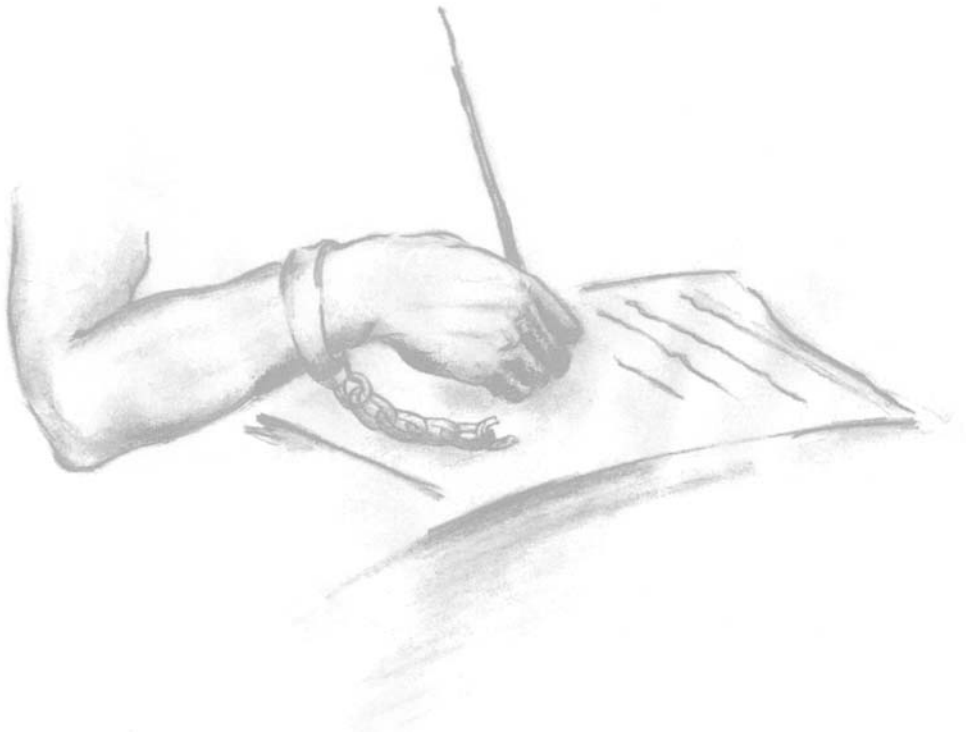


## **PART C**

### **PROTECTION AGAINST TORTURE: PROCEDURES BEFORE THE AFRICAN COMMISSION AND AFRICAN HUMAN RIGHTS COURT**



## VIII. Individual Communications

Allegations of torture and ill-treatment in violation of the African Charter or the African Women's Rights Protocol may be brought by way of an individual communication or an inter-State communication. Given the remote likelihood of frequent inter-State communications, the spotlight falls on the individual communications procedure, which has often been used. When a significant number of similar communications have been submitted against a State, the Commission may conduct a protective (or 'on-site') mission in that State.

### 1. Overview

Article 56 of the African Charter and Chapter 17 of the Commission's Rules of Procedure lay out the essential components of an individual petition before the African Commission system. Any person may initiate a communication before the Commission. The author need not be a lawyer or the victim. Authors or victims may engage lawyers to assist them, but this is not mandatory. Unlike the procedure before the United Nations Human Rights Committee the hearing and consideration of communications under the African Commission system is not exclusively in writing.<sup>187</sup> The Commission often hears oral arguments and may also hear the testimony of witnesses and victims. A communication must contain the following:

- (a) the name, address or other contact information, age and profession of the author; the author may, however, request anonymity;
- (b) the name of the State Party against whom the communication is filed;
- (c) provisions of the Charter allegedly violated;
- (d) a factual description of the events or incidents on which the complaint is founded, including, as applicable, dates, locations, persons or institutions involved;
- (e) any injuries or other consequences of the acts complained of, with proof where applicable;

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<sup>187</sup> See, First Optional Protocol to the International Covenant on Civil and Political Rights, adopted 16 Dec. 1996, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966), 999 UNTS 302.

- (f) measures taken by the author to exhaust local remedies, or an explanation as to why local remedies will be futile; and
- (g) the extent to which the same issue has been settled by another international investigation or settlement body.<sup>188</sup>

There is no limit on the length of a communication, but brevity and clarity are considered advantageous. The Commission can receive and process communications in English or French. Communications or supporting documents in other languages must be translated into either French or English, at the author's expense. The communication should be sent to the Commission's Secretariat in Banjul, The Gambia, in hard copy or by e-mail.<sup>189</sup> When it receives the communication, the Commission's Secretariat will assign a number to it and open a file. The file is first reviewed by the Commission's Secretariat to ensure that the case is suitable to be considered by the Commission. The Commission, for instance, will not receive cases against individuals, non-African States, or African States not parties to the African Charter.

If the case passes this largely *pro-forma* phase of acceptance, it goes forward for a decision on admissibility. At this stage, the Commission determines whether the author meets the conditions for admissibility contained in Article 56 of the Charter. These are considered more extensively below. A complainant or counsel may ask to be heard by the Commission at the admissibility phase.

The consideration of a communication ends if the Commission finds it inadmissible. If, however, the Commission finds the communication admissible, it proceeds to consider it on the merits. The Commission usually so notifies the parties. Through hearing notices issued by its Secretariat, the Commission invites the parties to attend and present their arguments at a hearing, alone or through counsel, if they so choose. The Commission would normally issue a decision at the end of this process, which is made public after it has been transmitted to and adopted by the AU Assembly of Heads of State and Government as part of the Commission's Activity Report.

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188 Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted 6 Oct. 1995, reproduced in 18 *Hum. Rts. L. J.* 154-63 (1997), Rule 104(1) [hereinafter 'Commission Rules of Procedure'].

189 For additional guidance in submitting an individual communication, refer to the example communication in Annex 2, as well as the communication form available at <<http://www.chr.up.ac.za/pulp/compendium/9%20-%20Communication%20form.pdf>>.

An author may supplement the communication at any time during the process. However, the Commission is obliged to bring each supplementary submission to the attention of the State against which the complaint is brought; the State will be entitled to a period of three months to respond to the contents. Supplementary submissions inordinately prolong the consideration of communications. They are, therefore, to be avoided unless absolutely essential to the success of the case.

## 2. Choice of Forum

A critical decision to be made before instituting any complaint or communication is the choice of forum. Many States Parties to the African Commission mechanism are also subject to many other mechanisms of international human rights supervision, such as the UN Human Rights Committee,<sup>190</sup> and, less extensively in Africa, the UN Committee Against Torture.<sup>191</sup> Rooted in African soil, but not yet fully operational, is the Committee of Experts on the Rights and Welfare of the Child established under the African Children's Rights Charter. When the torture or ill-treatment of a child is alleged, either the African Commission or the African Children's Rights Committee may in principle be approached.

A complainant may thus be faced with a decision about which forum to approach. Article 56(7) stipulates that complaints should not have been 'settled by the States involved in accordance with the UN Charter, the African Charter and the AU Constitutive Act. Rule 104(1)(g) of the Commission's Rules of Procedure further obliges the Secretariat of the Commission to clarify in any case 'the extent to which the same issue has been settled by another international investigation or settlement body'. In other words, communications may be addressed to two or more bodies simultaneously, but only if no human rights body has yet finalised ('settled') the matter.

Several factors may determine the choice of forum. These include requirements as to standing and access, the probable duration of the proceedings, the extent to which domestic remedies have been exhausted, the case strategy, the resources available to the author and the legal questions at issue. The African

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190 Under the First Optional Protocol to the ICCPR, *supra* note 187. Approximately 32 African States have accepted the competence of the Human Rights Committee.

191 Under Article 22 of the Convention against Torture, *supra* note 69.

Commission would be preferred, for instance, if the party instituting the case is not necessarily the victim or acting on the instruction of the victim. This does not necessarily mean that victims do not go to the African Commission in their own name or will not be successful before it. Rather, it is because standing requirements are much more generous under the African Charter than under many other international instruments. The African Commission has also been proven more accessible than the Human Rights Committee and the Committee Against Torture,<sup>192</sup> for example, in allowing exceptions to the rule requiring exhaustion of domestic remedies. Therefore, parties who have not exhausted domestic remedies or wish to argue for exemption from that rule may have a better chance of success before the African Commission.

The African Commission may conduct oral proceedings to hear arguments and live testimony. Respondent States are increasingly represented by their own lawyers and diplomatic agents at these hearings. A live hearing provides an opportunity to engage the respondent State in resolving the issues but may also be expensive and time-consuming because of travel and associated costs. By contrast, the proceedings before the UN human rights bodies are conducted exclusively in writing, which is more affordable and time-efficient.

The African Commission clearly has a more extensive set of rights guarantees than the other systems of human rights supervision to which African States subscribe, and parties seeking pronouncements on more than civil and political rights may find it more adapted to a flexible case strategy. Ultimately, parties seeking to introduce a human rights complaint will be guided by their prospects for success and full remedies.

### 3. *Locus Standi*

Before the issue of admissibility is considered, it must be determined whether a complainant has standing (*locus standi*) to bring a complaint. Under the African Charter, standing is not explicitly dealt with. However, the Commission has adopted a very broad approach, extending access to both victims and NGOs. Unlike the UN Human Rights Committee or the European Convention system, any person may initiate a communication in the African system. The authors need not be victims, their families or persons authorised

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192 The UN Committee Against Torture monitors State compliance with the Convention Against Torture. *Ibid.*, Part II.

by them.<sup>193</sup> In *Baes v. Zaire*,<sup>194</sup> for example, a Danish national submitted a communication in respect of the illegal detention of one of her colleagues at the University of Kinshasa, where she was working at the time. Nor do authors need to be citizens or residents of a State Party to the Charter, nor resident or located in any AU Member State. Any ‘person’ may submit a communication, whether individual or corporate. NGOs need not enjoy observer status with the Commission to be granted standing to submit a communication.

*Locus standi* before the African Human Rights Court is distinctly different in relation to contentious cases (those involving disputes about alleged violations) and advisory opinions. Under the African Human Rights Court Protocol, the following entities may institute contentious cases before the Court:<sup>195</sup>

- a) the African Commission;
- b) a State Party in a case in which it was a Complainant before the Commission;
- c) a State Party in a case in which it was a Respondent before the Commission;
- d) a State Party whose citizen has been a victim of human rights violations;
- e) African inter-governmental organizations.

In addition, the Court may also directly receive cases initiated by NGOs enjoying observer status with the African Commission against a State that has made a declaration under Article 34(6) of the Protocol recognizing the competence of the Court to consider such communications.<sup>196</sup> This provision is particularly relevant to cases of torture because it provides a mechanism of speedy judicial relief. Of the ratifying States, only Burkina Faso and Mali have made this declaration as of September 2006.

However, the usual route to the Court is through the Commission. Most individual communications therefore still must be submitted to the Commission. After the Commission has decided the case, the individual has no standing to

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193 Communication 25/89 (1997), *Organisation Mondiale Contre la Torture et al. v. Zaire* (Merits), reprinted in (1997) 4 *International Human Rights Reports* 89, 92.

194 Communication 31/89, *Baes v. Zaire*, Eighth Activity Report, (2000) AHRLR 72 (ACHPR 1995).

195 African Human Rights Court Protocol, *supra* note 22, art. 5(1).

196 *Ibid.*, arts. 5(3), 34(6).

submit the case to the Court. Only the Commission may forward it to the Court. The Court's and the Commission's revised Rules of Procedure are expected to set forth this procedure. Although States may also submit cases to the Court, they are likely to refrain from doing so in order to avoid negative publicity or legally binding negative decisions.

Like the African Commission before it, the African Human Rights Court also has an advisory jurisdiction, in terms adapted from Article 45(3) of the African Charter.<sup>197</sup> Advisory opinions may be requested by the following: any AU Member State, any AU organ and 'any African organisation recognised by the AU'. The latter category includes NGOs that enjoy observer status with the Commission.

#### 4. Admissibility

Communications may be initiated by a communication addressed to the Secretariat of the African Commission, located in Banjul, The Gambia. A communication is a written document alleging breaches of the African Charter by a State Party. To be considered by the Commission, a communication must fulfil the admissibility requirements contained in Article 56 of the Charter. These requirements are cumulative, meaning that they must all be satisfied for the communication to be declared admissible by the Commission.

The Court's admissibility requirements are similar to those of the Commission.<sup>198</sup> The relevant admissibility procedures before the Court and the Commission remain to be harmonised in the Rules of the two bodies. In practice, although it is empowered to do so, it is unlikely that the Court will reopen the admissibility of cases which the African Commission has previously decided on the merits. However, the Court will be able to exercise original admissibility jurisdiction under Article 6(2) of the African Court Protocol in those exceptional cases which may be initiated by NGOs under Article 5(3) of the Protocol; however such cases may only be brought against States that have recognised the Court's jurisdiction under Article 34(6) of the Protocol.

The Commission's admissibility requirements under Article 56 are now examined in turn.

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<sup>197</sup> *Ibid.*, art. 4.

<sup>198</sup> African Charter, *supra* note 9, art. 56(1)-(7); African Human Rights Court Protocol, *supra* note 22, art. 6.

**a. Communications Must Disclose Authors and Their Contact Information**<sup>199</sup>

Communications should indicate the name and addresses of the complainants (or ‘authors’). Authors of communications who fulfil this requirement may, nevertheless, request the Commission to preserve their anonymity with respect to the respondent State.<sup>200</sup> There is no requirement under the Charter or the relevant case-law that cases be brought only by neutral persons or organisations.<sup>201</sup>

**b. Violations Alleged Must Have Occurred After Ratification of the Charter**

The Commission may only consider allegations of violations that occurred after the respondent State ratified or acceded to the Charter. Where the violations alleged began before the ratification, the complaint may nevertheless be admissible if the violations substantially continued since then.<sup>202</sup> For instance, in the *Modise* case<sup>203</sup> the facts of the communication began in about 1977, long before the adoption of the African Charter. The author, a Botswana national who was stripped of his nationality for political reasons, was convicted of illegally entering Botswana. He filed an appeal in 1978, which disappeared and was never heard. He initiated a case before the Commission in 1993 and argued at the admissibility phase that the facts constituted a continuing violation. The Commission agreed on the ground that the State had repeatedly interrupted the legal process through repeated summary deportations of the author.

**c. Communications Must Be Compatible with the AU Constitutive Act and the African Charter**<sup>204</sup>

There are three elements of the requirement of compatibility with the Constitutive Act of the African Union and the African Charter. First, compatibility requires that a communication may only be brought against a State that

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199 African Charter, *supra* note 9, art. 56(1).

200 *Ibid.* See in this regard Communication 283/2003, *B v. Kenya*, Seventeenth Activity Report (ACHPR).

201 Communication 233/99, *INTERIGHTS (on behalf of the Pan African Movement and Citizens for Peace in Eritrea) v. Ethiopia*; Communication 234/99; *INTERIGHTS (on behalf of the Pan African Movement and Inter-Africa Group) v. Eritrea*, Sixteenth Activity Report, (2003) AHRLR 74 (ACHPR 2003), para. 47.

202 See Communication 59/91, *Emgba Louis Mekongo v. Cameroon*, Eighth Activity Report, (2000) AHRLR 56 (ACHPR 1995); The *Modise* case, *supra* note 31.

203 The *Modise* case, *supra* note 31.

204 African Charter, *supra* note 9, art. 56(2).



is party to both the African Charter and the AU Constitutive Act. Communications may not be initiated against a non-African State or against an African State that is not party to both instruments. In respect of the former, the Commission has dismissed as ‘irreceivable’ communications brought against such non-African States as Bahrain, Yugoslavia and USA.<sup>205</sup> The Commission has similarly declared ‘irreceivable’ communications brought against African States who were not parties to the Charter.<sup>206</sup> A communication would similarly be incompatible with both the Constitutive Act and the African Charter if it is brought against an entity that is not a State, such as an individual,<sup>207</sup> or if it does not identify a recognisable adverse party.<sup>208</sup>

Second, a communication would be inadmissible on this ground if it requests a remedy that is incompatible with the territorial integrity of one or more States Parties to the Charter. Thus the Commission dismissed as inadmissible a communication that requested it to recognise the Katangese people’s entitlement to secede from the Democratic Republic of the Congo.<sup>209</sup>

Third, a communication must allege violations of rights recognised by the Charter. In doing this, the complaint does not necessarily have to name specific articles or provisions of the Charter. It is enough if the facts alleged would violate any of the substantive rights recognised by the African Charter. If the allegations contained in the communication do not contain such allegations, the communication is deemed to be incompatible with the African Charter. Thus, for instance, in *Frederick Korvah v. Liberia*,<sup>210</sup> the author alleged ‘lack of discipline in the Liberian security police, corruption, immorality of the Liberian people generally, a national security risk caused by US financial experts, and that other countries are supporting South Africa and her apartheid

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205 See Communication 2/88, *Iheanyichukwu Ihebereme v. USA*, Seventh Activity Report (ACHPR); Communication 3/88, *Centre for Independence of Judges & Lawyers v. Yugoslavia*, Seventh Activity Report (ACHPR); Communication 5/88, *Prince J.N. Makoge v. USA*, Seventh Activity Report (ACHPR); Communication 7/88, *Committee for the Defence of Political Prisoners v. Bahrain*, Seventh Activity Report (ACHPR).

206 Communication 1/88, *Frederick Korvah v. Liberia*, Seventh Activity Report, (2000) AHRLR 140 (ACHPR 1998).

207 Communication 12/188, *Mohammed El-Nekheily v OAU*, Seventh Activity Report (ACHPR). The communication in this case was initiated against then Secretary-General of the OAU, Ide Oumarou.

208 Communication 34/88, *Omar M. Korah Jay* (ACHPR).

209 Communication 75/92, *Katangese Peoples’ Congress v. Zaire*, Eighth Activity Report, (2000) AHRLR 72 (ACHPR 1995), reprinted in (1996) 3 *International Human Rights Reports* 136.

210 *Frederick Korvah v. Liberia*, *supra* note 206.

regime'. The African Commission held that these allegations did not disclose any violations of the Charter. Similarly, allegations such as, 'there is no justice in Algeria',<sup>211</sup> and the allegation that the withdrawal of Togolese support for former OAU Secretary-General Edem Kodjo's re-election was 'a *de-facto* stripping of his Togolese nationality',<sup>212</sup> have been declared inadmissible.

With the adoption of the African Women's Rights Protocol, the Commission will admit complaints alleging violations of the Protocol, even if the facts alleged do not reveal a violation of the Charter itself. The Court's substantive jurisdiction is wider, because the Protocol determines that the Court's jurisdiction covers the same area as the Commission as well as 'any relevant human rights instrument ratified by the States concerned'.<sup>213</sup> Article 5(3) authorises the Court to admit a case alleging violations of non-AU instruments, such as the Convention against Torture.

#### **d. The Language of the Communication Must not Be Insulting**

Article 56(3) of the African Charter prohibits communications written in 'disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity (African Union)'. The Charter does not precisely define 'insulting language'. In *Ligue Camerounaise des Droits de l'Homme v. Cameroon*,<sup>214</sup> the authors alleged serious and massive violations, including 46 distinct cases of torture and deprivation of food. They also alleged ethnically motivated persecution and massacres of civilian populations. Cameroon objected to the communication arguing that it contained abusive and insulting language directed against its President, Paul Biya. For example, the State objected to statements such as 'Paul Biya must respond to crimes against humanity', and phrases including: '30 years of the criminal, neocolonial regime incarnated by the duo Ahidjo/ Biya', 'regime of torturers' and 'government barbarisms'. The Commission sustained the objection by

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211 Communication 13/88, *Hadjali Mohamad v. Algeria*, Seventh Activity Report, (2000) AHRLR 15 (ACHPR 1994).

212 Communication 35/89, *Seyoum Ayele v. Togo*, Seventh Activity Report, (2000) AHRLR 315 (ACHPR 1994).

213 African Human Rights Court Protocol, *supra* note 22, art. 3(1).

214 Communication 65/92, *Ligue Camerounaise des Droits de l'Homme v. Cameroon*, Tenth Activity Report, (2000) AHRLR 61 (ACHPR 1997).

Cameroon and declared the Communication inadmissible. About this decision, it has been said that:<sup>215</sup>

This decision by the Commission cannot be criticized too strongly. It allows the States Parties to escape without having to respond to the substance of allegations made against them.... By their very nature, communications alleging human rights violations often are conveyed in strong language, usually indicating the strength of revulsion aroused by the violations described. Article 56(3) offers the States Parties an artifice for distraction, obfuscation and subterfuge.

As a safety precaution, it is advisable for authors to describe the acts constituting violations of rights and leave it to the Commission to make conclusions as to the gravity of the conduct or the depravity of the persons implicated.

#### **e. The Complaint Should not Be Based Exclusively on Media Reports**

Article 56(4) of the Charter lays down, as a condition for admissibility, the requirement that authors must ensure that their communications ‘are not based exclusively on news disseminated through the mass media’. The African Commission considered the import of this requirement for the first time in *Sir Dawda K. Jawara v. The Gambia*.<sup>216</sup> Among other objections to ex-President Jawara’s communication, the Government of the Gambia claimed that his communication was based on information from the news media. While acknowledging that it would be dangerous to rely exclusively on news disseminated by the media, the Commission reasoned:<sup>217</sup>

[I]t would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word “exclusively”. There is no doubt that the media remains the most important, if not the only source of information... The issue therefore should not be whether the information was gotten from the media, but whether the information is correct.

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215 C. A. Odinkalu, ‘The Individual Complaints Procedure of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment’ (1998) 8 *Transnational Law and Contemporary Problems* 359, 382.

216 Communications 147/95 and 149/96, *Sir Dawda K. Jawara v. The Gambia*, Thirteenth Activity Report, (2000) AHRLR 107 (ACHPR 2000) [hereinafter ‘*Sir Dawda K. Jawara*’].

217 *Ibid.*, paras. 24-26.

Effectively, the Commission in this case recognised the rationale underlying Article 56(4) but circumscribed its effect. This is particularly relevant to torture cases. By its very nature, torture is often difficult to prove. Physical injuries may in many cases not be visible, and even visible injuries may be explained in more than one way. Media reports may be instrumental in corroborating torture or its widespread use.

#### **f. Local Remedies Must First Be Exhausted<sup>218</sup>**

The Charter requires authors of communications to exhaust local remedies before resorting to the procedures of the African Commission ‘unless it is obvious that this procedure is unduly prolonged’.<sup>219</sup> The Commission has recognised that this provision implies and assumes the availability, effectiveness and sufficiency of domestic adjudication procedures. If local remedies are unduly prolonged, unavailable, ineffective or insufficient, the exhaustion rule will not bar consideration of the case.<sup>220</sup>

The mechanisms of the African Commission are not processes of first instance. They complement and reinforce national protection mechanisms. The principle of complementarity is the basis for the rule on exhaustion of domestic remedies, which is the cornerstone of the procedure for remedies under the African Charter.<sup>221</sup>

Only remedies of a ‘judicial’ nature need to be exhausted. For this reason, non-judicial bodies such as national human rights commissions, and discretionary executive relief such as ‘pardon’, are not considered ‘domestic remedies’. Normal judicial remedies that are in fact available, effective and sufficient need to be exhausted.<sup>222</sup> An author or complainant is not bound to exhaust remedies that are ‘neither adequate nor effective’.<sup>223</sup>

The African Commission will decline to receive a case as long as domestic remedies are available, effective and sufficient. According to the Commission,

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218 African Charter, *supra* note 9, art. 56(5).

219 *Ibid.* This is the most controversial and far-reaching of the admissibility requirements in the African Charter. See N. J. Udombana, ‘So Far, so Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights’, (2003) 97 *American Journal of International Law* 1.

220 *Sir Dawda K. Jawara*, *supra* note 216, paras. 31-32.

221 African Charter, *supra* note 9, art. 56(6).

222 *Sir Dawda K. Jawara*, *supra* note 216, para. 31.

223 The *Lekwot* case, *supra* note 155, para. 6.

‘a remedy is 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’.<sup>224</sup>

In *RADDHO v. Zambia*,<sup>225</sup> the Government of Zambia objected on grounds of non-exhaustion of domestic remedies to a case filed on behalf of several hundreds of West African nationals expelled *en masse* by Zambia. In dismissing Zambia’s objection and upholding the admissibility of the communication, the Commission reasoned that Article 56(5) of the Charter ‘does not mean... that complainants are required to exhaust any local remedy which is found to be, as a practical matter, unavailable or ineffective’.<sup>226</sup> The Commission pointed out that the victims and their families were collectively deported without regard to possible judicial challenge and concluded that the remedies referred to by the Respondent State were as a practical matter unavailable.<sup>227</sup>

These principles, in the jurisprudence of the Commission, extend to those cases where it is ‘impractical or undesirable’ for a victim or applicant to approach domestic courts.<sup>228</sup> This is applicable in many cases to victims of torture and forced displacement.

There are no effective remedies when a victim is denied access to an effective appeal. In the *Sudan* cases, the Commission described the right to an appeal as ‘a general and non-derogable principle of international law’.<sup>229</sup> The Commission defined an ‘effective appeal’ in the *Sudan* cases as one that ‘subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice’.<sup>230</sup> It held that domestic legislation in both Mauritania and Nigeria that permitted the executive the prerogative to confirm decisions of first instance tribunals, in lieu of a right of appeal, violated Article 7(1)(a).

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224 *Sir Dawda K. Jawara, supra* note 216, paras. 31-32.

225 Communication 71/92, *Rencontre Africaine pour la Defense des Droits de l’Homme (RADDHO) v. Zambia*, Tenth Activity Report, (2000) AHRLR 321 (ACHPR 1996), reprinted in 6 *International Human Rights Reports* 825 [hereinafter ‘the RADDHO case’].

226 *Ibid.*, para. 12.

227 *Ibid.*, para. 15.

228 *Organisation Mondiale Contre la Torture et al. v. Zaire, supra* note 193, para. 37.

229 The *Sudan* cases, *supra* note 28, para. 37.

230 *Ibid.*

The Commission has further distilled the exception where remedies are not ‘available, effective and sufficient’ to extend to situations where (1) domestic procedures are too costly, (2) the jurisdiction of the courts has been ‘ousted’ and (3) serious or massive violations are occurring.

First, in *Purohit and Moore*,<sup>231</sup> the Commission indicated that recourse to the African Charter guarantees must not be the preserve of the wealthy. It is of no use if a remedy exists in theory but cannot be accessed in the concrete circumstances of a given case by the specific complainants or victims. Persons who have been institutionalised on the ground of their mental incapacity are likely to be poor and unsophisticated. Because the limited legal aid under Gambian law does not in practice extend to them, the Commission found that the victims (and presumably also the complainants) were not required to exhaust local remedies.<sup>232</sup>

Second, the Commission considered the impact of ‘ouster’ clauses on the question of the unavailability of domestic remedies in three cases, against the Gambia,<sup>233</sup> Nigeria<sup>234</sup> and Sudan.<sup>235</sup> In these cases, the Commission considered the consequences of ouster clauses, which it defined as legislative provisions that ‘prevent the ordinary courts from taking up cases ... or from entertaining any appeals from the decisions of ... special tribunals’.<sup>236</sup> In all of these cases, the Commission held that the existence of such clauses precluded any need to exhaust domestic remedies. The Commission recognised that the rule requiring exhaustion of domestic remedies prevents it from acting as a court of first instance but reiterated that domestic remedies must be available, effective and sufficient. In each case, the Commission took the view that ouster clauses rendered domestic remedies both unavailable and non-existent.

Third, the Commission has taken the view that the rule concerning exhaustion of domestic remedies is dispensed with in cases of serious and massive viola-

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

232 *Ibid.*, paras. 37-38.

233 *Ibid.*

234 See the cases cited in notes 98 and 134, *supra*.

235 See the cases cited in note 28, *supra*.

236 Communications 140/94, 141/94, 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Thirteenth Activity Report, (2000) AHRLR 227 (ACHPR 1999) para. 28.

tions of human rights. Thus the Commission holds that it must read Article 56(5) in the light of its duty to:<sup>237</sup>

ensure the protection of the human and peoples' rights... The Commission cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each individual complaint. This is the case where there are a large number of individual victims. Due to the seriousness of the human rights situation as well as the number of people involved, such remedies as might exist in the domestic courts are as a practical matter unavailable or, in the words of the Charter, 'unduly prolonged'.

This exception relates to both the availability and effectiveness of remedies.

A regime of impunity for torture would trigger an exception to the exhaustion requirement. The African Commission took this view in *OMCT et al. v. Rwanda*, in which it considered the Rwandan Government's mass expulsion of BaTutsi Burundian refugees to Burundi. In its 1996 decision, the Commission held on the question of admissibility that 'in view of the vast and varied scope of the violations alleged and the large number of individuals involved...remedies need not be exhausted'.<sup>238</sup> On the merits, the Commission found multiple violations of the African Charter, including due process rights and the prohibition against torture and cruel, inhuman and degrading treatment. The Commission further held that Article 12(3) of the Charter 'should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another State,'<sup>239</sup> and that Article 12(4) effectively prohibits *refoulement* of asylum seekers and refugees, making it also a part of the protection against torture. It is also arguable that the absence of effective remedies against torture would constitute an exception to the rule requiring exhaustion of domestic remedies as this would in reality mean the absence of sufficient or adequate remedies.

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237 *Ibid.*, paras. 56-57.

238 *OMCT et al. v. Rwanda*, *supra* note 91, para.17; but see, Communication 162/97, *Mouvement des Refugies Mauritiens au Senegal v. Senegal*, Eleventh Activity Report, (2000) AHRLR 287 (ACHPR 1997), in which the Commission, on grounds of non-exhaustion of domestic remedies, declined to consider a communication initiated on behalf of Mauritanian refugees in Senegal who alleged wide ranging violations against Senegalese security forces.

239 *Ibid.*, para. 30. It should be stressed that the right guaranteed in art. 12(3) of the African Charter is that to 'seek and obtain asylum'. The African Charter is unique in this respect in including an implicit obligation on the States Parties to grant asylum once the circumstances stipulated in art. 12(3) are met.

In practice, the authors of communications should indicate not only the available remedies but also the efforts made to exhaust such remedies. Communications should similarly state any difficulties – legal as well as practical – encountered in trying to utilise available remedies and should describe the outcome of efforts made. In *Stephen O. Aigbe v. Nigeria*,<sup>240</sup> the Commission declared a communication inadmissible because

the complainant had alleged that he sought redress before “several authorities”. The Commission has no indication in the file before it that there was any proceeding before the domestic courts on the matter.

Another issue that arises in the context of fleeing (further) torture or other ill-treatment is whether a victim who flees a country in order to escape torture must exhaust the local remedies within the country he is fleeing. In answering this question, the Commission has not been consistent. In *Abubakar v. Ghana*,<sup>241</sup> the Commission found that it was not ‘logical’ to require the exhaustion of local remedies under such circumstances. In this case, Abubakar escaped from prison in Ghana in 1992, where he had been held as a political detainee without trial since 1985, and fled to neighbouring Côte d’Ivoire. Finding that the facts revealed a violation of his rights, the Commission in its 1996 finding took the ‘nature of the complaint’ as a guiding principle in concluding that it would not be ‘logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities’.<sup>242</sup>

In a subsequent case, *Rights International v. Nigeria*,<sup>243</sup> finalised in 1999, a person fleeing the dictatorship in Nigeria was eventually accorded refugee status in the USA. As he took to flight for fear of his life, the person was not required to return to Nigeria in order to exhaust local remedies.

At the Commission’s 27th Session, held in October 2000, three further cases concerning this question were finalised. In two of them, the Commission followed the line of argument established in previous cases. In one case, *Sir Dawda K. Jawara*,<sup>244</sup> a previous head of State submitted a complaint related

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240 Communication 252/2002, *Stephen O. Aigbe v. Nigeria*, Sixteenth Activity Report, (2003) AHRLR 128 (ACHPR 2003), para. 15.

241 Communication 103/93, *Abubakar v. Ghana*, Tenth Activity Report, (2000) AHRLR 124 (ACHPR 1996).  
242 *Ibid.*, para. 6.

243 Communication 215/98, *Rights International v. Nigeria*, Thirteenth Activity Report, (2000) AHRLR 254 (ACHPR 1999).

244 *Sir Dawda K. Jawara*, *supra* note 216.



to his deposition and events following the *coup d'état* that removed him from power. Finding that the complainant does not have to exhaust domestic remedies in The Gambia, the Commission observed that it would be an affront to logic and common sense to require the ex-President to risk his life to return to The Gambia. In the other case, *Kazeem Aminu v. Nigeria*,<sup>245</sup> the complainant's fear of his life also motivated a finding that it would not be proper to require him to ensure that local remedies had been exhausted.

In the third case, *Legal Defence Centre v. The Gambia*,<sup>246</sup> the Commission seems to have deviated from its own jurisprudential approach, without justification. In this case, the Commission required exhaustion of local remedies by a complainant in a situation analogous to those just discussed. The complainant was a Nigerian journalist, based in The Gambia, who was ordered to leave The Gambia after his reporting caused embarrassment to the Nigerian Government. Ostensibly, the journalist was deported to 'face trials for crimes he committed in Nigeria'. His deportation took place within a very short time, and he had no opportunity to challenge his deportation. On arrival in Nigeria, he was not arrested or prosecuted. Despite the uncontested allegation presented as part of his argument that he cannot return to The Gambia because the deportation order was still valid, the Commission found that the complainant should first have exhausted remedies in The Gambia. Declaring the communication inadmissible, the Commission for the first time – and in clear disregard of its jurisprudence, including two findings taken during the very same session – required that a complainant that had fled or was otherwise forced to leave a country to instruct counsel in the country that he had left. This requirement may place an unreasonable and insurmountable financial and logistical burden on victims in similar circumstances.

The finding also contradicts a line of cases dealing specifically with deportation, in which the exhaustion of local remedies was not required. Under circumstances of mass expulsion that prevented a group of West Africans in Zambia and in Angola from challenging their expulsion, the Commission did not require them to attempt exhaustion of local remedies in the countries to which they had been expelled.<sup>247</sup>

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245 *Kazeem Aminu v. Nigeria*, *supra* note 141.

246 Communication 219/98, *Legal Defence Centre v. The Gambia*, Thirteenth Activity Report, (2000) AHRLR 121 (ACHPR 2000).

247 The *RADDHO* case, *supra* note 225; Communication 159/96, *Union Interafricaine des Droits de l'Homme and Others v. Angola*, Eleventh Activity Report, (2000) AHRLR 18 (ACHPR 1997).

An important element of this admissibility requirement is the onus of proof. In *Ilesanmi v. Nigeria*,<sup>248</sup> the Commission indicated that the following procedure applies to prove that a specific remedy is unavailable, ineffective or insufficient: (a) the complainant begins the process by making the relevant allegations; (b) the Respondent State must then show that the remedy is generally available, effective and sufficient; (3) the onus then shifts to the complainant, who must prove that even if the remedy is *generally* available, effective and sufficient, it is not so in the *specific* case.<sup>249</sup> The importance of the onus is illustrated in *Anuak Justice Council v. Ethiopia*.<sup>250</sup> Merely alleging that domestic remedies are not effective does not suffice to convince the Commission that local remedies need not be exhausted.

Where no exception to the exhaustion rule applies and statutes of limitations or other factors prevent exhaustion of local remedies, possible recourse may nevertheless be available. The Special Rapporteur on Prisons and Conditions of Detention may be able to intervene in certain situations. For more thorough discussion, refer to Part D, Section XVII, Subsection 1 of this volume.

#### **g. Other Admissibility Conditions Should Also Be Observed**

Among other conditions of admissibility, the Charter requires that where domestic remedies are attempted, the communication should be initiated with reasonable promptness after their exhaustion.<sup>251</sup>

The Commission will not receive a communication that is submitted while a ‘case with the same parties, alleging the same facts as that before the Commission’<sup>252</sup> has been settled or is pending before another international adjudicatory mechanism.<sup>253</sup> The fact that a matter has been brought to the attention of the High Commissioner for Refugees, for instance, should not preclude its being considered by the Commission under this requirement.<sup>254</sup>

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248 Communication 268/2003, *Ilesanmi v. Nigeria*, Eighteenth Activity Report (ACHPR).

249 *Ibid.*, para. 45.

250 Communication 299/05, *Anuak Justice Council v. Ethiopia*, Twentieth Activity Report (ACHPR).

251 African Charter, *supra* note 9, art. 56(6).

252 Communication 15/88, *Mpaka-Nsusu Andre Alphonse v. Zaire* (Admissibility), Seventh Activity Report, (2000) AHRLR 71 (ACHPR 1994).

253 African Charter, *supra* note 9, art. 56(7).

254 See C. A. Odinkalu and C. Christensen, ‘The African Commission on Human and Peoples’ Rights: The Development of Its Non-State Communications Procedures’, (1998) 20 *Human Rights Quarterly* 235, 266-268.

However, in *INTERIGHTS (on behalf of Pan African Movement & Citizens for Peace in Eritrea) v. Ethiopia* and *INTERIGHTS (on behalf of the Pan African Movement and the Inter Africa Group) v. Ethiopia*, the complaint concerned forced population transfers connected with the conflict between Eritrea and Ethiopia between 1998 and 1999.<sup>255</sup> Under a peace settlement to end the conflict, reached after the communication was initiated, a Claims Commission was set up to consider and award compensation, restitution and other remedies for the violations suffered by the victims of the forced population transfers. On the facts, the Commission ceded consideration of the case to the Claims Commission and suspended indefinitely the consideration of the communication.

## 5. Interim Measures

An author or counsel acting on his or her behalf may request the Commission to indicate provisional measures ‘to avoid irreparable damage being caused to the victim of the alleged violation’, or the Commission may do so of its own motion.<sup>256</sup> The Commission Rules of Procedure authorise it to indicate as it deems fit interim or provisional measures for implementation by the parties to the proceedings.<sup>257</sup> These measures do not have a bearing on the final determination of the case.

The African Commission has clarified that ‘in circumstances where an alleged violation is brought to the attention of the Commission and where it is alleged that irreparable damage may be caused to the victim, the Commission will act expeditiously appealing to the State to desist from taking any action that may cause irreparable damage until after the Commission has had the opportunity to examine the matter fully’.<sup>258</sup> For instance, in a case concerning torture or non-*refoulement*, the Commission could request a Respondent State to ensure abatement of the torture, preservation of the instruments of torture or that the refugee is not expelled from its territory pending the determination of the merits.<sup>259</sup> In the *Lekwot* case, the Commission successfully indicated provisional measures to stop an impending execution.<sup>260</sup>

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255 *INTERIGHTS (on behalf of Pan African Movement & Citizens for Peace in Eritrea) v. Ethiopia*, *supra* note 201; *INTERIGHTS (on behalf of the Pan African Movement and the Inter Africa Group) v. Ethiopia*, *supra* note 201.

256 Commission Rules of Procedure, *supra* note 188, Rule 111.

257 *Ibid.*, Rule 111(1).

258 Communication 239/2001, *INTERIGHTS (on behalf of Jose Domingos Sikunda) v. Namibia* Fifteenth Activity Report; (2002) AHRLR 21 (ACHPR 2002).

259 *Ibid.*

260 *Lekwot* case, *supra* note 155.

The main problem with these orders is non-compliance by States. Provisional measures in the case of *Ken Saro-Wiwa, Jr.*<sup>261</sup> and in the *Bosch case*<sup>262</sup> were disregarded by Nigeria and Botswana, respectively, and both cases resulted in the execution of applicants with pending communications.

The Court Protocol allows for interim measures in cases where they are necessary to avoid ‘irreparable harm to persons’.<sup>263</sup> This power will be particularly necessary in torture cases. Unlike the African Commission, whose powers to indicate interim relief are contained in its Rules of Procedure, the powers of the Court to indicate interim relief are established by the Protocol, suggesting that any interim measures indicated by the Court will be unequivocally binding on the States against which they are issued.

## 6. Amicable Settlement

Even in the absence of explicit provisions in the Charter and the Commission Rules of Procedure, the Commission developed a practice of settling complaints amicably. However, the use of amicable settlements should not be surprising, as it is derived from the Commission’s understanding that the individual communications procedure is aimed at dialogue and peaceful resolution of disputes. Other human rights treaty bodies, such as the Inter-American Commission of Human Rights, have also made use of this process on numerous occasions.

*INTERIGHTS (on behalf of Safia Yakubu Husaini and Others) v. Nigeria*<sup>264</sup> provides a good example of the benefits and pitfalls of amicable settlements in the context of allegations of torture and inhuman punishment. This complaint was brought on behalf a number of people who were convicted and sentenced under Shari’a penal law in some Nigerian states. Pending finalisation of the communication, the Commission invoked Rule 111 to ensure that persons sentenced to death are not executed. The President of Nigeria indicated that the administration would ‘leave no stone unturned’ in ensuring that the executions did not occur. On the implicit ground that this relief was granted, the complainant withdrew the case. Although the most severe form of harm was

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261 *Ken Saro-Wiwa, Jr.*, *supra* note 101.

262 The *Bosch case*, *supra* note 122.

263 African Human Rights Court Protocol, *supra* note 22, art. 27(2).

264 *INTERIGHTS (on behalf of Safia Yakubu Husaini and Others) v. Nigeria*, *supra* note 131.

averted, the withdrawal also meant that many other elements of the communication, related to the forms of punishment and the lack of fair trial guarantees under Shari'a law, were eventually not addressed.

Although both parties are required to agree to the terms of the settlement, there is no requirement or guarantee that the Commission will accept those terms if, in the opinion of the Commission, the terms do not comply with 'respect for human rights'. Moreover, when serious human rights violations such as torture are alleged, the likelihood of an amicable settlement may be remote, in part, because dialogue is foreclosed by the animosity between the parties.

Amicable settlement presumes willingness on the part of both parties to resolve the underlying cause of the violation. States may be more prepared to settle matters that would otherwise expose them to unfavourable publicity.

## **7. Establishing Facts (Evidentiary Requirements and Burden of Proof)**

Complainants bear the initial onus of laying a factual foundation in support of their allegations. The Commission requires that allegations of torture should be substantiated by the persons making them.<sup>265</sup> It is not enough to allege that the victims were tortured without giving details as to the date, place, acts committed and any effects that the victims may or may not have suffered as a result.<sup>266</sup> The Commission will not find a violation of Article 5 in the absence of such information.<sup>267</sup>

In support of their allegations of widespread torture, the complainants in the *Sudan* cases relied on personal statements, expert evidence (doctors' testimonies) and a report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions.<sup>268</sup> A list of the names of the alleged victims was also provided.

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265 Communication 218/98, *Civil Liberties Organisation, Legal Defence Centre and Legal Defence and Assistance Project v. Nigeria*, Fourteenth Activity Report, (2001) AHRLR 75 (ACHPR 2001), reprinted in (2002) 9 *International Human Rights Reports* 266, para. 45 [hereinafter '*Civil Liberties Organisation case*'].

266 Communications 83/92, 88/93, 91/93, *Jean Yaovi Degli (on behalf of Corporal N. Bikagni), Union Interfricaine des Droits de l'Homme, Commission Internationale des Jurists v. Togo*, Eighth Activity Report, (2000) AHRLR 317 (ACHPR 1995), reprinted in (1996) 3 *International Human Rights Reports* 125.

267 *Civil Liberties Organisation case*, *supra* note 265, para. 45.

268 The *Sudan* cases, *supra* note 28, para. 5.

Where an author provides these particulars, the State against whom they are made is obliged to respond to them. In the absence of such response, the Commission bases its judgment on the information provided by the author.<sup>269</sup> When the Government does not respond to contest the *prima facie* case made out by the applicant, the Commission accepts the version of facts offered by the complainant. In the *Sudan* cases, for example, the Commission concluded as follows:

Since the acts of torture alleged have not been refuted or explained by the government, the Commission finds that such acts illustrate ... government responsibility for violations of the provisions of article 5 of the African Charter.<sup>270</sup>

## 8. Findings on the Merits

Once a communication is declared admissible, the Commission proceeds to the 'merits' phase, during which it examines whether the Respondent State has violated any right under the relevant instruments. If aspects of the case need to be clarified, both parties have three months to supply additional information.<sup>271</sup> Consideration of the merits takes place in a separate session, and culminates in a finding as to whether the relevant rights have been violated. Over the years, the procedure during these hearings has become increasingly formal. Victims are in most cases represented by lawyers, often members of NGOs who provide this service free of charge. They prepare written arguments, are allowed to present oral arguments and, more exceptionally, may call witnesses.

## 9. Government Justifications

As the respondent in an individual communication, the State has the opportunity to put forth its version of events and its interpretation of the law. Under the Commission Rules of Procedure, States are notified of all communications and are given three months to respond, first on the issue of admissibility, and if a communication is found admissible, again on the merits.<sup>272</sup> Today, the

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269 The *Mauritania* cases, *supra* note 28, paras. 92, 103.

270 The *Sudan* cases, *supra* note 28, para. 57.

271 Commission Rules of Procedure, *supra* note 188, Rule 119(2).

272 *Ibid.*, Rules 117(4), 119(2).

Commission also provides both parties the opportunity to present oral arguments on both the admissibility and the merits of a communication.

Particularly during the early years of the Commission's functioning, States often did not participate in the written or oral proceedings before the Commission. The Commission's lack of visibility, as well as States' lack of awareness of and knowledge about the Commission, partially explain this cavalier approach. In the 1990s, State participation increased.

States have responded in a variety of ways to allegations of torture. Given that the prohibition of torture is accepted as a *ius cogens*, or peremptory, norm, and given that all AU member States have committed themselves to comply with the African Charter, no State has attempted to justify torture as such.

One State strategy is to dispute or deny the facts as presented by the complainant. In *Zegveld and Ephrem*,<sup>273</sup> alleging the *incommunicado* detention of 11 public figures, the Eritrean Ministry of Foreign Affairs conceded that the 11 persons were being held, but 'in appropriate government facilities'.<sup>274</sup> The Government further denied that they had been ill-treated and stated that the 11 persons had access to medical services. This defence failed, however, as the State did not provide 'information or substantiation' in support of these assertions.<sup>275</sup> The defence also fails on another ground: it does not address the essence of the detainees' claim, namely that they were detained secretly and without access to lawyers and family. The Commission was equally unimpressed by the Eritrean Government's assurance that the detainees in *Zegveld and Ephrem* would be brought before an appropriate court of law 'as early as possible'.<sup>276</sup>

Governments have also on occasion argued that they have acted to uproot torture, for example by prosecuting officials alleged to have committed torture. The Commission rejected such a justification by the Sudanese Government, in the *Sudan* cases, on the basis that government action was not 'commensurate with the magnitude of the abuses'.<sup>277</sup>

National security is also invoked as justification of some forms of ill-treatment. Although not presented as justifying torture as such, the Eritrean Government's

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273 *Zegveld and Ephrem*, *supra* note 135.

274 *Ibid.*, para 54.

275 *Ibid.*

276 *Ibid.*

277 *Ibid.*, para 56.

response to the allegations in *Zegveld and Ephrem* points to national security as rationalisation of illegal detention. The Government argued that the 11 detainees conspired to overthrow the legal government, ‘colluding with foreign powers with a view to compromising the sovereignty of the country, undermining Eritrean National Security and endangering Eritrean society and the general welfare of its people’.<sup>278</sup>

Related to arguments pertaining to national security are contentions about national legal standards and domestic sovereignty. In *Zegveld and Ephrem*, the Government referred to its national laws, arguing that the detention of the 11 persons was ‘in conformity with the criminal code of the country’.<sup>279</sup> The argument failed, however, because the Eritrean Constitution itself requires that all detainees be brought before a court of law within 48 hours of their arrest.<sup>280</sup>

## 10. Acceptable Limitations

The Commission has held that the prohibition of torture in Article 5 of the Charter is absolute and does not admit of any exceptions or limitations.<sup>281</sup> The African Commission has consistently held that ‘contrary to other human rights instruments, the African Charter does not allow for derogation from obligations due to emergency situations’.<sup>282</sup> Thus, ‘even a situation of [...] war [...] cannot be cited as justification for the violation by the State or its authority to violate the African Charter’.<sup>283</sup> In implementing the rights contained in it, moreover, the Charter enjoins States Parties ‘to secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals’.<sup>284</sup>

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278 *Ibid.*, para 47.

279 *Ibid.*

280 *Ibid.*, para 49.

281 The *Huri-Laws* case, *supra* note 102.

282 *Commission Nationale des Droits de l’Homme* case, *supra* note 28; the *Mauritania* cases, *supra* note 28, para. 84.

283 *Commission Nationale des Droits de l’Homme* case, *supra* note 28; the *Mauritania* cases, *supra* note 28, para. 84.

284 The *RADDHO* case, *supra* note 225.



## 11. Methods of Interpretation

The Charter allows the African Commission to ‘draw inspiration from international law on human and peoples’ rights,’ including other international instruments to which African States are parties.<sup>285</sup> The Charter further authorises the Commission to ‘take into consideration as subsidiary measures to determine the principles of law’<sup>286</sup> other general or special international conventions, customs generally accepted as law, general principles of law recognized by African States, legal precedents and doctrine<sup>287</sup> as well as African practices consistent with international norms on human and peoples’ rights.<sup>288</sup> On a number of occasions, case-law has highlighted the need to interpret provisions ‘holistically’,<sup>289</sup> and in a manner that is ‘responsive to African circumstances’.<sup>290</sup> A golden thread in the early case-law is the interpretation of rights *in favorem libertatis*,<sup>291</sup> in favour of the individual and human rights, or ‘generously’.<sup>292</sup> The Commission explained in *Curtis Francis Doebbler v. Sudan*, that:<sup>293</sup>

While ultimately whether an act constitutes inhuman or degrading treatment depends on the circumstances of the case, the Commission has stated that the prohibition of torture, cruel, inhuman or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuse.

This provision does not empower the African Charter to supervise other treaty systems or international standards. However, the Commission can and has consistently looked to comparative and international practice and jurispru-

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285 African Charter, *supra* note 9, art. 60.

286 *Ibid.*, art. 61.

287 This would include, for instance, the Conclusions of the Executive Committee of the UN High Commissioner for Refugees.

288 *Ibid.*

289 Also in accordance with art. 31(1) of the Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc. A/Conf.39/27, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875 (1969); see also, Communication 211/98, *Legal Resources Foundation v. Zambia*, (2001) AHRLR 84 (ACHPR 2001), para. 70: “The Charter must be interpreted holistically and all clauses must reinforce each other”.

290 *SERAC* case, *supra* note 26, para. 68.

291 See Justinina’s Digest 29.2.71.pr.

292 See, e.g., *Huri-Laws* case, *supra* note 102; the *Sudan* cases, *supra* note 28, para. 80: “Any restriction of rights should be the exception.”

293 *Curtis Francis Doebbler v. Sudan*, *supra* note 129, paras. 49-50; see also, the *Niran Malaolu* case, *supra* note 112; *Huri-Laws* case, *supra* note 102.

dence in its decision-making.<sup>294</sup> Authors of communications and their representatives may also cite or rely on such comparative standards and jurisprudence. As pointed out above, the more nuanced interpretation of Article 5 in the *Huri-Laws* case derives from reliance on jurisprudence adopted under the European Convention on Human Rights.<sup>295</sup> Case-law of the Inter-American Court of Human Rights served as interpretative inspiration in another important Commission decision, *Zegveld and Ephrem*.<sup>296</sup>

In giving more exact content to the provision of Article 5, the Commission on occasion has invoked the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In the *Ouko* case, for example, the Commission relied on Principles 1 and 6 and found a violation of both of these principles.<sup>297</sup>

## 12. Remedies

It is difficult to delineate neatly the remedies issued by the Commission in respect of violations of Article 5, as it is in relation to violations of other articles. In the evolution of the Commission's practice, three types of remedies may be identified. During its earliest years, the Commission for the most part simply found a violation and refrained from making any observation about possible remedies. The root of this reticence lay in the fact that neither the Charter nor the Commission Rules of Procedure makes mention of remedies. The Commission later began to adopt a vaguely formulated remedy, such as the recommendation that the State should 'take the necessary steps to bring its law into conformity with the Charter'. More recently, the Commission has begun to recommend more detailed and directed remedies, such as an appeal

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294 For instance in *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, *supra* note 92, para. 44, the Commission referred to and relied on the UN Declaration on the Protection of All Persons from Enforced Disappearance (1992, GA res. 47/133, 47 UN GAOR Supp. (No. 49) at 207, UN Doc. A/47/49). In the *SERAC* case, *supra* note 26, the Commission made extensive use of the opinions and General Comments of the Committee on Economic, Social and Cultural Rights and the Inter-American Court of Human Rights. See also, *Civil Liberties Organisation v. Nigeria*, *supra* note 98, in which the Commission places similar reliance on the fair hearing jurisprudence of the European Court of Human Rights.

295 *Huri-Laws* case, *supra* note 102, para. 41, relying on *Ireland v. The United Kingdom*, no. 5310/71, (1978) ECHR 1 (18 Jan. 1978); see also, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, ETS 5, 213 UNTS 221.

296 See *Zegveld and Ephrem*, *supra* note 135, relying on *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Series C No. 4, Judgment of 29 July 1988.

297 See the *Ouko* case, *supra* note 94.

to the State Party ‘to permit the accused persons to a civil trial with full access to lawyers of their choice; and to improve their conditions of detention’. However, the Commission’s practice has remained inconsistent.

In Article 5 cases through the years, the Commission has taken each approach described above. In *Rights International v. Nigeria*,<sup>298</sup> as well as in the *Huri-Laws* case,<sup>299</sup> for example, findings of Article 5 violations did not result in recommended remedies. The remedy recommended in *OMCT et al. v. Rwanda*,<sup>300</sup> following a violation of Article 5 as well as other provisions, is couched in an open-ended formulation urging the Government to ‘adopt measures in conformity with’ the Commission’s decision. More specific remedies requiring specific State action have been ordered in a number of cases and may be categorised as follows:

- (1) Recommendation that the Government ‘put an end to’ Article 5 and other violations;<sup>301</sup>
- (2) Recommendation to ‘improve’ the ‘conditions of detention’ of civilians held in military detention centres;<sup>302</sup>
- (3) Recommended legislative changes<sup>303</sup> and compensation.<sup>304</sup>

In contrast with the Charter, which governs the Commission, the Court Protocol provides explicitly for ‘appropriate orders’ to remedy violations.<sup>305</sup> Although it does not contain an exhaustive list, the relevant provision mentions ‘compensation’ and ‘reparation’ specifically.

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298 *Rights International v. Nigeria* *supra* note 243.

299 *Huri-Laws* case, *supra* note 102.

300 *OMCT et al. v. Rwanda*, *supra* note 91.

301 The *Sudan* cases, *supra* note 28, para. 85.

302 *Civil Liberties Organisation v. Nigeria*, *supra* note 98, para. 29.

303 See Communication 231/99, *Avocats Sans Frontieres v. Burundi*, Fourteenth Activity Report, (2000) AHRLR 48 (ACHPR 2000), para. 34.

304 In one of its most detailed remedies, in the *Mauritania* cases, *supra* note 28, the Commission found a violation of Article 5 on the basis of practices analogous to slavery in Mauritania, and recommended *inter alia* that victims be compensated (para. 146).

305 African Human Rights Court Protocol, *supra* note 22, art. 27(1).

## **IX. Inter-State Communications**

As of this writing, the Commission has finalised one inter-State communication. This case, *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*,<sup>306</sup> arose from an undeclared ‘war’ involving four States in the ‘Great Lakes’ area. The DRC directed allegations of serious human rights violations against the armed forces of the countries named above, committed mainly within the territory of the DRC, but also in Rwanda. The abduction and deportation of members of the civilian population to ‘concentration camps’ in Rwanda featured among the allegations by the DRC.<sup>307</sup> On the basis of Articles 60 and 61 of the Charter, the Commission in its decision relied on the Third Geneva Convention (Relative to the Protection of Civilian Persons in Time of War).<sup>308</sup> This Convention provides for the humane treatment of civilians during conflict or occupation. Rejecting both the factual claims and legal arguments of the Respondent States, the Commission found a number of violations, including the violation of Article 5.<sup>309</sup>

## **X. On-Site Missions**

### **1. Legal Basis and Conduct of Missions**

Article 46 of the African Charter allows the African Commission to make use of ‘any appropriate method of investigation’ in performing its functions. This provision has provided a legal basis for on-site or ‘investigative’ missions, also known as ‘country visits’. These visits are undertaken usually when numerous communications against a particular State have been received. One of the draw-backs of this procedure is its reliance on the consent and facilitating role of the very State that is under investigation.

### **2. Selected Missions**

The Commission has undertaken a number of on-site missions, amongst others to Senegal, Mauritania, Nigeria, Zimbabwe and Sudan. To examine the process more closely, we turn to the mission to Zimbabwe.

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306 *DRC v. Burundi, Rwanda and Uganda*, *supra* note 37.

307 *Ibid.*, para 6.

308 *Ibid.*, para 89.

309 *Ibid.*, para 98.

After receiving numerous reports of widespread human rights violations in Zimbabwe, during various of its sessions, the African Commission undertook a fact-finding mission to that country. Due to difficulties in arranging the visit, more than a year lapsed between the date of the decision to undertake the visit (May 2001), and the date of the visit itself (June 2002).

Beyond the contentious issue of land reform and the right to property under the African Charter, the mission also investigated allegations related to torture. The mission received ‘testimony from witnesses who were victims of political violence and other victims of torture while in police custody’.<sup>310</sup> There were allegations of arbitrary arrests of the President of the Law Society of Zimbabwe, among others, and of torture of opposition leaders and human rights defenders. In its report, the Commission found that in many instances those responsible were ‘ZANU PF party activists’. However, on the strength of assurances by President Mugabe and other ZANU PF politicians ‘that there has never been any plan or policy of violence’, the Commission refrained from concluding that the violations constituted an orchestrated Government-sanctioned pattern. In this respect, it was evident that too much deference was granted to the State.

A less equivocal finding was that there existed no effective institution to oversee the lawfulness of police action and to receive and investigate complaints against the police. Although there existed an Office of the Ombudsman, it had displayed bias in its activities; it was also under-resourced and mostly inactive, and delayed the publication of its reports. Consequently, it had lost public confidence. One of the Commission’s recommendations was the creation of an independent mechanism to receive complaints regarding police conduct.

The politicisation of the Zimbabwean police force was also deplored. Youth militia, trained in ‘youth camps’, were reportedly used to fuel political violence. The Commission recommended their abolition. The Commission also referred to ‘elements’ within the criminal investigation unit who ‘engaged in activities contrary to international practice’. In order to improve the professionalism and accountability of the police service, the Commission recommended that the Government study and implement the Robben Island Guidelines.<sup>311</sup>

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310 African Commission, Executive Summary of the Report of the Fact-finding Mission to Zimbabwe, Annex II to the Seventeenth Annual Activity Report of the African Commission, para. 3.

311 See Robben Island Guidelines, *supra* note 133, see Appendix 4.

When the Commission eventually presented the report as part of its Sixteenth Activity Report, the Zimbabwean representative protested that his Government had not been given an opportunity to respond to the findings. Although the Commission disputes the factual correctness of this contention, the report was referred back to the Government for its comments. As a consequence, the Assembly for the first time refused to authorise the publication of the Commission's activity report. The mission report was only authorised for publication after the Government had provided a response, which was included in the Commission's Seventeenth Activity Report.<sup>312</sup>

The real concern of the Zimbabwean Government is evident in its response, which concedes that it already had been given an opportunity to comment on the fact-finding report.<sup>313</sup> However, its opportunity came after the Commission had adopted the report, and the Government viewed this as a procedural irregularity, as the rules of natural justice had not been complied with. It is unclear, however, whether the Zimbabwean Government communicated any of these concerns to the Commission before the 'bomb' burst at the AU summit.

In its comments, the Government criticises the mission and report on a number of grounds. The length and scope of the mission, which lasted only four days and was restricted to Harare, was in its view not adequate to discern the 'truth'. The nature of the fact-finding process also came under scrutiny, and the Government argued that the Commission did not engage in an adequate verification process, interviewing specific complainants and obtaining government responses only to specific allegations.

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312 African Commission, Seventeenth Activity Report, Assembly/AU/Dec. 56(IV), January 2005.

313 Comments by the Government of Zimbabwe on the Report of the Fact-Finding Mission, contained in Annex II of the Commission's Seventeenth Activity Report, *ibid.*