICCPR), Arts. 26 and 23(3); United Nations Human Rights Committee (HRC) General Comment No 28 on equality of rights between men and women; Convention on the Rights of the Child (CRC), Art. 24(3); Committee on the Rights of the Child (CRC) General Comment No. 4 on adolescent health and development



Respondent State's submissions

96. The Respondent State avers that it has a legal framework for the promotion and protection of fundamental human rights and freedoms, and women's and children's rights in particular. The FDRE Constitution is the basic and supreme law. By Article 25 of the FDRE Constitution, all persons are equal before the law and are entitled to equal and effective protection of the law without discrimination. The right to have one's cause heard under Article 7 of the Charter is guaranteed as the right to bring a justiciable matter to a court of law or any other competent body with judicial power.² Article 78 of the FDRE Constitution guarantees the independence of the judiciary. Due process is also safeguarded.³ The right to life, security of the person and liberty are guaranteed under Article 14 of the FDRE Constitution. Every person has the right to protection against cruel, inhuman or degrading treatment or punishment. Slavery and servitude are prohibited.⁴ By Article 35(4) of the FDRE Constitution, the State is obligated to enforce the rights of women to eliminate the influences of harmful customs. In this regard, laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited. In addition to the fundamental rights under the FDRE Constitution, there are several international human rights instruments which have been ratified and form part and parcel of the domestic laws in terms of Articles 9(4) and 13(2) of the FDRE Constitution.
97. Subsidiary laws have also been enacted to augment and implement the protections under the FDRE Constitution. Rape is a criminal offence, and if committed on a young woman between the ages of 13 – 18 or committed with aggravating circumstances, the punishment is escalated.⁵
98. In addition to enactment of the above legal framework, various efforts are also being made to implement the laws, sensitise the general public about human rights generally and the rights of women and children in particular. Among others, it has mainstreamed women's and children's rights by mandating government ministries and department at all levels to attend to women's concerns, oversee the respect, protection and implementation of women's rights, and provide material and technical support for women generally, and victims of abuse specifically. It has also ensured the equality of women with men by improving access to higher education for girls using affirmative action interventions. Harmful traditional practices such

² FDRE Constitution, Art. 37

³ *Id.* Arts. 20(3), 20(5), 20(1), and 20(6).

⁴ *Id.* Art. 18(2)

⁵ FDRE Criminal Code, Art. 620(1), (2) and (3)



as female circumcision, child marriage and abduction have been reduced through criminalisation and awareness creation measures. A national steering committee; legal care and protection centres; children's violence investigation and prosecution centres; and victim support units have been established at various levels of government to provide multi-sectoral solutions to violence against women and children, child labour and exploitation. There is for these purposes also a Children's Rights Action Plan (2010/11-2017/18) which is currently being implemented. There is also a special prosecution group that deals with violence and exploitation of children.

99. In order to create awareness on gender equality, rape and other human rights issues, the government trains law enforcement and security officials, members of the judiciary, and officials in departments and institution that have a role in the promotion and protection of human rights. Awareness about the social, psychological, economic, and physical effects of abduction, sexual and domestic violence against children is also achieved through annual commemoration of the anti-violence day.
100. Regarding the case of Woineshet Zebene Negash, the Respondent State maintains that it provided adequate and effective remedies based on the amicable settlement reached with EWLA acting on behalf of the victim. It states that it provided compensation, employed the victim in one of its institutions, and built a house for her and delivered the title deeds for the same in her name to EWLA. It states that the victim has since taken leave of absence from her employment. It also took disciplinary measures against the judge who overturned the convictions by dismissing him because of his failure to properly apply the applicable law.
101. As far as it is concerned, the victim through EWLA is satisfied with the remedies provided. Accordingly, the Respondent State prays that this Communication must be dismissed. In support of these assertions, the Respondent State refers to and produces a copy of a letter written by Ethiopian Women Lawyers Association (EWLA) to the Commission indicating that the State has provided satisfactory remedies in terms of the amicable settlement, and requesting that the file should be closed.

Complainant's Reply

102. The Complainant maintains that the victim discharged EWLA from representing her in the present Communication and accordingly, Equality Now is the only legal representative for the victim.



103. More importantly, the amicable settlement negotiations were terminated effectively in 2012 on the ground that the Respondent State had failed to respond to proposals which could have formed a written settlement agreement. There had been no further negotiations between the victim, or Equality Now as her only legal representation, and the Respondent State. As a result, no settlement agreement was reached.
104. Further, the Respondent State does not produce any proof of the measures it purportedly took to remedy the violations. In particular, the Respondent State does not produce evidence of the title deed for the house and evidence of its delivery. Similarly there is no documentary proof of the removal of the judge who overturned the convictions and sentences. There is also no proof of adequate and additional compensation that would adequately fund the victim's education and training to enable her live a dignified life. Moreover the employment of the victim as a financial ledger keeper was inapt for her career preference which is in law. The Respondent State does not also produce any evidence of measures taken to bring the prosecutor and the actual perpetrators to account. Additionally, the Complainant states that the victim has actually had to leave the country and seek asylum somewhere owing to threats she received from an official of the Respondent State's Ministry of Foreign Affairs.
105. Furthermore, the Complainant observes that the Respondent State neither denies that the victim was abducted and raped when she was 13 years old, nor negates the assertion that it failed to provide remedies. The Complainant submits that both of these constitute violations of the victim's rights under Articles 2, 3, 4, 5, 6, 7(1) and 18(3) of the Charter.
106. Lastly, the Complainant states that the Charities and Societies Proclamation is still in force and being used to interfere with activities of civil society. For example, on 3 September 2014 the police abruptly halted the showing of a film documentary about another girl who had also been a victim of abduction and rape. Similarly, the director of EWLA who participated in the aborted amicable settlement negotiations in the present Communication was intimidated and has had to seek asylum in another country. In light of the foregoing, the Complainant reiterates the prayers advanced in its initial merit submissions.

The Commission's Analysis on the Merits

107. This Communication concerns one of the most repugnant traditional practices: forced marriage by abduction coupled with rape. It is a practice that draws stark parallels with a proverbial ancient past when a man would hunt down the female of his choice, slug her over the head with a club, drag her by the hair to his



dwelling, rape her and emerge triumphantly beating his chest and announcing to the applause of fellow men.⁶

108. Here, a young man, aided by his accomplices, went into Woineshet Zebene Negash's dormitory almost at mid-night, abducted her, took her to the house of his acquaintance who welcomed him and the victim. The young abductor then raped her. This happened twice. On her first abduction she was rescued by the police. Her abductor was arrested and subsequently released on bail. Only for him to abduct her for the second time. Unlike on the first occasion, on this second occasion close to one whole month elapsed without being rescued. She fled from her abductor by herself when opportunity presented. On the two occasions, she was raped for who-knows-how-many times. Ms Woineshet Zebene Negash was only 13 years old and attending school when she was subjected to these abhorrent acts which have not been controverted by the Respondent State.
109. At the material time, abduction and rape were already criminal offences under the Respondent State's Penal Code of 1957. Regardless, the practice of abduction and rape was widespread and considered a normal way of procuring a bride among the victim's society.
110. As it occurred, the abductor and his accomplices were eventually tried, found guilty, and sentenced to terms of between 8 to 10 years in prison. However, on appeal by the convicts, the Arsi Zonal High Court quashed the convictions and discharged the convicts. The court stated that "the evidence suggests that the act was consensual." The judge did not pinpoint the evidence which suggested consent. He simply relied on the statements of the prosecutor who in making his submissions on the appeal stated that the first instance court did not investigate the evidence properly and decided the matter out of emotional overtones. Surprisingly, whereas the same prosecutor submitted that the principal offender and one of his accomplices should be retried, the judge disregarded this submission and discharged all the convicts including these two. What is more, two further appeals by the prosecutor against the decision of the Arsi Zonal High Court did not yield any reversal of the discharge of the convicts. The perpetrators remain at liberty with impunity to this day.
111. These facts and the neat details thereof as alleged by the Complainant are not disputed by the Respondent State. To the contrary, the Respondent State confirms these facts. The Respondent State does not also dispute that the treatment which Ms

⁶ Alemayehu G. Mariam, 'Crimes Against Womanity: Marriage by Abduction in Ethiopia', *Al Mariam's Commentaries* available at < <http://almariam.com/2014/09/21/crimes-against-womanity-marriage-by-abduction-in-ethiopia/> > (accessed 18 June 2015)



Woineshet Zebene Negash suffered at the hand of private individuals constitutes violations of her rights guaranteed under its Constitution and international human rights instruments including the Charter to which it is a party.

112. The Respondent State does not also deny that the investigating police officers and the zonal prosecutor failed to diligently investigate the acts, properly identify the perpetrators, prosecute them, and secure their punishment as part of the remedies for the criminal violations Ms Negash suffered. Indeed the Respondent State confirms the failure of its agents by stating that it disciplined the prosecutor and removed the judge who discharged the convicts for their respective misconduct. It also provided personal remedies to the victim in the form of a job and a house in accordance with a settlement agreement reached with Ethiopian Women Lawyers Association. It would appear that by highlighting these measures, the Respondent State seeks to be absolved from international responsibility on the ground that it has remedied the violations.
113. In the circumstances, it is necessary to establish the nature and extent of the Respondent State's responsibility and whether the measures it has taken absolve it from responsibility.
114. In that regard, a convenient starting point is Article 1 of the Charter which obligates State Parties to recognise and give effect to the rights, freedoms and duties guaranteed under the Charter. The twin obligations to *recognise* and *give effect* to the rights and freedoms under the Charter generate at least four duties on the part of the State: the duties to respect, protect, promote and fulfil the rights and freedoms under the Charter.⁷ These duties are concomitant to all the rights and freedoms under the Charter. In other words, the State is obligated to recognise and give effect to the rights and freedoms by respecting, protecting, promoting, and fulfilling them at the domestic level. Accordingly, a State incurs international responsibility if it fails to meet the demands of these duties.
115. In the present Communication, the primary violations were committed by private citizens who twice abducted the victim and one of them raped her and forced her to sign a purported marriage contract while she was kept captive. These acts constitute violations of a range of rights guaranteed under the Charter. Article 6 of the Charter provides for two separate but inextricably linked rights: the right to liberty, and the right to security of the person. At the core of the right to liberty is the guarantee that no one should be deprived of their freedom to go or not to go anywhere as they will, so long as it lies in their power and means to do so. Although the freedom reserved to the person is open, it is not absolute. It can be

⁷ Communication 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria (SERAC Case)* (2000) ACHPR para. 44



legitimately limited through the formal processes of law: arrest and detention according to law. Conditioned by such formal processes of law, the right to liberty becomes a substantive guarantee that arrest and detention shall not be arbitrary or unlawful.⁸

116. Outside of the formal processes of law, the arrest and detention of a person by State or non-state actors alike becomes kidnapping or abduction which is outright arbitrary, unlawful and amount to violation of the liberty of the individual. Ordinarily kidnapping or abduction must be proscribed in domestic law as part of giving effect to the right to liberty. Thus, except as may be prescribed by law, the right to personal liberty means that no one should be restricted at all by the State or non-state actors, which includes private individuals. In this regard, the right to liberty is inextricably linked to the right to security of the person. The latter augments the right to liberty by guaranteeing that outside of the law, no one's person or body should be invaded or exposed to risk of invasion by State or non-state actors.
117. When Ms Negash was abducted and kept captive on both occasions, her liberty was manifestly violated, and her person grossly invaded. Accordingly, the abduction of Ms. Woineshet Zebene Negash by the private individuals was a clear infringement of both the liberty and the security of her person guaranteed under Article 6 of the Charter. However, this does not *per se* entail the international responsibility of the Respondent State, which is considered below.
118. Secondly, Article 5 of the Charter guarantees that every individual shall have the right to respect of the dignity inherent in a human being. Human dignity is the fountain of all other rights. At the core of human dignity is the idea and recognition that a human being has unique worth, value and significance that is innate, and not acquired. It also entails that a human being is a moral agent possessed with the conscience and personal volition to decide what happens to his or her body. The right to respect of dignity is a guarantee that a human being should not be subjected to acts or omissions that degrade or humiliate him or her. The worth, value and significance of a human being may not and need not be conceptualised with scientific precision. As such, the point at which the intensity of a given act or omission amounts to degradation of a human being cannot and need not be delineated and fixed with mathematical precision. The preoccupation of human rights law which recognises human dignity is the pragmatic protection of rights as opposed to vexing over theoretical conceptions of dignity.

⁸ The Charter, Art. 6



119. Thus in addition to guaranteeing the dignity of a human being, Article 5 of the Charter also enunciates the clear principle that all forms of degradation and exploitation of human beings shall be prohibited. It further provides for a sample of acts and omissions which in and of themselves amount to exploitation and degradation of a human being. These listed acts outright constitute violations of the dignity of a human being and are prohibited without reserve. Specifically: slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment are absolutely prohibited. Beyond the listed acts, there is a spectrum of acts or omissions that would constitute exploitation and debasement of a human being depending on the circumstances. In this regard the list of prohibited acts and omissions that amount to exploitation and degradation of a human being is not closed under Article 5 of the Charter.
120. In the Commission's view, by rape, the victim is treated as a mere object of sexual gratification against his or her will and conscience. The victim is treated without regard for the personal autonomy and control over what happens to his or her body. By rape, the personal volition of the victim is gravely subverted and disregarded, and the victim is reduced from being a human being who has innate worth, value, significance and personal volition, to a mere object by which the perpetrator can meet his or her sadistic sexual urges. Inevitably, rape may, and often does, inflict physical pain and invokes in the victim a sense of helplessness, worthlessness, and gross debasement, which cause unimaginable mental anguish beyond the physical suffering. Clearly, rape degrades and humiliates the victim. Thus, even though not expressly listed under Article 5 of the Charter, rape is one of the most repugnant affronts to human dignity and the range of dignity-related rights, such as security of the person and integrity of the person, respectively guaranteed under Articles 6 and 4 of the Charter.
121. Consequently, the rape of Ms. Negash constituted a serious violation of her dignity, integrity, and personal security as guaranteed under Article 5, 4 and 6 of the Charter, respectively. Further, *mutatis mutandis*, by keeping Ms Negash captive against her will, by compelling her to sign a purported marriage certificate under pain of physical assault and threats, her autonomy, control and volition over her body and life were seriously infringed, and thus her dignity was also violated. This too does not *per se* render the Respondent State internationally responsible as these acts were perpetrated by private individuals.
122. However, it is to be recalled that a State incurs international responsibility for violation of rights and freedoms when it breaches its international law obligations with respect to the rights and freedoms in question. A state breaches its obligations when its conduct does not meet the demands of international law obligations it has



voluntarily undertaken. With respect to violations primarily committed by non-state actors, the principle is well settled that:

an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, **but because of the lack of due diligence (1) to prevent the violation or (2) to respond to it as required by the Convention** [in the present case, the African Charter]. What is decisive is... whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible.⁹

123. It is therefore instructive to pinpoint the relevant obligations of the Respondent State with respect to the rights guaranteed under Article 4, 5, and 6 of the Charter which were violated by private individuals with respect to Ms Negash.
124. By Article 1 of the Charter, the Respondent State has the obligation to adopt legislative and other measures to give effect to the rights and freedoms under the Charter. This obligation gives rise to, among others, the duty to protect the rights and freedoms under the Charter.¹⁰ The duty to protect rights and freedom in turn requires the State to adopt and implement laws and other measures *to prevent violations* including by non-state actors, or *to provide for redress* when the rights and freedoms have been violated.¹¹
125. Regarding prevention of violations, the state fails in its duty when it tolerates a situation where private persons or groups act freely and with impunity in violation of the rights guaranteed under the Charter.¹² The duty to prevent violations is escalated when the State becomes aware of a situation where a specific individual or category of individuals face a real risk of their rights and freedoms being seriously violated by non-state actors. In such a case, the duty to prevent violations requires the state to adopt and diligently implement customised measures of protection that would avert the impending violations or indeed curb or eliminate altogether the prevailing violations.
126. In the present case, the Respondent State was aware or must be deemed to have been aware of the prevalence of marriage by abduction and rape, which meant that

⁹ Velásquez-Rodríguez v. Honduras (Merits) (1988) IACtHR (Ser.C No.4) para. 172, 173; Communication 272/03 - Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon (2009) ACHPR para. 89

¹⁰ See above, para. 109, n7

¹¹ SERAC Case, above, n7, para. 57; Communication 245/02 - Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) ACHPR para. 143, 146, 147

¹² Communication 245/02 - Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) ACHPR paras. 143, 144.



girls were under the continuing threat of being abducted, raped and forcibly married in the area where the practice was rampant, and where Ms Negash lived. This required escalated measures beyond the criminalisation of abduction and rape under the criminal law that existed at the time.

127. More specifically with respect to the case at hand, Ms Woineshet Zebene Negash was abducted twice. The State quickly became aware of her first abduction and rescued her, albeit after she had already been raped. The rescue was commendable. However, inexplicably, the perpetrator was released from custody, and neither party has explained what conditions, if any, were attached to his release for the purpose of preventing him from offending again. Further, after the first abduction, the Respondent State ought to have reckoned the reality of the risk Ms. Negash and other girls at her residence faced. The duty to prevent a repetition of the abduction, rape and forced purported marriage of Ms Negash, and no less other girls in like situations, required the Respondent State to adopt and implement heightened measures as a matter of urgency.
128. It is not for the Commission to pinpoint the actual measures that could or should have been adopted and implemented in the situation of Ms Negash and other girls in similar situations. Given its unique knowledge of the local realities, the Respondent State has a margin of appreciation in adopting the most appropriate and effective measures to prevent imminent violations that it is aware of. Without prejudice to that margin of appreciation, such measures could have included immediately launching sensitisation campaigns in the area about the illegality of the practice of forced marriage by abduction and rape and the attendant penal consequences; providing direct security at the residences of girls attending school; conducting random patrols of the areas where the practice was rampant; or indeed requiring the owners of properties accommodating school-attending girls, such as Ms Negash's dormitory, to adequately secure the premises.
129. From the facts presented, beyond the criminalisation of abduction and rape at the time, the Respondent State did not adopt any specific measures prior to Ms Negash's first abduction. Indeed the Complainant states that when the perpetrator was arrested for Ms Negash's first abduction, the practice ebbed. But it immediately resumed when it was learnt that the principal offender has been released on bail. This suggests that the Respondent State had not been prosecuting perpetrators of abduction and rape. Had it been doing so, the ripple effect of arrests and prosecution of perpetrators could have long operated as an effective deterrent as it did when Ms Negash's abductor was arrested the first instance.
130. More so, even after her first abduction the Respondent State does not appear to have adopted escalated measures of protection. In fact, its court set the perpetrator



at liberty, and as it appears, without any conditions that would deter the abductor for repeating his acts. Unsurprisingly, the same perpetrator freely went on to abduct Ms. Negash again, kept her captive for close to a whole month, and raped her. For that longer period, the Respondent State did not come to her rescue, and she had to flee by herself when opportunity presented.

131. These events depict failure on the part of the Respondent State to *prevent* the abduction and rape of Ms Negash, especially when the Respondent State was at all times aware of the prevalence of the practice, and more so when it was aware of the specific insecurity of Ms Negash and her friends following her first abduction. The Respondent State failed to meet its duty to prevent the violations, and thus failed in its 'duty to protect' which arises from the obligation to adopt measures to give effect to the rights and freedoms under the Charter.
132. In this regard, the Respondent State breached its obligation under Article 1 of the Charter. As a result of that breach, Ms Negash suffered the violations established above. The Respondent State is accordingly internationally liable for failing to prevent the violations. The commendable matrix of initiatives aimed at curbing or eliminating marriage by abduction and rape do not absolve the Respondent State from responsibility because they came after Ms Negash had already fallen victim to the vice. Even if such measures may have been adopted prior to Ms Negash's abduction, they certainly did not yield the protection of Ms Negash from the abduction and rape.
133. In addition to the duty to prevent violations, the duty to protect also entails the duty to provide for a mechanism or take measures for redressing violations when they occur. This is part of the prerequisites for the effective protection of rights and freedoms under the Charter. The actual steps for meeting this duty depend on the circumstances of the case, including the nature of the violations. Among others, the State has the duty to investigate human rights violations that occur within its jurisdiction. Specifically, where the violations are of a criminal nature, the State has the duty to establish criminal responsibility by diligently investigating the violations with a view to ascertaining the facts; identifying the perpetrators; diligently prosecuting the perpetrators, and when convicted to adequately punish them. This is in addition to civil remedies that may be availed to the victim against the perpetrators.
134. In the case at hand, the Respondent State clearly failed in its duty to diligently investigate the acts, identify all those who participated in or facilitated the abduction and rape of Ms Negash, and sanction their acts. Further, whereas the Arsi high court adopted the zonal prosecutor's comments that the court *à quo* had convicted out of emotion, the Arsi high court wilfully disregarded the comments of



the same zonal prosecutor to the effect that the principal offender and one of his accomplices could be judged again after hearing them in defence. No reason was offered for disregarding this latter suggestion. Instead of remitting the case to the court *a quo* for retrial, the Arsi high court outright acquitted the perpetrators and suffered no concern about rendering any form of justice to Ms Negash.

135. This was repeated on appeal to the Oromo Supreme Court and the Cassation Bench of the Federal Supreme Court, both of which held that there was no error or law to warrant consideration of the appeals as they did not find anything wrong with the decision of the court *a quo*.
136. It is not for the Commission to second-guess domestic courts as to the guilt of the perpetrators of Ms Negash's abduction and rape. Rather, the manner in which domestic courts discharge their functions is a factor to be considered in assessing whether the domestic authorities diligently discharged the State's duty to investigate, prosecute, adjudicate and punish perpetrators of violations of a criminal nature.
137. In the present case, the Commission considers that the decisions of the Arsi high court, the Oromo Supreme Court and the Federal Supreme Court (Cassation Bench) are manifestly arbitrary and affront the most elementary conception of the judicial function. The rulings are barely reasoned. In the relevant parts, both ruling merely state that there was no error of law to warrant a review on appeal. The judgments embody the Respondent State's breach of its duty to offer a decent system of justice for each victim of crime such as Ms Negash. In this regard, the courts' refusal to re-examine the matter in respect of the two key offenders constitutes a denial of justice to Ms Negash and amounts to violation of the right to have one's cause heard as guaranteed under Article 7(1) (a) of the Charter. The courts' decisions also constitute breach of the obligation to give effect to the rights by responding to violations with criminal sanctions as was clearly necessary for the abduction and rape of Ms Negash.
138. Notably, the Respondent State acknowledges the failures of its zonal prosecutor and the Arsi high court. It states that it took disciplinary measures against the prosecutor who abdicated his duty and wrongly supported the acquittal of the perpetrators. It has also removed the judge who arbitrarily acquitted the convicts. These measures indicate admission that the mechanism of criminal justice failed to render justice to Ms Negash. For the avoidance of doubt, these disciplinary measures do not amount to remedies to Ms Negash for the two-tiered violations she suffered. She was abducted and raped by private individuals and the Respondent State failed to provide her the necessary protection. This was the first tier of violations. When she sought justice, which the Respondent State is obligated to



render to her, she was denied justice by the failures of the prosecution and judicial authorities to establish criminal responsibility and punish the perpetrators. This was the second tier of the violations. The disciplinary measures against the prosecutor and the judge of the Arsi high court did not remediate the violations she suffered. To be clear, whereas these measures demonstrate disapproval of the conduct of the prosecutor and the judge, they did not yield the re-trial of the perpetrators and sanctioning of their criminal acts. Permitting perpetrators to escape criminal sanctions discloses some kind of subtle approval or tolerance of the acts they committed.

139. Thus whereas the Respondent State was not directly responsible for the violations primarily committed by private individuals, these failures to respond to the violations attract the international responsibility of the Respondent State in respect of the rights that were violated. It is in this regard that the Respondent State is internationally responsible for violations of Ms Negash's rights to: integrity of her person (Art. 4), dignity (Art. 5), liberty and security of her person (Art. 6), and protection from inhuman and degrading treatment (Art. 5).¹³ The failures also amount to the State's direct violations of Ms Negash's rights to have her cause heard (Art. 7(1)(a)), and the right to protection of the law (Art. 3).
140. The Complainant also contends that the Respondent State violated Articles 3 and 2 of the Charter. The former provides for the guarantees that every individual: (a) shall be equal before the law; (b) shall have protection of the law; and (c) the protection of the law shall be provided equally to persons in relevantly analogous situations. The right to protection of the law has been considered above and found to have been violated. The Commission will thus focus on discrimination which infringes on the right to equality and equal protection of the law.
141. In Communication 294/04 - Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe, the Commission expounded that

the most fundamental meaning of equality before the law under Article 3(1) of the Charter is the right by all to equal treatment under similar conditions. The right to equality before the law means that individuals legally within the jurisdiction of a State should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. Its meaning is the right to have the same procedures and principles applied under the same conditions. The principle that all persons are equal before

¹³ Velásquez-Rodríguez v. Honduras (Merits), n 9 above



the law means that existing laws must be applied in the same manner to those subject to them.¹⁴

142. Thus every human being must be recognised as such under and by the law. A human being must also have protection by the law. Legal protection entails the existence of laws guaranteeing rights and freedoms; proscribing acts and omissions that constitute infringement the rights and freedoms. In addition to existence of such laws, protection of the law includes the guarantee that individuals will have access to mechanisms, institutions and processes for vindication of their rights and obtaining remedies when they suffer violations. Further, Article 3 of the Charter guarantees that such protection must be accorded to all persons in analogous situations in an equal manner and measure. These elements constitute the essence of Article 3 of the Charter.
143. In that regard, Article 3 of the Charter must be read together with Article 2 of the Charter. The latter embodies two basic entitlements; to enjoy the rights under the Charter, and not to be discriminated against in the enjoyment of the rights and freedoms under the Charter. This includes the right to protection of the law. In this regard, individuals should not be subjected to unjustifiable distinctions of any kind such as those listed under Article 2 of the Charter. Article 2 embodies the principle of non-discrimination which reinforces the equality rights under Article 3 by prohibiting unjustifiable discrimination.
144. Notably, the gravamen of discrimination is the unjustifiable distinction or differential treatment of persons in relevantly analogous situations. This is clear from the definitions of discrimination in international human rights law. For example, Article 1(f) of the Protocol to the African Charter on the Rights of Women in Africa (the Women's Protocol) defines discrimination as "any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women [...] of human rights and fundamental freedoms in all spheres of life."¹⁵ Article 1 of the Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) uses the same terms as the Women's Protocol. In General Recommendation (GR) No. 19, the Committee on CEDAW interprets discrimination to include "gender-based violence, that is, violence that is directed

¹⁴ Communication 294/04 - Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe (2009) ACHPR para. 96

¹⁵ Protocol to the African Charter on the Rights of Women in Africa, adopted on 13 September 2000, Art. 1(f)

against a woman because she is a woman or that affects women disproportionately.”¹⁶

145. Thus distinctively exacting violence on someone simply because she is a woman, as opposed to being a man (the comparator) or indeed exacting more violence on women as compared to men in the same circumstances amounts to discrimination. In *Communication 323/06: Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2011) ACHPR the Commission posed the following questions to determine whether there had been discrimination:

“Whether the women and male protesters had similar treatment; and whether the treatment was ‘fair and just’, given that all women and men in the scene were under the same circumstances, that is, exercising their political rights.”¹⁷

146. The Commission concluded that the victims were exclusively women and there was no evidence showing that male protesters at the scene of the demonstrations were also stripped naked and sexually harassed as the women were. On that basis the Commission found a violation of Article 2 on prohibition of discrimination.
147. To make out a claim of violation of Article 3 as read together with Article 2 of the Charter, the complainant must make out a *prima facie* case that the respondent state had not given the [victim] the same treatment it accorded to the others in analogous situations or that, the respondent state had accorded less favourable treatment to the victim than that accorded to others in relevantly analogous situation, or indeed that the State imposed a disproportionate burden or restriction on the victim relative to that imposed on others in relevantly analogous situations.¹⁸ The complainant must identify the comparator and show how the treatment complained of and that of the comparator are comparable.¹⁹
148. When such a case is made out, the Respondent State has two options. It may demonstrate with cogent evidence that the *prima facie* case is factually misconceived in that the treatment exacted on the victims was also exacted on others in the same situation as the victim or that the circumstances of the victims are relevantly different from those of the comparator. Secondly, the Respondent State may admit

¹⁶ GR No. 19 “Violence Against Women” Committee on the Elimination of Discrimination Against Women (1992) para. 6

¹⁷ *Communication 323/06 - Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2011) ACHPR para. 129

¹⁸ *Communication 293/2004, Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development v Zimbabwe* (2008) ACHPR para. 127; *Communication 294/2004, Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe*, n 14 above, para. 101

¹⁹ *Lithgow and others v the United Kingdom*, App. No. 28627/95, Eur. Comm’n H.R. (1986) 8 EHRR 329



the differential treatment but demonstrate that the differential treatment was objectively and reasonably justifiable.²⁰

149. In the present Communication, the Complainant contends that the abduction and rape by the private individual, and the failures of the Respondent State to protect Ms Negash's rights by preventing the abduction and rape and by sanctioning the acts as a remedy amount to discrimination contrary to Article 2 of the Charter. In contending so, the Complainant does not identify the comparator. In other words, the Complainant does not identify a similarly situated person who was accorded the necessary protection by the Respondent State or accorded justice for violations similar to those suffered by Ms Negash. It is not possible in the circumstances to identify the differentiation or distinction which is the gravamen of discrimination. Not all violence against women necessarily amounts to or ought to be termed "discrimination" to be condemned as violations of women's rights. In this respect this Communication can be distinguished from *Communication 323/06 - Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* in which the Commission found that there was no evidence to show that male demonstrators received the same treatment as the female demonstrators at whom violent sexual abuse was directed.
150. In the circumstances, it is difficult to find that the Respondent State distinctively failed to protect Ms Negash's rights by preventing the abduction and rape as compared to others similarly situated. Similarly, the Respondent State's failure to act diligently and render justice to Ms Negash for the violations she suffered cannot be considered as differential in the absence of a comparator. The Commission is accordingly indisposed to affirm that there was discrimination. For purposes of the present case, it is sufficient that the failures of the Respondent State amount to violations of a name other than "discrimination" as established above with respect to the rights under Article 3, 4, 5, 6, 7(1)(a) of the Charter. The Commission does not also find it necessary to separately examine the alleged violation of Article 18(3) of the Charter as it was invoked in respect of discrimination and other rights which have already been confirmed to have been violated.
151. As to the appropriate remedial measures, the Commission notes the Complainant's prayer as stated at paragraph 15 above. The Commission considers that the acts committed against Ms Negash were instantaneous. The impugned acts did not engage a continuing failure on the part of the State to give effect to the rights of Ms Negash. Had they been of such a nature, it would have been necessary to require the Respondent State to ensure the cessation of the acts with respect to Ms Negash.



152. However, the Complainant alleges, and the Respondent State does so refute, that the practice of marriage by abduction and rape still exists despite the commendable on-going legal and institutional reforms reported by the Respondent State. This entails that beyond Ms Negash, other girls and women are under a continuing risk of being abducted, raped and forcibly married. As noted above, the Respondent State is under the obligation to adopt escalated and targeted measures to ensure that this practice ceases completely, and in that regard it has a margin of appreciation bearing in mind its knowledge of the peculiar national realities.
153. In addition to general measures it is already implementing, such measures must as of necessity include diligent prosecution of those still engaging in the practice and wide publication of convictions to put prospective offenders on notice of the consequences of engaging in the practice with a view to deter them. In such matters, statistics are instructive. Accordingly, the Respondent State would be requested to provide statistics on instances of marriage by abduction and rape, as well as on successful prosecution of perpetrators.
154. Concerning the perpetrators of the abduction and rape of Ms Negash in particular, the Commission takes into account that the acts were committed in 2001, about 14 years ago. The perpetrators were prosecuted, found guilty, but acquitted and discharged on appeal, without possibility of being retried. The Commission does not consider it necessary to insist, in the circumstances, that the Respondent State should commence criminal proceedings afresh. Having failed to prevent the violations and render appropriate remedies through the criminal justice system, the Respondent State now bears responsibility for the violations and is liable to provide reparations to Ms Negash.
155. In that regard the Commission notes the Respondent State's averments that it already compensated Ms Negash in accordance with the settlement agreement reached through Ethiopian Women Lawyers Association acting on behalf of Ms Negash. However, as noted at paragraph 43 above, the Commission terminated the settlement negotiations in 2012 following lack of commitment from the Respondent State. Indeed it was on the basis that settlement negotiations had been terminated that the Commission resumed consideration of the Communication on admissibility. The Commission cannot have regard to the purported settlement agreement.
156. Even if it had regard to the purported settlement agreement, the Respondent State does not produce any evidence of the measures it purportedly took in compliance with the terms of the alleged settlement agreement. The alleged measures are of the nature that would ordinarily be documented. The Respondent State has not produced any copy of the record of disciplinary measures taken. Neither has it



produced title deeds for the house to the Commission. Moreover, the Commission has on record Ms Negash's own correspondence terminating legal representation by Ethiopian Women Lawyers Association. From the date of such termination, EWLA had no basis for purporting to represent Ms Negash in negotiations with the Respondent State.

157. Notably, Ms Negash, who proceeded on the understanding that the settlement negotiations had been terminated, states that she no longer has interest in the house. In any event, she has since left the country and the house may not be of much immediate benefit to her. It is immaterial if she is away from her country on leave of absence or having sought asylum there. In the circumstances, the Commission considers that the house can be processed to form part of reparations that have practical utility to Ms Negash.
158. Regarding compensation as a form of reparations or remedies, the Commission notes that monetary compensation for non-material damage is at large and is determined as a matter of impression, taking into account all the relevant circumstances of the case as opposed to a mathematical formula. The relevant circumstances include the physical, psychological, and emotional trauma that Ms Negash suffered as a result of the primary violations by the private individuals, as well as the denial of justice by the Respondent State's failures. The Complainant suggests a monetary award in the range of US\$250,000.00 to US\$500,000.00. Nothing has been offered to justify this range. The Commission does not have any comparable awards in its jurisprudence. This makes the relevant award even the more at large. Having considered the matter, the Commission deems that a lump sum award of US\$150,000.00 suffices as equitable and fair compensation to Ms Negash. If indeed the Respondent State built the house as indicated, it is at liberty to sell the same to defray part of this lump sum award.
159. The Complainant also requests that the Respondent State should repeal the Charities and Societies Proclamation which is being used to stifle the work of civil society organisations working on human rights. The Commission notes that the Complainant only included this issue in the reply. It was not part of the case advanced at the admissibility stage. As result, the admissibility of this issue was not considered on admissibility, and the Respondent State has had no chance to present its observations on the same. The Commission declines to consider the attendant prayer.

Decision of the Commission on the merits

160. In light of the foregoing, the African Commission on Human and Peoples' Rights:



- (a) Declares that the Respondent State violated Article 3, 4, 5, 6, and 7(1)(a) of the Charter;
- (b) Declares that there was no violation of Article 2 of the Charter;
- (c) Requests the Respondent State to pay Ms Woineshet Zebene Negash the sum of US\$150,000.00 as compensation for the non-material damage she suffered as a result for the affirmed violations.
- (d) Requests the Respondent State to adopt and implement escalated measures to specifically deal with marriage by abduction and rape; monitor instances of marriage by abduction and rape; and diligently prosecute and sanction offenders. In this regard, the Respondent State should also continue training judicial officers on specific human rights themes including on handling cases of violence against women.
- (e) Requests the Respondent State to report to the Commission within 180 days on the measures adopted to implement the above recommendations; and also include in its next periodic report yearly statistics on the prevalence of marriages by abduction and rape, cases of successful prosecutions, and challenges faced if any.

Adopted this 16th day of November 2015 during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 - 18 November 2015 in Banjul, The Gambia

