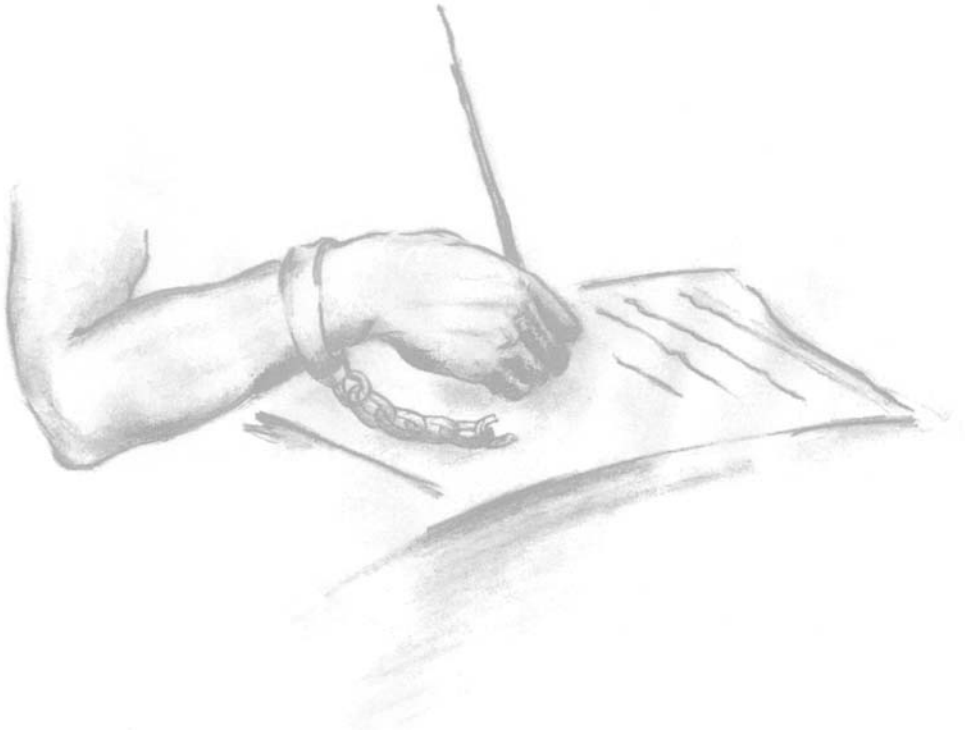


## **PART B**

### **SUBSTANTIVE NORMS ON TORTURE IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM**



## VI. Substantive Norms under the African Charter on Human and Peoples' Rights

The prohibition against torture and ill-treatment is contained in a body of treaty and non-treaty norms applicable to African countries. Foremost among the relevant treaties is the African Charter. Similar prohibitions are contained in the African Children's Rights Charter<sup>77</sup> and the African Women's Rights Protocol.<sup>78</sup> The binding standards contained in these instruments are discussed in more depth below.

Another treaty adopted under OAU auspices, the Convention Governing the Specific Aspects of Refugee Problems in Africa, prohibits *refoulement*, in the context of refugee law and protection, to a country in which an individual's 'life, physical integrity or liberty would be threatened'.<sup>79</sup> Although resolutions adopted by the Commission provide interpretative guidance to the treaty norms, they do not in themselves have binding authority. In part XIV below, the history and scope of 'soft-law' standards (such as resolutions) adopted under the OAU/AU are discussed.

### 1. Overview of Charter Provisions

The foundations and scope of the guarantees of life and integrity of the human person are defined by several provisions in the African Charter. Article 5 of the Charter guarantees human dignity and prohibits torture in the following words:<sup>80</sup>

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

It should be noted that a right to human dignity is guaranteed separately from the prohibition of torture. The right to human dignity is the positive dimension

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77 African Children's Rights Charter, *supra* note 22.

78 African Women's Rights Protocol, *supra* note 22.

79 Adopted in 1969, OAU Doc. No. CAB/LEG/24.3, entered into force in 1974, art. 2(3) [hereinafter 'OAU Refugee Convention'].

80 African Charter, *supra* note 9, art. 5.

of the obligations contained in Article 5. When the State or its agents breach this obligation, the prohibition against torture, cruel, inhuman and degrading treatment or punishment is almost invariably also breached. The expression ‘all forms of’, casts the net of Article 5 wide enough to include a prohibition of both State and non-State conduct.<sup>81</sup>

Article 5 is reinforced and supplemented by other Charter provisions, such as guarantees of equal protection of the law,<sup>82</sup> the right to life and integrity, including the guarantee against ‘arbitrary deprivation’ of that right,<sup>83</sup> the right to personal liberty and security<sup>84</sup> and fair trial and due process guarantees.<sup>85</sup>

## **2. The Jurisprudence of the African Commission on Human and Peoples’ Rights**

Through the exercise of its protective mandate, the African Commission has developed a body of jurisprudence on the rights guaranteed under the African Charter, including Article 5 and the other provisions relevant to torture and ill-treatment mentioned above.

### **a. The Prohibition against Torture: General Principles and Conceptual Clarifications**

Article 5 incorporates two disparate though interrelated aspects: respect for dignity and the prohibition of exploitation and degradation. The Article further complicates matters by listing slavery, slave trade, torture, cruel, inhuman and degrading treatment and punishment as ‘examples’ of exploitation and degradation. Issues pertaining to slavery and the slave trade are conceptually and factually usually quite distinct from the other examples on the list, and are not canvassed here. When finding an Article 5 violation, the Commission often does not distinguish between failure to respect ‘dignity’ and a violation of the prohibition of ‘cruel, inhuman and degrading treatment and punishment’.<sup>86</sup>

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81 See *Uzoukwu v. Ezeonu II*, (1991) 6 *Nigeria Weekly Law Reports* (Pt. 200) 708, in which the Supreme Court of Nigeria held that the prohibition against slavery and other forms of inhuman and degrading punishment or treatment was not limited to acts of the State but also extended to slavery in private arrangements.

82 African Charter, *supra* note 9, art. 3(2).

83 *Ibid.*, art. 4.

84 *Ibid.*, art. 6.

85 *Ibid.*, art. 7.

86 See, e.g., *Sudan cases*, *supra* note 28, para. 57.

This limited analysis and clarity undermines attempts to come to a clear understanding of the distinct Article 5 elements. Not only are these two main elements often conflated, but very seldom is any attempt made at distinguishing or disentangling the potentially subtle distinctions among ‘torture’ and other forms of ill-treatment, such as ‘inhuman’ and ‘degrading’ treatment. This tendency is explained with reference to two main factors.

First, the facts presented in communications before the Commission are usually very crude and cumulative, and clearly reveal excessive ill-treatment or punishment, such that a careful judicial analysis is rendered redundant. For example, in the earliest interpretation of Article 5 of the African Charter, the Commission considered conditions of detention and summary and arbitrary executions. In *Krishna Achutan (on behalf of Aleke Banda) v. Malawi*,<sup>87</sup> the State Party allegedly chained prisoners for days without access to sanitary facilities, detained them without access to natural light, water or food, beat them with sticks and iron bars and permanently shackled their hands, depriving them of autonomous activity and movement even within the cells. It was also alleged that many of the prisoners were kept in solitary confinement, while others were held in conditions of excessive overcrowding, to the extent that cells built for 70 prisoners were occupied by over 200 persons. The Commission decided that these facts violated the guarantee of personal dignity in Article 5 of the Charter.<sup>88</sup> The Commission has also taken the view that ‘detaining individuals without allowing them contact with their families and refusing to inform their families of the fact and place of the detention of these individuals amount to inhuman treatment both of the detainees and their families’.<sup>89</sup> Also, in the *Commission Nationale des Droits de l’Homme* case,<sup>90</sup> the Commission affirmed that Article 5 prohibits summary, arbitrary and extra-judicial executions.<sup>91</sup> Thus the Commission had no difficulty finding that ‘the

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87 Communication 64/92, *Krishna Achutan (on behalf of Aleke Banda) v. Malawi*, Seventh Activity Report, (2000) AHRLR 143 (ACHPR 1994).

88 Communication 64/92, *Krishna Achutan (on behalf of Aleke Banda) v. Malawi*, *ibid.*, joined with Communications 68/92 and 78/92, *Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, (1994), (2000) AHRLR 143 (ACHPR 1994), reprinted in (1996) 3 *International Human Rights Reports* 134.

89 Communications 222/98, 229/98, *Law Office of Ghazi Sulaiman v. Sudan*, Sixteenth Activity Report, (2003) AHRLR 134 (ACHPR 2003), para.62.

90 *Commission Nationale des Droits de l’Homme* case, *supra* note 28, para. 22.

91 *Ibid.*; Communications 27/89, 49/91, 99/93, *Organisation Mondiale Contre la Torture v. Rwanda*, Tenth Activity Report, (2000) AHRLR 282 (ACHPR 1996) [hereinafter ‘*OMCT et al. v. Rwanda case*’].

deaths of citizens who were shot or tortured to death' by law enforcement agents violated Article 5 of the Charter.<sup>92</sup>

Second, the limited analysis is also part of a jurisprudential trend on the part of the Commission. Especially at the beginning, the Commission did not elaborate on its findings, but merely stated the essential facts and the applicable provision, and then concluded that a violation of the provision had occurred without attempting to show how the particular legal provisions relate or are applied to the specific facts.<sup>93</sup> Although later findings are more expansive and more rigorously substantiated, the depth of analysis can often be improved considerably.

When the four forms of ill-treatment ('torture', 'cruelty', 'inhuman treatment' and 'degradation') are used disjunctively, at least to some extent, no clear categorisation and careful distinction is elaborated in the case-law. In *John D. Ouko v Kenya*<sup>94</sup>, a distinction is drawn between 'dignity and freedom from inhuman or degrading treatment' on the one hand, and 'freedom from torture' on the other. The established facts were as follows: the complainant was arrested and detained for ten months without trial in violation of Article 6 of the Charter. During the ten-month detention, a bright (250 watt) light bulb was left alight continuously, and the victim was denied bathroom facilities. In the Commission's view, these conditions constituted inhuman and degrading treatment, but fell short of torture, and presumably also of 'cruel' treatment.<sup>95</sup> Finding that the evidence revealed no specific instances of 'physical and mental torture', though such treatment was alleged in general terms, the Commission declined to conclude that the 'right to freedom from torture' was violated.<sup>96</sup>

There is some contradiction in the *Ouko* finding, however, placing in doubt the persuasiveness of the distinction apparently drawn. In the paragraph before the Commission declines to find a violation of the right to be free from torture in

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92 Communication 204/97, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Fourteenth Activity Report, (2001) AHRLR 51 (ACHPR 2001), 57.

93 See, e.g., Communications 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group and Others v. Zaire*, Ninth Activity Report, (2000) AHRLR 74 (ACHPR 1995), para. 41 ('The torture of 15 persons by a military unit ... as alleged in [the] communication constitutes a violation of [Article 5]').

94 Communication 232/99, *John D. Ouko v. Kenya*, Fourteenth Activity Report, (2000) AHRLR 135 (ACHPR 2000), reprinted in (2002) 9 *International Human Rights Reports* 246 [hereinafter '*Ouko*'].

95 *Ibid.*, para. 23.

96 *Ibid.*, para. 26.

Article 5, the Commission finds – on the same facts already stated – a violation of Principle 6 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>97</sup> This principle stipulates that no detainee may be ‘subjected to torture, or cruel, inhuman or degrading treatment or punishment’. Reading the finding as a whole, the inference must be drawn that Principle 6 is found to have been violated to the extent of constituting inhuman and degrading treatment, and not cruelty or torture. However, such an interpretation is by no means clear from the Commission’s reasoning.

In *Civil Liberties Organisation v. Nigeria*,<sup>98</sup> the complaint itself alleges the lesser ‘inhuman and degrading treatment’ rather than the more serious ‘torture’ or ‘cruel treatment’.<sup>99</sup> The outcome does not mirror the distinction suggested by the allegation: The Commission finds that deprivation of family visits constitutes ‘inhuman treatment’ and that deprivation of light, insufficient food and lack of access to medicine or medical care constitute ‘violations of Article 5’.<sup>100</sup> The reference to ‘Article 5’, in this context, should be to ‘inhuman and degrading treatment’.

The Commission provides its clearest explanation of Article 5 in *International Pen, Constitutional Rights Project, INTERIGHTS (on behalf of Ken Saro-Wiwa Jr.) and Civil Liberties Organisation v. Nigeria*:<sup>101</sup>

Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.

In *Huri-Laws v. Nigeria*, the Commission concluded that treatment impugned as torture or cruel, inhuman or degrading treatment or punishment must attain a minimum level of severity. However, the determination of the minimum required to bring such treatment within the scope of the Charter prohibitions

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97 See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (9 Dec. 1988).

98 Communication 151/96, *Civil Liberties Organisation v. Nigeria*, Thirteenth Activity Report, (2000) AHRLR 243 (ACHPR 1999).

99 *Ibid.*, paras. 5, 25.

100 *Ibid.*, para. 27.

101 Communications 137/94, 139/94, 154/96 & 161/97, *International Pen, Constitutional Rights Project, INTERIGHTS (on behalf of Ken Saro-Wiwa, Jr.) and Civil Liberties Organisation v. Nigeria*, Twelfth Activity Report, (2000) AHRLR 212 (ACHPR 1998), para. 78 [hereinafter ‘*Ken Saro-Wiwa, Jr.*’].

must depend on several variables, including the duration of the treatment, its effects on the physical and mental life of the victim and, where relevant, the age, gender and state of health of the victim.<sup>102</sup>

In light of the Commission's conception of the degrees of ill-treatment, as well as its relatively vague definitions, the discussion now proceeds to an analysis of the specific situations in which Article 5 and related provisions have been invoked.

### **b. Violations of Human Dignity**

Article 5 of the African Charter guarantees an entitlement to human dignity and prohibits torture and cruel, inhuman and degrading treatment. According to the African Commission:<sup>103</sup>

Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right, which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.

In a number of decisions, the Commission has interpreted 'dignity' broadly in reaching its findings. The protection in Article 5 covers not just the physical person of the victim but also the minimal economic and social circumstances required for human existence in any situation. In the absence of an express guarantee of a right to housing in the Charter, the Commission has based protection for housing-related rights on the Article 5 guarantee of human dignity, including the prohibition of torture and cruel, inhuman and degrading treatment. In the *Modise* case,<sup>104</sup> the author was rendered stateless when the Respondent State cancelled his Botswana nationality and deported him to South Africa for political reasons. South Africa in turn deported him to what was then Bophuthatswana, which in turn deported him back to Botswana. Unable to determine where to keep the victim, the authorities of the Respondent State left him homeless for an extended period in a specially created strip

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102 Communication 225/98, *Huri-Laws v. Nigeria*, Fourteenth Activity Report, (2000) AHRLR 273 (ACHPR 2000), para. 41 [hereinafter '*Huri-Laws*'].

103 Communication 241/2001, *Purohit and Moore v. The Gambia*, Sixteenth Activity Report, (2003) AHRLR 96 (ACHPR 2003), para. 57 [hereinafter '*Purohit and Moore*'].

104 *Modise* case, *supra* note 31.

of territory along the South African border called ‘no-man’s land’. The Commission found that by denying Mr Modise his nationality and deporting him repeatedly, Botswana violated his right to respect for human dignity. The Commission also found that such enforced homelessness was inhuman and degrading treatment that offended ‘the dignity of human beings and thus violated Article 5’.<sup>105</sup> This case supports the conclusion that involuntary or forced displacement directly attributable to the State or its agencies is a violation of the right to respect for human dignity. The case further supports the argument that victims of such displacement are entitled in such cases to minimum guarantees of assistance, including shelter.

In another case, the Commission clarified that personal suffering and indignity ‘can take many forms, and will depend on the particular circumstances of each case brought before the African Commission’.<sup>106</sup> The particular circumstances may require that violations of the right to respect for human dignity are found in conjunction with other provisions of the Charter, such as the right to health. The *Mauritania* cases,<sup>107</sup> for example, comprised five consolidated communications arising from developments in Mauritania between 1986 and 1992. Briefly, these communications alleged the existence in that State of slavery and analogous practices, and of institutionalized racial discrimination perpetrated by the ruling Beydane (Moor) community against the more populous black community. The cases alleged that black Mauritians were enslaved, routinely evicted or displaced from their lands, which were then confiscated by the Government. The communication also alleged that some detainees had, among other things, been starved to death, left to die in severe weather without blankets or clothing and were deprived of medical attention. The Commission found that starving prisoners and depriving them of blankets, clothing and health care violated both the guarantee of respect for human dignity in Article 5 and the right to health in Article 16 of the Charter.<sup>108</sup>

### **c. Conditions of Pre-Trial Detention and Incarceration**

Conditions of detention are the most frequently alleged violations of Article 5. The conditions of detention alleged in communications decided by the Com-

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105 *Ibid.*, para. 32.

106 *Purohit and Moore*, *supra* note 103, para. 77.

107 The *Mauritania* cases, *supra* note 28.

108 *Ibid.*, para. 122.



mission may be subdivided into three groups: those dealing with specific official misconduct; those of a more systemic nature that pertain to ‘physical’ or even ‘psychological’ ‘conditions’ and those related to the bare necessities of life (or ‘socio-economic rights’) such as food and medical attention.

The abuse of official discretion in places of detention often constitutes inhuman and degrading treatment. Examples include the following: beatings, shackling with leg irons in the absence of flight risk, handcuffs, shackling and excessive solitary confinement. The African Commission has held that forced nudity, electric shock and sexual assault constitute, together and separately, failure to respect human dignity under Article 5 of the Charter.<sup>109</sup>

Physical conditions amounting to inhuman and degrading treatment may take the following forms: dark, airless or dirty cells or overcrowding. In one case, the Commission held that confining detainees in a ‘sordid and dirty cell under inhuman and degrading conditions’ without contact with the outside world was cruel, inhuman and degrading.<sup>110</sup> Similarly, imprisonment for ten months in a cell that was constantly lit by a 250 watt bulb was also held to constitute inhuman and degrading treatment.<sup>111</sup> In *Media Rights Agenda v. Nigeria*, the victim allegedly suffered<sup>112</sup>

[h]is legs and hands chained to the floor day and night. From the day he was arrested and detained until he was sentenced by the tribunal, a total of 147 days, he was not allowed to take his bath. He was given food twice a day, and while in detention, both in Lagos and Jos before he faced the Special Investigation Panel that preceded the trial at the Special Military Tribunal, he was kept in solitary confinement in a cell meant for criminals.

As for the basic conditions to ensure life, the following circumstances have been found to violate Article 5: insufficient food, poor quality of food, denial or unavailability of medical attention.

As the Commission’s case-law demonstrates, these elements often overlap. In the *Ken Saro-Wiwa Jr.* case, acts found to be in violation of Article 5 of the Charter included keeping detainees in leg irons, manacles and handcuffs and

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109 The *Commission Nationale des Droits de l’Homme* case, *supra* note 28; see also, *Krishna Achutan (on behalf of Aleke Banda) v. Malawi*, *supra* note 87.

110 *Huri-Laws* case, *supra* note 102 para. 40.

111 *Ouko* case, *supra* note 94 para. 22.

112 Communication 224/98, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Fourteenth Activity Report, (2000) ACHPR 262 (ACHPR 2000), para. 70 [hereinafter ‘*Niran Malaolu*’].

subjecting them to beatings in their cells. Some of the detainees in this case were chained to the cell walls. The cells were described as ‘airless and dirty’, and the detainees were denied medical attention. There was no evidence of any violent action by the detainees or attempt on their part to escape.<sup>113</sup>

However, the Commission has curiously also concluded in *Civil Liberties Organisation v. Nigeria*, that holding a detainee in a military camp was ‘not necessarily inhuman’ although it acknowledged ‘the obvious danger that normal safeguards on the treatment of prisoners will be lacking’.<sup>114</sup>

#### **d. Mental Health Detainees**

In *Purohit and Moore*,<sup>115</sup> the allegations were that the mental health regime in The Gambia was dehumanizing and incompatible with Article 5 of the Charter. The Lunatics Detention Act of 1917 defined persons with mental health problems as ‘lunatics’ and ‘idiots’ and prescribed certification procedures that were not subject to oversight or effective mechanisms of control. The African Commission held that branding persons with mental illness as ‘lunatics’ and ‘idiots’ had the effect of dehumanizing them and denying them dignity contrary to Article 5 of the African Charter. The Commission explained its decisions as follows:<sup>116</sup>

In coming to this conclusion, the African Commission would like to draw inspiration from Principle 1(2) of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care. Principle 1(2) requires that “all persons with mental illness, or who are being treated as such, shall be treated with humanity and respect for the inherent dignity of the human person.” The African Commission maintains that mentally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human beings. Like any other human being, mentally disabled persons or persons suffering from mental illness have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all States Party to the African Charter in accordance with the well established principle that all human beings are born free and equal in dignity and rights.

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113 *Ken Saro-Wiwa Jr. case*, *supra* note 101, para. 79.

114 *Civil Liberties Organisation v. Nigeria*, *supra* note 98, para. 26.

115 *Purohit and Moore*, *supra* note 103.

116 *Ibid.*, paras. 59-60.

It is the right to dignity, as such, and not the guarantee against torture or ill-treatment that underlies this finding. In the words of the Commission, human dignity is ‘an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination’.<sup>117</sup> However, the Commission rejected the argument that the ‘automatic’ detention of persons believed to be mentally ill or disabled, which effectively excludes the possibility of reviewing the diagnosis, violates the prohibition of ‘arbitrary’ detention. In the Commission’s view, persons who have been institutionalised are not included within the protective scope of Article 6, which deals with ‘liberty and security’ and prohibiting arbitrary arrest and detention.<sup>118</sup>

This interpretation is disappointing, in particular because the vulnerability of those institutionalised is increased by that fact that general medical practitioners – who are not necessarily psychiatrists – may make those important diagnoses. Quite explicitly, the Commission also concedes that the situation (and therefore its decision) falls short of Principles 15, 16 and 17 of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care.<sup>119</sup>

#### e. Death Penalty

The African Charter does not explicitly prohibit capital punishment. The Charter merely prohibits the ‘arbitrary’ deprivation of human life.<sup>120</sup> At its 26th Ordinary Session in Kigali, Rwanda, in November 1999, the Commission adopted a ‘Resolution Urging States to Envisage a Moratorium on the Death Penalty’, in which it requested States Parties to the African Charter that still legalised capital punishment to refrain from implementing it.<sup>121</sup>

In *INTERIGHTS (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, the Commission confirmed that capital punishment was not incompatible with the

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117 *Ibid.*, para. 57.

118 In violation of art. 6 of the Charter; see *ibid.*, paras. 64-68. The Commission stated, ‘Article 6 of the African Charter was not intended to cater for situations where persons in need of medical assistance or help are institutionalized.’ Para. 68.

119 *Ibid.*, para. 68.

120 *Ibid.*, art. 4.

121 Resolution Urging the State to Envisage a Moratorium on Death Penalty (1999), ACHPR/Res.42 (XXVI)99.

Charter.<sup>122</sup> In the *Bosch* case, it was submitted that the imposition of the death penalty was disproportionate to the gravity of the offence committed, and therefore constituted a violation of Article 5. In a sense echoing its resolution on the death penalty, the Commission begins with the premise that ‘there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed’.<sup>123</sup> The Commission’s reasoning indicates that a sentence would be disproportionate if facts that reduce the moral blameworthiness of an accused (the ‘extenuating circumstances’) were disregarded or accorded too little weight. In this case, the Commission found that the analysis by domestic courts was not unreasonable because there were no facts relating to the criminal conduct itself which lessened the perpetrator’s moral blameworthiness. The accused (Bosch) was convicted of a serious and gruesome offence (murder), involving considerable effort and planning. Even where the circumstances of the individual offender give rise to extenuation, the nature of the offence ‘cannot be disregarded’.<sup>124</sup>

It may also be argued that the issue in respect of sentencing is not the proportionality of the sentence, but the form that the punishment takes. It may for example be argued that, even if the death penalty is under certain circumstances proportionate to the crime, the method of execution as such may amount to a cruel form of punishment, in conflict with Article 5. In the *Bosch* case, the complainant submitted that the form of execution in Botswana (hanging) is cruel and amounts to ‘unnecessary suffering, degradation and humiliation’.<sup>125</sup> In its decision, the Commission does not deal with this argument, presumably because the decision is premised on the notion that international law does not outlaw the death penalty irrespective of the form it takes.

The complainant in the *Bosch* case also argued that failure to give reasonable notice of the date and time of execution is a violation of Article 5, and that this failure ‘makes’ the execution a form of cruel, inhuman and degrading punishment. Although it declines to rule on this argument due to the fact that the

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122 In this case, the Commission claimed that ‘there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed’. See Communication 240/2001, *INTERIGHTS (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, (Merits) Seventeenth Activity Report, para. 50 [hereinafter ‘*Bosch*’]. A more appropriate approach may have been for the Commission to consider the scope of limitations in international law on the application and use of capital punishment.

123 *Ibid.*, para. 31.

124 *Ibid.*, para. 37.

125 *Ibid.*, para. 5.

Respondent State did not receive ample notice of this argument in order to prepare a response, the Commission observes in an *obiter dictum* that the ‘justice system must have a human face in matters of execution of death sentences’.<sup>126</sup> In support of this statement, the Commission quotes a decision of the United Kingdom’s Privy Council, to the effect that a condemned person must be afforded an opportunity ‘to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself as best he can, to face his ultimate ordeal’.<sup>127</sup>

These remarks indicate that, in an appropriate case, failure to observe these minimum guarantees could render execution a violation of Article 5 of the Charter. As the facts disclosed in the Commission’s decision do not indicate that any such opportunity was provided to the convicted person between the dismissal of her appeal (on 30 January 2001) and her execution (on 31 March 2001), it appears that the facts in this particular case in fact constituted a violation on this ground. Rather than declining to rule on this issue, the Commission should have given the Respondent State an opportunity to prepare arguments. It is regrettable that the undue haste which characterised the handling of the case at the domestic level continued at the international level.

In other cases, however, the Commission has recognised and applied due process guarantees as limitations on the use of capital punishment under the African Charter. Thus, the imposition of capital punishment in breach of the due process guarantees in the Charter constitutes a violation of the right to life, and arguably a violation of the prohibition against torture.<sup>128</sup>

#### **f. Judicial Corporal Punishment**

In *Curtis Francis Doebbler v. Sudan*, eight female students of the Ahlia University in Sudan were convicted of infraction of a public order and sentenced 25 to 40 lashes, to be publicly inflicted on their bare backs. The lashes were administered with a wire and plastic whip that left permanent scars on the women. The instrument used was not clean, and no doctor was present to supervise the execution of the punishment. The students alleged that the lashings were

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126 *Ibid.*, para. 41.

127 *Guerra v. Baptiste*, United Kingdom Privy Council, (1996) Appeal Cases, 397, 418.

128 *Ken Saro-Wiwa, Jr.*, *supra* note 101, para. 78.

humiliating and incompatible with the high degree of respect to women accorded by Sudanese society.<sup>129</sup> The Commission held that

there is no right for individuals, and particularly, the government of a country, to apply physical violence to individuals for minor offences. Such a right would be tantamount to sanctioning State-sponsored torture under the Charter and contrary the very nature of this human rights treaty.<sup>130</sup>

### **g. Other Forms of Punishment**

In a number of African countries, Shari'a penal laws apply. This system of law allows the stoning of a married person convicted of adultery, and of an unmarried person engaging in extra-martial sexual intercourse. For offences such as theft, the penalty is amputation of a person's hand. These forms of punishment were raised in *INTERIGHTS (on behalf of Safiya Yakubu Husaini et al v. Nigeria)*<sup>131</sup> for example, but did not in that instance lead to a finding of a violation, as the case was withdrawn. In an appropriate case, the Commission is – based on its general approach – likely to find that Article 5 of the Charter is violated.

### **h. Procedural and Judicial Safeguards**

The Fair Trial<sup>132</sup> and Robben Island Guidelines<sup>133</sup> emphasise the interrelatedness of procedural safeguards and the right to be free from torture and other forms of ill-treatment. In its case-law, the Commission has held that the deprivation of procedural safeguards, for example, detention without charges, constitutes an 'arbitrary deprivation of liberty' and therefore violates Article 6.<sup>134</sup>

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129 Communication 236/2000, *Curtis Francis Doebbler v. Sudan*, Sixteenth Activity Report, (2003) AHRLR 153 (ACHPR 2003), paras. 42-44.

130 *Ibid.*, para. 55.

131 Communication 269/2003, *INTERIGHTS (on behalf of Safiya Yakubu Husaini and Others) v. Nigeria*, Twentieth Activity Report.

132 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, ACHPR /Res.41(XXVI) 99 (1999) [hereinafter 'Fair Trial Guidelines'].

133 Robben Island Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa, Sixteenth Activity Report, Annex VI 33, ACHPR /Res.61(XXXII) 02 (2002) [hereinafter 'Robben Island Guidelines'], included as Annex 4 to this volume.

134 Communication 102/93, *Constitutional Rights Project and Another v. Nigeria*, Twelfth Activity Report, (2000) AHRLR 191 (ACHPR 1998), para. 55.

In *Zegveld and Ephrem v. Eritrea*,<sup>135</sup> the Commission found a violation of Article 6 and observed that all detained persons ‘must have prompt access to a lawyer and to their families’, and ‘their rights with regards to physical and mental health must be protected’.<sup>136</sup> The Commission adds that the lawfulness of detention must be determined by a court of law ‘or other appropriate judicial authority’, and it should be possible to challenge the grounds that justify prolonged detention on a periodic basis. These observations amount to a requirement that domestic law should allow for *habeas corpus* or similar proceedings. Suspects should be charged and tried ‘promptly’, and States should comply with the fair trial standards set out in the Fair Trial Guidelines.<sup>137</sup> In this case, the Commission found a violation of Article 7(1), which encompasses various elements of the right to have one’s case heard.

An important procedural safeguard is a procedure to ensure that the legality of detention may be reviewed in *habeas corpus* or similar proceedings. In cases involving torture or similar violations of physical integrity, the best evidence is nearly always the body of the victim. This is why *habeas corpus* is often an effective remedy. Denial of the right to *habeas corpus* procedures thus triggers an exception to the requirement of exhaustion of domestic remedies.<sup>138</sup> In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, the Commission was, however, equivocal on the exact consequences of a denial of the right to *habeas corpus* procedures in terms of State responsibility under the Charter. In this case it was established that the Nigerian Government had denied certain detained journalists the right of access to *habeas corpus* through the use of ouster clauses. In reasoning that is not remarkable for its clarity, the Commission concluded that ‘deprivation of the right of *habeas corpus* alone does not automatically violate Article 6 (personal liberty)’.<sup>139</sup> The Commission did find that detention without trial or charge is contrary to Article 6. However, concerning *habeas corpus*, it argued that the real question must be ‘whether the right of *habeas corpus*, as it has developed in the common law systems, is a necessary corollary to the protection in Article 6 and whether its suspension thus violates this Article’.<sup>140</sup> The

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135 Communication 250/2002, *Zegveld and Ephrem v. Eritrea*, Seventeenth Activity Report [hereinafter ‘*Zegveld and Ephrem*’].

136 *Ibid.*, para. 55.

137 *Ibid.*, para. 56.

138 Communication 153/96, *Constitutional Rights Project v. Nigeria*, Thirteenth Activity Report, (2000) AHRLR 248 (ACHPR 1999), para. 10.

139 *Ibid.*, para. 24.

140 *Ibid.*, para. 25.

Commission's decision disappointingly declines to answer this question. However, it appears to answer it in the affirmative in another decision,<sup>141</sup> and, in yet another case, the Commission finds in any event that the denial of the right to *habeas corpus* violates the right to be heard under Article 7(1)(a).<sup>142</sup>

The Commission elaborated on the prohibition against torture and safeguards against the arbitrary deprivation of life in the *Sudan* cases<sup>143</sup> and *Mauritania* cases.<sup>144</sup> In the *Sudan* cases, the alleged acts of torture included forcing detainees to lie on the floor, soaking them with cold water, confining groups of four detainees in cells measuring 1.8 metres in floor space by one metre in height, deliberately flooding the cells and frequently banging on the doors so as to prevent detainees from lying down, mock executions and prohibiting detainees from bathing or washing. Other acts of torture included burning detainees with cigarettes, binding them with ropes to cut off blood circulation to parts of the body, beating them severely with sticks to the point of severe laceration then treating the wounds with acid.<sup>145</sup> Finding violations of Article 5, the Commission stated the following:

Since the acts of torture alleged have not been refuted or explained by the Government, the Commission finds that such acts illustrate, jointly and severally, government responsibility for violations of the provisions of Article 5 of the African Charter.<sup>146</sup>

Allegations of torture made in the *Mauritania* cases included housing detainees in small, dark, underground cells, forcing them to sleep on cold floors in the desert winter at night, starving prisoners deliberately, denying them access to medical care, plunging their heads in water until they lapsed into unconsciousness, spraying their eyes with pepper and administering high voltage electric current to their genitalia. The security agents also burnt detainees and buried them in the sand of the desert to die a slow death, routinely beat them and raped female prisoners.<sup>147</sup> The Commission found that these acts constituted a violation of Article 5.<sup>148</sup>

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141 Communication 205/97, *Kazeem Aminu v. Nigeria*, Thirteenth Activity Report, (2000) AHRLR 258 (ACHPR 2000), para.21.

142 *Constitutional Rights Project v. Nigeria*, *supra* note 138, para. 18.

143 The *Sudan* cases, *supra* note 28.

144 The *Mauritania* cases, *supra* note 28.

145 *Ibid.*, para. 5.

146 *Ibid.*, para. 57.

147 *Ibid.*, paras. 115-117.

148 *Ibid.*, para. 118.



The Government did not produce any argument to counter these facts. Taken together or in isolation, these acts are proof of widespread utilization of torture and of cruel, inhuman and degrading forms of treatment and constitute a violation of Article 5. The fact that prisoners were left to die slow deaths (para.10) equally constitutes cruel, inhuman and degrading forms of treatment prohibited by Article 5 of the Charter.

In both cases, the Commission also decided that deaths resulting from acts of torture or executions following trials conducted in breach of the Article 7 due process guarantees violated the prohibition against arbitrary deprivation of life in Article 4 of the Charter.

Where conduct constituting a violation of Article 4 or 5 occurs, the State is obliged to investigate it independently and to ensure appropriate punishment for those implicated. In the *Sudan* cases, the Commission found that ‘prisoners were executed after summary and arbitrary trials and that unarmed civilians were also victims of extra-judicial executions’.<sup>149</sup> Noting that the Government had provided ‘no specific information on the said executions’, the Commission continued:

In addition to the individuals named in the communications, there are thousands of other executions in Sudan. Even if these are not all the work of forces of the Government, the Government has a responsibility to protect all people residing under its jurisdiction (see ACHPR/74/91:93, *Union des Jeunes Avocats v. Chad*). Even if Sudan is going through a civil war, civilians in areas of strife are especially vulnerable and the State must take all possible measures to ensure that they are treated in accordance with international humanitarian law. The investigations undertaken by the Government are a positive step, but their scope and depth fall short of what is required to prevent and punish extra-judicial executions. Investigations must be carried out by entirely independent individuals, provided with the necessary resources, and their findings should be made public and prosecutions initiated in accordance with the information uncovered. Constituting a commission of the District Prosecutor and police and security officials, as was the case in the 1987 Commission of Enquiry set up by the Governor of South Darfur, overlooks the possibility that police and security forces may be implicated in the very massacres they are charged to investigate. The commission of enquiry, in the Commission’s view, by its very composition, does not provide the required guarantees of impartiality and independence.

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149 The *Sudan* cases, *supra* note 28, para. 48; see also, the *Mauritania* cases, *supra* note 28, para. 119.

The Commission further ruled that the fact that a legal process precedes punishment does not preclude the obligation to respect the rights to life and human dignity. Where legal process violates the Charter, punishment resulting therefrom is also in violation of the Charter. In the *Sudan* cases, the Commission determined that the execution of 28 army officers following their trial was unlawful because the right to counsel under Article 7 was also violated.<sup>150</sup>

The *Sudan* communications alleged that the 28 officers executed on 24 April 1990 were allowed no legal representation. The Government stated that its national legislation permits the accused to be assisted in his or her defence by a legal advisor or any other person of his or her choice. Before the Special Courts the accused has the right to be defended by a friend, subject to Court approval. The Government argued that the court procedures were strictly followed in the case of these officers. Based on contradiction of testimony between the Government and the complainant, the Commission concluded that in the case of the 28 executed army officers basic standards of fair trial were not met.<sup>151</sup> Indeed, the Sudanese Government gave the Commission no convincing reply as to the fair nature of the cases that resulted in the execution of the 28 officers. The Commission deemed insufficient the Government's statement that the executions were carried out in conformity with its internal legislation. The Government should instead provide proof that its laws are in accordance with the provisions of the African Charter, and that in the conduct of the trials the accused's right to defence was scrupulously respected.<sup>152</sup>

### **i. *Refoulement* and forced displacement**

Article 5 of the Charter also obliges States Parties to refrain from returning refugees to a place where they may be subject to torture, cruel, inhuman and degrading treatment. The State is obliged to comply strictly with due process norms before removing refugees or persons seeking protection as refugees.<sup>153</sup> The African Commission has thus held the due process guarantees in Article 7 of the African Charter to be applicable to the involuntary removal of a person from his State of residence or host State.<sup>154</sup> The Commission has elaborated

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150 The *Sudan* cases, *supra* note 28, paras. 65-66.

151 *Ibid.*

152 See, *Ken Saro-Wiwa, Jr.*, *supra* note 101, paras. 101-103.

153 *OMCT et al. v. Rwanda*, *supra* note 91, para. 34.

154 *Ibid.*

that the right of the individual in Article 7 includes a State duty to establish structures to enable the exercise of this right.<sup>155</sup> This implies a State duty to extend legal and other material assistance to persons seeking refuge within the State's territory and persons undergoing procedures of removal from its territory. Thus, collective expulsion of non-nationals is prohibited under the Charter as a violation of the right to respect for human dignity and the right to due process.<sup>156</sup>

In addition, Article 12(3) of the Charter provides that 'every individual shall have the right when persecuted to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions'. The prohibition of *refoulement*, as part of general international law, is read into the Charter on the basis of this provision and of Article 5.

Furthermore, the Charter guarantees 'national and international peace and security' as a right of peoples.<sup>157</sup> The African Commission has interpreted this provision to include State 'responsibility for protection' of nationals.<sup>158</sup> In *Commission Nationale des Droits de l'Homme*,<sup>159</sup> the Commission concluded that Article 23(1) included a duty on States to provide security and stability to the inhabitants of their territories, including victims of forced displacement. This makes the Charter provisions on human dignity relevant even in situations of forced displacement.<sup>160</sup>

## j. Incommunicado Detention

In September 2001, eleven former members of the Eritrean Government who had openly expressed their criticism of government policies in an open letter were arrested and detained *incommunicado* without charges. Their whereabouts were unknown, and they had no access to their lawyers and families. In a communication brought on their behalf, *Zegveld and Eprhem*, the Com-

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155 Communication 87/93, *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v. Nigeria*, Eighth Activity Report, (2000) AHRLR 183 (ACHPR 1995), reprinted in (1996) 3 *International Human Rights Reports* 137, [hereinafter '*Lekwot*'].

156 African Charter, *supra* note 9, art. 12(5); *Modise* case, *supra* note 31.

157 African Charter, *supra* note 9, art. 23(1).

158 The *Mauritania* cases, *supra* note 28, para. 138.

159 *Commission Nationale des Droits de l'Homme* case, *supra* note 28, para. 22.

160 Cf., *Elmi v. Australia*, Committee against Torture, Twenty-second Session, U.N. Doc. CAT/C/22/D/120/1998 (25 May 1999), available at <<http://unbisnet.un.org/webpacbin/wgbroker?1106184915075418274+1+scan+select+1+0>>.

mission found a violation of, amongst other provisions, the Article 6 right to liberty and security of the person and the right not to be arbitrarily detained. In its reasoning, the Commission describes *incommunicado* detention as ‘a gross human rights violation that can lead to other violations such as torture and ill-treatment’.<sup>161</sup> In other words, *incommunicado* detention as such is a violation of Article 6, and it may also lead to a violation of other provisions, such as Article 5. The Commission adds, however, that *incommunicado* detention, of itself, may constitute cruel, inhuman or degrading treatment or punishment if it is ‘prolonged’ and entails ‘solitary confinement’.<sup>162</sup> Given this pronouncement, it is surprising that the Commission did not find a violation of Article 5, as the period of *incommunicado* detention already totalled more than two years (from September 2001 to November 2003, the date of the Commission’s finding). It is difficult to conceive of a definition of ‘prolonged detention’ that would not apply to the facts in this case, but the Commission’s finding did not explicitly address this point.

In the course of its decision, the Commission also stated that there should be no ‘secret detentions’ and that ‘States must disclose the fact that someone is being detained as well as the place of detention’.<sup>163</sup>

## **VII. Substantive Norms under Other African Human Rights Treaties**

### **1. The Prohibition of Torture in the African Charter on the Rights and Welfare of the Child**

The prohibition of torture in the African Charter on the Rights and Welfare of the Child (African Children’s Rights Charter) is founded on the recognition that the development of the child into a balanced adult ‘requires legal protection in conditions of freedom, dignity and security’.<sup>164</sup>

In addressing the problem of torture relevant to children in Africa, the African Children’s Rights Charter identifies five specific aspects of the prohibition

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161 *Zegveld and Ephrem, supra* note 135, para. 55.

162 *Ibid.*

163 *Ibid.*

164 African Children’s Rights Charter, *supra* note 22, Preamble. Note also that the African Children’s Rights Charter defines a child as a person under the age of 18. *Ibid.*, art. 2.

against torture, namely: traditional practices, protection against child labour, the protection of children from abuse and violence, due process protection and the protection of children in armed conflict or other situations of forced displacement. The Charter requires States to discourage customary, cultural or religious practices inconsistent with the human rights of children.<sup>165</sup> The Charter defines such practices to include those that are ‘prejudicial to the health or life of the child’ or discriminatory to the child on grounds of gender.<sup>166</sup> In this context, the African Children’s Rights Charter prohibits the betrothal of both male and female children and prescribes 18 years as the age of marital consent.<sup>167</sup> It is clear from these and other provisions described below, that the prohibition of torture and cruel, inhuman or degrading treatment is not limited to acts committed by State agents; the African Children’s Rights Charter includes provisions that address torture and other ill-treatment of children as committed by non-State actors.<sup>168</sup>

The range of measures that a State may take to discourage harmful practices become clearer on reading those provisions of the African Children’s Rights Charter that deal with child labour and child protection. These provisions require States Parties to take legislative and administrative measures, including the use of criminal sanctions and public education and information,<sup>169</sup> to protect children against ‘all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral, or social development’.<sup>170</sup>

Similarly, the African Children’s Rights Charter requires States to take ‘legislative, administrative, social and educational measures’ to protect children from torture, inhuman and degrading treatment.<sup>171</sup> The African Children’s Rights Charter emphasises the prohibition of ‘physical or mental injury or abuse, neglect or maltreatment, including sexual abuse’ of children.<sup>172</sup> Measures of protection for the purposes of the Charter include:<sup>173</sup>

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165 *Ibid.*, art. 1(3).

166 *Ibid.*, arts. 21 (1)(a)-(b).

167 *Ibid.*, art. 21(2).

168 *Ibid.*, arts. 1(3), 10, 15, 16, 19(1), 20-21.

169 *Ibid.*, arts. 15(2)(c)-(d).

170 *Ibid.*, art. 15(1).

171 *Ibid.*, art. 16(1)

172 *Ibid.*

173 *Ibid.*, art. 16(2).

effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child abuse and neglect.

Turning to due process protections related to torture and abuse of children, the African Children's Rights Charter prohibits the application of capital punishment to children<sup>174</sup> and the torture or ill-treatment of children deprived of their liberty.<sup>175</sup> The Charter specifically requires that children deprived of their liberty are separated from adults in their place of detention or imprisonment<sup>176</sup> and requires States Parties to establish a minimum age below which children shall be presumed to lack the capacity to violate the domestic penal laws.<sup>177</sup>

In situations of armed conflict, including internal armed conflict,<sup>178</sup> States Parties to the African Children's Rights Charter agree to respect international humanitarian law norms affecting the child, including the prohibition of the use of children in direct hostilities or the recruitment of children as soldiers.<sup>179</sup> The Charter also extends the protection of all international refugee conventions to child refugees and, with necessary modifications, to children living in situations of internal displacement.<sup>180</sup> This means, for instance, that children cannot be returned or transferred to foreign territories, or to internal regions, where they may suffer or be exposed to torture, inhuman or degrading treatment, punishment, abuse or neglect. As was mentioned above, the monitoring mechanism of this treaty, the African Children's Rights Committee, has not yet expounded on any of these provisions in concrete cases.

## **2. The Prohibition of Torture in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

Like the African Children's Rights Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('African

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174 *Ibid.*, art. 5(3).

175 *Ibid.*, art. 17(2).

176 *Ibid.*, art. 17(2)(b).

177 *Ibid.*, art. 17(4).

178 *Ibid.*, art. 22(3).

179 *Ibid.*, arts. 22(1)-(2).

180 *Ibid.*, art. 23(1) and (4).

Women's Rights Protocol') complements Article 5 of the African Charter on Human and Peoples' Rights by addressing aspects of the prohibition of torture that are specific to women, in particular, the right to dignity, the prohibition of harmful traditional practices and violence against women. The Protocol defines harmful traditional practices as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.<sup>181</sup> Violence against women is defined by the Protocol as follows:

Acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations or armed conflicts or of war.<sup>182</sup>

This definition makes clear that under this Protocol, the prohibition against torture may encompass treatment inflicted by State actors as well as non-State entities. The Protocol prohibits harmful traditional practices and violence against women and requires States Parties to prohibit, prevent, punish and eradicate them.<sup>183</sup> The Protocol assures the dignity of women and requires States Parties to adopt 'appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence'.<sup>184</sup> Such measures may include legislative, administrative, social, educational, or economic measures, criminal prosecution and sanctions, services for rehabilitation and treatment of victims, budgetary provisions for expansion of social services or other policy measures.<sup>185</sup>

In situations of armed conflict, including internal armed conflict, States Parties to the African Women's Rights Protocol agree thereunder to respect international humanitarian law applicable to the protection of women from prohibited forms of violence, including sexual violence, rape and other forms of sexual exploitation as instruments of war. Such acts are recognized as war crimes or crimes against humanity under the Protocol.<sup>186</sup> These provisions are yet to be clarified in the context of communications presented to either the African Commission or the African Human Rights Court.

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181 African Women's Rights Protocol, *supra* note 22, art. 1.

182 *Ibid.*

183 *Ibid.*, arts. 4-5.

184 *Ibid.*, art. 3(4).

185 *Ibid.*, art. 4.

186 *Ibid.*, art. 11.

