

Litigating Torture Cases in Light of Recent Developments within the African Human Rights System

A. Introduction

Litigants before the African human rights system have an array of human mechanisms to which their complaints can be submitted. Individual complaints can be presented to UN treaty bodies, regional mechanisms and sub-regional mechanisms. This paper presents an overview of the African human rights system and focuses on considerations that should be taken into account in the choice of a forum when presented with UN treaty bodies and African regional human rights mechanisms in the litigation of torture cases.

B. Overview of the African Human Rights System

The African human rights system is composed of human rights norms and mechanisms created within the African Union (AU) and the sub-regional economic community REC frameworks. The first of these human rights treaties; the OAU Convention Governing Specific Aspects of Refugee Problems in Africa was adopted in 1969¹. The adoption of the African Charter on Human and Peoples' Rights² (the African Charter) in 1981 was followed by the adoption of the African Charter on the Rights and Welfare of the Child in 1990 (the Children's Charter).³ A Protocol to the establishment of a Court on Human and Peoples' Rights (the Court Protocol) and a Protocol on Women's Rights in Africa (the Women's protocol)⁴ were adopted in 1998 and 2003 respectively.

Human rights mechanisms with competence to consider individual complaints alleging violations of torture, inhuman and degrading treatment in Africa at the regional level:

- the African Commission on Human and Peoples' Rights (the African Commission);
- the African Committee on the Rights and Welfare of the Child (the Committee) and;
- The recently established African Court on Human and Peoples' Rights (the Court)⁵.

At the sub-regional level mechanisms that can consider human rights issues within the framework of sub- regional economic communities include:

- The East African Community (EAC) Court of justice;
- The Economic Community of West African Court (ECOWAS) Court of justice;
- The Southern African Development (SADC) Tribunal.

At the time of writing, the only regional mechanism that regularly receives and considers complaints against state parties is the African Commission. The African Court is yet to

¹OAU Doc CAB/LEG/24.3

²OAU Doc. CAB/LEG/67/3

³OAU Doc. CAB/LEG/24.9/49

⁴CAB/LEG/66.6

⁵OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

consider its first case and the Committee has received but not considered two cases alleging violations of children's rights against Uganda and Kenya.

At the sub-regional level, the ECOWAS Court has received human rights related complaints and the EAC Court is about to examine its first human rights case⁶. Regional Courts are still very much untried and it is too early to tell how they will deal with human rights cases.

C. The Normative Framework

The prohibition of torture is regarded as a general principle of international law. This carries a special status that of *jus cogens*, which is a 'peremptory norm' of general international law.⁷ General international law is binding on all states, even if they have not ratified a particular treaty. Rules of *jus cogens* cannot be contradicted by treaty law or by other rules of international law.⁸

The normative framework proscribing torture, inhuman and degrading treatment under the African human rights system consists of provisions from the African Charter, the Children's Charter and the Women's Rights Protocol.

The African Charter

The cornerstone of protection from torture, inhuman and degrading treatment within the African human rights system is derived from Article 5 of the African Charter which provides that:

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 of obligations contained in Article 5.⁹ The effective enjoyment of the right to human dignity may require States to take measures to protect it. When the state or its agents breach this obligation, the prohibition against torture, cruel, inhuman and degrading treatment or punishment is almost invariably 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.¹⁰

⁶ James Katabazi & 20 Ors v. Secretary General of the East African Community and Uganda, EACCIJ, Ref. No1 of 2007

⁷ Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para 10

⁸ C. Foley, Combating Torture, A manual for Judges and Prosecutors http://www.essex.ac.uk/combatingtorturehandbook/manual/1_content.htm#1 accessed on 10 July 2007

⁹ Viljoen et al, The prohibition of Torture and Ill-treatment in the African Human Rights System, OMCT Handbook Series Vol. 3, p 37

¹⁰ Ibid, Viljoen et al n. 9

It has also been suggested that a combined reading of Articles 4 and 5 of the Charter infers prohibition of certain criminal penalties such as flogging or the stoning to death of a person sentenced.¹¹ Other provisions which bolster Article 5 include guarantees of equal protection of the law,¹² the right to life and integrity, including the guarantee against ‘arbitrary deprivation’ of that right,¹³ the right to personal liberty¹⁴ and fair trial and due process guarantees.¹⁵

The Women’s Rights Protocol

The Women’s Rights Protocol complements Article 5 of the African Charter by focusing on aspects of torture, cruel, inhuman and degrading treatment, in particular the right to dignity, the prohibition of harmful traditional practices and violence against women. It 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.’¹⁶

Violence against women is defined as acts which cause or could cause physical, sexual, psychological, and economic harm, including the threat undertake 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 of war.¹⁷

This definition makes clear that under the Women’s Rights Protocol, the prohibition against torture may encompass treatment inflicted by state actors as well as non-state actors.¹⁸ It prohibits harmful traditional practices and violence against women and requires States Parties to prohibit, prevent, punish and eradicate them.¹⁹ It assures the dignity of women and requires State 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.’²⁰ There has been debate on whether domestic violence should be considered torture for which the state is accountable when such acts are of the nature envisioned by the international standards of torture and when the state has failed to fulfil its obligation to provide women effective protection.²¹

During situations of armed conflict, the Women’s Rights Protocol calls on states 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

¹¹ F. Ouguergouz, *The African Charter on Human and Peoples’ Rights, A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Martinus Nijhoff Publishers, p. 116

¹² African Charter, Art 3(2)

¹³ *Ibid.*, Art 4

¹⁴ *Ibid.*, Art 6

¹⁵ *Ibid.*, Art 7 See also the Guidelines and Principles on the right to a fair trial and legal assistance in Africa developed by the Commission.

¹⁶ *Supra* n 7, Art 1

¹⁷ *Ibid.*

¹⁸ *Supra*, Viljoen et al p 57

¹⁹ *Supra*, Art 4-5

²⁰ *Ibid.* Art 3(4)

²¹ Amnesty International USA, *Domestic Violence as Torture*

<http://www.un-instraw.org/revista/hypermil/alltickers/fr/0726.html> accessed 27 June 2007

exploitation as instruments of war. It recognises these acts as war crimes and/ or crimes against humanity.²² The Protocol's provisions are yet to be clarified in the context of communications presented to either the African Commission or the African Human Rights Court.²³

The Children's Charter

The Children's Charter which specifically protects the rights of children in Africa identifies five areas of the prohibition against torture, namely: traditional practices, protections against child labour, the protection of children from abuse and violence, due process protection and the protection of children in armed conflict or other situation.²⁴

The Children's Charter requires states to discourage customary and cultural or religious practices inconsistent with the human rights of children.²⁵ These are practices that are 'prejudicial to the health or life of the child' or discriminatory to the child on the grounds of gender.²⁶ It proscribes the betrothal of both male and female children and prescribes 18 years as the age of marital consent.²⁷ The Children's Charter also has provisions that deal with torture carried out by non -state actors.²⁸ States are required to take legislative and administrative measures, including the use of criminal sanctions and public education and information to protect children from forms of economic exploitation.²⁹

The Children's Charter also requires states to take legislative, administrative, and social and education measures to protect children from torture, inhuman and degrading treatment.³⁰ It prohibits 'physical and mental injury or abuse, neglect or maltreatment, including sexual abuse' of children.³¹ With respect to torture and due process guarantees related to children, the Children's Charter prohibits the application of capital punishment to children³² and the torture or ill-treatment of children deprived of their liberty.³³ In situations of armed conflict, including internal armed conflict³⁴ State Parties are obliged to respect international humanitarian law norms affecting the child, including the prohibition of the use of children indirect hostilities or the recruitment of children as soldiers.³⁵

The African Commission³⁶, the Court³⁷ and the Children's Committee³⁸ can draw inspiration from international human rights instruments. Within the sub-regional context,

²² Supra n 7 Art 11

²³ Viljoen et al

²⁴ Supra, Viljoen p 55

²⁵ Supra Article 1(3)

²⁶ Supra, Ibid Articles 21(1) (a)-(b)

²⁷ Ibid, Article 21(2)

²⁸ Ibid, Articles 1(3) 10, 15, 16, 19 (1), 20-21

²⁹ Ibid, Articles 15(2) (c)- (d)

³⁰ Ibid, Article 15(1)

³¹ Ibid, Article 16

³² Ibid, Article 5(3)

³³ Ibid, Article 17 (2)

³⁴ Ibid, Article 22(3)

³⁵ Ibid, Articles 22(1) – (2)

³⁶ Supra Articles 60 and 61 of the African Charter

³⁷ Supra Article 3 of the Court Protocol

³⁸ Supra Article 46 of the Children's Charter

the Protocol of the ECOWAS treaty allows the this regional Court to ‘apply, as necessary, the body of laws as contained in Article 38 of the Statute of the International Court of Justice.’³⁹ The mechanisms mandated to monitor States’ implementation of the above treaties are the African Commission, the Court and the Children’s Committee.

D Regional Human Rights Mechanisms

I. The African Commission on Human and Peoples’ Rights

The African was established by article 30 of the African Charter which stipulates that ‘An African Commission on Human and Peoples’ Rights...shall be established with the Organisation of African Unity to promote human and peoples’ rights and ensure their protection in Africa.’

The African Commission comprises of 11 members, who, pursuant to article 31 must be “chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples’ rights, particular consideration being given to persons having legal experience.” Members of the African Commission are elected by the Assembly of Heads of States parties to the Charter. Once elected, they sit in their individual capacities.

The African Commission has special mechanisms and working groups that monitor, investigate and report on allegations of violations related to specific thematic issues. A Working Group chaired by Commissioner Sanji Monageng is tasked with implementing Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment and Punishment in Africa (the Robben Island Guidelines).⁴⁰ Commissioner Mumba Malila is the Special Rapporteur on Prisons and Conditions of Detention in Africa.⁴¹

Article 45 of the Charter details the Commission’s functions which are divided into two main categories, protection and promotional activities.

The African Commission’s complaints procedure

The individual complaints procedure is provided for in articles 55 and 56 of the African Charter and in the Rules of Procedure of the African Commission. The Commission considers complaints during the private session of its bi-annual meetings.

Before 2006, anybody could submit a complaint to the African Commission if they had reason to believe that a *prima facie* violation of human rights had occurred. Article 56.1 of the Charter, does not specifically require the author of the communication to be the

³⁹Article 19(1)] of the Protocol A/P1/7/91

⁴⁰ Resoluton on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) http://www.achpr.org/english/info/rig_res_1.htm accessed 10 July 2006

⁴¹ Resolution on the appointment of a Special Rapporteur on Prisons and Conditions of Detention in Africa, http://www.achpr.org/english/info/prison_res_2.html, accessed 10 July 2007

victim or for him to be authorised by the victim. However more recently, even though the African Commission adopted a paper⁴² touching on the impact of this generous locus standi practice on its communications procedure, any one can still petition it. Only identification of the author is required.⁴³ It is worth noting that the Commission has found that that the requirement of local remedies does not “apply literally in [a] case where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation.⁴⁴ In cases filed on behalf of several victims⁴⁵ the African Commission has provided for nearly open access.

The various stages of the procedure are seizure, admissibility and the decision on merits. After the complaint has been seized, it has to meet criteria laid out in article 56 of the Charter. Once the admissibility phase is over, and the Commission has all the elements in fact and in law it takes a decision on the merits of the case. The time it takes to reach a decision depends on the complexity of the case and the diligence of the complainant in presenting his case. The duration of complaints before the Commission varies; generally decisions are rendered 1.5-2.5 years from the time they are initially submitted.

The African Commission can grant provisional measures to avoid irreparable damage being caused to the victim of the alleged violation.⁴⁶ Its Chairperson writes to the state concerned, stating that it has been seized of a case, and that irreparable prejudice should not come to the alleged victim before the Commission has had the opportunity to fully consider the case.

There are no restrictions as to the forms of evidence that can be submitted to the African Commission during the merits stage. Complainants have proffered photographs, video recordings and expert evidence. The most effective type of evidence given before the African Commission is victim impact evidence, given orally.⁴⁷ The standard of proof before the African Commission is not officially specified, but in practice it seems to be a preponderance of the evidence standard.⁴⁸

⁴² African Commission, Capacity for individuals to bring a Communication to the African Commission on Human and Peoples’ Rights, A paper Considered by the Commission at its 38th Ordinary Session

⁴³ Art 56(1) of the Charter

⁴⁴ See 25/89, 47/90, 56/91, 100/93 (Joined), Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Témoins de Jehovah/Zaire

⁴⁵ See the Commission’s decisions in communications 27/89, 46/91, 49/91, 99/93 World Organisation against Torture, International Association of Democratic Jurists, International Commission of Jurists and Inter-African Human Rights Union vs/ Rwanda; 27/89, 46/91, 49/91, 99/93 World Organisation against Torture, International Association of Democratic Jurists, International Commission of Jurists and Inter-African Human Rights Union vs/ Rwanda; 54/91 Malawi African Association/Mauritania; 61/91 Amnesty International/Mauritania; 98/93 Ms. Sarr Diop, Union Interafricaine des Droits de l’Homme and RADDHO/Mauritania; 164/97 à 196/97 Collectif des Veuves et Ayants-droit/Mauritania; 210/98 Association Mauritanienne des Droits de l’Homme/Mauritania

⁴⁶ Rule 111 of the African Commission’s rules of procedure

⁴⁷ Harrington et al, Recent Developments in the Article 55 communications procedure of the African Commission on Human and Peoples’ Rights, p. 7

⁴⁸ Ibid, n 48 p. 8

The African Commission can draw inspiration from international human rights.⁴⁹ To this end it has referred to various human rights instruments in its decisions. It has considered a wide range of cases related to article 5 breaches. These have included cases touching on violations of human dignity, conditions of pre-trial detention and incarceration, mental health detainees, death penalty, judicial corporal punishment, procedural and judicial safeguards, incommunicado detention, refoulement and forced displacement.⁵⁰

In 1999 the African Commission considered its first inter-state communication⁵¹ filed by the Democratic Republic of Congo against the presence of Burundian, Ugandan and Rwandese troops on its territory. It found the killings, massacres, rapes, mutilations, and other grave human rights abuses to be violations of article 4 of the Charter, obligations under Part III of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 and Protocol 1 of the Geneva Convention. It also found violations of Article 5 even though it did not detail how it reached this conclusion.

In a later complaint in which the complainant alleged that the ZANU PF ruling party in Zimbabwe had orchestrated a systematic campaign of intimidation, including the use of violence, against opposition supporters; the African Commission found that there had been no violation of Article 5 because the state had investigated the allegations. This reasoning is a departure from the African Commission's view earlier in the same case when it agreed with the Inter-American Court's view in *Velasquez Rodriguez v. Honduras* that states 'could be held responsible not for the acts of non-state actors, but for lack of due diligence in preventing the violation or failure to take steps to provide the necessary reparation.'⁵²

The enforcement of the African Commission's decisions is the least clear-cut, in view of the formal role the Assembly of Heads of State seems to play in it. Implementation of the Commission's decisions depend to a large extent on the good will of the offending State. It is left to the complainant and their representative to come up with a strategy to ensure enforcement.

More recently the African Commission's Annual Activity reports which include its decisions have been the subject of lengthy and animated discussions by the Assembly of Heads of State and Government during the AU summits. States have begun paying more attention to the Commission's work, particularly its decisions. However the rate of implementation of the Commission decisions remains low. A recent study indicates that only 14% of the Commission's decisions have been implemented.⁵³

⁴⁹ Articles 60 and 61 of the African Charter

⁵⁰ See Discussion in Viljoen et at pps37-54

⁵¹ 227/1999

⁵² Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) para 172

⁵³ An Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights by Lirette Louw: A thesis submitted in fulfilment of the requirements for the degree of Doctor of Laws (LLD) at the University of Pretoria, South Africa (28 January 2005).

II. The African Court on Human and Peoples Rights

The establishment of the Court marks a significant milestone in the protection of human rights in Africa and increases the number of mechanisms litigants can submit their complaints to.

In 2004 the AU Assembly decided to integrate the African Human Rights Court and the Court of Justice of the African Union, a move which has contributed to delay in the establishment of the Court. The merging process is ongoing and will most likely culminate in a single court with a human rights chamber. The merger of the two courts would only become possible once the protocol on the AU Court of Justice has entered into force, something that has not yet happened.⁵⁴

The protocol establishing the Court came into force on 25 January 2005 after receipt of the 15th instrument of ratification of the Comoros on 25 December 2004. The election of judges took place at the mid-term AU Summit from 16- 24 January 2006.

Litigants from whom the Court may receive communications are; the African Commission, a state party that is a complainant before the Commission, a State Party that is also a respondent before the African Commission, a State Party whose citizen has been a victim of human rights violations and African inter-governmental organisation.⁵⁵

The Court can apply any instrument or source of law concerning human rights that is ratified by all the states concerned. This, over time, will permit the Court to address emerging human rights issues. Access to the Court is however limited by Article 34 (6) which requires state parties make a declaration accepting the competence of the Court to receive cases from individuals. Burkina Faso is the only country that has made this declaration.⁵⁶

In terms of evidence, the Court will hear submissions by all parties and if deemed necessary, hold an enquiry. State Parties shall assist by providing relevant facilities for the efficient handling of the case. The Court may receive written and oral evidence including expert testimony.⁵⁷

The Court once it becomes operational will complement the Commission's mandate.⁵⁸ It will supplement its mandate to examine individual and inter-state communications. The protocol empowers the Court to provide legal assistance to litigants before it if 'the interests of justice so require.'⁵⁹ A judgment of the Court shall be binding on States Parties, who shall therefore be obliged to guarantee its execution.⁶⁰

⁵⁴ Supra n Viljoen et al p 30

⁵⁵ Art 5 (1) Court Protocol

⁵⁶ OAU, Report on the Status of OAU/AU Treaties EX.CL/296(X) Rev. I

⁵⁷ Art 26 Court Protocol

⁵⁸ Art 2 Court Protocol

⁵⁹ Ibid Article 10(2)

⁶⁰ Ibid., Art 30

III. The African Committee on the Rights and Welfare of the Child

Established in 2001, the Committee is mandated to promote and protect rights detailed in the Children's Charter, to monitor implementation and ensure protection of children's rights and to investigate violations of Children's rights. It is composed of 11 members elected by the Assembly of Heads of State and Government of the OAU/AU. Like the members of the African Commission on Human and Peoples' Rights, they serve in their individual capacities.

Article 44 of the Charter recognises the jurisdiction of the Committee with regard to individual communications. These complaints against states parties may concern any issue covered by the Charter, and may be submitted by any individual, group or non-governmental organisation recognised by the OAU/AU, a member state or the UN.

However, it should be underscored that the Children's Charter, unlike the African Charter, does not contain any provisions specifying the conditions of admissibility to be met before individual complaints submitted against states parties can be examined. The Committee has however not considered individual complaints.

IV. Sub- Regional Mechanisms

Through judicial mechanisms of regional economic integration, African States over the past decade have evolved formidable, if yet tentative, supra-national judicial oversight of human rights norms that compete with the African Court on Human and Peoples' Rights. Because of this development, most African countries are today party to one or more mechanisms of supra-national judicial oversight.⁶¹ Sub-regional institutions do not have any formal relationship with the regional human rights mechanisms and UN treaty bodies. The proliferation of these institutions which were set up to consider disputes related to the interpretation of sub-regional economic treaties will impact human rights litigation on the continent. The regional human rights system and the sub-regional bodies present rich possibilities for forum shopping in the enforcement of regional human rights standards in Africa.⁶²

The EA Court is established under a treaty of a regional economic community. Article 6(2) of the treaty obliges partner States to protect human rights in accordance with the African Charter. Judges of the Court are appointed from among persons "recommended by the partner States who have proven integrity, impartiality, and independence, and who fulfil the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognised competence, in their respective partner States"⁶³. Unlike the regional Court, human rights expertise is not a requirement for a judgeship appointment.

The ECOWAS Court of Justice is established under Article 15 of the ECOWAS

⁶¹ Odinkalu C.A, *Complementarity, Competition or Contradiction: The Relationship between the African Court on Human and Peoples' Rights and Regional Economic Courts in East and Southern Africa*, p 3

⁶² *Ibid*, p 5

⁶³ Article 24, Treaty of the East African Community.

treaty. Under the treaty members of the community affirm ‘to adhere to the principles of recognition promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples Rights.⁶⁴ A supplementary protocol⁶⁵ which grants individuals direct access to the Court was adopted in 2005. Judges of this Court are not required to have human rights expertise and its rules of procedure do not take cognizance of the Court’s competence to consider human rights complaints.

The SADC Tribunal was formed within the framework of the SADC Community.⁶⁶ Member states agree to subscribe to a set of fundamental principles including human rights, democracy and rule of law.⁶⁷ They are obliged to undertake far-reaching obligations to eliminate discrimination on grounds of gender, religion, race, political opinion, ethnic origin, culture or disability.⁶⁸ Like the EAC Court and the ECOWAS Court SADC tribunal judges are not required to have knowledge of human rights law.

These recently established sub-regional courts will in the near future give binding judgments. The first few human rights decisions given by these bodies will give potential litigants a glimpse of what to expect when they approach these Courts.

These mechanisms are relatively untested and the judges on them are not necessarily familiar with human rights law. Litigants thinking of submitting cases to these bodies must be fully aware of the pros and cons from the outset. They must justify their preference of sub-regional mechanisms over regional and UN bodies. Sub-regional mechanisms may be ideal fora for cases related to the interpretation of treaties which mainly focus on community issues. Caution must be exercised when considering whether to submit human rights cases to these bodies.

In future the Court, the African Commission and the regional economic courts and tribunals will need to share information on their pending and completed cases. This should place these institutions in a position to anticipate and respond to cases of unwarranted forum shopping. By sharing jurisprudence in completed cases, these bodies will also be able to minimise the opportunities for contradictory jurisprudence on the African Charter.⁶⁹

In choosing between an African regional human rights mechanism and a UN treaty body, there are a number of considerations that that should be taken into account.

E. Points to think about in the choice of fora⁷⁰

In choosing a mechanism with jurisdiction to hear a case a litigant should also take into account which body offers the most beneficial jurisprudence, procedures and remedies.

⁶⁴ Article 4(g) of the ECOWAS Treaty

⁶⁵ A/SP.1/01/05

⁶⁶ Article 9 SADC Treaty

⁶⁷ Ibid n 66 Article 4

⁶⁸ Ibid Article 6(b)

⁶⁹ Supra, Odinkalu n52 p 12 & 13

⁷⁰ Adopted from Interights Manual on the Theory and Practice of Strategic Litigation with particular reference to the EC Race Directive.

I. **In selecting the appropriate forum** there are a number of considerations litigants should take into account

a. Relevant law.

Litigants have to be certain that the relevant international law permits a complaint to the chosen forum on the facts of their case. Litigants from all African countries, except Morocco which is not a member of the African Union can file complaints before the African Commission. Once the Court starts hearing cases, only litigants from Burkina Faso will directly petition the Court. Other complainants will access the Court through the Commission and their states. Complainants who wish to petition a particular UN treaty body should check whether their countries have ratified the relevant treaty and accepted the mechanism's competence to consider individual complaints.

b. Assessment of potential impact

If you are litigating strategically, there are a few issues to bear in mind. You need to have an idea whether success in the chosen forum will have widespread effect. The prevailing political environment in a country is important in assessing the impact of the decision. Assess the potential impact of a case being decided by an African body as opposed to a UN body.

It is difficult to assess the impact of the African Commission's decisions as only 14% of its decisions have been implemented. Unlike the African Commission and UN treaty body decisions, the Court and the sub-regional mechanisms will hand out binding judgments.

c. Ongoing developments

Potential petitioners should find out if there are cases on this subject already ongoing in the chosen mechanism. If so, it might be possible to take immediate advantage of this by finding out about how this is related to your case. Exchange of information and strategies with complainants before the mechanism you are thinking of approaching will ensure that a similar ongoing matter does not prejudice your case. Is the respondent state or the theme of potential case under scrutiny by a treaty body? It would be useful to find out whether a Special Rapporteur has made plans to visit the country or whether there are any relevant General Assembly resolutions related to the issues you intend to raise.

d. Previous decisions

It is helpful to find out about each mechanism's record in dealing with similar cases. Check if previous decisions indicate a favourable disposition towards the issue you intend to litigate on. For example if you are dealing with a women's rights case in which the respondent country has ratified CEDAW's optional protocol, in deciding which forum to approach look at both the African Commission's and CEDAW's record in dealing with similar cases. Important to look at would be previous resolutions and documents like state reports and Special Rapporteurs' reports.

e. Quick wins

If getting a quick win is one of your goals look for a jurisdiction where you can get early and quick wins to gain momentum and lay successful ground work. You may not want a hard case, at least to begin with, because it may set back the whole process. Look at the duration of complaints before the UN treaty body and the regional mechanisms that are competent to consider your case. The complaints procedure before the African

Commission' procedure takes anything from 1.5 to 2.5 years. The Court will give its judgment within 90 days from the completion of its deliberations.

The African Commission may grant interim measures to avoid irreparable damage being caused to the victim of the alleged violation.⁷¹ The Court can adopt provisional measures in cases of extreme gravity and urgency to avoid irreparable harm to persons.⁷²

f. Regional and international courts

It is important to determine how efforts in treaty bodies should interact with other efforts. Is the treaty body more likely than the Commission to push forward the jurisprudence on this issue? If you don't plan on developing jurisprudence look at the record of the mechanisms in dealing with the kind of complaint you intend to submit. Are there jurisdictions from which certain questions or issues are likely to get better outcomes in a treaty body? What is the state more concerned about: regional or international reputation? Certain African states have been known to engage with the regional and international human rights system differently.

g. Political and Social context

i. Litigants are best place to gauge the respondent state's reaction to decisions from human rights mechanisms. What are the chances that the decision will be enforced? States respond to regional and international mechanisms differently so it would be helpful to figure how the state would respond to a decision from the African Commission or one from a UN mechanism.

Before the African Commission litigants should give thought to the issue of enforcement as they map out their litigation strategy at the beginning of the case. In handing down remedies the Commission usually responds to the remedies requested for in the applicant's brief. UN treaty bodies require states to provide an update on the implementation of the findings three months after a decision has been given.

ii. The political and economic situation in your country might affect how and where you choose to conduct human rights litigation. How does the government respond to human rights issues? What is the economic situation in the country? Is the government under political pressure (e.g. pending elections)? Is the culture in the State one of acceptance and understanding human rights issues? Lawyers from countries facing economic and political crises like Zimbabwe have used litigation before the African Commission as a strategy to focus attention on the human rights situation in their country.

iii. Can you or the organisation you work for accept politically sensitive or volatile cases that may put the organisation or its leaders in personal danger? If yes, determine the most effective means to meet the potential risk and formulate a strategy. There have been instances when lawyers fearing for their safety have preferred to work with representatives outside the country

II. Applicable Laws

It is vital to know what law or standards will be applied in the case by the chosen tribunal. Find out whether the mechanism you plan to approach can refer to relevant international

⁷¹ Ibid, n 44 Rule 111

⁷² Article 27(2) Supra, Court Protocol

instruments during its consideration of your complaint. The Commission in its consideration of cases regularly draws inspiration from international human rights and humanitarian law instruments. The Children's Charter and the Court Protocol have provisions allowing the Committee and the Court to do the same. If the respondent state has made reservations to the relevant UN treaty, find out whether reservations have been made to the relevant regional treaty.

III. Procedural criteria

i. Costs

The high costs involved in international litigation are a detriment to litigants intending to petition these mechanisms. The admissibility and merits stages of complaints before the African Commission are for the most part conducted orally. This may require the applicant's representative to travel to the country at which the session is scheduled to take place. Other than travel expenses other costs that litigants have to take into account are legal fees and miscellaneous costs.

ii. Time limits

Time limits can debar claims and so must seriously be considered when choosing a forum. You must determine whether there are tight time limits for submitting the case. Before the African Commission the requirement is that complaints be submitted within 'reasonable period from the time local remedies are exhausted.'⁷³ Verify what the rules before the relevant UN treaty body say.

iii. Rules of Standing

Standing before the Court and the African Commission is provided for in article 56 of the African Charter. Recent practice before the Commission requires that the author and the complainant have a link. Once the African Court begins considering cases, NGOs and individuals will have the opportunity to file complaints if their governments have made a declaration under article 34(6). The Commission and State Parties will also be able to file complaints on behalf of victims before the Court.

Before UN treaty bodies the applicant must show that they are personally and directly affected by the law, policy, practice, act or omission of the State party which you claim has violated or is violating your rights.⁷⁴ Ascertain whether the person on whose behalf you are filing the complaint been personally affected by the action to file the complaint.

iv. Rules of evidence

Human rights litigation involves some of the most vulnerable and excluded groups in society. These groups are often worst placed to document and prove the violations they have endured. Are the rules of evidence strict? Rules of evidence that exclude or question the value of certain types of evidence may operate to prejudice certain claims. Also, certain abuses such as indirect discrimination or institutionalised racism can be extremely difficult to prove. The African Commission is open to various forms of evidence including video recordings, photographs and expert testimony. The Court can receive oral and written evidence. It can also carry out an inquiry.

⁷³ Article 56 (6)

⁷⁴ Procedure for complaints by individuals under the human rights treaties, The admissibility of your case p.5, accessed on 9 July 2007 from <http://www.ohchr.org/english/bodies/petitions/individual.htm#admissibility>

The UN Committees consider complaints on the basis of written information supplied by the complainant and the State Party. There are no oral submissions from the parties and the Committees don't receive audio or audio-visual evidence.⁷⁵

v. Exhaustion of domestic remedies or other alternative venue doctrines

Verify whether the mechanism you are considering approaching insists on formal application of exhaustion of local remedies. The African Commission's admissibility stage requires applicants to have exhausted local remedies unless they are duly prolonged, ineffective or unavailable. The African Court's admissibility requirements like the African Commission's require victims to exhaust local remedies.

vi. Nature of proceedings

Pleadings before the African Commission normally involve both oral hearings, however more recently the Commission has informed parties that there was no need to conduct oral hearings if it had received all the relevant documents. Submissions related to complaints before UN treaty bodies are all made in writing. Oral testimony, which entails travel by victims and their representatives to the hearing venue, can be a powerful tool in litigating torture cases.

vii. The duration of the proceeding

At the start of the process be honest with the victims and give them an idea of the duration of the litigation process. Inform them about the average time a mechanism takes to dispose of a matter. The African Commission takes an average of 1.5-2.5 years. Once it starts hearing the cases the African Court will deliver judgment within 90 days of completing its deliberations. You can compare this with the average length of proceedings taken before the UN treaty body competent to consider your complaint.

IV Choice of remedies:

Remedies granted by the African Commission are usually the prayers requested for by the applicant in their petition. These have included returning citizenship, setting up truth commissions, undertaking environmental impact studies, revising legislation. While the African Commission has requested states to compensate victims, it has generally left it to states to quantify specific amounts. Before the African Commission applicants can be innovative and ask for things beyond the obvious. It is in the hands of the complainants to set out what they want. In terms of remedies the Court shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.⁷⁶

If the goal of litigation you are undertaking requires a particular type of remedy, this will determine the type of procedure and the mechanism before which the matter should be filed. The type of remedy and the action to be taken must be decided by you together with your client. Does a particular mechanism give a type of remedy that another does not. Can the applicant request for innovative remedies? Compare the remedies rendered by the mechanisms you are thinking of approaching.

⁷⁵ Ibid, Procedure for complaints by individuals under the human rights treaties, p.6

⁷⁶ Article 27 African Human Rights Court Protocol

VII. Enforcement

Before the African Commission, there is no formal follow up procedure regarding states' implementation of decisions, and it is up to the applicants to prepare a strategy. The Court Protocol obliges states to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.⁷⁷ The procedure before UN mechanisms requires the State Party to supply information within three months on the steps it has taken to give effect to its findings.⁷⁸

For torture victims, good decisions are meaningless if they simply remain on paper. Implementation strategies should take into account the roles of the relevant state agencies with whom one should engage. The existence of various human rights mechanisms rendering human rights decisions require that steps are in place to ensure that these decisions provide concrete remedies for the aggrieved..

F. Conclusion

Since one of the goals of litigating torture cases is to seek redress for victims it is important that their thoughts are taken into account during litigation before human rights mechanisms. Proceedings before the African Commission allow the views of torture victims to be taken into account orally, through the submission of written statements or video testimony. Similarly, the Court which will receive oral and written evidence also has power to conduct an inquiry. Decisions granted by the Court will bind parties and the availability of legal aid before the Court system will increase the number of vulnerable people who would be able to access justice through the regional human rights mechanism.

Litigants need to assess various issues related to the peculiarities of each forum, the applicable standards, procedural aspects and the national context in which the alleged violations have occurred. Presented with a multiplicity of mechanisms within the region and before the UN system, complainants must carefully choose the most appropriate body which can provide them with a fitting remedy. Litigants should petition a mechanism whose decision will have impact for the victim and effect changes in law, policy and practice.

Judith A. Oder is a Lawyer with INTERIGHTS' Africa Programme. The views expressed in this paper do not necessarily reflect those of INTERIGHTS.

⁷⁷ Ibid, Art 30

⁷⁸ Supra n 67, Procedure for complaints by individuals under the human rights treaties