

The Prohibition of Torture and Ill-treatment in the African Human Rights System:

A HANDBOOK FOR VICTIMS AND THEIR ADVOCATES

OMCT Handbook Series Vol. 3

Frans Viljoen & Chidi Odinkalu

Revised and updated by:
Lorna McGregor and Jo-Anne Prud'Homme



2nd edition

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IN THE AFRICAN HUMAN RIGHTS SYSTEM:
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The World Organisation Against Torture (OMCT) coordinates the activities of the SOS-Torture Network, which is the world's largest coalition of non-governmental organisations fighting against torture and ill-treatment, arbitrary detention, extrajudicial executions, forced disappearances, and other serious human rights violations. OMCT's growing global network currently includes 311 local, national, and regional organisations in 92 countries spanning all regions of the world. An important aspect of OMCT's mandate is to respond to the advocacy and capacity-building needs of its network members, including the need to develop effective international litigation strategies to assist victims of torture and ill-treatment in obtaining legal remedies where none are available domestically, and to support them in their struggle to end impunity in states where torture and ill-treatment remain endemic or tolerated practices. In furtherance of these objectives, OMCT has published a Handbook Series of four volumes, each one providing a guide to the practice, procedure, and jurisprudence of the regional and international mechanisms that are competent to examine individual complaints concerning the violation of the absolute prohibition of torture and ill-treatment. This updated edition of the Handbook on seeking remedies for torture victims in the African Human Rights System is the third volume of the series.

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DISCLAIMER

The views expressed in this book are solely those of the authors of this book. They do not reflect the views of any institution or organization.

PREFACE

'Nothing can justify torture and cruel, inhuman or degrading treatment under any circumstances'. The law could not be clearer on this point. Yet implementation remains the primary challenge around the world.

This revision of the *Practitioners' Handbook* aims to contribute to closing the implementation gap by enabling, encouraging and supporting lawyers and human rights defenders from Africa to make recourse to the African Human Rights System, including the sub-regional Courts of Justice, a foundational aspect in their litigation and anti-torture strategies. The use of torture has been prohibited through Article 5 of the African Charter and most African States have passed domestic legislation outlawing torture and ill-treatment. However, torture and other forms of ill-treatment remain pervasive amongst African countries.

Although torture remains pervasive, progress has been made since the publication of the first edition of the *Handbook* towards ending the impunity that too often accompanies torture. Even if it is comparatively new, the African human rights system has become a valuable tool for ending such impunity. The progressive development of case law and protection measures allow human rights organisations and lawyers to use the African system for the purposes of strategic litigation seeking to redress systemic and institutional problems in their home countries.

Practiced outside the public eye, torture allegations raise serious and multiple evidentiary challenges. Practiced by state officials in isolation or as part of a systemic policy, litigators find themselves confronted with a strong and misguided *corps d'esprit* seeking to prevent justice. Involving public opinion and sympathy, too, can be difficult if the victim is accused of serious crimes. Moreover, seeking remedies and reparation often results in threats to victims, witnesses and human rights defenders. In light of these challenges, pursuing regional remedies is often the only hope for redressing torture.

The first publication of the *Handbook* in 2006 was drafted by *Frans Viljoen* and *Chidi Odinkalu*, authoritative experts on the African Human Rights System. While most of the initial text remains intact, this publication offers an updated edition by *Lorna McGregor*, international legal adviser and Director of the Human Rights Centre of the University of Essex, and *Jo-Anne Prud'homme*, senior researcher and legal adviser. The second edition includes a step-by-step guide to the complaint procedure before the African Commission on Human and Peoples' Rights and other sub-regional bodies, as well as an explanation of the role of the African Court on Human and Peoples' Rights.

The updated *handbook* also covers the evolution of case law, pinpointing settled and emerging jurisprudential approaches regarding the nature and substance of the obligations contained in Article 5 of the African Charter on Human and Peoples' Rights, as well as the content of procedural duties and the scope of reparations for victims of torture.

This expanded body of case law demonstrates how the African Human Rights System is evolving into an effective tool in the fight against torture and ill-treatment. Nevertheless, significant difficulties currently faced by Commission and Court cannot be overlooked. The updated edition of the *Handbook* should also help to build the capacity of practitioners and civil society organisations to enhance the strengths and overcome the challenges of the African Human Rights System.

We hope that this publication will be of practical help to lawyers, human rights defenders and the members of the SOS torture network of the OMCT across the African continent. We thereby encourage them to contribute to closing the implementation gap and bringing us closer to the legal promise that indeed '*nothing can justify torture under any circumstances*'.

Gerald Staberock
Secretary General
2014

INTRODUCTION

This publication aims to provide an introduction to the African regional human rights system, by presenting an overview of the framework and evolving norms and jurisprudence of the regional and sub-regional human rights bodies. Additionally, this *Handbook* seeks to act as a practical guide for civil society actors and NGOs by detailing procedures and requirements for utilising the various human rights tools built into the system. In general, this publication will describe the accomplishments, potential and challenges of this system to deal with the pervasive problem of torture.

In Part A, the broader African Union ('AU') institutional framework within which the system functions is set out and explained. A basic introduction is then given of the main AU human rights treaty, the African Charter on Human and Peoples' Rights ('African Charter', 'the Charter'), and its implementing body, the African Commission on Human and Peoples' Rights ('African Commission', 'the Commission'). In discussing the African Commission, a distinction is drawn between its protective and promotional mandates. The African Court on Human and Peoples' Rights ('African Human Rights Court', 'the African Court'), which supplements the Commission's protective mandate, is then introduced, before other AU treaties of relevance to torture are briefly discussed. This second edition subsequently provides a detailed examination of the mandate, composition, and jurisprudence of various sub-regional human rights bodies, including Economic Community of West African States (ECOWAS) Community Court of Justice, East African Community (EAC) Court of Justice, and the Southern African Development Community (SADC) Tribunal. This section, importantly, also details the complaint procedure for accessing each of these human rights bodies.

The main substantive norms of a binding nature are then extracted from the African Charter and are discussed in the light of the Commission's interpretation of these norms in specific cases (in Part B). By examining the jurisprudence of the Commission, this part examines essential elements of torture and ill-treatment, such as the requisite threshold distinguishing torture, the treatment of detainees, and the obligations of States to investigate, punish, and avoid practices of immunity and amnesty. In addition, Part B makes note of the substantive norms set out regarding the rights of the child and the rights of women. This part also places emphasis on the means of remedy that are available through these human rights bodies.

Part C explains the communications procedure in an effort to provide litigators with practical knowledge about the application procedure to the various regional and sub-regional bodies. The phases through which an individual petition before

the African Commission proceed are discussed step-by-step and are compared with the process likely to develop before the African Human Rights Court. This part then explains the application procedure for each of the sub-regional bodies. Additionally, on-site missions are covered as part of the protective mandate, highlighting instances where torture was investigated or reported on.

Part D covers the promotional mandate of the Commission in so far as it is relevant to issues of torture and ill-treatment. Core elements of this discussion are the role of non-governmental organisations ('NGOs'), the Commission's public sessions, the significance of promotional visits by Commissioners, the adoption of (non-binding) resolutions, State reporting and the efforts of the Special Rapporteur on Prisons and Conditions of Detention in Africa. The emphasis on promotion, born from a context of denial of and ignorance about human rights as well as poverty and illiteracy, distinguishes the African human rights system from other regional systems.

The target audience of this publication is, generally, anyone concerned about torture in Africa and, specifically, civil society organisations and NGOs operating in Africa. As stated in the preface to this volume, Africa's era of democratisation has opened a space in which NGOs are able to operate more freely and to greater effect. When understood and used properly, the African human rights system can be a highly effective tool in combating the implementation gap that currently exists in many African countries. As such, the role and responsibility of civil society organisations in addressing torture is now greater than ever before.

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PART A

BACKGROUND TO THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM

I. Institutional Development: From OAU to AU

As in other regional human rights systems, African inter-governmental institutions have adopted regional mechanisms relevant to the prohibition against torture in Africa. The attitudes of these institutions to human rights generally and, in particular, to the prohibition against torture have evolved in the light of regional political values that have changed since the independence of most African States in the 1960s. The relevant regional inter-governmental institutions in Africa are the Organization of African Unity (OAU) (1963 - 2001/2) and the African Union (AU) (since 2001/2). It is necessary briefly to introduce these two institutions.

The OAU was established in May 1963 under a Charter with treaty status adopted by the then newly independent African States.¹ Among its objectives, the OAU Charter mandated the African States in the OAU 'to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa'² and 'to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'.³ However, the OAU Charter also required Member States to abide by a number of bedrock principles, including the principle of sovereign equality of all Member States and the principle of non-interference in the internal affairs of States.⁴

The OAU Charter established the Assembly of Heads of State and Government ('AHSG' or 'Assembly') as the 'supreme organ of the Organization'.⁵ The Assembly met once a year and was composed - as its name suggests - of Heads of African Member States and Governments. Its resolutions were carried by a two-thirds majority of the Members.⁶ Other principal institutions included a Council of Ministers and a General Secretariat. The Secretariat was established in Addis Ababa, Ethiopia under the administrative leadership of a Secretary-General. The Council of Ministers consisted of ministers of foreign affairs, who met twice annually and prepared the agenda of the AHSG. The Secretariat was given responsibility for the operations of the OAU.⁷ It supported the operations of both the OAU and of regional human rights institutions in Africa.⁸

1 Charter of the Organization of African Unity, adopted on 25 May 1963, Addis Ababa (Ethiopia), entered into force on 13 September 1963, United Nations Treaties Series (UNTS) 479, p. 39, reprinted in *International Legal Material (I.L.M.)* 2, 766 (1963) [hereinafter 'OAU Charter'].

2 *Ibid.*, Article II(1)(b).

3 *Ibid.*, Article II(1)(e); Universal Declaration of Human Rights, adopted and proclaimed by UN General Assembly Resolution 217A (III) of 10 December, 1948, UN Doc. A/810 at 71 (1948).

4 OAU Charter, *supra* note 1, Articles III(1)-(2).

5 *Ibid.*, Articles VII(1), VIII.

6 *Ibid.*, Article X(2).

7 *Ibid.*, Article VII.

8 The OAU only adopted rules on consultative arrangements with civil society organisations in 1993.

For most of the life of the OAU, the question of how Governments treated their nationals was regarded as a domestic matter over which other African Governments or institutions had little influence. The OAU's narrow prohibition against 'interference' in the domestic affairs of Member States and Governments enabled many African Governments to persecute and eliminate their perceived opponents through torture and other summary and arbitrary means, without complaints from other African Governments. This complicit inaction was at its utmost in the 1970s when the continent saw the ascendancy of many brutal regimes. Thus African Governments failed to condemn the systematic elimination of opponents of the regimes of Idi Amin in Uganda, Jean Bedel Bokassa in Central African Republic, Sekou Toure in Guinea and Macias Nguema in Equatorial Guinea, while vocally condemning the violations in apartheid South Africa.

Justifiable resentment both within and outside Africa against such double standards inspired the adoption of the African Charter on Human and Peoples' Rights.⁹ With the entry into force of the African Charter in 1986 and the establishment of the African Commission on Human and Peoples' Rights ('African Commission' or 'The Commission') in 1987, there came into existence a continental mechanism for monitoring the behaviour of African Governments in the treatment of their own people.¹⁰

At its 36th Ordinary Session in July 2000 in Lomé, Togo, the Summit of the Assembly of Heads of State and Government of the OAU adopted a new foundational treaty

Under these rules, there are two forms of consultative arrangements: observer status and a more specialised co-operation agreement. Only African NGOs may seek observer status with the OAU, unlike the more specialised co-operation agreement, which may also be concluded with non-African NGOs. In order to qualify for observer status, an NGO would have to show that its objectives and activities conform to the fundamental principles and objectives of the OAU, as elaborated in the Charter; that it is an African organisation, registered and headquartered in Africa; and that the majority of its membership is composed of Africans. It must also demonstrate that it has a secure financial basis and that the majority of its funding comes from African sources. Criteria for Granting OAU Observer Status as Amended by the Twenty-Ninth Ordinary Session of the Assembly of Heads of State and Government, AHG/192, Rev. 1 (XXIX), Articles 1(a)-(c) (1993). An NGO wishing to apply for observer status must submit a written request to the Secretary General at least 6 months before the next meeting of the Council of Ministers and include its charter, rules and regulations, a current membership list, sources of funding, its last account balance, and a memorandum of the organization's activities, past and present. For further discussion, refer to Part D, Section XII of this volume. Under the AU Constitutive Act, the Economic, Social and Cultural Council (ECOSOCC) is the organ for organising civil society relations with the AU. The AU established its ECOSOCC in 2004.

9 African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, reprinted in 21 I.L.M. 58 (1982) [hereinafter 'African Charter', 'the Charter'], reproduced in full in Annex 1 to this *Handbook*.

10 The African Commission on Human and Peoples' Rights is established under Article 30 of the African Charter. It was inaugurated on 2 November 1987. See First Activity Report of the African Commission on Human and Peoples' Rights 1987-88, ACHPR/RPT/1st, para. 4 [hereinafter 'ACHPR', 'African Commission'].

- the Constitutive Act of the African Union.¹¹ The AU Constitutive Act entered into force in 2001, and the African Union formally succeeded and superseded the OAU when its inaugural meeting was held in July 2002.

Unlike the OAU Charter before it, the AU Constitutive Act contains explicit commitments on human rights and States Parties thereto undertake to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments’.¹² It establishes a new ‘right of the Union to intervene in Member States pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity’¹³ as well as the right of Member States to request intervention from the Union to restore peace and security.¹⁴ In addition, the treaty commits Member States to the promotion of gender equality;¹⁵ promotion of democratic principles, human rights, rule of law, and good governance;¹⁶ and to ‘respect for the sanctity of human life’.¹⁷

The organs of the African Union, mirroring those of the now defunct OAU, include the AU Assembly (similar to the OAU AHSG), an AU Executive Council (similar to the OAU Council of Ministers), and the AU Commission,¹⁸ which replaced the Secretariat of the OAU.¹⁹ The position of OAU Secretary-General is replaced with that of the Chairperson of the AU Commission.

The Assembly, Executive Council, and AU Commission play a significant role in supporting and reinforcing the effectiveness of regional human rights mechanisms in Africa and implementing regional human rights norms.²⁰ For instance, AU political organs such as the AU Assembly and Executive Council have a treaty responsibility to ensure that States Parties comply with the decisions of the African Commission.

11 The Constitutive Act of the African Union, adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government, 11 July 2000, Lomé, Togo, entered into force on 26 May 2001, CAB/LEG/23.15 [hereinafter ‘AU Constitutive Act’].

12 *Ibid.*, Article 3(e)-(h).

13 *Ibid.*, Article 4(h).

14 *Ibid.*, Article 4(j). The States Parties to the AU Constitutive Act reject ‘unconstitutional changes of governments’. *Ibid.*, Article 4(p). They also undertake not to allow governments that come to power through unconstitutional means to participate in the activities of the Union. *Ibid.*, Article 30.

15 *Ibid.*, Article 4(l).

16 *Ibid.*, Article 4(m).

17 *Ibid.*, Article 4(o).

18 *Ibid.*, Article 5.

19 *Ibid.*, Article 20.

20 For a description of the organs of the OAU and their functions in the promotion and protection of human rights, see, F. Viljoen, *International Human Rights Law in Africa*. Oxford University Press: Oxford (2012).

Under the AU Constitutive Act, numerous supranational governance structures have been added to the institutional design of the OAU. Since its inception, the AU has established a Peace and Security Council (PSC), a Pan-African Parliament (PAP), an Economic, Social and Cultural Council (ECOSOCC) and accorded a significant role to the ambassadors of the Member States based in Addis Ababa, in the form of the Permanent Representatives' Committee (PRC).

The PSC exists to respond on a continuous basis to conflicts in Africa and to advise the AU Assembly on matters pertaining to peacekeeping and possible intervention. The PAP and ECOSOCC are deliberative organs; the PAP consisting of members of parliament from the AU Member States and ECOSOCC of civil society organisations. At this stage, the PAP only has advisory powers, but its mandate includes oversight of activities of the AU executive. The PRC meets much more regularly than the Assembly or the Executive Council and plays an increasingly important role in exploring issues in greater depth and in preparing the agenda of the Executive Council.

The main human rights bodies are the African Commission, established under the African Charter, the main human rights treaty in the African system, and the African Court of Human and Peoples' Rights. Their main features are now discussed.

II. The African Charter on Human and Peoples' Rights

The African Charter²¹ is the premier instrument governing the protection of human rights on the African continent.²² The Charter was adopted by the OAU in Nairobi, Kenya in June 1981 and entered into force five years later, on 21 October 1986. In March 1999, the African Charter attained full ratification by all African States, with

21 African Charter, *supra* note 9.

22 Since the adoption of the Charter, African States have concluded other treaty instruments for the protection of human rights in Africa, including the African Charter on the Rights and Welfare of the Child, adopted by the Assembly of Heads of State and Government of the OAU on 11 July 1990, Kampala, Uganda, entered into force on 29 November 1999, OAU Doc. CAB/LEG/24.9/49 [hereinafter 'ACRWC']; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU on 9 June 1998, Ouagadougou, Burkina Faso, OAU/LEG/AFCHPR/PROT (III), reprinted in 6 *International Human Rights Reports* 891 [hereinafter 'African Human Rights Court Protocol'], reproduced in full in Annex 3; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of Heads of State and Government of the African Union, 11 July 2003, Maputo, Mozambique, Assembly/AU/Dec. 14(II) [hereinafter 'African Women's Rights Protocol'].

the deposit of Eritrea's instrument of ratification.²³ In other words, all 54 Member States of the AU are parties to the African Charter.²⁴

The African Charter contains features that distinguish its contribution to the regional protection of human rights. An early commentator on the Charter observed that it was 'modest in its objectives and flexible in its means'.²⁵ Reflecting the challenges of the continent, the Charter integrates protection of civil, political, economic, social, and cultural rights in one document, without distinguishing the manner in which these rights are implemented. For example, the right to education and to the best attainable health are included on par with the right to freedom of speech and association. In an important finding, the Commission underlined that socio-economic rights form an integral part of the Charter and emphasised that they can be 'made real' in the same way as any other right.²⁶

The civil and political rights guarantees in the Charter are mostly hedged in with claw-back clauses, which appear to subject their enjoyment to domestic laws. For example, freedom of association is granted if its exercise is allowed for by 'law'. However, the Commission has made clear that the term 'law' is not equivalent to domestic law, finding that any limitation of Charter rights must be compatible with standards of international law.²⁷

The Charter does not contain any provisions on derogation and the Commission has interpreted this silence to mean that derogation from the Charter is

23 Eritrea deposited its instrument of ratification on 15 March 1999, Thirteenth Activity Report AHG/222 (XXXVI) Annexes 1-V & Addendum (July 2000). Morocco is the only African State that is not currently party to the African Charter. Having pulled out of the OAU in 1984, Morocco remains outside the framework of regional treaty monitoring mechanisms negotiated under the auspices of the OAU.

24 Its membership includes the Sahrawi Arab Democratic Republic ('Western Sahara'), and excludes Morocco, which withdrew when the OAU recognised the Arab Democratic Republic.

25 O. Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems", 6 *Human Rights Quarterly* 141, 158 (1984).

26 ACHPR, *Social and Economic Rights Action Centre and Another v. Nigeria*, Comm. No. 155/96, 30th Ordinary Session (27 October 2011), para. 68.

27 ACHPR, *Media Rights Agenda and Others v. Nigeria*, Comm. Nos. 105/93, 128/94, 130/94 & 152/96, 24th Ordinary Session (31st October 1998). Also, the right to asylum is followed by the Article 23 qualification: '1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States. 2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that: (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter; (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.'

impermissible.²⁸ However, the absence of a provision on derogation is not necessarily a prohibition of derogation. The entitlement of States to derogate from treaties exists in customary international law and it remains arguable whether or not the African Charter can abrogate this entitlement.²⁹ Some States parties, for example Egypt³⁰ and Zambia³¹, have ratified the Charter with reservations, though this has been very limited.

Like the American Declaration on the Rights and Duties of Man, the Charter contains provisions on both rights and duties of the individual.³² Unlike the international covenants, the Charter guarantees a right to property, omits express guarantees of privacy and citizenship or nationality as human rights,³³ prohibits collective expulsion of foreign nationals, and creates an entitlement to asylum.³⁴

As its title indicates, the African Charter also contains the rights of 'peoples', thus embodying the idea that rights are not only individualistic, but are also collective in nature. One such right, the right of 'peoples' to self-determination, has been contentious, begging the question as to who qualifies as a 'people'. The concept of 'people' is not defined in the Charter; however the African Commission has expounded on the attributes that are required in order for a group of individuals to consider themselves a 'people'. In the case of *Kevin Mgwanga Gunme et. al. v. Cameroon*, the Commission, following a thorough analysis of the literature, held that the 'people of Southern Cameroon' qualify to be considered a 'people' for the purposes of the Charter 'because they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook'.³⁵

28 ACHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Comm. No. 74/92, 18th Ordinary Session (11 October 1995); *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93, 26th Ordinary Session (15 November 1999); *Malawi Africa Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97, 210/98, 27th Ordinary Session (11 May 2000).

29 See R. Higgins, "Derogations under Human Rights Treaties", 48 *British Yearbook of International Law*, 281 (1976-77).

30 See: African Charter on Human and Peoples' Rights, Ratification status, available at: <http://www.achpr.org/instruments/achpr/>.

31 *Ibid.*

32 African Charter, *supra* note 9, Articles. 27-29; see also American Declaration on the Rights and Duties of Man, adopted by the 9th International Conference of American States on 2 May 1948, O.A.S. Resolution XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003); 43 *AJIL Supp.* 133 (1949).

33 The ACHPR has, however, read the right to nationality as implicit in the guarantee of legal status in Article 5 of the Charter. See ACHPR, *John K. Modise v. Botswana*, Comm. No. 97/93, 28th Ordinary Session (6 November 2000).

34 African Charter, *supra* note 9, Article 12(3) provides that 'every individual shall have the right, when persecuted, to seek and obtain asylum...'

35 ACHPR, *Kevin Mgwanga Gunme et. al. v. Cameroon*, Comm. No. 266/03, 45th Ordinary Session (27 May 2009), paras. 174-177.

The complainants in this case alleged, principally, a violation of their right to self-determination under Article 20 of the Charter arising from the failure of the Cameroonian State to address their appeals for autonomy, including the 1994 referendum in which Southern Cameroonians overwhelmingly supported separation.³⁶ However, the Commission held that it could not ‘envisage, condone or encourage secession, as a form of self-determination for the Southern Cameroons’ as this would ‘jeopardise the territorial integrity of the Republic of Cameroon’.³⁷ The Commission upheld the test established in the case of *Katanga People’s Congress v. Democratic Republic of Congo*, that in order for violations to constitute the basis for the exercise of the right to self-determination under Article 20 of the Charter, there must be:

[Co]ncrete evidence of violations of human rights to the point that the territorial integrity of the State Party should be called to question, coupled with the denial of the people, their right to participate in the government as guaranteed by Article 13(1).³⁸

The Commission also clarified that that ‘secession is not recognised as a variant of the right to self-determination within the context of the African Charter’ and that ‘various forms of governance or self-determination such as federalism, local government, unitarism, confederacy and self-government can be exercised only subject to conformity with State sovereignty and territorial integrity of a State party.’ In this case, the Commission found no violation of Article 13, which, combined with the absence of proof of ‘massive violations of human rights’, led the Commission to conclude that there had been no violation of Article 20 of the Charter.³⁹

III. The African Commission on Human and Peoples’ Rights

The African Commission, established under Article 30 of the Charter, has been able to hear cases since 1987 and, until the entry into force of the Protocol establishing the African Court on Human and Peoples’ Rights in January 2004, was the only mechanism for the implementation of the African Charter.⁴⁰

1. Membership and Functioning

Article 30 of the African Charter establishes the African Commission as an independent expert body comprised of eleven ‘African personalities of the highest

36 *Ibid.*, paras. 184-186.

37 *Ibid.*, para. 190.

38 ACHPR, *Katangese Peoples’ Congress v. Zaire*, Comm. No. 75/92, 16th Ordinary Session (22 March 1995), para. 6.

39 ACHPR, *Kevin Mgwanga et. al. v. Cameroon*, Comm. No. 266/03, para. 200.

40 See African Charter, *supra* note 9, Article 30; First Activity Report of the ACHPR, (April 1988) ACHPR/RPT/1st, para. 4; see also, African Human Rights Court Protocol, *supra* note 22.

reputation'; who are nationals of States Parties to the Charter 'known for their high morality, integrity, impartiality and competence in the field of human and peoples' rights';⁴¹ and who function in their individual capacities, that is, not as representatives of their Governments or countries. The Charter mandates the Commission to 'promote human and peoples' rights and ensure their protection in Africa',⁴² Members of the Commission serve for six years and are eligible for re-election.⁴³

As the eleven Commissioners serve part-time, the permanent secretariat based in Banjul, The Gambia plays an important role. The Commission's secretariat is headed by a Secretary.⁴⁴ The under-resourcing of the Commission in terms of both human and financial resources has been criticised by commentators.⁴⁵

The Commission accomplishes most of its work during two fifteen-day annual sessions in April/May and October/November. Its mandate requires action to be taken during sessions (the 'intersession'). Its sessions are divided into a closed portion, during which the Commission's protective mandate is exercised, and a public portion, in which the Commission's promotional mandate is fulfilled. In addition to these 'ordinary' sessions, it may also hold 'extraordinary' sessions either at the request of the Chairperson of the African Union Commission or a majority of the Commission members. Since 2008, the Commission has held at least one and often two extraordinary sessions per year. Extraordinary sessions have been held to address particularly concerning situations for human rights. For example, in the 14th Extraordinary Session, held in 2013, the Commission focused on the political situation in Mali and in the 8th Extraordinary Session, held in 2010, the Commission discussed the political coup d'état in Niger.

41 African Charter, *supra* note 9, Article 31(1).

42 *Ibid.*, Article 30.

43 ACHPR, Rules of Procedure, approved by the African Commission on Human and Peoples' Rights during its 47th ordinary session held in Banjul (The Gambia) from 12 to 26 May 2010 [hereinafter, 'Rules of Procedure'], Rule 5.

44 As of this writing, the Commission is made up of the following people: Catherine Dupe Atoki (Nigeria) as Chairperson; the Vice-Chair is Zainabo Sylvie Kayitesi (Rwanda); the other members are Lucy Asuagbor (Cameroon), Maya Sahli Fadel (Algeria), Med S.K. Kaggwa (Uganda), Mohamed Bechir Khalfallah (Tunisia), Pacifique Manirakiza (Burundi), Reine Alapini-Gansou (Benin), Soyata Maiga (Mali), Yeung Kam John Yeung Sik Yuen (Mauritius), and Faith Pansy Tlakula (South Africa). Their contact details can be found on the Commission's web site: www.achpr.org.

45 For example, see: International Service for Human Rights, 'African Commission: Week in Perspective' (April 2013), available at: <http://www.ishr.ch/news/african-commission-week-perspective>; D. Long and L. Muntingh, "The Special Rapporteur on Prisons and Conditions of Detention in Africa and the Committee for the Prevention of Torture in Africa: The Potential for Synergy or Inertia?" *SUR-International Journal of Human Rights*, Vol. 13 (2011); Sheila B. Keetharuth, "Implementation of Decisions of the African Commission on Human and Peoples' Rights", International Human Rights Standards Project of the University of Bristol (2009).

2. Protective Mandate

Aggrieved parties may submit complaints alleging a violation(s) of Charter provisions to the African Commission. Both States⁴⁶ and non-State entities, including individuals, may initiate cases and communications before the Commission.⁴⁷ There is no additional protocol or declaration required to bring States Parties within the ambit of the Commission's protective mandate. Article 30 of the Charter creates a compulsory monitoring mechanism in the form of the African Commission. The African Commission system is compulsory because States Parties to the Charter do not have the option of refusing to submit to it.

One State Party to the African Charter may submit a complaint alleging that another State Party is in violation of the African Charter ('inter-State communication'). So far, only one inter-State communication has been submitted to the Commission.⁴⁸ Similar to the other regional human rights bodies, States tend not to use the inter-State complaint mechanism of the African Commission. The second possibility entails the submission of a complaint by any individual or NGO ('individual communication').⁴⁹

The Commission is a quasi-judicial body. Its decisions do not carry the binding force of decisions from a court of law, 'but have a persuasive authority akin to the opinions of the UN Human Rights Committee' and Inter-American Commission on Human Rights.⁵⁰ However, the Commission, like the African Court, is the authoritative interpreter of the Charter. The Commission can make a finding or declaration as to a State's compliance with the Charter and, in the case of a violation, address recommendations to the State Party to rectify those violations. Through the procedure for considering individual complaints, the Commission has developed significant jurisprudence interpreting the provisions of the Charter, including the right to be free from torture and other forms of ill-treatment.

The Commission also has special investigative powers with respect to emergency situations or 'special cases which reveal the existence of a series of serious and

46 *Ibid.*, Articles 47-54; ACHPR, *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*, Comm. No. 227/99, 33rd Ordinary Session (29 May 2003). This case is the only inter-State communication so far registered by the ACHPR.

47 African Charter, *supra* note 9, Articles 55-57.

48 ACHPR, *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*, Comm. No. 227/99.

49 Rules of Procedure, *supra* note 43, Rule 93(1).

50 G. J. Naldi, "Future Trends in Human Rights in Africa: The Increased Role of the OAU", in M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*, (2002) 1, 10. The UN Human Rights Committee is responsible for monitoring the compliance of States Parties to the International Covenant on Civil and Political Rights (ICCPR). See ICCPR, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of December 1966, entered into force on 23 March 1976, Part IV.

massive violations' of Charter provisions.⁵¹ Under the Charter, emergency situations are those that reveal a pattern of serious or massive violations. Such a pattern could be shown to exist through evidence of impunity or absence of consequences for acts in violation of Article 5 of the Charter.

Under Article 46 of the Charter, the Commission may 'resort to any appropriate method of investigation'⁵² including a request for information from 'the Secretary General of the Organization of African Unity or any other person capable of enlightening it' as well as fact-finding missions, discussed in further detail in Part D.⁵³ In relation to the prevention of and protection against torture and other cruel, inhuman and degrading treatment, this could involve the use of experts, NGOs, receiving testimonies from victims, survivors and perpetrators, and mechanisms for the collection of evidence that do not endanger the victims.

Before the Commission may publish its decisions or annual Activity Report, it must submit them for consideration by the AU Assembly, as stipulated in Article 59 of the Charter. Although the Charter does not necessarily require it to do so, the Assembly usually concludes its consideration by authorizing or withholding authority for publication of the report or decisions. The decisions are thus included in the Commission's Activity Reports to the AU Assembly. Before the AU replaced the OAU, the Assembly did not take much notice of these decisions and approved the Commission's Activity Reports without much debate. Since 2002, many more African Governments have engaged with these reports, leading to more rigorous and politically coloured discussions of the Activity Reports at the Executive Council, to which the Assembly delegated its authority to consider the Commission's annual reports. The Executive Council has on a number of occasions decided to delay the publication of the Commission's Activity Reports. For example, at its Eighteenth Ordinary Session in January 2011, the Executive Council did not authorise the publication of the Twenty-Ninth Activity Report. Instead, it called on the African Commission to 'incorporate in its report, the responses by Member States in order to have a balanced view', and to 'engage concerned member states in the verification of the facts and resubmit its report to the Nineteenth Ordinary

51 African Charter, *supra* note 9, Articles 58 (1)-(3). For an analysis of Article 58 of the African Charter, see: C. A. Odinkalu and R. Mdoe., *Article 58 of the African Charter on Human Rights: A Legal Analysis and Proposals for Implementation*, INTERIGHTS (1996); R. Murray, "Serious and Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms", 17 *Netherlands Quarterly of Human Rights* 109 (1999).

52 African Charter, *supra* note 9, Article 46. Under the AU Constitutive Act, the Chairperson of the Commission of the African Union replaces the Secretary-General of the OAU as the head of the Secretariat of the AU. AU Constitutive Act, *supra* note 11.

53 African Charter, *supra* note 9, Article 46.

Session'.⁵⁴ The adoption of the African Commission's Twenty-Ninth Activity Report was further delayed in July 2011, along with the Thirtieth Activity Report, before both were eventually adopted in January 2012.⁵⁵ In June 2006 the Council also decided to delay the publication of a decision against Zimbabwe contained in the Commission's Twentieth Activity Report,⁵⁶ and allowed the Zimbabwean Government another opportunity to comment on the case, although it had already participated in the hearing of the matter.⁵⁷ The decision was included in the Twenty-First Activity Report.⁵⁸ These actions of the Executive Council are indicative of a degree of defensiveness amongst Member States concerning public criticism of their human rights records.

3. Promotional Mandate and Special Procedures (Rapporteurs)

Under Article 45 of the Charter, the responsibilities of the African Commission include promotional work through standard-setting, including the formulation of 'principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations',⁵⁹ advisory work, including the interpretation of the Charter 'at the request of a State Party, an institution of the AU, or an African organisation recognized by the AU',⁶⁰ and awareness-raising programs such as conferences, seminars, and symposia.⁶¹

The Commission also receives and considers periodic reports that States Parties are required to submit under Article 62, as discussed in further detail in Part D. The Commission monitors State compliance with Charter provisions by receiving and considering these reports.⁶²

Over time, however, the Commission has taken the initiative to establish other mechanisms to supplement its initial mandate. One of these mechanisms was the establishment of the position of Special Rapporteur. The Commission established and appointed the following Special Rapporteurs and other special mechanisms: the Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions in Africa (in 1994), the Special Rapporteur on Prisons and Conditions of Detention

54 AU Executive Council, Decision on the Activity Report of the ACHPR, EX.CL/Dec.639(XVIII), paras. 4 and 6.

55 AU Executive Council, Decision on the Activity Report of the ACHPR, EX.CL/Dec.666(XIX).

56 *Ibid.*

57 AU Executive Council, Decision on the Activity Report of the ACHPR, EX.CL/Dec.310(IX), para. 2.

58 ACHPR, Twenty-First Activity Report, adopted in November 2006, EX.CL/322 (X).

59 African Charter, *supra* note 9, Article 45(1)-(b).

60 *Ibid.*, Article 45(3).

61 *Ibid.*, Article 45(1)(a).

62 *Ibid.*, Article 62.

in Africa ('SRP' in 1996), the Special Rapporteur on the Rights of Women in Africa (in 1999), the Special Rapporteur on Freedom of Expression in Africa (in 2004), the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internal Displaced Persons in Africa (in 2004), the Special Rapporteur on Human Rights Defenders in Africa (in 2004) and the Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV (in 2010). These mandates are discussed in more detail in Part D.

The Commission also appoints working groups, which are distinct from Special Rapporteurships in that they consist of one or more Commissioners as well as members of civil society organisations or other experts. Examples of Working Groups of the African Commission are those on Indigenous Peoples/Communities in Africa, on the Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa and the Committee on the Prevention of Torture, which promotes and facilitates the implementation of the Robben Island Guidelines within Member States.⁶³ The work of the Committee is discussed in further detail in Part D of this *Handbook*.

IV. The African Court on Human and Peoples' Rights

On 3 July 2006, the AU Assembly inaugurated the African Court on Human and Peoples' Rights ('African Human Rights Court'). The concept of the African Human Rights Court dates as far back as 1961; however there was little political will amongst OAU Member States to include provisions establishing a court in the Charter. The original Charter instead provides for the creation of the African Commission, a non-judicial body argued at the time to be more in line with African tradition.⁶⁴ The initiative for the creation of the African Court was spearheaded by the International Commission of Jurists in 1993.⁶⁵ The Protocol to the Charter⁶⁶ establishing an African Human Rights Court was adopted by the OAU in 1998, but only entered into force in 2004, following its fifteenth ratification. As of 1 November 2013, 26 States have ratified the African Human Rights Court Protocol.⁶⁷

63 For further discussion of the Robben Island Guidelines, see "Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa" (Robben Island Guidelines), ACHPR/Res.61(XXXII)02 (2002) [hereinafter referred to as 'The Robben Island Guidelines']; Part D, Section XIV(1)(b) The Commission adopted these Guidelines during its 32nd ordinary session in Banjul, the Gambia, from 17-23 October 2002. The Guidelines are reproduced in full in Annex 4 to this *Handbook*.

64 Dr. A. Zimmerman and J. Baumler, "Current Challenges Facing the African Court on Human and Peoples' Rights", *KAS International Reports* (July 2010).

65 *Ibid.*

66 See African Human Rights Court Protocol *supra* note 22.

67 They are: Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Comoros, Congo, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Niger, Nigeria, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.

The Court officially began operating in November 2006 in Addis Ababa, Ethiopia and in August 2007 it moved to its seat in Arusha, Tanzania. The Court received its first application in August 2008 and delivered its first judgment in 2009 in the case of *Michelot Yogogombaye v. the Republic of Senegal*.⁶⁸ By September 2013, the Court had received 28 applications of which it had finalised twenty with eight cases pending, including one request for an Advisory Opinion. However, the Court has yet to issue a judgment dealing with Article 5 of the Charter, and it is therefore too early to assess the Court's jurisprudence relating to torture and ill-treatment.

In 2009, the Protocol for an African Court of Justice entered into force, having been adopted by the AU Assembly in 2003. However, before its establishment, the AU Assembly decided to 'merge' this Court and the African Human Rights Court under one body, the African Court of Justice and Human Rights.⁶⁹ The reasoning for an amalgamated court was concern regarding the limited financial and human resources available for both courts. The Protocol on the Statute of the African Court of Justice and Human Rights was adopted in 2008. However, the merging process has stalled indicating a lack of political will to establish this court. As of 3 January 2013, the Protocol on the AU Court of Justice and Human Rights had only 5 of the 15 ratifications needed to enter into force.⁷⁰

The African Court on Human and Peoples' Rights was established 'to complement the protective mandate of the African Commission on Human and Peoples' Rights'.⁷¹ In other words, the Court does not replace the Commission, but supplements its mandate to examine individual and inter-State communications.⁷² As discussed in further detail in Part C, the usual route to the Court is through the Commission via the referral procedure. Most individual communications therefore still must be submitted to the Commission. After the Commission has decided the case, the individual has no standing to submit the case to the Court. Only the Commission may forward it to the Court, as provided for under Rule 118(1) of the Commission's Rules of Procedure. Examples of cases that are referred by the Commission to the Court include those in which the State party has failed to comply with the Commission's decision or those involving serious or large-scale

68 African Court on Human and Peoples' Rights, *Michelot Yogogombaye v. Republic of Senegal*, App. No. 001/2008, (15 December 2009).

69 Decision on the Seats of the Organs of the African Union, Assembly/AU/Dec. 45 (III) Rev. 1.

70 Benin, Burkina Faso, Congo, Lesotho and Mali. The Protocol had 29 signatories. See African Union List of countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights, available at: <http://au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf>.

71 African Human Rights Court Protocol, *supra* note 22, Article 2.

72 For more discussion on the relationship between the Court and Commission including referral of cases to the Court from the Commission, see Part C, Section IX(3) below.

human rights violations.⁷³ States may also submit cases to the Court.⁷⁴ A distinct difference between the Court and the Commission is that decisions of the former are legally binding on States Parties. As far as its promotional role is concerned, the Commission's mandate remains intact.

The Court consists of eleven judges selected because they are jurists of high moral character with recognized practical, judicial or academic ability in the field of human and peoples' rights. The first judges were sworn in on 3 July 2006. Under the Protocol, judges shall serve a term of six years, which may be renewed once.⁷⁵ The quorum for a sitting of the Court shall be seven.⁷⁶ Unlike the Commission, whose secretariat was initially staffed by the secretariat of the OAU, and later by the Commission of the AU, the Court has its own registry with dedicated staff.⁷⁷ Its functioning is governed by the Protocol and by Rules of Procedure which were adopted by the Court in 2010.⁷⁸

The Protocol empowers the Court to provide legal assistance to litigants if 'the interests of justice so require'.⁷⁹ The Court sits and conducts its proceedings in public⁸⁰ and is required to deliver its decisions within ninety days of the conclusion of its deliberations.⁸¹ A judgment of the Court is binding on States Parties, who are obligated to guarantee its execution. However, there are issues relating to implementation of decisions, as discussed in Part C, section 13 of this *Handbook*.⁸²

73 African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Great Socialist Peoples' Libyan Arab Jamahiriya* App. No. 004/2011 (25 March 2011); *African Commission on Human and Peoples' Rights v. Libya*, App. No. 002/2013 (2013); *African Commission on Human and Peoples' Rights v. Kenya*, App. No. 006/2012 (15 March 2013).

74 African Human Rights Court Protocol, *supra* note 22, Article 5.

75 African Human Rights Court Protocol, *supra* note 22, Article 15(1): 'The judges of the Court shall be elected for a period of six years and may be re-elected only once. The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years.' The current judges of the Court are: Justice Sophia Akuffo (Ghana) (2 years), Judge Bernard Makgabo (South Africa) (6 years), Justice Gérard Niungeko (Burundi) (two years), Justice Fatsah Ouguergouz (Algeria) (6 years), Justice Augustino Ramadhani (Tanzania) (6 years), Justice Duncan Tambala (Malawi) (6 years), Justice Elsie Nwanwuri Thomson (Nigeria) (6 years), Justice Sylvain Ore (Côte d'Ivoire) (4 years), Justice El Hadji Guissé (Senegal) (6 years), Justice Ben Kioko (Kenya) (6 years), and Justice Kimelabalou Aba (Togo) (4 and half year term).

76 African Human Rights Court Protocol, Article 23.

77 *Ibid.*, Article 24.

78 The 2010 Rules of Procedure replaced the Interim Rules of Procedure adopted by the Court in 2008. See: African Union, Rules of Court, available at www.african-court.org.

79 *Ibid.*, Article 10(2).

80 *Ibid.*, Article 10(1).

81 *Ibid.*, Article 28.

82 *Ibid.*, Article 30.

V. Other African Human Rights Treaties and Treaty Bodies

Since the adoption of the African Charter, African States under the auspices of the now defunct OAU⁸³ and its successor, the AU, have negotiated and agreed upon other human rights treaties, the most notable of which include the African Charter on the Rights and Welfare of the Child (ACRWC)⁸⁴ and the African Women's Rights Protocol.⁸⁵ The first of these instruments established a separate treaty body, the African Committee of Experts on the Rights and Welfare of the Child ('African Children's Rights Committee').⁸⁶ Its mandate mirrors that of the African Commission. By November 2013, the Committee had received 14 State party reports and provided recommendations on eight. The Committee has only received two communications to date.⁸⁷ As a protocol that adds to the substance of the African Charter, the African Women's Rights Protocol did not create a new monitoring body. The African Commission and Court on Human and Peoples' Rights are mandated to implement its provisions. So far, the African Commission has not considered any complaints alleging violations of the Protocol.

African States have accepted as binding numerous UN human rights treaties that are relevant to torture, such as the four 1949 Geneva Conventions,⁸⁸ the two 1977 Optional Protocols thereto,⁸⁹ the International Covenant on Civil and

83 See Section I above.

84 ACRWC, *supra* note 22.

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

86 ACRWC, *supra* note 22, Article 32.

87 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v. Kenya*, Comm. No. 002/2009, 17th Ordinary Session (22 March 2011).

88 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of the International Conventions for the Protection of Victims of War, entered into force on 21 October 1950, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, entered into force on 21 October 1950, 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, entered into force on 21 October 1950, 75 U.N.T.S. 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, entered into force 21 October 1950, 75 U.N.T.S. 287.

89 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in Geneva, signed on 12 December 1977, entered into force on 7 December 1979, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the

Political Rights⁹⁰ and the Convention against Torture.⁹¹ Common Article 3 of the Geneva Conventions prohibits torture and other forms of ill-treatment, and these Conventions have been ratified by all 54 African UN Member States, while 51 and 50 States have ratified or acceded to Additional Protocols I and II to the 1949 Geneva Conventions respectively.⁹² Fifty African States have ratified the ICCPR, Article 7 of which contains the explicit provision that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.⁹³ Of these States only 32 have ratified the Optional Protocol to ICCPR⁹⁴ allowing for individual complaints. The Convention Against Torture, which provides more detail on the nature of State obligations than Article 7 of the ICCPR, has been accepted as binding by 43 AU Member States.⁹⁵ However, few States have made a declaration accepting the right of individuals or other States to bring complaints against the State,⁹⁶ and even fewer have ratified the Optional Protocol to the Convention Against Torture,⁹⁷ allowing for regular visits by independent international and national bodies to places of detention within States Parties.⁹⁸

Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in Geneva, signed on 12 December 1977, entered into force on 7 December 1978, 1125 U.N.T.S. 609.

90 ICCPR, *supra* note 50.

91 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 39/46 of 10 December 1984, entered into force on 26 June 1987 [hereinafter 'Convention Against Torture'].

92 See www.icrc.org.

93 For status of ratification of UN human rights treaties, see: <https://treaties.un.org/pages/ParticipationStatus.aspx> [Chapter IV]

94 Optional Protocol to the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, in accordance with Article 9, 21 UN GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966); 999 U.N.T.S. 302.

95 The only AU Member States not parties to the Convention Against Torture are Angola, the Central African Republic, Comoros, Eritrea, The Gambia, Rwanda, Sahrawi Arab Democratic Republic, São Tomé e Príncipe, South Sudan, Sudan, Tanzania and Zimbabwe. The Sahrawi Arab Democratic Republic ('Western Sahara') is not a UN member, but Morocco, which is a UN member and not an AU member, has also ratified the Convention Against Torture.

96 Eleven African States accepted the Committee against Torture's competence under Article 22 to consider individual communications: Algeria, Burundi, Cameroon, Ghana, Guinea Bissau, Morocco, Senegal, Seychelles, South Africa, Togo and Tunisia. Three of them (Burundi, Morocco and Seychelles) did not make a similar declaration under Article 21, accepting the inter-State communications procedure. In all, nine African States accepted that procedure: the eight mentioned above as well as Uganda.

97 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 18 December 2002 at the fifty-seventh session of the General Assembly by Resolution A/RES/57/199, entered into force on 22 June 2006, UN Doc. A/RES/57/199 (2003), 42 ILM 26 (2003).

98 As of 1 November 2013, of the 70 States Parties to the Optional Protocol, 12 were African: Benin, Burkina Faso, Burundi, Democratic Republic of Congo, Gabon, Liberia, Mali, Mauritania, Mauritius, Senegal, Togo, and Tunisia.

VI. Sub-Regional Courts of Justice

1. Economic Community of West African States (ECOWAS) Community Court of Justice

Founded in 1975, the Economic Community of West African States (ECOWAS) comprises fifteen West African states.⁹⁹ Its mission is to promote economic integration in all fields of economic activity amongst its member States, as well as to implement development projects such as intra-community road construction and telecommunications as well as agricultural, energy, and water resources development within member States. The ECOWAS Court of Justice, located in Abuja, Nigeria, is the judicial organ of the ECOWAS. Article 15 of the ECOWAS Treaty,¹⁰⁰ as revised in 1993 ('Revised Treaty'), provides for the establishment of the ECOWAS Court of Justice. The organisational framework, functioning mechanism, powers, and procedure of the Court, which became operational in 2000, are set out in the Protocol of 6 July 1991, the Supplementary Protocol of 19 January 2005, the Supplementary Protocol of 14 June 2006, the Regulation of 3 June 2002 and the Supplementary Regulation of 13 June 2006.¹⁰¹

a) Mandate, Composition and Jurisdiction

Under Article 9 of the Protocol, the mandate of the Court is to 'ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty'.¹⁰² The Court is composed of seven judges who are appointed by the Authority of Heads of State of Government and are nationals of member States. Judges serve a four-year term.

Under the 2005 Supplementary Protocol, the Court gained 'jurisdiction to determine cases of violations of human rights that occur in any Member State', including cases of torture. In addition, Article 4(g) of the ECOWAS Revised Treaty of 1993 sets out the principles of the Court, which includes 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.¹⁰³

99 These are: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

100 ECOWAS Treaty also known as 'The Treaty of Lagos', adopted 28 May 1975, Lagos, Togo, revised 24 July 1993.

101 Protocol on the ECOWAS Court of Justice, A/P1/7/91 (1991) (hereinafter, 'Protocol on the ECOWAS Court of Justice'); Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending the Preamble and Articles 1, 2, 9, 22 and 30 of Protocol A/P1/7/91 and Article 4(1) of the English Version of the Said Protocol; Supplementary Protocol A/SP.2/06/06 of 14 June 2006 amending Article 3(1)-(2), and (4), Article 4(1)-(3) and (7) and Article 7(3); Regulation of 3 June 2002, and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.

102 Protocol on the ECOWAS Court of Justice, Article 9(1).

103 ECOWAS Treaty, *supra* note 107, Article 4(g).

b) Submitting Complaints to the Court

Under the Supplementary Protocol of 2005, the Court is competent to deal with cases brought by individuals alleging human rights violations by member States; by individuals and corporate bodies alleging violations of their rights by ECOWAS officials or institutions; by member States and the Executive Secretary alleging a failure of a member State to meet their treaty obligations and for determination of the legality of any action related to ECOWAS agreements; as well as disputes between member States and disputes referred by the Authority of Heads of State of Government.¹⁰⁴ According to the Protocol, the Court can also issue advisory opinions if requested by the Authority or member States.¹⁰⁵

The individual complaints procedure of the Court permits individuals and corporations to access the Court and submit complaints against member States for alleged breaches of the African Convention on Human and Peoples' Rights and of other international human rights treaties and conventions to which member States are parties. There is no exhaustion of domestic remedies requirement to access the Court. In order for a complaint to be admitted, Article 10 of the Amended Protocol on the ECOWAS Community Court of Justice requires that the application is not anonymous and that the matter is not pending before another international court.¹⁰⁶ Relevant decisions of the ECOWAS Court are discussed in further detail in Part B of this *Handbook*.

2. East African Community (EAC) Court of Justice

The East African Community (EAC) is the smallest sub-regional organisation in Africa, with only five member States: Burundi, Kenya, Rwanda, United Republic of Tanzania and Uganda. Established in 1999 pursuant to the adoption of the Treaty for the Establishment of the East African Community ('EAC Treaty'),¹⁰⁷ the EAC's aims and objectives include deepening co-operation amongst member States in political, economic and social issues. Article 9 of the EAC Treaty established the East African Court of Justice ('EACJ') as one of the institutions of the EAC. The Court was inaugurated in 2001 and heard its first case in 2005.

104 Supplementary Protocol A/SP.1/01/05 (2005), Article 4.

105 Protocol on the ECOWAS Court of Justice, Article 10.

106 *Ibid.* See also: ECOWAS Court of Justice, *Hadijatou Mani Koraou v Niger*, App. No. ECW/CCJ/APP/08/08 (27 October 2008).

107 EAC Treaty, signed on 30 November 1999 and entered into force on 7 July 2000 following its ratification by the three original Partner States, Kenya, Uganda and Tanzania. The Republic of Burundi and the Republic of Rwanda acceded to the EAC Treaty on 18 June 2007 and became full members of the Community with effect from 1 July 2007 (amended 14 December 2006 and 20 August 2007), available at: <http://www.eac.int/treaty/>.

The EACJ functions on a part-time basis, which means that judges gather in Arusha only when the necessity arises, as determined by the EAC Council of Ministers.¹⁰⁸ The Court can issue decisions in individual cases as well as advisory opinions relating to ‘a question of law arising from [this] Treaty’¹⁰⁹ and binding interim measures, ‘which it considers necessary or desirable’.¹¹⁰ An application to review the Court’s decisions may be lodged only if it ‘is based upon the discovery of some fact which by its nature might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was made’.¹¹¹

Article 34 of the EAC Treaty provides that in addition to the EACJ, national courts of member States are also competent to interpret Treaty provisions as well as ‘validity of the regulations, directives, decisions or actions of the Community’. However, under Article 33, decisions of the Court regarding the application and interpretation of provisions of the Treaty ‘shall have precedence over decisions of national courts on a similar matter’.¹¹²

a) Mandate, Composition and Jurisdiction

The EACJ is mandated to ensure adherence with the law in the interpretation and compliance with the EAC Treaty. The Court consists of two chambers: a First Instance Division and an Appellate Division. The latter has jurisdiction to hear and determine any judgement or order of the First Instance Division on ‘points of law’, ‘grounds of lack of jurisdiction’ or ‘procedural irregularity’.¹¹³

Under Article 24 of the Treaty, the EAC Summit is responsible for appointing judges ‘from among persons recommended by the Partner States who are of proven integrity, impartiality and independence’. The same Partner State can provide no more than two judges for the First Instance Division or one judge for the Appellate Division.¹¹⁴ The term of service of the judges is non-renewable and lasts 7 years.

Article 27 of the Treaty sets out the jurisdiction of the Court as follows: ‘the Court shall initially have jurisdiction over the interpretation and application of [this]

108 For further information on the Establishment of the East African Court of Justice, see: http://eacj.org/?page_id=19.

109 EAC Treaty, Chapter 8, Article 36(1).

110 *Ibid.*, Article 39.

111 EAC Treaty, Article 35(3).

112 EAC Treaty, Article 33(2).

113 EAC Treaty, Articles 23(1)-23(3) and 35(a).

114 *Ibid.*, Article 24(1).

Treaty'.¹¹⁵ It can also consider any matter 'arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party' or 'arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court'.¹¹⁶ At the same time Article 27(2) provides that 'the Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction'.¹¹⁷

While the EACJ does not have clear jurisdiction over human rights issues, the fundamental principles of the East African Community as set out in Article 6 of the Treaty include 'good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.¹¹⁸ Article 7 similarly obliges member States of the EAC to 'abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights'.¹¹⁹

Thus, in *Katabazi v. Secretary General of East African Community*, which challenged the lawfulness of the detention of Ugandan prisoners, the Court held that while it has not yet been mandated to adjudicate on issues relating to human rights violations per se,¹²⁰ it referred to the abovementioned Articles 6 and 7 to justify declaring the case admissible. The Court made it clear that although it 'will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegation of human rights violation'.¹²¹ This is the position the EACJ continues to maintain in response to the States' preliminary objections aiming to challenge its jurisdiction over human rights related cases.¹²² In May

115 *Ibid.*, Article 27.

116 *Ibid.*, Article 32(a) and 32(c).

117 *Ibid.*, Article 27(2)

118 *Ibid.*, Article 6(d).

119 EAC Treaty, Article 7(2).

120 EACJ, *Katabazi v. Secretary General of East African Community*, Reference No. 1 of 2007 (1 November 2007).

121 *Ibid.* at para. 39.

122 EACJ Ruling on Preliminary Objection in *Independent Medico Legal Unit v. Attorney General of Kenya and 4 others*, Reference No. 3 of 2010 (29 June 2011) [...]'Court shall not abdicate its duty to interpret

2005, the EAC Council of Ministers discussed the issue of extending jurisdiction of the Court pursuant to Article 27(2) of the Treaty, which led to the adoption of the draft Protocol to Operationalise Extended Jurisdiction of the East African Court of Justice in 2007. This Protocol has not yet entered into force.¹²³

b) Submitting Complaints to the Court

The Court is mandated to receive complaints of breaches of the treaty from member States against each other and institutions of the EAC. The EAC Secretary General can also submit such complaints against member States. Legal and natural persons who are residents of a member State can also access the Court to submit complaints alleging breaches of the Treaty by member States or institutions of the EAC.¹²⁴ Decisions of the Court are binding on member States, though they can be appealed to the Appeals Chamber of the Court. Under Article 38(3) of the Treaty, member States must take immediate measures to implement judgements of the Court; however there is no procedure in place to sanction States, which fail to do so.

The EACJ admissibility requirements do not include exhaustion of domestic remedies; however complaints must be submitted ‘within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant’.¹²⁵ As discussed in further detail in Part C, Section 4, the Court has taken a somewhat strict approach to the issue of time limits when dealing with human rights related communications.¹²⁶ Article 40 of the Treaty provides that ‘a Partner State, the Secretary General or a resident of a Partner State who is not a party to a case before the Court may, with leave of the Court, intervene in that case, but the submissions of the intervening party shall be limited to evidence supporting or opposing the arguments of a party to the case’.¹²⁷

3. Southern African Development Community Tribunal

The Southern African Development Community (SADC) is the sub-regional body mandated to support regional integration and improvement of living conditions in

the Treaty merely because Human Rights violations are mentioned in the Reference. In the result, we hold that this Court has jurisdiction to entertain the Reference’].

123 See Press Release, “25th Extraordinary Meeting of Council of Ministers Concludes”, 30 June 2012, Latest from the EAC, available at: http://www.eac.int/news/index.php?option=com_content&view=article&id=729:25th-extraordinary-meeting-of-council-of-ministers-concludes&catid=48:eac-latest&Itemid=69.

124 EAC Treaty, Article 30.

125 EAC Treaty, Article 30(2).

126 See: EACJ, *Independent Medico Legal Unit v. Attorney General of Kenya and 4 others*, Appeal No.1 OF 2011.

127 EAC Treaty, Article 40.

southern African member States.¹²⁸ The predecessor to the SADC was the Southern African Development Coordinating Conference, which was established in 1980 under a Memorandum of Understanding. In 1992, the SADC Declaration and Treaty was adopted, effectively transforming the Southern African Development Coordinating Conference into the SADC. Article 16 of the 1992 Treaty provides for the establishment of the SADC Tribunal (SADCT), whose ‘composition, powers, functions, procedures and other related matters’ will be prescribed in a Protocol adopted by the Summit.¹²⁹ The SADCT was formally established through a Protocol adopted in 2000, which sets out the composition, organisation, jurisdiction and rules of procedure of the Tribunal. The Tribunal was only inaugurated in 2005 during the SADC Summit in Windhoek, Namibia, when members of the Tribunal were appointed.¹³⁰

In 2010, following a series of decisions against Zimbabwe, the Summit of the SADC Heads of State announced the commencement of a review of the Tribunal’s functions, which resulted in its suspension. In August 2012, the Tribunal’s jurisdiction to hear cases by natural and legal persons was curtailed and later that year the Tribunal was disbanded.¹³¹ In November 2013, the president of South Africa confirmed that a new protocol regarding the Tribunal is in the process of being negotiated.¹³² However, even if the Tribunal is reinstated or a new institution for resolving disputes in the SADC is created, its jurisdiction is likely to remain limited to interpretation of the SADC Treaty and Protocols relating to disputes between Member States only.¹³³

a) Mandate, Composition and Jurisdiction

The SADCT was mandated to ensure ‘adherence to and the proper interpretation of the provisions of the SADC Treaty and its subsidiary bodies’.¹³⁴ The Tribunal was made up of ten members – five permanent and five temporary members – who

128 Member States of the SADC are: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

129 Treaty of the Southern African Development Community [hereinafter, ‘SADC Treaty’], adopted on 17 August 1992, entered into force on 30 September 1993 and modified by the 2001 Agreement Amending the SADC Treaty on 14 August 2001.

130 Protocol on the Tribunal in the Southern African Development Community [hereinafter, ‘SADCT Protocol’], passed on 7 August 2000 and amended in 2000, 2007, and 2008 by the SADC,

131 See Zvamaida Murwira, “Southern Africa: Regional Leaders Permanently Disband SADC Tribunal”, *All Africa* (21 August 2012), available at <http://allafrica.com/stories/201208210893.html>.

132 See “Zuma suggests alternative to SADC tribunal” *TimesLive*, 6 November 2013 available at <http://www.timeslive.co.za/politics/2013/11/06/zuma-suggests-alternative-to-sadc-tribunal>.

133 SADC Heads of State and Government, 32nd Summit, Maputo (Mozambique), Final Communiqué (18 August 2012), para. 24.

134 SADC Treaty, Article 16(1).

serve as substitutes for permanent members if they were unable to carry out their duties. Prior to its suspension, the Tribunal could issue preliminary rulings and advisory opinions¹³⁵ and had exclusive jurisdiction over disputes between states and community; disputes between natural or legal persons and community; and disputes between community and staff.¹³⁶ The powers of the Tribunal pursuant to applicable law were limited to interpretation of the SADC Treaty, all its protocols and subsidiary instruments adopted by institutions of the SADC. Article 24(3) of the Protocol states that decisions of the Tribunal are final and binding and there is no further instance of appeal.

Article 32(5) stipulates that if a Member State fails to give effect to decisions of the Tribunal, the decisions are enforceable through the SADC Summit; however, the weakness of enforcement powers due to a lack of political will of Members States was exposed following the Tribunal's judgement in the *Campbell* case¹³⁷ on discriminatory property legislation in Zimbabwe. This ruling initiated a discussion about limitation of Tribunal's powers, eventually resulting in disbandment of the Tribunal.¹³⁸ The case concerned a group of white farmers, whose land was confiscated by the government, as a consequence of a compulsory land expropriation programme. The Tribunal held that Amendment 17, section 16b of the Zimbabwean Constitution, which excluded the possibility of challenging land expropriation, denied applicants the right to a fair hearing and the right not to be discriminated against on the basis of race, thereby breaching Article 4 (c) of the SADC Treaty.¹³⁹ Following refusal of the Zimbabwean government to comply with the decision and pay the farmers compensation and the failure of the Summit to act, Zimbabwe successfully lobbied with other SADC Member States for the Tribunal's suspension.

Although the Tribunal was not a human rights court per se, Article 14 of the Protocol conferred special powers on the Tribunal to interpret the SADC Treaty in line with the principles of human rights, rule of law and democracy.¹⁴⁰ Therefore the Tribunal could and did adjudicate on human rights cases.¹⁴¹ If the Tribunal's mandate was limited to disputes between States, its role in human rights protection would be

135 SADC Protocol, Articles 16 and 20.

136 *Ibid.*, Articles 17, 18 and 19.

137 SADC, *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe*, Case No. SADC (T) 2/2007 (28 November 2008).

138 SADC Heads of State and Government, 32nd Summit, Maputo (Mozambique), Final Communiqué (18 August 2012).

139 SADC, *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe*, Case No. SADC (T) 2/2008, *supra* note 138, p. 18.

140 Article 14, SADC Protocol.

141 See for example SADC, *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe*, Case No. SADC (T) 2/2008; *L. T. Gondo and Others v. Zimbabwe*, Case No. SADC (T) 5/2008, (9 December 2010).

significantly curtailed, as the tribunal would not be able to hear cases brought by individuals against their governments.

b) Submitting Complaints Before the Tribunal

Under Rule 32 of the SADCT Rules of Procedure as found in the SADCT Protocol, proceedings can be instituted by an application which must include details of the applicant and the respondent, as well as the nature of the claim and the relief sought.¹⁴² Cases could also be instituted by special agreement under Rule 34.¹⁴³

The admissibility requirements for complaints submitted to the Tribunal are outlined in Article 15 of the SADCT Protocol, which requires that the applicant is a SADC member State, a natural or legal person or an employee of the SADC. An applicant need not be a citizen of a member State to bring a claim. Additionally, the SADC Summit and the SADC Council of Ministers could apply to the Tribunal when seeking an advisory opinion. Claims could be brought against SADC member States or any SADC institution, but the Tribunal did not have jurisdiction over disputes between private or public persons only.¹⁴⁴ Unlike the ECOWAS Court of Justice and the EAC Court of Justice, the SADC Tribunal required an exhaustion of domestic remedies, 'unless the municipal law does not offer remedy, or the remedy offered is ineffective'.¹⁴⁵

During its short existence the Tribunal ruled on twenty-one cases, dealing with various issues including unfair dismissal,¹⁴⁶ land confiscation legislation¹⁴⁷, deportation orders¹⁴⁸ and exclusion from the power-sharing process.¹⁴⁹ Two cases in particular were of significance in respect to development of regional jurisdiction on torture.

The first case of torture before the Tribunal was *Gondo and Others v. Republic of Zimbabwe*,¹⁵⁰ in which 12 victims of violence inflicted by the Zimbabwean police brought a claim against Zimbabwe, who failed to comply with the orders of its court. Zimbabwe relied on section 5(2) of the State Liability Act, which denied the

142 SADCT, Rules of Procedure, Rules 32 and 33.

143 *Ibid.*, Rule 34.

144 SADCT, *Albert Fungai Mutize et al v. Mike Campbell (Pvt) Ltd and others*, Case No. SADC (T) 8/2008 (30 May 2008).

145 SADCT, *Mike Campbell (PVT) Limited and Others v. The Republic of Zimbabwe*, Case No. SADC (T)11/2008 (18 July 2008).

146 SADCT, *Ernest Francis Mtingwi v. the SADC Secretariat*, 2007, Case No. SADC (T) 1/2007 (27 May 2008).

147 SADCT, *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe*, Case No. SADC (T) 2/2008.

148 SADCT, *United Republic of Tanzania v. Cimexpan (Mauritius) LTD and Others*, Case No. SADC (T) 01/2009 (11 June 2010).

149 SADCT, *United Peoples' Party of Zimbabwe v. SADC and Others*, Case No. SADC (T) 12/2008 (14 August 2009).

150 SADCT, *L. T. Gondo and Others v. Republic of Zimbabwe*, Case No. SADC (T) 05/2008.

applicants the right to effective remedy. The Tribunal held that the provision in question violated Articles 4(c) and 6(1) of the SADC Treaty, as the concept of rule of law protected by the Treaty covers right to effective remedy, and therefore failure to provide effective remedy to the applicants amounted to breach of state's obligation to uphold human rights principles and rule of law. In its judgement the Tribunal referred to jurisprudence on the right to effective remedy developed by the European Court of Human Rights,¹⁵¹ the Inter-American Court of Human Rights,¹⁵² the African Commission,¹⁵³ the Constitutional Court of South Africa¹⁵⁴ and The Human Rights Committee's General Comment No. 18 on Non-Discrimination.¹⁵⁵ Although the court upheld the applicants' claim, awarding damages of nearly US \$17 million to the victims, Zimbabwean government refused to abide by the judgement.

In *United Republic of Tanzania v. Cimexpan (Mauritius) Ltd, Cimexpan (Zanzibar) Ltd & AjayeJogoo*,¹⁵⁶ a case concerning treatment of a Mauritian national during his deportation, the Tribunal relied on Article 1 of the 1984 Convention Against Torture in its definition of torture and reaffirmed that international legal norms were more than just a point of reference in its jurisprudence. Nevertheless, the court denied jurisdiction to issue a preliminary ruling on legality of deportation order due to lack of *locus standi* (the right or capacity to bring a legal action), as the applicant failed to exhaust domestic remedies and his inability to substantiate the claim that he had been subject to torture by any evidence. The court held that despite the fact the applicant was deported, he could have accessed national courts and challenged deportation order in his absence through his legal representatives.¹⁵⁷

151 ECHR, *Ramirez Sanchez v. France*, App. No. 59450/00 (4 July 2006).

152 Advisory Opinion OC-9-87, *Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights)*, Inter-American Court of H.R (6 October 1987).

153 ACHPR, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe*, Comm. No. 294/04, 43rd Ordinary Session (22 May 2008).

154 Constitutional Court of South Africa, *Nyathi v. MEC for Department of Health, Gauteng and Another Case*, CCT 19/07, ZACC 8 (2 June 2008).

155 HRC, General Comment No. 18 on Non-Discrimination, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994).

156 SADCT, *United Republic of Tanzania v. Cimexpan (Mauritius) LTD and Others*, Case No. SADC (T) 01/2009 (11 June 2010).

157 *Ibid.* p. 6.

PART B

SUBSTANTIVE NORMS ON TORTURE IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM

The prohibition against torture and ill-treatment is contained in a body of treaty and non-treaty norms applicable to African countries. It is additionally a customary norm of international law with *jus cogens* status, meaning that even for those States that have not ratified any treaties including the prohibition of torture, it remains an absolute and non-derogable obligation. Foremost among the relevant treaties is the African Charter. Similar prohibitions are contained in the African Charter on the Rights and Welfare of the Child (ACRWC)¹⁵⁸ and the African Women's Rights Protocol.¹⁵⁹ The binding standards contained in these instruments are discussed in more depth below.

Another treaty adopted under OAU auspices, the Convention Governing the Specific Aspects of Refugee Problems in Africa, prohibits *refoulement* or removal, in the context of refugee law and protection, to a country in which an individual's 'life, physical integrity or liberty would be threatened'. Although resolutions adopted by the Commission provide interpretative guidance to the treaty norms, they do not in themselves have binding authority.¹⁶⁰ In Part XV below, the history and scope of 'soft-law' standards (such as resolutions) adopted under the OAU/AU are discussed.

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

1. Overview of Charter Provisions

The foundations and scope of the guarantees of life and integrity of the human person are defined by several provisions in the African Charter. Article 5 of the Charter guarantees human dignity and prohibits torture in the following words:¹⁶¹

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.

Article 5 is reinforced and supplemented by other Charter provisions, such as guarantees of equal protection under the law,¹⁶² the right to life and integrity, including the guarantee against 'arbitrary deprivation' of that right,¹⁶³ the right to personal

158 ACRWC, *supra* note 22.

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

160 Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session on 10 September 1969, entered into force on 20 June 1974, OAU Doc. No. CAB/LEG/24.3, Article 2(3) [hereinafter 'OAU Refugee Convention'].

161 African Charter, *supra* note 9, Article 5.

162 *Ibid.*, Article 3(2).

163 *Ibid.*, Article 4.

liberty and security¹⁶⁴ and fair trial and due process guarantees.¹⁶⁵

The African Commission has confirmed that Article 5 applies to the acts of State and non-state actors. It has found that even where the State is not directly responsible for the acts of non-state actors, it can still be found to have violated the Charter. In the case of *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the Commission recognised the general principle that the State can be found responsible for the acts of non-state actors “not because of the act itself, but because of the lack of due diligence [on the part of the State] to prevent the violation or for not taking the necessary steps to provide the victims with reparation”.¹⁶⁶ In this particular case, the Commission addressed whether or not the State acted with due diligence in preventing acts of torture and extrajudicial killings by non-state actors and protecting the victims subsequently. The State had argued that it had taken a range of measures ‘to deal with the alleged human rights violations, including amendment of legislation, arrest and prosecution of alleged perpetrators, payment of compensation to some victims and ensuring that it investigated most of the allegations brought to its attention’.¹⁶⁷ It argued that ‘due to the circumstances prevailing at the time, the nature of the violence and the fact that some victims could not identify their perpetrators, the police were not able to investigate all cases referred to them’.¹⁶⁸ The Commission observed that the complainant had not provided adequate evidence that the measures taken by the State were insufficient and therefore did not find a violation.

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

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

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

Article 5 incorporates two distinct, but interrelated aspects: respect for dignity and the prohibition of exploitation and degradation. The Article further complicates matters by listing slavery, slave trade, torture, cruel, inhuman and degrading

164 *Ibid.*, Article 6.

165 *Ibid.*, Article 7.

166 ACHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Comm. No. 245/02, 39th Ordinary Session (15 May 2006), para. 142.

167 *Ibid.*, para. 161.

168 *Ibid.*, para. 154.

treatment and punishment as ‘examples’ of exploitation and degradation. Slavery, servitude and forced labour are usually dealt with under a separate article in other international conventions leaving open the possibility of a dual violation of the prohibition of slavery, servitude or forced labour and the prohibition of torture and inhuman treatment or punishment. Notably, in the case of *Hadijatou Mani Koraou v. Niger*, the ECOWAS Community Court of Justice found that ‘it is trite that slavery may exist without the presence of torture’. However, although the Court found that the ‘condition of slavery has caused the Applicant undeniable physical, psychological and moral harm’, it found a violation of Article 5 on grounds of slavery but did not make a separate finding of torture or ill-treatment.¹⁶⁹

The African Commission has clarified the meaning of ‘human dignity’ as ‘an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities, are entitled to without discrimination. It is an inherent right which every State is obliged to respect and protect by all means possible’.¹⁷⁰ In other cases when finding an Article 5 violation, the Commission has not distinguished between failure to respect ‘dignity’ and a violation of the prohibition of ‘torture, cruel, inhuman and degrading treatment and punishment’.¹⁷¹

This limited analysis undermines attempts to come to a clear understanding of the distinct elements of Article 5. Not only are these two main elements often conflated, but the Commission does not always distinguish between acts that constitute ‘torture’ and acts that constitute ‘cruel, inhuman or degrading’ treatment or punishment, preferring to simply pronounce a violation of Article 5. This tendency is explained with reference to two main factors.

The limited analysis is also part of a jurisprudential trend on the part of the Commission. Especially at the beginning, the Commission did not elaborate on its findings, but merely stated the essential facts and the applicable provision before making a simple conclusion about whether or not there had been a violation without attempting to show how the particular legal provisions relate or are applied to the specific facts.¹⁷² For example, in the case of *Krishna Achuthan v. Malawi*, the Commission did not specify whether the solitary confinement, shackling, extremely poor food quality and denial of access to medical care experienced by the victims

169 ECOWAS Court of Justice, *Hadijatou Mani Koraou v. Niger*, App. No. ECW/CCJ/APP/08/08.

170 See, e.g., ACHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Comm. Nos. 279/03 & 296/05, 45th Ordinary Session (27 May 2009), para. 163; *Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt*, Comm. No. 323/06, 10th Extraordinary Session (12 October 2013), para. 190.

171 See, e.g., *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93, para. 57.

172 See, e.g., ACHPR, *Free Legal Assistance Group and Others v. Zaire*, Comm. Nos. 25/89, 47/90, 56/91 & 100/93, 18th Ordinary Session (4 April 1996), para. 41 (‘The torture of 15 persons by a military unit ... as alleged in [the] communication constitutes a violation of [Article 5]’).

separately amounted to torture or other ill-treatment. Instead, the Commission simply held that these acts together were in contravention of Article 5. Although later findings are more expansive and more rigorously substantiated, the depth of analysis could often be improved considerably.

When the four forms of ill-treatment ('torture', 'cruelty', 'inhuman treatment' and 'degradation') are used disjunctively, at least to some extent, no clear categorisation or careful distinction is elaborated in the case-law. In *John D. Ouko v. Kenya*¹⁷³, a distinction is drawn between 'dignity and freedom from inhuman or degrading treatment' on the one hand, and 'freedom from torture' on the other. The established facts were as follows: the complainant was arrested and detained for ten months without trial in violation of Article 6 of the Charter. During the ten-month detention, a bright (250 watt) light bulb was left alight continuously, and the victim was denied bathroom facilities. In the Commission's view, these conditions amounted to inhuman and degrading treatment, but fell short of torture, and presumably also of 'cruel' treatment.¹⁷⁴ Finding that the evidence revealed no specific instances of 'physical and mental torture', though such treatment was alleged in general terms, the Commission declined to conclude that the 'right to freedom from torture' was violated, but did find a violation of Article 5 without specifying the particular element involved.¹⁷⁵

There is some contradiction in the *Ouko* case finding, however. In the paragraph before the Commission declines to find a violation of the right to be free from torture in Article 5, the Commission finds – on the same facts already stated – a violation of Principle 6 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.¹⁷⁶ This principle stipulates that no detainee may be 'subjected to torture, or cruel, inhuman or degrading treatment or punishment'. Reading the finding as a whole, the inference must be drawn that Principle 6 was violated because of the presence of inhuman and degrading treatment, but not cruelty or torture. However, such an interpretation is by no means clear from the Commission's reasoning. The Commission's lack of clarity regarding the distinction between torture and other cruel, inhuman and degrading treatment can also be seen in subsequent cases. In *Institute for Human Rights and Development in Africa (on behalf of Esmalia Connateh and 13 others) v. Angola*, the Commission stated that the terms 'cruel, inhuman or degrading punishment or treatment...refer to any act ranging from denial of contact with one's family and refusing to inform

173 ACHPR, *John D. Ouko v. Kenya*, Comm. No. 232/99, 28th Ordinary Session (6 November 2000).

174 *Ibid.*, para. 23.

175 *Ibid.*, para. 26.

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

the family of where the individual is being held, to conditions of overcrowded prisons and beatings and other forms of physical torture, such as deprivation of light, insufficient food and lack of access to medicine and care'.¹⁷⁷

Threshold for Torture and Cruel, Inhuman or Degrading Treatment or Punishment

Though the Commission has not always clarified whether violations of Article 5 amount to torture or to other ill-treatment, its jurisprudence does provide guidance on the threshold that must be attained for an act to violate Article 5. In *Huri-Laws v. Nigeria*, the Commission concluded that treatment impugned as torture or cruel, inhuman or degrading treatment or punishment must attain a minimum level of severity. However, the determination of the minimum required to bring such treatment within the scope of the Charter prohibitions depends on several variables, including the duration of the treatment, its effects on the physical and mental life of the victim and, where relevant, the age, gender and state of health of the victim.¹⁷⁸ With regard to the Commission's interpretation of the definition of torture, it has in its jurisprudence referred to the definition found in Article 1 of the UN Convention Against Torture¹⁷⁹, which is as follows:

[T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁸⁰

The Commission has provided some clarification as to the kinds of acts that would fall within the definition of inhuman and degrading treatment. It has consistently held that:

Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.¹⁸¹

177 ACHPR, *Institute for Human Rights and Development in Africa (on behalf of Esmalia Connateh and 13 Others) v. Angola*, Comm. No. 292/2004, 43rd Ordinary Session (May 2008), para. 52 (emphasis added).

178 ACHPR, *Huri-Laws v. Nigeria*, Comm. No. 225/98, 28th Ordinary Session (6 November 200), para. 4.

179 ACHPR, *Sudan Human Rights Organisation and COHRE v. Sudan*, Comm. Nos. 279/03 & 296/05, para. 155.

180 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on 10 December 1984, entered into force on 26 June 1987, Article 1.

181 ACHPR, *International Pen, Constitutional Rights Project, INTERIGHTS (on behalf of Ken Saro-Wiwa, Jr.) and Civil Liberties Organisation v. Nigeria*, Comm. Nos. 137/94, 139/94, 154/96 & 161/97, 24th Ordinary Session

The Commission has also clarified specific acts that constitute cruel, inhuman and degrading treatment. For example, it has taken the view that ‘detaining individuals without allowing them contact with their families and refusing to inform their families of the fact and place of the detention amounts to inhuman treatment of both the detainees and their families’.¹⁸² The Commission has also found certain practices in places of detention to constitute inhuman and degrading treatment, and in some cases even torture. Examples of such treatment include beatings, shackling with leg irons, handcuffs, and solitary confinement.¹⁸³

Treatment in Detention

The Commission elaborated on the prohibition against torture and safeguards against the arbitrary deprivation of life in the *Sudan* cases¹⁸⁴ and *Mauritania* cases.¹⁸⁵ In the *Sudan* cases, the alleged acts of torture included forcing detainees to lie on the floor, soaking them with cold water, confining groups of four detainees in cells measuring 1.8 metres in floor space by one metre in height, deliberately flooding the cells and frequently banging on the doors so as to prevent detainees from lying down, mock executions and prohibiting detainees from bathing or washing. Other acts of torture included burning detainees with cigarettes, binding them with ropes to cut off blood circulation to parts of the body, beating them severely with sticks to the point of severe laceration then treating the wounds with acid.¹⁸⁶ Finding violations of Article 5, the Commission stated the following:

Since the acts of torture alleged have not been refuted or explained by the Government, the Commission finds that such acts illustrate, jointly and severally, government responsibility for violations of the provisions of Article 5 of the African Charter.¹⁸⁷

Allegations of torture made in the *Mauritania* cases, discussed in further detail in section 2.c below, included housing detainees in small, dark, underground cells, forcing them to sleep on cold floors in the desert winter at night, starving prisoners deliberately, denying them access to medical care, plunging their heads in water

(31 October 1998), para. 78. Reiterated in subsequent cases: ACHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Comm. 245/02, para. 96; *Gabriel Shumba v. Zimbabwe*, Comm. No. 288/2004, 51st Ordinary Session (2 May 2012), para. 164; *Egyptian Initiative for Personal Rights & INTERIGHTS v. Egypt*, Comm. No. 323/06, para. 187; *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Comm. No. 334/06, 9th Extraordinary Session (1 March 2011), para 190.

182 ACHPR, *Law Office of Ghazi Suleiman v. Sudan*, Comm. Nos. 222/98 & 229/98, 33rd Ordinary Session (3 May 2003), para.62.

183 ACHPR, *Krishna Achuthan (on behalf of Aleke Banda), v. Malawi*, Comm. No. 64/92, para. 7.

184 ACHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91 & 89/93.

185 ACHPR, *Malawi Africa Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97 & 210/98.

186 ACHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91 & 89/93.

187 *Ibid.*, para. 57.

until they lapsed into unconsciousness, spraying their eyes with pepper and administering high voltage electric current to their genitalia, as well as rape of female prisoners and burying prisoners in the sand to die a slow death. The Commission found that these acts constituted a violation of Article 5:¹⁸⁸

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

In both cases, the Commission also decided that deaths resulting from acts of torture or executions were in breach of the Article 7 due process guarantees and violated the prohibition against arbitrary deprivation of life in Article 4 of the Charter. Also, in the *Commission Nationale des Droits de l'Homme* case,¹⁸⁹ the Commission affirmed that Article 5 prohibits summary, arbitrary and extra-judicial executions.¹⁹⁰ Thus the Commission had no difficulty finding that 'the deaths of citizens who were shot or tortured to death' by law enforcement agents violated Article 5 of the Charter.¹⁹¹

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

b. Incommunicado Detention

Incommunicado detention refers to detention in which those held have no means or possibility of communicating with anyone other than their captor and perhaps their co-detainees.¹⁹²

In September 2001, eleven former members of the Eritrean Government who had openly expressed their criticism of government policies in an open letter were arrested and detained incommunicado without charges. Their whereabouts were unknown, and they had no access to their lawyers or families. In a communication brought on their behalf, *Zegveld and Ephrem*, the Commission found a violation of, amongst other provisions, the Article 6 right to liberty and security of the person and the right not to be arbitrarily detained. In its reasoning, the

188 *Ibid.*, para. 118.

189 ACHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Comm. No. 74/92, para. 22.

190 *Ibid.*; ACHPR, *Organisation Mondiale Contre la Torture (OMCT) and Others v. Rwanda*, Comm. Nos. 27/89, 49/91 & 99/93, 20th Ordinary Session (31 October 1996).

191 ACHPR, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Comm. No. 204/97, 29th Ordinary Session (7 May 2001).

192 Association for the Prevention of Torture, "Incommunicado, Unacknowledged and Secret Detention under International Law." (2 March 2006).

Commission describes *incommunicado* detention as ‘a gross human rights violation that can lead to other violations such as torture and ill-treatment’.¹⁹³ In other words, *incommunicado* detention as such is a violation of Article 6, and it may also lead to a violation of other provisions, such as Article 5, as was found by the Committee in *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*.¹⁹⁴ In this case, the Commission confirmed that *incommunicado* detention, in and of itself, may constitute cruel, inhuman or degrading treatment or punishment if it is ‘prolonged’ and entails ‘solitary confinement’.¹⁹⁵ Given this pronouncement, it is surprising that the Commission did not find a violation of Article 5, as the period of *incommunicado* detention already totalled more than two years (from September 2001 to November 2003, the date of the Commission’s finding). It is difficult to conceive of a definition of ‘prolonged detention’ that would not apply to the facts in this case, but the Commission’s finding did not explicitly address this point. However, in the case of *Article 19 v. Eritrea*, the Commission held that 5 years of *incommunicado* detention constitutes inhuman and degrading treatment.¹⁹⁶

In the course of its decision in the *Zegfeld and Ephrem* case, the Commission also stated that there should be no ‘secret detentions’ and that ‘States must disclose the fact that someone is being detained as well as the place of detention’.¹⁹⁷

c. Violations of Human Dignity

The African Commission has held that forced nudity, electric shock and sexual assault constitute, together and separately, failure to respect human dignity under Article 5 of the Charter.¹⁹⁸ In a number of decisions, the Commission has interpreted ‘dignity’ broadly in reaching its findings. The protection in Article 5 covers not just the physical person of the victim but also the minimal economic and social circumstances required for human existence in any situation.¹⁹⁹ For example, in the absence of an express guarantee of a right to housing in the Charter, the Commission has based protection for housing-related rights on the Article 5 guarantee of human dignity, including the prohibition of torture and cruel, inhuman and degrading treatment. In the *Modise* case,²⁰⁰ the author was rendered stateless when the Respondent State cancelled his Botswana nationality and deported him

193 ACHPR, ACHPR, *Zegveld and Ephrem v. Eritrea*, Comm. No. 250/2002, 24th Ordinary Session (20 November 2003), para. 55.

194 ACHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Comm. No. 334/06, para. 219.

195 *Ibid.*

196 ACHPR, *Article 19 v. Eritrea*, Comm. No. 275/03, 41st Ordinary Session (30 May 2007).

197 *Ibid.*

198 ACHPR, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Comm. No. 74/92; see also, *Krishna Achutan (on behalf of Aleke Banda) v. Malawi*, Comm. No. 64/92.

199 ACHPR, *Sudan Human Rights Organisation & COHRE v. Sudan*, Comm. Nos. 279/03 & 296/05.

200 ACHPR, *John K. Modise v. Botswana*, Comm. No 97/93.

to South Africa for political reasons. South Africa in turn deported him to what was then Bophuthatswana, which in turn deported him back to Botswana. Unable to determine where to keep the victim, the authorities of the Respondent State left him homeless for an extended period in a specially created strip of territory along the South African border called ‘no-man’s land’. The Commission found that by denying Mr Modise his nationality and deporting him repeatedly, Botswana violated his right to respect for human dignity. The Commission also found that such enforced homelessness was inhuman and degrading treatment that offended ‘the dignity of human beings and thus violated Article 5’.²⁰¹ This case supports the conclusion that involuntary or forced displacement directly attributable to the State or its agencies is a violation of the right to respect for human dignity. The case further supports the argument that victims of such displacement are entitled in such cases to minimum guarantees of assistance, including shelter.

In another case, *Purohit and Moore v. The Gambia*, the Commission clarified that personal suffering and indignity ‘can take many forms, and will depend on the particular circumstances of each case brought before the African Commission’.²⁰² The particular circumstances may require that violations of the right to respect for human dignity are found in conjunction with other provisions of the Charter, such as the right to health. The *Mauritania* cases,²⁰³ for example, comprised five consolidated communications arising from developments in Mauritania between 1986 and 1992. Briefly, these communications alleged the existence in that State of slavery and analogous practices, and of institutionalized racial discrimination perpetrated by the ruling Beydane (Moor) community against the more populous black community. The cases alleged that black Mauritians were enslaved, routinely evicted or displaced from their lands, which were then confiscated by the Government. The communication also alleged that some detainees had, among other things, been starved to death, left to die in severe weather without blankets or clothing and were deprived of medical attention. The Commission found that starving prisoners and depriving them of blankets, clothing and health care violated both the guarantee of respect for human dignity in Article 5 and the right to health in Article 16 of the Charter.²⁰⁴

Similarly, in the case of *Sudan Human Rights Organisation and COHRE v. Sudan*, the Commission agreed with the UN Committee Against Torture²⁰⁵ that ‘forced

201 *Ibid.*, para. 32.

202 ACHPR, *Purohit and Moore v. The Gambia*, Comm. No. 241/2001, 33rd Ordinary Session (May 2003), para. 77.

203 ACHPR, *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97 & 210/98.

204 *Ibid.*, para. 122.

evictions and destruction of housing carried out by non-State actors amounts to cruel, inhuman and degrading treatment or punishment if the State fails to protect victims from such a violation of their human rights'.²⁰⁶ In this case, the Commission held that the State's failure to protect civilians from forced evictions 'was cruel and inhuman and threatened the very essence of human dignity', finding a violation of Article 5 of the Charter.²⁰⁷ In light of the fact that the Charter does not include a provision on the right to housing, it is significant that the Commission has used the protections under Article 5, in particular the right to human dignity to uphold economic, social and cultural rights such as the right to housing.²⁰⁸

The ECOWAS Community Court of Justice has also elaborated on the meaning of 'human dignity', and acts which would constitute a breach of an individual's right to human dignity. The case of *Djot Bayi & 14 Others v. Nigeria & 4 Others* involved fifteen applicants who were members of a shipping vessel crew. Their vessel was stopped by the Nigerian military and the crewmembers were arrested on suspicion of illegal oil trading in violation of Nigerian law. The applicants alleged that they were paraded before the Nigerian and international press by the State that claimed they were guilty on all charges, before any trial had taken place, and that the resulting damage to their reputation amounted to a violation of their right to human dignity under Article 5 of the Charter. The ECOWAS Court held that while the State's negative publicity actions were indicative of the State's 'excesses during the preliminary enquiry', they did not amount to a violation of the right to human dignity.²⁰⁹

d. Conditions of Detention

Conditions of detention are the most frequently alleged violations of Article 5. The conditions of detention alleged in communications decided by the Commission may be subdivided into two groups: those of a more systemic nature that pertain to 'physical' or 'psychological' 'conditions' and those related to the bare necessities of life (or 'socio-economic rights') such as food, water and medical attention.

Physical conditions amounting to inhuman and degrading treatment may take the following forms: darkness, airless or dirty cells or overcrowding. In one case, the Commission held that confining detainees in a 'sordid and dirty cell under

205 Committee Against Torture, *Hajrizi Dzemaajl et al. v. Yugoslavia*, Comm. No. 161/2000, 29th Ordinary Session (21 November 2002).

206 ACHPR, *Sudan Human Rights Organisation and COHRE v. Sudan*, Comm. Nos. 279/09 & 296/05, para. 159.

207 *Ibid.* at para. 164.

208 For further information regarding jurisprudence relating to economic, social and cultural rights, see: M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*. Cambridge University Press: Cambridge (2009).

209 ECOWAS Court of Justice, *Djot Bayi & 14 Others v. Nigeria & 4 Others*, App. No. ECW/CCJ/APP/10/06 (2009).

inhuman and degrading conditions' without contact with the outside world was cruel, inhuman and degrading.²¹⁰ Similarly, imprisonment for ten months in a cell that was constantly lit by a 250-watt bulb was also held to constitute inhuman and degrading treatment.²¹¹ In *Media Rights Agenda v. Nigeria*, the victim allegedly suffered:

[h]is legs and hands [were] chained to the floor day and night. From the day he was arrested and detained until he was sentenced by the tribunal, a total of 147 days, he was not allowed to take his bath. He was given food twice a day, and while in detention, both in Lagos and Jos before he faced the Special Investigation Panel that preceded the trial at the Special Military Tribunal, he was kept in solitary confinement in a cell meant for criminals.²¹²

In this case, the Commission found this treatment to constitute 'a violation of the right to respect and dignity and the right to freedom from inhuman or degrading treatment under Article 5 of the Charter',²¹³

In *Institute for Human Rights and Development in Africa v. Angola*, the Commission held that detaining people in facilities that had previously been used to house animals and which had not been cleaned, as well as forcing detainees to sleep in close proximity of inadequate toilet facilities, 'cannot be called anything but degrading and inhuman', and therefore in breach of Article 5 of the Charter.²¹⁴

As for the basic conditions to ensure life, the following circumstances have been found to violate Article 5: insufficient food, poor quality of food and denial or unavailability of medical attention.²¹⁵

As the Commission's case law demonstrates, these elements often overlap. In the *Ken Saro-Wiwa Jr.* case, acts found to be in violation of Article 5 of the Charter included keeping detainees in leg irons, manacles and handcuffs and subjecting them to beatings in their cells. Some of the detainees in this case were chained to the cell walls. The cells were described as 'airless and dirty', and the detainees were denied medical attention. There was no evidence of any violent action by the detainees or attempt on their part to escape.²¹⁶

However, the Commission has also concluded in *Civil Liberties Organisation v. Nigeria*, that holding a detainee in a military camp was 'not necessarily inhuman'

210 ACHPR, *Huri-Laws v. Nigeria*, Comm. No. 225/98, para. 40.

211 ACHPR, *John D. Ouko v. Kenya*, Comm. No. 232/99, para. 22.

212 ACHPR, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Comm. No. 224/98, 28th Ordinary Session (6 November 2000), para. 70.

213 *Ibid.*, para. 72.

214 ACHPR, *Institute for Human Rights and Development in Africa v. Angola*, Comm. No. 292/2004.

215 *Ibid.* para. 52.

216 ACHPR, *International Pen, Constitutional Rights Project, INTERIGHTS (on behalf of Ken Saro-Wiwa, Jr.) and Civil Liberties Organisation v. Nigeria*, Comm. Nos. 137/94, 139/94, 154/96 & 161/97, para. 79.

although it acknowledged ‘the obvious danger that normal safeguards on the treatment of prisoners will be lacking’.²¹⁷

e. Detention on Grounds of Mental Health

In *Purohit and Moore*,²¹⁸ the complainants alleged that the mental health regime in The Gambia was dehumanizing and incompatible with Article 5 of the Charter. The Lunatics Detention Act of 1917 defined persons with mental health problems as ‘lunatics’ and ‘idiots’ and prescribed certification procedures that were not subject to oversight or effective mechanisms of control. The African Commission held that branding persons with mental illness as ‘lunatics’ and ‘idiots’ had the effect of dehumanizing them and denying them dignity contrary to Article 5 of the African Charter. The Commission explained its decisions as follows:

In coming to this conclusion, the African Commission would like to draw inspiration from Principle 1(2) of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care. Principle 1(2) requires that “all persons with mental illness, or who are being treated as such, shall be treated with humanity and respect for the inherent dignity of the human person.” The African Commission maintains that mentally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being. Like any other human being, mentally disabled persons or persons suffering from mental illness have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all States Party to the African Charter in accordance with the well established principle that all human beings are born free and equal in dignity and rights.²¹⁹

It is the right to dignity, as such, and not the guarantee against torture or ill-treatment that underlies this finding. In the words of the Commission, human dignity is ‘an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination’.²²⁰ However, the Commission rejected the argument that the ‘automatic’ detention of persons believed to be mentally ill or disabled, which effectively excludes the possibility of reviewing the diagnosis, violates the prohibition of ‘arbitrary’ detention. In the Commission’s view, persons who have been institutionalised are not included within the protective scope of Article 6, which deals with ‘liberty and security’ and prohibiting arbitrary arrest and detention.²²¹

217 ACHPR, *Civil Liberties Organisation v. Nigeria*, Comm. No. 151/96, 26th Ordinary Session (15 November 1999), para. 26.

218 ACHPR, *Purohit and Moore v. The Gambia*, Comm. No. 240/2001.

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

220 *Ibid.*, para. 57.

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

This interpretation is disappointing, in particular because the vulnerability of those institutionalised is increased by that fact that general medical practitioners – who are not necessarily psychiatrists – may make those important diagnoses. Quite explicitly, the Commission also concedes that the situation (and therefore its decision) falls short of Principles 15, 16 and 17 of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care.²²²

f. Death Penalty

The African Charter does not explicitly prohibit capital punishment. The Charter merely prohibits the ‘arbitrary’ deprivation of human life.²²³ At its 26th Ordinary Session in Kigali, Rwanda, in November 1999, the Commission adopted a ‘Resolution Urging States to Envisage a Moratorium on the Death Penalty’, in which it requested States Parties to the African Charter that still legalised capital punishment to refrain from implementing it.²²⁴ In 2008, the Commission adopted a subsequent ‘Resolution Calling on State Parties to Observe a Moratorium on the Death Penalty’, reiterating the 1999 resolution and additionally calling on States Parties to ratify the Second Optional Protocol to the ICCPR and to include in their periodic reports information regarding steps taken to move towards abolition of the death penalty in their countries.²²⁵

In *INTERIGHTS (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, the Commission confirmed that capital punishment was not incompatible with the Charter. In the Bosch case, it was submitted that the imposition of the death penalty was disproportionate to the gravity of the offence committed, and therefore constituted a violation of Article 5. In a sense echoing its resolution on the death penalty, the Commission began with the premise that ‘there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed’.²²⁶ The Commission’s reasoning indicates that a sentence would be disproportionate if facts that reduce the moral blameworthiness of an accused (the ‘extenuating circumstances’) were disregarded or accorded too little weight. In this case, the Commission found that the analysis by domestic courts was not unreasonable because there were no facts relating to the criminal conduct itself

222 *Ibid.*

223 African Charter, *supra* note 9, Article 4.

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

225 Resolution Calling on States Parties to Observe a Moratorium on the Death Penalty, (2008) ACHPR/Res.136(XXXIII)08.

226 See ACHPR, *INTERIGHTS (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, Comm. No. 240/2001, 34th Ordinary Session (November 2003), para. 31. A more appropriate approach may have been for the Commission to consider the scope of limitations in international law on the application and use of capital punishment.

that lessened the perpetrator's moral blameworthiness. The accused (Bosch) was convicted of a serious and gruesome offence (murder), involving considerable effort and planning. Even where the circumstances of the individual offender give rise to extenuation, the nature of the offence 'cannot be disregarded'.²²⁷ However, the Commission's position regarding the death penalty does not conform to international norms which prescribe the circumstances under which the death penalty may not be imposed; that is, against juveniles, pregnant women and mentally disabled persons, as well as the unlawfulness of mandatory death penalty statutes.

It may also be argued that the issue in respect of sentencing is not the proportionality of the sentence, but the form that the punishment takes. It may for example be argued that, even if the death penalty is under certain circumstances proportionate to the crime, the method of execution may amount to a cruel form of punishment, in conflict with Article 5. In the Bosch case, the complainant submitted that the form of execution in Botswana (hanging) is cruel and amounts to 'unnecessary suffering, degradation and humiliation'.²²⁸ In its decision, the Commission does not deal with this argument, presumably because the decision is premised on the notion that international law does not outlaw the death penalty irrespective of the form it takes. The Commission upheld this view and similarly declined to address the argument regarding the cruel and inhuman nature of death by hanging in the case of *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*.²²⁹

The complainant in the Bosch case also argued that failure to give reasonable notice of the date and time of execution is a violation of Article 5, and that this failure 'makes' the execution a form of cruel, inhuman and degrading punishment. Although it declines to rule on this argument due to the fact that the Respondent State did not receive ample notice of this argument in order to prepare a response, the Commission observes in an *obiter dictum* that the 'justice system must have a human face in matters of execution of death sentences'.²³⁰ In support of this statement, the Commission quoted a decision of the United Kingdom's Privy Council, to the effect that a condemned person must be afforded an opportunity 'to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself as best he can, to face his ultimate ordeal'.²³¹

These remarks indicate that, in an appropriate case, failure to observe these minimum guarantees could render execution a violation of Article 5 of the Charter.

227 *Ibid.*, para. 37.

228 *Ibid.*, para. 5.

229 ACHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Comm. No. 334/06.

230 ACHPR, *INTERIGHTS (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, Comm. No. 240/2001, para. 41.

231 United Kingdom Privy Council, *Guerra v. Baptiste*, Appeal Case Nos. 397 & 418 (1996).

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

In other cases, however, the Commission has recognised and applied due process guarantees as limitations on the use of capital punishment under the African Charter. Thus, the imposition of capital punishment in breach of the due process guarantees in the Charter constitutes a violation of the right to life, and arguably a violation of the prohibition against torture.²³²

In the *Sudan* and *Mauritania* cases, the Commission ruled that the fact that a legal process precedes punishment does not preclude the obligation to respect the rights to life and human dignity. Where a legal process violates the Charter, punishment resulting therefrom is also in violation of the Charter. In the *Sudan* cases, the Commission determined that the execution of 28 army officers following their trial was unlawful because the right to counsel under Article 7 was also violated.²³³

The Sudan communications alleged that the officers executed on 24 April 1990 were denied legal representation. The State submitted that its national legislation permits the accused to be assisted in his or her defence by a legal advisor or any other person of his or her choice, including before the Special Courts, subject to Court approval. The State argued that the court procedures were strictly followed in the case of these officers. The Commission concluded that in the case of the 28 executed army officers, basic standards of fair trial were not met.²³⁴ The Commission rejected the State's statement that the executions were carried out in conformity with its internal legislation. It found that the State should instead provide proof that its laws are in accordance with the provisions of the African Charter, and that in the conduct of the trials the accused's right to defence was respected.²³⁵

By contrast, in *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt* (334/06), in which the complainants were sentenced to death following an unfair trial with no right to appeal, the Commission held that while the unfair trial proceedings

232 ACHPR, *International Pen, Constitutional Rights Project, INTERIGHTS (on behalf of Ken Saro-Wiwa, Jr.) and Civil Liberties Organisation v. Nigeria*, Comm. Nos. 137/94, 139/94, 154/96 & 161/97, para. 78.

233 ACHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91 & 89/93, paras. 65-66.

234 *Ibid.*

235 *Ibid.*, para. 66.

were in violation of Article 7 of the Charter, because the death sentence had not yet been carried out, there was no violation of Article 4 or 5 on grounds of the death penalty.²³⁶ The Commission found a violation of Article 5 for the torture and ill-treatment suffered by the complainants during their time in detention, including physical violence as well as incommunicado detention, as well as the lack of safeguards meant to prevent these acts such as access to a lawyer and doctor; however the death sentence did not lead to a violation of Article 5.²³⁷

g. Corporal Punishment

In *Curtis Francis Doebbler v. Sudan*, eight female students of the Ahlia University in Sudan were convicted of infraction of a public order and sentenced 25 to 40 lashes, to be publicly inflicted on their bare backs. The lashes were administered with a wire and plastic whip that left permanent scars on the women. The instrument used was not clean, and no doctor was present to supervise the execution of the punishment. The students alleged that the lashings were humiliating and incompatible with the high degree of respect to women accorded by Sudanese society.²³⁸ The Commission held that

there is no right for individuals, and particularly, the government of a country, to apply physical violence to individuals for minor offences. Such a right would be tantamount to sanctioning State-sponsored torture under the Charter and contrary to the very nature of this human rights treaty.²³⁹

h. Other Forms of Punishment

In a number of African countries, Shari'a penal laws apply. This system of law allows the stoning of a married person convicted of adultery, and of an unmarried person engaging in extra-marital sexual intercourse. For offences such as theft, the penalty is amputation of a person's hand. *INTERIGHTS (on behalf of Safiya Yakubu Husaini et al v. Nigeria)*²⁴⁰ challenged these forms of punishment, but the Commission did not find any violation, as the case was withdrawn. In an appropriate case, the Commission would – based on its general approach – likely find that Article 5 of the Charter is violated by such punishments.

236 ACHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Comm. No. 334/06, paras. 231-232.

237 *Ibid.*, para. 190.

238 ACHPR, *Curtis Francis Doebbler v. Sudan*, Comm. No. 236/2000, 33rd Ordinary Session (29 May 2003), paras. 42-44.

239 *Ibid.*, para. 55.

240 ACHPR, *INTERIGHTS (on behalf of Safiya Yakubu Husaini and Others) v. Nigeria*, Comm. No. 269/2003, 37th Ordinary Session (11 May 2005).

i. Safeguards

The Fair Trial²⁴¹ and Robben Island Guidelines²⁴² emphasise the interrelatedness of procedural safeguards and the right to be free from torture and other forms of ill-treatment. In the case of *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, the Commission held that the deprivation of procedural safeguards, denying detainees access to a lawyer, for example, constitutes a violation of Article 5 of the Charter. In its decision, the Commission held that '[i]t should be understood by the Respondent State that there is a positive obligation on them to provide access to independent legal assistance under the Charter, inherent in the international prohibition of torture and ill-treatment'. The Commission also found that the rights of detainees to undergo a medical examination as well as to be brought promptly before a judge are also 'vital aspects of the prevention and deterrence of torture and other ill-treatment'. Similarly, the Commission has found that detention without charge constitutes an 'arbitrary deprivation of liberty' and therefore violates Article 6.²⁴⁴

In *Zegveld and Ephrem v. Eritrea*,²⁴⁵ the Commission found a violation of Article 6 and observed that all detained persons 'must have prompt access to a lawyer and to their families', and that 'their rights with regards to physical and mental health must be protected'.²⁴⁶ The Commission added that the lawfulness of detention must be determined by a court of law 'or other appropriate judicial authority', and it should be possible to challenge the grounds that justify prolonged detention on a periodic basis. These observations amount to a requirement that domestic law should allow for *habeas corpus* or similar proceedings. Suspects should be charged and tried 'promptly', and States should comply with the fair trial standards set out in the Fair Trial Guidelines.²⁴⁷ In this case, the Commission found a violation of Article 7(1), which encompasses various elements of the right to have one's case heard.

Taking steps to ensure that the legality of detention may be reviewed in *habeas corpus* or similar proceedings are an important procedural safeguard. In cases involving torture or similar violations of physical integrity, the best evidence is

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

242 The Robben Island Guidelines, reproduced in full in Annex 4 to this Handbook.

243 ACHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Comm. No. 334/06, paras. 177, 179 and 183.

244 ACHPR, *Constitutional Rights Project and Another v. Nigeria*, Comm. No. 102/93, 24th Ordinary Session (31 October 1998), para. 55.

245 ACHPR, *Zegveld and Ephrem v. Eritrea*, Comm. No. 250/2002.

246 *Ibid.*, para. 55.

247 *Ibid.*, para. 56.

nearly always the body of the victim. This is why habeas corpus is often an effective remedy. Denial of the right to *habeas corpus* procedures thus triggers an exception to the requirement of exhaustion of domestic remedies.²⁴⁸ In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, the Commission was, however, equivocal on the exact consequences of a denial of the right to *habeas corpus* procedures in terms of State responsibility under the Charter. In this case, the Nigerian Government had denied certain detained journalists the right to access to *habeas corpus* through the use of ouster clauses. Although, it concluded that 'deprivation of the right of *habeas corpus* alone does not automatically violate Article 6 (personal liberty)',²⁴⁹ the Commission found that detention without trial or charge is contrary to Article 6. However, concerning *habeas corpus*, it argued that the real question must be 'whether the right of *habeas corpus*, as it has developed in the common law systems, is a necessary corollary to the protection in Article 6 and whether its suspension thus violates this Article'.²⁵⁰ While the Commission's decision disappointingly declined to answer this question in that case, the Commission appeared to answer it in the affirmative in *Kazeem Aminu v. Nigeria*.²⁵¹ The Commission further supported its finding in the *Kazeem Aminu* case by holding that the denial of the right to *habeas corpus* violates the right to be heard under Article 7(1)(a).²⁵²

j. Refoulement

Article 5 of the Charter also implicitly obliges States Parties to refrain from returning individuals to a place where they may be at risk of a violation of Article 5.²⁵³ The State is obliged to comply strictly with due process norms before carrying out expulsions.²⁵⁴ The African Commission has thus held the due process guarantees in Article 7 of the African Charter to be applicable to the involuntary removal of a person from his State of residence or host State.²⁵⁵ The Commission has elaborated that the right of the individual in Article 7 includes a State duty to establish structures to enable the exercise of this right.²⁵⁶ This implies a State duty to extend legal and other material assistance to persons seeking refuge within the State's territory

248 ACHPR, *Constitutional Rights Project v. Nigeria*, Comm. No. 153/96, 26th Ordinary Session (15 November 1999), para. 10.

249 *Ibid.*, para. 24.

250 *Ibid.*, para. 25.

251 ACHPR, *Kazeem Aminu v. Nigeria*, Comm. No. 205/97, 27th Ordinary Session (11 May 200), para. 21.

252 ACHPR, *Constitutional Rights Project v. Nigeria*, Comm. No. 153/96, para. 18.

253 The Robben Island Guidelines refer to a risk of torture at para 15 and in *John K. Modise v. Botswana*, Comm. No. 97/93, para. 91, the ACHPR applied the principle in relation to a risk of a violation of human dignity.

254 ACHPR, *OMCT v. Rwanda*, Comm. Nos. 27/89, 49/91 & 99/93, para. 34.

255 *Ibid.*

256 ACHPR, *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v. Nigeria*, Comm. No. 87/93, 17th Ordinary Session (22 March 1995), reprinted in (1996) 3 *International Human Rights Reports* 137.

and persons undergoing procedures of removal from its territory. Thus, collective expulsion of non-nationals is prohibited under the Charter as a violation of the right of respect for human dignity and the right to due process.²⁵⁷

k. Enforced Disappearances

Enforced disappearance refers to the ‘arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law’.²⁵⁸ While the International Convention on the Protection of All Persons from Enforced Disappearances entered into force in December 2010, as at November 2013, it had been ratified by only a handful of African states.²⁵⁹ The African Charter does not include an explicit prohibition against enforced disappearance; however the African Commission has been presented with cases involving alleged enforced disappearances, and has held that:

enforced disappearance violates a range of human rights including, the right to security and dignity of person, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, the right to humane conditions of detention, the right to a legal personality, the right to a fair trial, the right to a family life, and when the disappeared person is killed, the right to life.²⁶⁰

In *J.E. Zitha and P.J.L. Zitha v. Mozambique*, the Commission characterised enforced disappearance as a continuing violation of the Charter. Following an analysis of international jurisprudence relating to acts that constitute a continuing violation, the Commission held that ‘the enforced disappearance...constitutes a continuing violation of his human rights...’²⁶¹

l. Extraordinary Renditions

In 2009, a complaint against Djibouti was confidentially submitted to the African Commission.²⁶² The complainant, a Yemeni national, alleged that he was taken

257 African Charter, *supra* note 9, Article 12(5); ACHPR, *John K. Modise v. Botswana*, Comm. No. 97/93; ACERWC, *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v. Kenya*, Comm. No. 002/2009.

258 International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006, entered into force on 23 December 2010, UN Doc. A/61/448, Article 2.

259 The Convention has been ratified by the following African States: Burkina Faso, Gabon, Mauritania, Morocco, Senegal, Tunisia and Zambia. Nigeria acceded to the Convention in July 2009. It has been signed by the following African States: Algeria, Burundi, Cameroon, Chad, Congo, Lesotho, Madagascar, Mozambique, Niger, Swaziland, Tanzania, Togo and Uganda.

260 ACHPR, *J.E. Zitha and P.J.L. Zitha v. Mozambique*, Comm. No. 361/08, 9th Extraordinary Session (1 April 2011), para. 81.

261 *Ibid.*, para. 94.

262 ACHPR, *Al-Asad v. Djibouti*, Comm. No. 383/2010, 49th Ordinary Session (April-May 2011), for more

from his home in Tanzania in 2003, blindfolded and flown to a secret detention facility in Djibouti. He alleges that he was then transferred by the Djibouti authorities to the custody of the United States, flown to Afghanistan and detained in a secret prison, incommunicado, for sixteen months before being released without charge. He alleges that he was subjected to torture and other ill-treatment in Djibouti and Afghanistan. The applicant alleges violations of Articles of 1, 2, 3, 4, 5, 6, 7(1), 12(4), 14 and 18 of the Charter. As of November 2013, the case was still awaiting a decision on admissibility.

m. Procedural Duties

Duty to Investigate and Punish

Where conduct constituting a violation of the Charter is alleged, the State is obliged to investigate it independently and to ensure appropriate punishment for those implicated. In *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, the Commission cited the decision of the European Court on Human Rights in *Jordan v. UK* to set standards of effectiveness for investigations into alleged human rights violations.²⁶³ The Commission found that the continuation of the violations alleged in the complaint since it was submitted 'demonstrates a weakness of the judicial system and lack of effectiveness to guarantee effective investigations...'²⁶⁴ The Commission held that Sudan had violated Articles 4 and 5 of the Charter due to its 'failure to 'act diligently to protect the civilian population in Darfur...'²⁶⁵ Conversely, in *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the Commission failed to find a violation of Articles 4 and 5 as the acts in question were carried out by non-State actors and the Commission found that the State had exercised due diligence, as best as possible under the circumstances, to investigate the allegations.²⁶⁶ Interestingly, this decision makes no reference to standards of effectiveness for investigations into alleged violations of the Charter.

In the *Sudan* cases, the Commission found that 'prisoners were executed after summary and arbitrary trials and that unarmed civilians were also victims of extra-judicial executions'.²⁶⁷ Noting that the State had provided 'no specific information on the said executions', the Commission continued:

information see: <http://www.interights.org/al-asad/index.html>.

263 ACHPR, *Sudan Human Rights Organisation and COHRE v. Sudan*, Comm. Nos. 279/03 & 296/05, para. 150.

264 *Ibid.*, para. 153.

265 *Ibid.*, para. 168.

266 ACHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Comm. No. 245/02, para 181-183.

267 ACHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93, para. 48; see also, ACHPR, *Malawi Africa Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97 & 210/98, para. 119.

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

Immunities and Amnesties

Immunities and amnesties for the crime of torture are considered incompatible with the obligations of States to prohibit, prevent and punish torture under international law.²⁶⁸ The Robben Island Guidelines clearly state that ensuring there is no immunity or amnesty for crimes of torture and ill-treatment is an essential component of combating impunity for such crimes.²⁶⁹

The African Commission has upheld this principle in its jurisprudence.²⁷⁰ In the case of *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the Commission held that the Clemency Law No. 1 of 2000 which prohibited prosecution and provided for liberation of perpetrators of 'politically motivated crimes', 'not only encouraged impunity but effectively foreclosed any available avenue for the alleged abuses to be investigated...'²⁷¹ Finding the Clemency Law to constitute a violation of articles 1 and 7 of the Charter, the Commission concluded its findings by stating that, '[t]he granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.'²⁷²

268 UN Committee Against Torture, General Comment No. 3, (2012) UN Doc. CAT/C/GC/3, para. 38.

269 Robben Island Guidelines, para. 16.

270 ACHPR, *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97 & 210/98; *Jean Yokovi Degli on behalf of Corporal N. Bikagni, Union Interafricaine des Droits de l'Homme, Commission Internationale de Juristes v. Togo*, Comm. Nos. 83/92, 88/93 & 91/93, 17th Ordinary Session (22nd May 1995).

271 ACHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Comm. No. 245/02, para. 211.

272 *Ibid.*, para. 215.

VIII. Substantive Norms under Other African Human Rights Treaties

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

The prohibition of torture in the African Charter on the Rights and Welfare of the Child (ACRWC) is founded on the recognition that the development of the child into a balanced adult ‘requires legal protection in conditions of freedom, dignity and security’.²⁷³ The ACRWC was adopted in 1990 and came into force in 1999.

In addressing the problem of torture relevant to children in Africa, the ACRWC identifies five specific aspects of the prohibition against torture, namely: traditional practices, protection against child labour, the protection of children from abuse and violence, due process protection and the protection of children in armed conflict or other situations of forced displacement. The Charter requires States to discourage customary, cultural or religious practices inconsistent with the human rights of children.²⁷⁴ The Charter defines such practices to include those that are ‘prejudicial to the health or life of the child’ or discriminatory to the child on grounds of gender.²⁷⁵ In this context, the African ACRWC prohibits the betrothal of both male and female children and prescribes 18 years as the age of marital consent.²⁷⁶ It is clear from these and other provisions described below, that the prohibition of torture and cruel, inhuman or degrading treatment is not limited to acts committed by State agents; the ACRWC includes provisions that address torture and other ill-treatment of children as committed by non-State actors.²⁷⁷

The range of measures that a State may take to discourage harmful practices become clearer on reading those provisions of the ACRWC that deal with child labour and child protection. These provisions require States Parties to take legislative and administrative measures, including the use of criminal sanctions and public education and information,²⁷⁸ to protect children against ‘all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral, or social development’.²⁷⁹

273 ACRWC, Preamble. Note also that the ACRWC defines a child as a person under the age of 18; *Ibid.*, Article 2.

274 *Ibid.*, Article 1(3).

275 *Ibid.*, Articles 21 (1)(a)-(b).

276 *Ibid.*, Article 21(2).

277 *Ibid.*, Articles 1(3), 10, 15, 16, 19(1), 20-21.

278 *Ibid.*, Articles 15(2)(c)-(d).

279 *Ibid.*, Article 15(1).

Similarly, the ACRWC requires States to take ‘legislative, administrative, social and educational measures’ to protect children from torture, inhuman and degrading treatment.²⁸⁰ The ACRWC emphasises the prohibition of ‘physical or mental injury or abuse, neglect or maltreatment, including sexual abuse’ of children.²⁸¹ Measures of protection for the purposes of the Charter include:²⁸²

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

Turning to due process protections related to torture and abuse of children, the ACRWC prohibits the application of capital punishment to children²⁸³ and the torture or ill-treatment of children deprived of their liberty.²⁸⁴ The ACRWC specifically requires that children deprived of their liberty are separated from adults in their place of detention or imprisonment²⁸⁵ and requires States Parties to establish a minimum age below which children shall be presumed to lack the capacity to violate the domestic penal laws.²⁸⁶

In situations of armed conflict, including internal armed conflict,²⁸⁷ States Parties to the ACRWC agree to respect international humanitarian law norms affecting the child, including the prohibition of the use of children in direct hostilities or the recruitment of children as soldiers.²⁸⁸ The Charter also extends the protection of all international refugee conventions to child refugees and, with necessary modifications, to children living in situations of internal displacement.²⁸⁹ This means, for instance, that children cannot be returned or transferred to foreign territories, or to internal regions, where they may suffer or be exposed to torture, inhuman or degrading treatment, punishment, abuse or neglect.

The African Committee of Experts on the Rights and Welfare of the Child (‘African Children’s Rights Committee’) is established by Article 32 of the African Charter on the Rights and Welfare of the Child. The Committee is mandated to promote and ensure the protection of the rights of the child under the Charter. The Committee is made

280 *Ibid.*, Article 16(1)

281 *Ibid.*

282 *Ibid.*, Article 16(2).

283 *Ibid.*, Article 5(3).

284 *Ibid.*, Article 17(2).

285 *Ibid.*, Article 17(2)(b).

286 *Ibid.*, Article 17(4).

287 *Ibid.*, Article 22(3).

288 *Ibid.*, Article 22(1)-(2).

289 *Ibid.*, Article 23(1) and (4).

up of 11 members elected by the Assembly of Heads of State and Government of the African Union, who may serve a term of 5 years and are not eligible for re-election.²⁹⁰

The African Children's Rights Committee has received only individual complaints: one relating to the discrimination and violation of the right to nationality of children of Nubian descent in Africa, and another concerning the situation of children in Northern Uganda. The Committee has not yet issued its decision in the latter. The case of *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v. Kenya* alleged violations of articles 3, 6, 11(3) and 14, and did not address issues relating to torture outlined above.²⁹¹

The Committee is also mandated to receive and review State party reports regarding the implementation of the ACRWC. As mentioned above, as of November 2013, the Committee had received 14 State party reports, and provided recommendations for eight.²⁹² This is rather paltry when considering that 46 African countries have ratified the ACRWC.

Under Article 45 of the ACRWC, the Committee is also mandated to undertake investigative missions to States parties to document the situation of the rights of the child in the State, and to make recommendations to the State concerned. Subsequent to such missions, the Committee prepares a report detailing its investigation and setting out the recommendations. The report is then submitted to the African Union Executive Council, the Permanent Representatives' Committee and the African Union Assembly. Once it has been adopted by the Assembly, the report may be made publicly available. There is also a follow-up procedure whereby States Parties may be asked to present a written reply outlining any steps taken to implement the recommendations of the Committee. The Committee undertook its first investigative mission in 2005 in Northern Uganda.

The Committee has also commissioned several studies to clarify the scope, meaning and content of specific provisions within the ACRWC. For example, it commissioned research on the 'Best Interest of the Child' principle and Article 31 of the Charter, the findings of which were presented during the 10th and 12th Sessions of the Committee in November 2007 and May 2008 respectively.

290 Members of the Committee of Experts on the Rights and Welfare of the Child as of November 2013 are: Mme Fatima Delladj-Sebba (Algeria); Mr Cyprien Adébayo Yanclou (Benin); Mrs Agnès Kabore Ouattara (Burkina Faso); Dr Benyam Dawit Mezmur (Ethiopia); Mme Amal Muhammad al-Hanqari (Libya); Mr Andrianirainy Rasamoely; Mrs Maryam Uwais (Nigeria); Mme Felicité Muhimpundu (Rwanda); Prof. Judith Sloth-Nielsen (South Africa); Mr Clement Julius Mashamba (Tanzania); and Justice Alfas M. Chitakunye (Zimbabwe).

291 ACERWC, *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v. Kenya*, Comm. No. 002/2009.

292 To view the reports submitted to date, please see: <http://acerwc.org/member-states/state-reports/>.

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

Like the ACRWC, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('African Women's Rights Protocol') complements Article 5 of the African Charter on Human and Peoples' Rights by addressing aspects of the prohibition of torture that are specific to women, namely: the right to dignity, the prohibition of harmful traditional practices and violence against women. The Protocol defines harmful traditional practices as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.²⁹³ Violence against women is defined by the Protocol as follows:

Acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.²⁹⁴

This definition makes clear that under this Protocol, the prohibition against torture may encompass treatment inflicted by State actors as well as non-State entities. The Protocol prohibits harmful traditional practices and violence against women and requires States Parties to prohibit, prevent, punish and eradicate them.²⁹⁵ The Protocol assures the dignity of women and requires States Parties to adopt 'appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence'.²⁹⁶ Such measures may include legislative, administrative, social, educational, or economic measures, criminal prosecution and sanctions, services for rehabilitation and treatment of victims, budgetary provisions for expansion of social services or other policy measures.²⁹⁷

In situations of armed conflict, including internal armed conflict, States Parties to the African Women's Rights Protocol agree to respect international humanitarian law applicable to the protection of women from prohibited forms of violence, including sexual violence, rape and other forms of sexual exploitation as

293 African Women's Rights Protocol, *supra* note 22, Article 1.

294 *Ibid.*

295 *Ibid.*, Article 4-5.

296 *Ibid.*, Article 3(4).

297 *Ibid.*, Article 4.

instruments of war. Such acts are recognized as war crimes or crimes against humanity under the Protocol.²⁹⁸ These provisions are yet to be clarified in the context of communications presented to either the African Commission or the African Human Rights Court.

²⁹⁸ *Ibid.*, Article 11.

PART C

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

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 before the African Commission or the African Court. Given the remote likelihood of frequent inter-State communications, the spotlight falls on the individual communications procedure, which has often been used before the Commission. 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, as discussed in further detail in Section XI, below.

IX. Individual Communications

1. Overview

Article 56 of the African Charter and Part Three, Chapter III of the Commission's Rules of Procedure lay out the essential components of an individual petition before the African Commission system.²⁹⁹ Any natural or legal (i.e. an NGO) 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. The consideration of communications under the African Commission system is not exclusively in writing; 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;
- (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.³⁰⁰

299 ACHPR, Rules of Procedure, see *supra* note 43.

300 *Ibid.*, Rule 93.

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.³⁰¹

The petition may be sent by mail to:

Dr. Mary Maboreke, Executive Secretary
African Commission on Human and Peoples' Rights
Kairaba Avenue
P.O. Box 673 Banjul
The Gambia
By fax: (220) 4392 962
By e-mail: au-banjul@africa-union.org

When in hard copy, it is advisable to send it by courier or recorded delivery in order to be able to confirm its arrival at the Commission. When the Commission 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 the Commission finds the communication admissible, it proceeds to consider the communication on the merits, at which point the Commission usually notifies the parties. At any point before determining the case on the merits, the Commission may by itself or, at the request of a complainant, make a request for the State to adopt provisional measures to prevent the victim/s from suffering irreparable harm.³⁰² Through hearing notices issued by its Secretariat, the

301 For additional guidance in submitting an individual communication, refer to the example communication in Annex 2, as well as Information Sheet No.2, Guidelines for the Submission of Communications, available at: http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf

302 ACHPR, Rules of Procedure, see *supra* note 43, Rule 98.

Commission then invites the parties to attend and present their arguments at a hearing, alone or through counsel, if they so choose.³⁰³ 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.

An author may supplement the communication at any time during the process, including during its oral presentation at the hearing. 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

As many State parties to the African Commission are also subject to other international human rights mechanisms, such as the UN Human Rights Committee³⁰⁴ and, less extensively in Africa, the UN Committee against Torture³⁰⁵, a complainant must choose an appropriate forum. Victims of human rights violations have a number of potential forum choices. While the decisions of the African Commission are not binding, those of the African Court are. Cases can be referred from, and therefore the referral procedure of the Commission to the Court, as described in further detail in Section 3 below, as well as in Part A, Section IV of this *Handbook*. Additionally, Article 34(6) of the Court Protocol allows NGOs enjoying observer status to submit complaints directly to the Court; however, at the time of writing, only a handful of States had issued the necessary declaration to allow for individual complaints to be submitted directly to the Court. The Committee of Experts on the Rights and Welfare of the Child, established under the African Children's Rights Charter, offers another potential forum when the torture or ill-treatment of a child is alleged.³⁰⁶ In addition, the sub-regional courts of justice, namely the ECOWAS Court of Justice, the EAC Court of Justice and the SADC Tribunal, may also be considered as viable fora for victims of human rights violations in Africa, in particular as the decisions of these bodies are considered binding on States parties,

303 *Ibid.*, Rule 99.

304 Under the First Optional Protocol to the ICCPR, *supra* note 94. Approximately 32 African States have accepted the competence of the Human Rights Committee.

305 Convention against Torture, *supra* note 91, Article 22.

306 See Part A, Section VIII(1) above for more detailed information on the African Committee of Experts on the Rights and Welfare of the Child.

and these bodies are able to adjudicate on violations of international human rights treaties in addition to the African Charter.³⁰⁷

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 93(2) of the Commission’s Rules of Procedure further obliges the Secretariat of the Commission to give in any case ‘an indication that the complaint has not been submitted to another international settlement proceeding’. 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.³⁰⁸

Several factors may determine the choice of forum, including requirements of 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 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. Similarly, the ECOWAS Court of Justice and the EAC Court of Justice may be the preferred forum for victims in States falling under the jurisdiction of these bodies as their admissibility requirements do not include exhaustion of domestic remedies.

The African Commission may conduct oral proceedings to hear arguments and live testimony. Respondent States are in most cases 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 has a more extensive set of rights and guarantees than the other systems of human rights supervision to which African States subscribe, and parties seeking pronouncements on economic, social and cultural 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.

307 See Part A, Section VI above for more detailed information on the sub-regional courts of justice.

308 See, e.g., *ACHPR, Haregewoin Gebre-Sellassie & IHRDA (on behalf of former Dergue Officials) v. Ethiopia*, Comm. No. 301/05, 52nd Ordinary Session (7 November 2011), paras. 114-117.

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, the CAT 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 by them.³⁰⁹ In *Baes v. Zaire*,³¹⁰ for example, a Danish national submitted a communication regarding the illegal detention of one of her colleagues at the University of Kinshasa, where she was working at the time. Moreover, authors do not need to be citizens or residents of a State party to the Charter, nor a resident of, or located in, any AU Member State.³¹¹ In *Haregewoin Gebre-Sellaise & IHRDA (on behalf of former Dergue officials) v. Ethiopia*, the respondent State challenged the admissibility of the complaint on grounds that the IHRDA (Institute for Human Rights and Development in Africa) was not registered in Ethiopia, however the Commission affirmed that there is no requirement of citizenship to bring a complaint before it.³¹² Any 'person', whether individual or corporate, may submit a communication. NGOs need not enjoy observer status with the Commission to be granted standing to submit a communication.

Locus standi before the African Court on Human and Peoples' rights is distinctly different regarding 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:³¹³

- 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;
and
- e) African inter-governmental organizations.

309 ACHPR, *Organisation Mondiale contre la Torture (OMCT) v. Zaire*, Comm. No. 25/89, para. 92; ACHPR, *Haregewoin Gebre-Sellaise & IHRDA (on behalf of former Dergue Officials) v. Ethiopia*, Comm. No. 301/05, para 105. .

310 ACHPR, *Maria Baes v. Democratic Republic of the Congo (former Zaire)*, Comm. No. 31/89, 17th Ordinary Session (22 March 1995).

311 ACHPR, *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, Comm. No. 277/03, 10th Extraordinary Session (12 October 2013).

312 ACHPR, *Haregewoin Gebre-Sellaise & IHRDA (on behalf of former Dergue Officials) v. Ethiopia*, Comm. No. 301/05, para. 64.

313 African Human Rights Court Protocol, *supra* note 22, Article 5(1).

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.³¹⁴ 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, Ghana, Malawi, Mali and Tanzania have made this declaration as of November 2013.

The usual route to the Court is through the Commission via the referral procedure. Individual communications therefore are generally submitted to the Commission. After the Commission has decided the case, the individual has no standing to submit the case to the Court. Only the Commission may forward it to the Court, as provided for under Rule 118(1) of the Commission's Rules of Procedure.³¹⁵ Examples of cases that are referred by the Commission to the Court include those in which the State party has failed to comply with the Commission's decision, or those involving serious or large-scale human rights violations.³¹⁶ Although States may also submit cases to the Court, they are likely to refrain from doing so in order to avoid negative publicity or a legally binding negative decision. To date, no such cases have been submitted to the Court.

Like the African Commission, the African Court has advisory jurisdiction, in terms adapted from Article 45(3) of the African Charter.³¹⁷ 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. As of November 2013, the Court has received five requests for advisory opinions: two from States parties and three from NGOs.³¹⁸ The first request, submitted by the Socio-Economic Rights and Accountability Project (SERAP), alleged that the widespread poverty in Nigeria constituted a violation of the African Charter. The request was dismissed for failing to specify which provisions of the African Charter or other international human rights instruments were violated.³¹⁹ A request from Libya was also struck down³²⁰,

314 *Ibid.*, Articles 5(3), 34(6).

315 ACHPR, Rules of Procedure, *supra* note 43.

316 African Court, *African Commission on Human and Peoples' Rights v. Libya*, App. No. 004/2011; *African Commission v. Libya*, App. No. 002/2013; *African Commission v. Kenya*, App. No. 006/2012.

317 African Human Rights Court Protocol, *supra* note 22, Article 4.

318 African Court, Request No 001/2013 by the Socio-Economic Rights and Accountability Project (SERAP) (6 August 2013); Request No. 001/2012 by the SERAP, (16 May 2012); Request No. 002/2012 by the Pan-African Lawyers' Union (PALU) and Southern African Litigation Centre (23 November 2012).

319 African Court, Request No 001/2012 by the SERAP (16 May 2012).

320 African Court, Request No 002/2011 by the Great Socialist Peoples' Libyan Jamahiriya (16 May 2012).

while the request of Mali was withdrawn.³²¹ Two advisory opinion requests were pending as of November 2013, including a request from South African civil society organisations regarding the legality of the suspension of the SADC Tribunal.³²²

***Locus standi* before the sub-regional bodies**

The ECOWAS Court of Justice has also interpreted *locus standi* requirements broadly. In the case of *SERAP v. Nigeria*, the State made several objections on a number of grounds, including that the complainant lacked the requisite *locus standi* to initiate proceedings. Since the complainant, an NGO, had failed to show that it had suffered any damage, loss or personal injury resulting from acts alleged in the complaint, the State contended that ‘the plaintiff has no right, interest or obligation that can give them the right to maintain this action; or alternatively that the plaintiff does not have a sufficient or special interest in the performance of the duty sought to be enforced by the institution of this action’.³²³ The Court undertook a review of the interpretation of *locus standi* in public interest cases, and concluded that in such litigation, ‘the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable’.³²⁴ The EAC Court of Justice has taken a similar position.³²⁵

4. Admissibility

A complaint to the African Commission 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 the same as those of the Commission under Article 56 of the African Charter.³²⁶ The Court may also request the opinion

321 African Court, Request No 001/2011 by the Republic of Mali (16 May 2012).

322 African Court, Request No 002/2012 by The Pan African Lawyers’ Union (PALU) and Southern African Litigation Centre (6 August 2013). On the suspension of the SADC Tribunal, see Part A, Section VI(3).

323 ECOWAS Court of Justice, *SERAP v. Nigeria*, ECW/CCJ/APP/08 (27 October 2009), para. 20.

324 *Ibid.*, para 33.

325 EACJ, *East African Law Society, Law Society of Kenya, Tanganyika Law Society, Uganda Law Society, Zanzibar Law Society v. Attorney General of Kenya, Attorney General of Tanzania, Attorney General of Uganda, Secretary General of the East African Community*, App. No. 9 of 2007 (11 July 2007).

326 African Charter, *supra* note 9, art. 56(1)-(7); African Human Rights Court Protocol, *supra* note 22, Article 6.

of the Commission when considering the admissibility of a case.³²⁷ In practice, although it is empowered to do so, the Court has so far not reopened 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, as mentioned earlier, such cases may only be brought against States that have recognised the Court's jurisdiction under Article 34(6) of the Protocol.

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

a. Communications Must Disclose Authors and Their Contact Information³²⁸

Communications should indicate the name and addresses of the complainants (or 'authors') though authors can request anonymity.³²⁹ While it is not required that the alleged victims' names and addresses be included, the Commission has suggested that these be included,³³⁰ although victims can also request anonymity.³³¹ There is no requirement under the Charter or the relevant case law that cases be brought only by neutral persons or organisations.³³²

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 after ratification.³³³ For instance, in the *Modise case*,³³⁴ the alleged violation began in about 1977, long before the adoption of the African Charter. The author, a Botswana national who was stripped of his

327 African Human Rights Court Protocol, *ibid*.

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

329 ACHPR, *Darfur Relief and Documentation Centre v. Sudan*, Communication 310/05, 46th Ordinary Session (25 November 2009), para. 65.

330 ACHPR, *Malawi Africa Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97, 210/98; *Kevin Mgwanga Gunme et. al. v. Cameroon*, Comm. No. 266/03. See also: formation Sheet No.2, Guidelines for the Submission of Communications, *supra* note 301.

331 ACHPR, *Malawi Africa Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97, 210/98; *Kevin Mgwanga Gunme et. al. v. Cameroon*, Comm. No. 266/03. See also: formation Sheet No.2, Guidelines for the Submission of Communications, *supra* note 301.

332 ACHPR, *INTERIGHTS (on behalf of the Pan African Movement and Citizens for Peace in Eritrea) v. Ethiopia* Comm. Nos. 233/99 & 234/99, 33rd Ordinary Session (29 May 2003),), para. 47.

333 See, ACHPR, *Emgba Louis Mekongo v. Cameroon*, Comm. No. 59/91, 17th Ordinary Session (22 March 1995); *John K. Modise v. Botswana*, Comm. No. 97/93

334 ACHPR, *John K. Modise v. Botswana*, Comm. No. 97/93.

nationality for political reasons, was convicted of illegally entering Botswana. He filed an appeal in 1978, which 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. In the case of *Kevin Mgwanga Gunme et. al. v. Cameroon*, the Commission similarly held that though some of the violations alleged by the complainants had taken place prior to the entry into force of the African Charter in Cameroon in 1989, the complaint was admissible as the effects of the earlier violations continued to be felt after the entry into force of the Charter. Noting that as ‘the effects of such violations may themselves constitute violations under the Charter’, the Commission explicitly held that it had jurisdiction over violations that occurred before the adoption of the Charter ‘if such violations or their residual effects continued after’ the Respondent State ratified the Charter.³³⁵ This complaint centred on the discrimination and violence faced by predominantly English-speaking Southern Cameroonians who protested against the annexation of Southern Cameroon by the Republic of Cameroon in 1961, which led to the formation of the Federal Republic of Cameroon in the same year. According to the complainants, starting in 1961, Southern Cameroonians experienced violations of a range of civil and political rights, including the right to equality before the law, the right to life, the prohibition of torture, and the right to fair trial, among others. Though Cameroon only ratified the Charter in 1989, the Commission found that the communication revealed ‘prima facie violations of the charter, all of which are alleged to have continued following Cameroon’s ratification of the African Charter’.³³⁶ The Commission has also held that enforced disappearances constitute a continuing violation of the Charter.³³⁷

The EAC Court of Justice, however, has taken a somewhat differing position regarding acts that constitute a continuing violation. Under article 30(2) of the EAC Treaty, proceedings must be instituted “within 2 months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be”.³³⁸ In the case of *Independent Medico-Legal Unit v. Kenya*, the State filed a preliminary objection arguing that as the alleged violations (executions and acts of torture and cruel, inhuman and degrading treatment against residents of the Mount Elgon District) had taken place more than two months before the complaint was filed, the

335 ACHPR, *Kevin Mgwanga Gunme et. al. v. Cameroon*, Comm. No. 266/03, paras. 95-97.

336 *Ibid.*, para. 72.

337 ACHPR, *J.E. Zitha and P.J.L. Zitha v. Mozambique*, Comm. No. 361/08.

338 EAC Treaty, Article 30.2.

Court should not have jurisdiction.³³⁹ The complainants argued that the failure to investigate the acts in question and to punish, as appropriate, the perpetrators, as well as compensate the victims, amounted to a continuing violation of their rights. The Court agreed with the complainants, describing the matters complained of as ‘a whole continuous chain of events from when the alleged violations started until the Claimant decided that the Republic of Kenya had failed to provide any remedy for the alleged violations’.³⁴⁰ The EAC Court declared the case admissible. However, the State appealed the decision on grounds that the incidents alleged in the Complaint were time-barred.³⁴¹ The Appellate Division overturned the decision on admissibility, finding that Article 30(2) of the EAC Treaty ‘does not recognise any continuing breach or violation of the Treaty outside of the two months after a relevant action comes to the knowledge of the Claimant’, and that the Treaty does not grant the Court ‘any express or implied jurisdiction to extend the time set in the Article’. From this case, it would appear that the EAC Court of Justice does not recognise a State’s failure to investigate and to provide redress and remedy for human rights violations as a continuing violation of the Treaty. The Court similarly rejected the concept of continuing violations on grounds of legal certainty in the case of *Omar Awadh and Six Others v. Attorney General of Kenya, Attorney General of Uganda and Secretary General of the EAC*.³⁴²

c. Communications Must Be Compatible with the AU Constitutive Act and the African Charter³⁴³

There are two 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 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 the USA.³⁴⁴ The Commission has similarly declared

339 EACJ, *Independent Medico Legal Unit v. Attorney General of Kenya and 4 others*, Reference No. 3 of 2010 (29 June 2011).

340 *Ibid.*

341 EACJ Appellate Division, *Attorney General of Kenya v. Independent Medico-Legal Unit*, Appeal No. 1 of 2011, from the Ruling of the First Instance Division (15 March 2012), p. 17 and 16.

342 EACJ, *Omar Awadh and Six Others v. Attorney General of Kenya, Attorney General of Uganda, and Secretary General of the EAC*, App. No. 4 of 2011 (5 December 2011).

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

344 See, ACHPR, *Iheanyichukwu Ihebereme v. USA*, Comm. No. 2/88, 4th Ordinary Session (26 October 1988); *Centre for Independence of Judges & Lawyers v. Yugoslavia*, Comm. No. 3/88, 4th Ordinary Session (26 October 1988); *Prince J.N. Makoge v. USA*, Comm. No. 5/88, 4th Ordinary Session (26 October 1988);

‘irreceivable’ communications brought against African States who were not parties to the Charter.³⁴⁵ 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,³⁴⁶ or if it does not identify a recognisable adverse party.³⁴⁷

The African Court’s jurisdiction is also limited to complaints brought against a State³⁴⁸, and in particular one which has made the necessary declaration under Article 34(6) of the Court Protocol, discussed in further detail in Section 3 above. In the case of *Femi Falana v. African Union*, the African Court held that though the African Union represents State parties to the Protocol, it is not itself a party to the Protocol, and therefore the Court held that it did not have jurisdiction to hear the case.³⁴⁹ In this case, the applicant sought to challenge the declaration requirement under Article 34(6) of the Protocol, arguing that the requirement was inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter and in violation of the applicant’s rights to freedom from discrimination, to a fair hearing and equal treatment, as well as the right to be heard.³⁵⁰

Second, a communication must allege *prima facie* 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 violations, the communication is deemed to be incompatible with the African Charter. Thus, for instance, in *Frederick Korvah v. Liberia*,³⁵¹ the author alleged a ‘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 regime’. The African Commission held that these allegations did not disclose any violations of the Charter. Similarly,

Committee for the Defence of Political Prisoners v. Bahrain, Comm. No. 7/88, 4th Ordinary Session (26 October 1988).

345 ACHPR, *Frederick Korvah v. Liberia*, Comm. No. 1/88, 4th Ordinary Session (26 October 1988).

346 ACHPR, *Mohammed El-Nekheily v OAU*, Comm. No. 12/188, 4th Ordinary Session (26 October 1988). The communication in this case was initiated against then Secretary-General of the OAU, Idee Oumarou.

347 ACHPR, *Omar M. Korah Jay*, Comm. No. 34/88

348 Cases against State parties can be referred to the Court from by the African Commission, as described in Part A, Section IV of this *handbook*, or can be brought by NGOs enjoying observer status, pursuant to Article 34(6) of the African Human Rights Court Protocol, as described in Section 3 of this *Handbook*.

349 African Court, *Femi Falana v. African Union*, App.No. 001/11 (26 June 2012), para. 71.

350 *Ibid.*, para. 3.

351 ACHPR, *Frederick Korvah v. Liberia*, Comm. No. 1/88.

allegations such as, ‘there is no justice in Algeria’,³⁵² 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’,³⁵³ have been declared inadmissible. On the other hand, in the case of *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the State challenged the admissibility of the case on the grounds that the complainant had failed to specify the particular articles of the African Charter alleged to have been violated. The Commission clarified that ‘it is for the African Commission, after consideration of all the facts at its disposal, to make a pronouncement on the rights violated and recommend the appropriate remedy to reinstate the Complainant to his or her right’.³⁵⁴

With the adoption of the African Women’s Rights Protocol, the Commission can 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’.³⁵⁵ Article 3(1) of the Court Protocol 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*,³⁵⁶ 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 Cameroon and declared the Communication inadmissible.

352 ACHPR, *Hadjali Mohamad v. Algeria*, Comm. No. 13/88, 5th Ordinary Session (27 April 1994).

353 ACHPR, *Seyoum Ayele v. Togo*, Comm. No. 35/89, 5th Ordinary Session (27 April 1994).

354 ACHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Comm. No. 245/02, para. 167.

355 African Human Rights Court Protocol, *supra* note 22, Article 3(1).

356 ACHPR, *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, Communication 65/92, 21st Ordinary Session (24 April 1997).

In *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, the State similarly challenged admissibility on grounds that the complaint did not meet the requirements under article 56(3) of the Charter as the language in the complaint was insulting. The Commission provided some clarification as to the threshold for such language:

In determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute. To this end, Article 56(3) must be interpreted bearing in mind Article 9(2) of the African Charter, which provides that “every individual shall have the right to express and disseminate his opinions within the law”. A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression.³⁵⁷

Though the Commission in this case did not find the language in the complaint to be disparaging and insulting under Article 56(3) of the Charter, it is advisable for authors to describe the acts constituting violations of rights in less polarizing language and let the Commission to make conclusions regarding 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*.³⁵⁸ 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:³⁵⁹

[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.

357 ACHPR, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, Comm. No. 284/03, 6th Extraordinary Session (3 April 2009), para. 96. See also, e.g., ACHPR, *Darfur Relief and Documentation Centre v. Sudan*, Comm. No. 310/05, paras. 68-69.

358 ACHPR, *Sir Dawda K. Jawara v. The Gambia*, Comm. Nos. 147/95 & 149/96, 27th Ordinary Session (11 May 2000).

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

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.

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. The Commission has upheld this position in subsequent cases.³⁶⁰

f. Local Remedies Must First Be Exhausted³⁶¹

The Charter requires authors of communications to exhaust local remedies before resorting to the procedures of the African Commission.³⁶² The mechanisms of the African Commission are not processes of first instance. They complement and reinforce national protection mechanisms. This 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.³⁶³ In determining these factors, the Commission has emphasised that the purpose of the requirement to fulfil domestic remedies is to allow a State the opportunity to address such allegations internally before they are brought to an international forum for consideration.³⁶⁴ However, this requirement does not mean that complainants are required to exhaust any local remedy which is found to be, as a practical matter, unavailable or ineffective.³⁶⁵

The Commission has recognised that this provision implies and assumes the availability, adequacy and effectiveness of domestic adjudication procedures.³⁶⁶ Only remedies of a ‘judicial’ nature need to be exhausted. For this reason, non-judicial

360 See, e.g., *ACHPR, Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Comm. No. 245/02, para. 43.

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

362 *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”, 97 *American Journal of International Law* 1 (2003).

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

364 See, for example: *ACHPR, Sir Dawda K. Jawara v. The Gambia*, Comm. Nos. 147/95 & 149/96, para. 31; *Rencontre Africaine pour la Defense des Droits de l’Homme (RADDHO) v. Zambia*, Comm. No. 71/92, 71/92, 20th Ordinary Session (31 October 1997), reprinted in 6 *International Human Rights Reports* 825; *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Comm. No. 338/07, 48th Ordinary Session (28 November 2010), para. 58.

365 *Ibid.*

366 *ACHPR, Sir Dawda K. Jawara v. The Gambia*, Comm. Nos. 147/95 & 149/96, para. 31; *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v. Nigeria*, Comm. No. 87/93, para. 6.

bodies such as national human rights commissions, and discretionary executive relief such as a 'pardon', are not considered 'domestic remedies'.³⁶⁷ According to the Commission, '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'.³⁶⁸ There are therefore four exceptions to the general requirement to exhaust domestic remedies:

- (1) As set out in Article 56(5) of the African Charter, domestic remedies do not need to be exhausted if 'it is obvious that this procedure is unduly prolonged';
- (2) Unavailable remedies;
- (3) Inadequate or insufficient remedies;
- (4) Ineffective remedies.³⁶⁹

Availability of Remedies when the Complainant has been Deported or Fled the State in which the Torture Allegedly Took Place

A key issue that arises in torture cases is whether domestic remedies can be said to be available to a person who has been deported or who has fled a country. In answering this question, the Commission has not been consistent.

In *RADDHO v. Zambia*,³⁷⁰ the Government of Zambia objected on grounds of non-exhaustion of domestic remedies to a case filed on behalf of several hundred 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'.³⁷¹ The Commission pointed out that the victims and their families were collectively deported without the possibility of a judicial challenge and concluded that the remedies referred to by the Respondent State were as a practical matter unavailable.³⁷² The Commission has upheld this position in subsequent decisions.³⁷³

367 ACHPR, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Comm. No. 334/06.

368 ACHPR, *Sir Dawda K. Jawara v. The Gambia*, Comm. Nos. 147/95 & 149/96, paras. 31-32.

369 *Ibid.*; ACHPR, *Article 19 v. Eritrea*, Comm. No. 275/03, para. 46; ACHPR, *Gabriel Shumba v. Zimbabwe*, Comm. No. 288/2004, paras. 56-59.

370 ACHPR, *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v. Zambia*, Comm. No. 71/92.

371 *Ibid.*, para. 12.

372 *Ibid.*, para. 15.

373 ACHPR, *IHRDA (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, Comm. No. 249/02, 26th Ordinary Session (7 December 2004).

In *Abubakar v. Ghana*,³⁷⁴ the Commission found that it was not 'logical' to require the exhaustion of local remedies where a person had fled the country. 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'.³⁷⁵

In a subsequent case, *Rights International v. Nigeria*,³⁷⁶ 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*,³⁷⁷ a previous head of State submitted a complaint related to his deposition and events following the *coup d'état* that removed him from power. Finding that the complainant did not need 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*,³⁷⁸ 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*,³⁷⁹ 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

374 ACHPR, *Abubakar v. Ghana*, Comm. No. 103/93, 20th Ordinary Session (31 October 1996).

375 *Ibid.*, para. 6.

376 ACHPR, *Rights International v. Nigeria*, Comm. No. 215/98, 215/98, 26th Ordinary Session (15 November 1999).

377 ACHPR, *Sir Dawda K. Jawara v. The Gambia*, Comm. Nos. 147/95 & 149/96.

378 ACHPR, *Kazeem Aminu v. Nigeria*, Comm. No. 205/97.

379 ACHPR, *Legal Defence Centre v. The Gambia*, Comm. No. 219/98, 27th Ordinary Session (11 May 2000).

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 Commission took a similar position in the case of *Obert Chinkhamo v. Zimbabwe*. The complainant in this case claimed that exhaustion of domestic remedies was unreasonable and impractical in light of the fact that he had fled from Zimbabwe fearing for his life following threats, harassment and arrests by State officials. The State argued that the departure was voluntary and not forced, and further that one need not be physically present in the country to access local remedies. The State cited the case of two Zimbabweans who had fled to the United Kingdom and who, with the assistance of counsel in Zimbabwe, had successfully petitioned the Zimbabwean courts for reparation for the torture they were subjected to. The Commission agreed with the State that ‘in view of the fact that under Zimbabwe law, one need not be physically in the country to access local remedies, the Complainant cannot claim that local remedies are not available to him’.³⁸⁰ The decision does not take into account the possible impediments to accessing local remedies from outside the country, such as the costs of securing legal counsel and difficulties in obtaining evidence, among others.

In 2012, the Commission issued its admissibility and merits decision in the case of *Gabriel Shumba v. Zimbabwe*. The victim in this case was a Zimbabwean human rights lawyer who had been arrested, detained and tortured for three days by State officials before being charged with treasonous acts. He was released on a High Court injunction, and immediately fled the country to South Africa, fearing for his life. He later returned to Zimbabwe for two days. As a result of his involuntary departure from Zimbabwe, the complainant argued that it was impractical and unreasonable to expect him to return to Zimbabwe to exhaust domestic remedies. The complaint also referred to the ineffectiveness of local remedies, citing cases in which court orders, including those of the Supreme Court, have not been enforced and alleging that court orders against the government are regularly ignored by the State.³⁸¹

380 ACHPR, *Obert Chinkhamo v. Zimbabwe*, Comm. No. 307/05, 42nd Ordinary Session (28 November 2007), para. 82.

381 *Gabriel Shumba v. Zimbabwe*, Comm. No. 288/2004, para. 68.

The Commission examined previous decisions on whether complainants should be required to exhaust domestic remedies and their applicability to this case in great detail.³⁸² Without providing much reasoning, it found the case admissible on the grounds that the Complainant could not pursue domestic remedies without impediment due to the fears for his life, rendering domestic remedies unavailable.³⁸³ It also found domestic remedies ineffective.³⁸⁴ However, as discussed below in the burden of proof sub-section, not all cases have been found admissible on similar grounds.

In short, the requirement for the exhaustion of domestic remedies in cases where victims have been forced to flee the country does not appear to be a settled doctrine of the Commission, but rather assessed on a case-by-case basis. However it would appear that if the author of a communication in which this was the case furnishes sound reasoning and evidence indicating that returning to the State where the violation occurred would put him or her in danger or if doing so would be de fact unfeasible, the Commission may waive the requirement for the exhaustion of domestic remedies.

The SADC Tribunal has taken a somewhat different approach to this question. In *United Republic of Tanzania v. Cimexpan (Mauritius) Ltd. and 2 Others*, a preliminary objection was raised by Tanzania against the complaint filed by Cimexpan (Mauritius) Ltd regarding the deportation of the company's director. The objection was raised on grounds of non-exhaustion of domestic remedies and Tanzania's objection to the request by Cimexpan to have the deportation order of its director rescinded. In response to the preliminary objection, the Tribunal held that deportation does not mean that the requirement for exhaustion of domestic remedies is waived, and that the victims in this case could have contested their deportation from outside the country.³⁸⁵

Sufficiency and Effectiveness of Domestic Remedies

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.³⁸⁶ This is applicable in many cases to victims of torture. Instances in which the Commission has found domestic remedies to be inadequate or ineffective include:

382 *Ibid.*, paras 60-68.

383 *Ibid.*, para. 75.

384 *Ibid.*, para. 77.

385 SADCT, *United Republic of Tanzania v. Cimexpan (Mauritius) LTD and Others*, Case No. SADC (T) 01/2009 (11 June 2010).

386 ACHPR, *OMCT v. Zaire*, Comm. No. 25/89, para. 37.

Denial of Access to an Effective Appeal

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’.³⁸⁷ 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 re-consideration 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’.³⁸⁸ 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). In *Egyptian Initiative for Personal Rights and Interights v. Egypt*, the complainants were not required to exhaust domestic remedies. The Commission found that no local remedies were available as the victims in this case had been sentenced to death by Egypt’s State Security Emergency Court and had no right of appeal against the decision.³⁸⁹ They could only rely on the President to revoke the sentence, which the Commission stated is a non-judicial measure of discretionary nature.

Ouster of the Jurisdiction of the ‘Ordinary’ Courts

The Commission considered the impact of ‘ouster’ clauses on the question of the unavailability of domestic remedies in three cases, against The Gambia,³⁹⁰ Nigeria³⁹¹ and Sudan.³⁹² In these cases, the Commission defined ouster clauses as legislative provisions that ‘prevent the ordinary courts from taking up cases ... or from entertaining any appeals from the decisions of ... special tribunals’.³⁹³ 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.

387 ACHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91 & 89/93, para. 37.

388 *Ibid.*

389 ACHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Comm. No. 334/06, para. 96.

390 *Ibid.*

391 See ACHPR, *Purohit and Moore v. The Gambia*, Comm. No. 241/2001, 33rd Ordinary Session (May 2003); *Zegveld and Ephrem v. Eritrea*, Comm. No. 250/2002.

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

393 ACHPR, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Comm. No. 140/94, 141/94, 145/95, 26th Ordinary Session (5 November 1999), para. 28.

State of the Legal System and Due Process

In *Article 19 v. Eritrea*, the case involved the continuous incommunicado detention, without charge or trial, of 18 journalists in Eritrea. The State argued that the continued detention of the victims was a result of the poor state of the criminal justice system. The Commission found that '[i]n the absence of any concrete steps on the part of the State to bring the victims to court, or to allow them access to their legal representatives three years after their arrest and detention, and more than one year after being seized of the matter, the African Commission is persuaded to conclude that domestic remedies, even if available, are not effective and/or sufficient'.³⁹⁴ Similarly, in *Haregewoi Gebre-Sellasia and IHRDA v. Ethiopia*, the State argued that as the matters raised in the complaint were before a domestic court, local remedies had not yet been exhausted and therefore the requirements of Article 56(5) were not met. However, the Commission held that 'exceptions to Article 56(5) must be linked to the determination of possible violations of certain rights enshrined in the Charter, such as the right to fair trial under Article 7. The exception to the rule on exhaustion of domestic remedies therefore applies where the domestic situation of the State doesn't afford due process of law'.³⁹⁵

The SADC Tribunal, though no longer functioning, was the only sub-regional body to require exhaustion of domestic remedies for the submission of complaints. The Tribunal took a position similar to that of the Commission, establishing that exhaustion of domestic remedies is not required where the remedy is inaccessible or ineffective, which includes situations where the right to a fair trial and due process are infringed upon.³⁹⁶

Cost of Proceedings

In *Purohit and Moore*,³⁹⁷ 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. In this case, which involved victims who were institutionalised on the ground of their mental incapacity, the Commission stated that it could not 'help but look at the nature of people that would be detained as voluntary or involuntary patients under the [Lunatics Detention Act, LDA] and ask itself whether or not these patients [could] access the

394 ACHPR, *Article 19 v. Eritrea*, Comm. No. 275/03, para. 82.

395 ACHPR, *Haregewoin Gebre-Sellasia & IHRDA (on behalf of former Dergue Officials) v. Ethiopia*, Comm. No. 301/2005, para. 113.

396 SADCT, *Mike Campbell (Pvt) Ltd. & 78 Others v. Zimbabwe*, Case No. SADC (T) 02// 2008 (28 November 2008), paras. 25 and 26.

397 ACHPR, *Purohit and Moore v. The Gambia*, Comm. No. 241/2001.

legal procedures available without legal aid'.³⁹⁸ Because the limited legal aid under Gambian law did not in practice extend to them, the Commission found that the victims (and presumably also the complainants) were not required to exhaust local remedies.³⁹⁹

Large-Scale Violations of Human Rights and Impunity

The Commission has taken the view that the rule concerning exhaustion of domestic remedies is dispensed with in cases of serious and large-scale violations of human rights. Thus the Commission holds that it must read Article 56(5) in the light of its duty to:

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'.⁴⁰⁰

This exception relates to both the availability and effectiveness of remedies. In *Sudan Human Rights Organisation and COHRE v. Sudan*, the Commission similarly held that 'the scale and nature of the alleged abuses, the number of persons involved *ipso facto* make local remedies unavailable, ineffective and insufficient'.⁴⁰¹

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'.⁴⁰² 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.

398 *Ibid.*, para. 35.

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

400 ACHPR, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Comm. No. 140/94, 141/94,145/95, 26th Ordinary Session (5 November 1999), paras. 56-57.

401 ACHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Comm. Nos. 279/03 & 296/05, para. 100.

402 ACHPR, *Organisation Mondiale Contre la Torture (OMCT) and Others v. Rwanda*, Comm. Nos. 27/89, 49/91 & 99/93, para.17; but see, *Mouvement des Refugies Mauritaniens au Senegal v. Senegal*, Comm. No. 162/97,162/97, 22nd Ordinary Session (11 November 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.

The absence of effective remedies against torture also constitutes an exception to the rule requiring exhaustion of domestic remedies. In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the Commission cited the Clemency Order, which pardoned every person liable for any politically motivated crime, and thereby effectively foreclosed the possibility of bringing criminal action, as a reason for declaring the complaint admissible, despite the failure to exhaust domestic remedies.⁴⁰³

Burden of Proof

An important element of the exhaustion of local remedies admissibility requirement is the onus of proof. In *Ilesanmi v. Nigeria*,⁴⁰⁴ 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.⁴⁰⁵ The importance of the burden of proof is illustrated in *Anuak Justice Council v. Ethiopia*.⁴⁰⁶ Merely alleging that domestic remedies are not effective does not suffice to convince the Commission that local remedies need not be exhausted. This has been reiterated in a number of subsequent cases,⁴⁰⁷ including *Article 19 v. Eritrea*, in which the African Commission made it clear that 'it is incumbent on the [c]omplainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the [c]omplainant to cast aspersions on the ability of the domestic remedies of the State due to isolated incidences'.⁴⁰⁸ However, as set out above, there are some specific circumstances in which the complainant may be able to concretely demonstrate the inadequacy or ineffectiveness of domestic remedies without attempting to exhaust them.

Three cases, however, demonstrate the challenges associated with satisfying the burden of proof and the exception to the requirement to exhaust domestic remedies on grounds of ineffectiveness or inadequacy. As noted above, in the case of *Gabriela Shumba v. Zimbabwe*, the Commission found the case admissible even though the complainant had not exhausted domestic remedies on the combined grounds that local remedies were ineffective and the complainant's fear for his life should he be required to return to Zimbabwe to exhaust domestic remedies.

403 ACHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Comm. No. 245/02, para. 72.

404 ACHPR, *Ilesanmi v. Nigeria*, Comm. No. 268/2003, 37th Ordinary Session (11 May 2005).

405 *Ibid.*, para. 45.

406 ACHPR, *Anuak Justice Council v. Ethiopia*, Comm. No. 299/05, 39th Ordinary Session (25 May 2006).

407 ACHPR, *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Comm. No. 338/07.

408 ACHPR, *Article 19 v. Eritrea*, Comm. No. 275/03, para. 67.

By contrast, in the cases of *Michael Majuru v. Zimbabwe*⁴⁰⁹ and *Obert Chinhamo v. Zimbabwe*⁴¹⁰, respectively, the Commission appears to have taken a different position with regard to the availability and effectiveness of domestic remedies in Zimbabwe. The facts in the *Michael Majuru* and *Obert Chinhamo* cases were largely similar to those in the *Gabriel Shumba* case: in that the complainants had been subjected to a series of intimidation, threats and harassment prompting them to flee to South Africa fearing for their life. However, the Commission appears to have distinguished the cases on grounds of how well the complainants established their fear for their lives. The Commission reasoned that:

In the above cases, there is one thing in common - the clear establishments of the element of fear perpetrated by identified state institutions, fear which in the case, the Commission observed that “it would be reversing the clock of justice to request the complainant to attempt local remedies”.

In the communication under consideration however, Mr Michael Majuru alleges that he fled the country for fear of his life, that he was intimidated and harassed by the Minister of Justice and by suspected state agents. He also indicated that he received “a telephone call from a sympathetic member of the legal fraternity and the police that the Respondent State was fabricating a case against him and that he was to be arrested and incarcerated on unspecified charges as punishment for defying the Respondent’s orders”.

In this communication, it is clear that the Complainant has simply made general accusations and has not corroborated his allegations with documentary evidence, sworn affidavits or testimonies of others. He claims the Minister sent an Instruction through a colleague of his but there is no way of ascertaining this fact. The applicant was the President of the Administrative Court, and has not show how the instruction purportedly sent by the Minister through the Complainant’s colleague, who the Commission is not told the kind of influence he had over the Complainant, could have or did intimidate him. Apart from the direct telephone call the Complainant claims he received from the Minister on 23rd October and 24th November 2003, all the alleged threats intimidations and harassment he claims, were perpetrated by persons he suspects were government agents. Most of his allegations are unsubstantiated. For example, he indicated in paragraph 2.5.4.7 of his submissions that “the Minister expressed his displeasure with the said decision and further attempted to unduly influence and/or threaten the Complainant”. He fails to show how this attempted influence or threat by the Minister was carried out.

It is further observed by the Commission that the alleged threat or pressure claimed by the Complainant to have been meted by Enoch Kamushinda, who the complainant himself refers to as a suspected Central Intelligence Organisation (CIO) operative, has not been substantiated: neither has the purported pressure and entrapment alleged to have been made by Mr Ben Chisvo who according to the Complainant, is a suspected CIO informer. Furthermore, the Complainant alleged he received a telephone call from a sympathetic member of the legal fraternity and the police that the Respondent State was fabricating a case against him, and that he was to

409 ACHPR, *Michael Majuru v. Zimbabwe*, Comm. No. 308/05, 44th Ordinary Session (24 November 2008).

410 ACHPR, *Obert Chinhamo v. Zimbabwe*, Comm. No. 307/05, 42nd Ordinary Session (28 November 2007).

be arrested and incarcerated on unspecified charges as punishment for defying the Respondent's orders. All the above allegations are not substantiated take the latter for example, what if the "sympathetic member of the legal fraternity" was a hoax? What if he was acting on his own or wanted to benefit from the misfortune of the Complainant? His or her name is not even known.

It is not possible for the Commission to determine the level of intimidation or harassment that is needed to instil fear in a person to force that person to flee for their life. However, in the instant case, there is no concrete evidence to link the Complainant's fear to the Respondent State.⁴¹¹

Like the complaint in the *Shumba* case, the *Michael Majuru* and *Obert Chinhamo* complaints also referenced the ineffectiveness of the remedies available in Zimbabwe, similarly referring to a dozen cases in which court orders against the State, including those of the Supreme Court, have not been enforced. However, in these cases, the Commission was not convinced by the arguments relating to the ineffectiveness of the remedies available and referred to the requirement for complainants to provide 'some *prima facie* evidence of an attempt to exhaust local remedies'. In both cases, the Commission also referred to the European Court of Human Rights' position that even if applicants have reason to believe that available domestic remedies may be ineffective, they should seek those remedies. In a departure from its decision and reasoning in the *Shumba* case, in both the *Michael Majuru* and the *Obert Chinhamo* cases, the Commission found that the complainants had simply 'cast aspersions' on the effectiveness of the domestic remedies based on 'isolated incidents'. Both cases were declared inadmissible for failure to exhaust local remedies.

Where no exception to the exhaustion rule applies, 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 XVIII, Subsection 1 of this volume.

Presentation of Exhaustion of Domestic Remedies Arguments

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*, 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.⁴¹²

411 ACHPR, *Michael Majuru v. Zimbabwe*, Comm. No. 308/05, paras. 90 – 94.

412 ACHPR, *Stephen O. Aigbe v. Nigeria*, Comm. No. 252/2002, 33rd Ordinary Session (29 May 2003), para. 15.

g. Other Admissibility Conditions that Should Also be Observed

‘Reasonable Period’

Article 56(6) of the Charter requires that where domestic remedies are attempted, the communication should be initiated within a ‘reasonable period’ after their exhaustion.⁴¹³

The Charter does not indicate what a ‘reasonable period’ constitutes, and the Commission has instead addressed this on a case-by-case basis. This has resulted in some inconsistency: –on the one hand, the Commission has referred to the ‘usual 6 month period’ from the exhaustion of domestic remedies given by the Commission for the submission of complaints⁴¹⁴, but has also declared admissible complaints which were submitted more than 6 months after the exhaustion of domestic remedies.⁴¹⁵ The Commission has clarified that ‘where there is a good and compelling reason why a Complainant does not submit his complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a Complainant an opportunity to be heard’.⁴¹⁶

In the case of *Darfur Relief and Documentation Centre v. Sudan*, the complaint was submitted 29 months after the exhaustion of domestic remedies. As no reason was provided for this delay, the Commission declared the case inadmissible for failing to meet the requirements of article 56(6).⁴¹⁷ In *Article 19 and Others v. Zimbabwe*, the complainants challenged the legislative restrictions imposed on the media, which they alleged infringed on freedom of expression. The complaint was submitted two years following a Supreme Court decision, and the reason given for the delay was that the complainants were waiting to see whether the Supreme Court decision would be implemented. However, the Commission did not find this to be a ‘good or compelling’ reason, as the Supreme Court decision held that only four of the 17 legislative provisions challenged were unconstitutional and the complainants were not satisfied with the outcome. For this reason, the Commission declared the case inadmissible due to the lack of a ‘good and compelling’ reason for the two-year delay between the exhaustion of domestic remedies and the submission of the complaint to the Commission.

However, there appear to be some inconsistencies in the Commission’s findings

413 African Charter, *supra* note 9, Article 56(6).

414 ACHPR, *Darfur Relief and Documentation Centre v. Sudan*, Comm. No. 310/05, paras. 75-78; *Obert Chinhamo v. Zimbabwe*, Comm. No. 307/05, para. 89. In this case, the Commission held that a delay of 10 months does not constitute an ‘unreasonable delay’, however the case was declared inadmissible for failing to exhaust domestic remedies.

415 ACHPR, *Gabriel Shumba v. Zimbabwe*, Comm. No. 288/2004, para. 44.

416 ACHPR, *Darfur Relief and Documentation Centre v. Sudan*, Comm. No. 310/05, para. 77.

417 *Ibid.*, para. 78-79.

of what it considers to be ‘good and compelling’ reasons for a delay of more than six months from the exhaustion of domestic remedies for submitting complaints. In the case of *Gabriel Shumba v. Zimbabwe*, the complaint was filed with the Commission 16 months after the complainant was forced to flee the country fearing for his safety. In its decision on admissibility, the Commission stated,

Indeed, as the Respondent State has noted, the African Commission has not specified what a reasonable period is but it is apparent from its practice that it has tended to be flexible and as such, determines this question on a case-by-case basis. For instance, in several communications, the African Commission has admitted communications that have been brought before the African Commission more than 16 months after the violation is reported to have taken place or domestic remedies were exhausted. Consequently, the African Commission believes that the Complainant in the present communication having filed the communication 16 months after the violation took place, met the conditions laid down in Article 56(6) of the African Charter.⁴¹⁸

The Commission did not extrapolate on how the delay met the conditions of Article 56(6) or the ‘good and compelling’ reason for the delay. Yet in the case of *Michael Majuru v. Zimbabwe*, the complaint was filed 22 months after the complainant fled Zimbabwe fearing for his life and safety. The complainant alleged that the 22 month delay was caused as he was undergoing psychotherapy in South Africa following his experience of harassment and threats on his life by persons he believed to be part of the Zimbabwean intelligence and security services. He also stated that he was waiting for the situation in Zimbabwe to improve so that he could exhaust domestic remedies. The Commission accepted the fact that the complainant had fled the country and therefore ‘needed time to settle’, but declared the case inadmissible as ‘twenty-two months after fleeing the country is clearly beyond a reasonable man’s understanding of a reasonable period of time’.⁴¹⁹

While the Commission has become increasingly progressive on the issue of exhaustion of domestic remedies, in particular in cases where these are inadequate or ineffective, it is at the same time moving towards a more restricted application of the reasonable time requirement under article 56(6) of the Charter.

Cases which have been settled

The Commission will not receive a communication that is submitted if a ‘case with the same parties, alleging the same facts’⁴²⁰ has been settled by or is pending before another international adjudicatory mechanism, such as the UN Committee against Torture or the UN Human Rights Committee.⁴²¹ However, the fact that a matter

418 ACHPR, *Gabriel Shumba v. Zimbabwe*, Comm. No. 288/2004, para. 44.

419 ACHPR, *Michael Majuru v. Zimbabwe*, Comm. No. 308/05, para. 110.

420 ACHPR, *Mpaka-Nsusu Andre Alphonse v. Zaire* (Admissibility), Comm. No. 15/88, 5th Ordinary Session (8 October 1988).

421 African Charter, *supra* note 9, Article 56(7).

has been brought to the attention of the High Commissioner for Refugees, for instance, should not preclude it from being considered by the Commission under this requirement.⁴²² Similarly, the Working Group on Arbitrary Detention and other such non-judicial international bodies are not the kinds of bodies envisioned under article 56(7) of the Charter.⁴²³ As such, cases which have been brought before such bodies should not be declared inadmissible on grounds of failing to meet this admissibility requirement. However, in *INTERRIGHTS (on behalf of Pan African Movement & Citizens for Peace in Eritrea) v. Ethiopia* and *INTERRIGHTS (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 1999.⁴²⁴ 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. Provisional Measures

An author, or counsel acting on the author's behalf, may request that the Commission indicate provisional measures 'to prevent irreparable harm to the victim or victims of the alleged violation', or the Commission may do so of its own motion.⁴²⁵ The Commission Rules of Procedure authorise it to indicate, as it deems fit, interim or provisional measures for implementation by the respondent State in the proceedings.⁴²⁶ 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

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

423 ACHPR, *Haregewoin Gebre-Sellassie & IHRDA (on behalf of former Dergue Officials) v. Ethiopia*, Comm. No. 301/2005, para. 117.

424 ACHPR, *INTERRIGHTS (on behalf of Pan African Movement & Citizens for Peace in Eritrea) v. Ethiopia and IINTERRIGHTS (on behalf of Pan African Movement and Inter Africa Group) v. Eritrea*, Comm. Nos. 233/99 & 234/99, 33rd Ordinary Session (29 May 2003).

425 ACHPR, Rules of Procedure, *supra* note. 43, Rule 98(i).

426 *Ibid.*, Rule 98.

the matter fully'.⁴²⁷ 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.⁴²⁸ In the *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt* case, the Commission successfully indicated provisional measures to stop an impending execution.⁴²⁹ It is important to note that provisional measures requested can require both negative measures, such as those described calling on a respondent State to desist from taking certain actions, as well as positive measures, enjoining a respondent State from undertaking certain measures such as provision of medical care for a detainee.

The main problem with these orders is non-compliance by States. Provisional measures in the case of *Ken Saro-Wiwa, Jr.*⁴³⁰ and in the *Bosch* case⁴³¹ were disregarded by Nigeria and Botswana, respectively, and both cases resulted in the execution of applicants with pending communications.

The Court Protocol allows for provisional measures in cases 'of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons'.⁴³² This power is particularly important 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 are as unequivocally binding on the States against which they are issued as judgements of the Court.⁴³³ The Court has ordered provisional measures in several cases, calling for Respondent States to take actions to avoid irreparable harm. In *African Commission of Human and Peoples' Rights v. Republic of Kenya*, regarding the complaint received by the African Commission on the forced eviction of the Ogiek indigenous ethnic group from their traditional lands in the Mau forest, the Court ordered provisional measures calling on the Government of Kenya to reinstate the ban on transactions of the land in dispute to prevent irreparable harm to the Ogiek people.⁴³⁴ In *Lohe Issa Konate v. Burkina Faso*, involving a journalist who was convicted for libel and sentenced to

427 ACHPR, *INTERIGHTS (on behalf of Jose Domingos Sikunda) v. Namibia* Comm. No. 239/2001, 31st Ordinary Session (16 May 2002).

428 *Ibid.*

429 ACHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Comm. No. 334/06, para. 78.

430 ACHPR, *International Pen, Constitutional Rights Project, INTERIGHTS (on behalf of Ken Saro-Wiwa, Jr.) and Civil Liberties Organisation v. Nigeria*, Comm. Nos. 137/94, 139/94, 154/96 & 161/97.

431 ACHPR, *INTERIGHTS (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, Comm. No. 240/2001.

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

433 See Interim Report of the African Court of Human and Peoples' Rights notifying the Executive Council of Non-Compliance by a State, in accordance with Article 31 of the Protocol (2013), para. 8.

434 African Court, *African Commission on Human and Peoples' Rights v. Republic of Kenya*. App. No. 006/2012 (15 March 2013).

one year imprisonment, the complainant, alleging the conviction was in breach of his right to freedom of expression, requested provisional measures in the form of his immediate release and to be provided with adequate medical care in detention. The Court declined to request his immediate release, as this would impact on the substantive case; however, the Court ordered the State to immediately provide him with medication and health care for the entire period of his detention.⁴³⁵

The sub-regional bodies are also empowered to grant interim measures, and have greater flexibility to do so as these are not limited to the prevention of ‘irreparable harm’ as is the case for the African Commission and Court. Under Article 20 of the Protocol on the Community Court of Justice, the ECOWAS Community Court of Justice is empowered to order provisional measures or issue any provisional instructions which it may consider necessary or desirable.⁴³⁶ The EAC Court of Justice may issue interim measures, which have the same effect as decisions of the Court, under Article 39 of the Treaty establishing the Court.⁴³⁷ Under Article 28 of the SADC Protocol on Tribunal, the SADC Tribunal may ‘on good cause, order the suspension of an alleged act challenged before the Tribunal and may take other interim measures as necessary’.⁴³⁸ In the highly contested case of *Mike Campbell (Pvt) Ltd and Another v. Zimbabwe*, in which the applicants were challenging the acquisition of agricultural land by the Government of Zimbabwe, the SADC Tribunal granted interim measures to halt the removal of the applicants from their land until the determination of their complaint.⁴³⁹

6. Amicable Settlement

The Rules of Procedure of the African Commission outline the process for amicable settlements for inter-State complaints and individual communications, respectively. Under Rule 109, the Commission may, at the request of the parties concerned or on its own initiative with the parties’ consent, provide services for an amicable settlement, including facilitating negotiations between the parties as well as ensuring that any amicable settlements reached comply with the provisions of the Charter, that the victims involved have consented to the terms, and that the settlements include an undertaking by the parties for implementation of the terms of the settlement.⁴⁴⁰ The Commission is also mandated to prepare a report

435 African Court, *Lohe Issa Konate v. Burkina Faso*, Application No. 004/2013, Order of Provisional Measures, paras. 20 and 22.

436 Protocol on the ECOWAS Court of Justice, Article 20.

437 EAC Treaty (as amended in December 2006 and August 2007), Article 39.

438 SADCT Protocol, Article 28.

439 SADCT, *Mike Campbell (Pvt) Limited and Another v Zimbabwe*, Case No. SADC (T) 2/2007 (13 December 2007).

440 ACHPR, Rules of Procedure, *supra* note. 43, Rule 109.

regarding the settlement, including an explanation of the settlement reached, recommendations for implementing the settlement, and the role of the Commission in monitoring compliance with the terms agreed. If the terms of the settlement are not implemented, at the request of the complainant the Commission may continue to process the complaint under its regular procedure.⁴⁴¹ Rule 90 of the Rules of Procedure outline the process for amicable settlements in the context of inter-State complaints; however there is no precedent of this procedure being used.

The use of amicable settlements 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 European Court of Human Rights and 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*⁴⁴² 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 were 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 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 a willingness on the part of both parties to resolve the underlying cause of the violation without taking the case to a more formal stage. States may be more prepared to settle matters amicably than to proceed to a hearing or judgement that would otherwise expose them to unfavourable publicity.

441 *Ibid.*

442 ACHPR, *INTERIGHTS (on behalf of Safiya Yakubu Husaini and Others) v. Nigeria*, Comm. No. 269/2003.

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

Complainants before the Commission bear the initial onus of laying a factual foundation in support of their allegations. The Commission requires that allegations of torture be substantiated by the persons making them.⁴⁴³ 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.⁴⁴⁴ The Commission will not find a violation of Article 5 in the absence of such information.⁴⁴⁵

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.⁴⁴⁶ A list of the names of the alleged victims was also provided.

Where an author provides these particulars, the State against is obliged to respond. In the absence of such response, the Commission bases its judgment on the information provided by the author.⁴⁴⁷ That is, 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.⁴⁴⁸

The Commission has upheld this position in subsequent cases in which the State has failed to contest *prima facie* evidence of the use of torture or cruel, inhuman or degrading treatment or punishment.⁴⁴⁹

The importance of substantiating allegations of violations with adequate evidence is highlighted in the recent cases against Zimbabwe. In *Michael Majuru v. Zimbabwe*, the Commission found that the complaint did not substantiate the allegations

443 ACHPR, *Civil Liberties Organisation, Legal Defence Centre and Legal Defence and Assistance Project v. Nigeria*, Comm. No. 218/98, 29th Ordinary Session (7 May 2001), para. 45.

444 ACHPR, *Jean Yaovi Degli (on behalf of Corporal N. Bikagni), Union Inter africaine des Droits de l'Homme, Commission Internationale des Jurists v. Togo*, Comm. Nos. 83/92, 88/93, 91/93.

445 ACHPR, *Civil Liberties Organisation, Legal Defence Centre and Legal Defence and Assistance Project v. Nigeria*, Comm. No. 218/98, para. 45.

446 ACHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93, para. 5.

447 ACHPR, *Malawi Africa Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97 & 210/98, paras. 92, 103.

448 ACHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93, para. 57.

449 See, e.g., ACHPR, *Gabriel Shumba v. Zimbabwe*, Comm. No. 288/04, para. 132; *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Comm. No. 334/06, paras. 170-171.

made regarding the harassment and threats, which is the reason the complainant fled from Zimbabwe. The Commission cited the lack of medical evidence, the insufficient detail provided regarding those the complainant alleged to be responsible for the threats and harassment as well as lack of evidence that these persons were in fact agents of Zimbabwe's Central Intelligence Office.⁴⁵⁰ The Commission took the same position in the *Obert Chinhamo v. Zimbabwe* case, citing the dearth of evidence linking the alleged violations to State agents. Both these cases were declared inadmissible. In the *Gabriel Shumba* case, however, which was admitted and in which the Commission found in favour of the complainant, the Commission noted the 'more than adequate evidence' submitted to support the victim's allegations of torture and ill-treatment, which included a number of medical and psychological reports.⁴⁵¹

The Commission has also established that if a person develops injuries while in detention, the burden of proof shifts to the State to convince the Commission that the allegation is unfounded. In the case of *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, the Commission concluded that as the State had failed to give a satisfactory explanation as to how the victims sustained injuries while in detention, and in light of the consistency amongst the victims' accounts of torture, the marks on the victims as documented by the unduly delayed forensic exam were considered evidence of the use of torture which could only have been inflicted by the State.⁴⁵²

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.⁴⁵³ Consideration of the merits takes place in a separate session, and culminates in a finding as to whether the relevant rights have been violated. The procedure is the same for the African Court. Over the years, the procedure during these hearings before the Commission has become increasingly formal. Although not required by the Commission's Rules of Procedure, 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,

450 ACHPR, *Michael Majuru v. Zimbabwe*, Comm. No. 308/05, para. 92.

451 ACHPR, *Gabriel Shumba v. Zimbabwe*, Comm. No. 288/04, para. 159.

452 ACHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Comm. No. 334/06, para. 171.

453 ACHPR, Rules of Procedure, *supra* note 43, Rule 119(2).

may call witnesses, as provided for under Rule 100 of the Commission's Rules of Procedure.⁴⁵⁴

9. Government Justifications

As the respondent in an individual communication, the State has the opportunity to put forward 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; if a communication is found admissible, the State responds again on the merits.⁴⁵⁵ The Commission also provides both parties with 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 and now, in most cases, States are represented by legal counsel in their written submissions as well as at hearings before the Commission.

States have responded in a variety of ways to allegations of torture. Given that the prohibition of torture is accepted as a *jus 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. The Commission has held that 'in seeking to refute the allegations, it is not sufficient for the Respondent State to simply argue that they are unsubstantiated when they are supported by a range of documentation. Rather, the Respondent State must provide evidence to the contrary'.⁴⁵⁶ In *Zegveld and Ephrem*,⁴⁵⁷ 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'.⁴⁵⁸ 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.⁴⁵⁹ The defence also failed on another ground: it did not address

454 *Ibid.*, Rule 100.

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

456 *Ibid.*, para. 159.

457 ACHPR, *Zegveld and Ephrem v. Eritrea*, Comm. No. 250/02.

458 *Ibid.*, para 54.

459 *Ibid.*

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'.⁴⁶⁰

The ECOWAS Court of Justice has taken a similar position, finding in favour of victims of torture in cases where States simply deny the claims made regarding torture without providing any substantiating evidence. In *Musa Saidykhan v. The Gambia*, the complainant was a Gambian journalist who alleged to have been arbitrarily arrested and detained by the Gambian security and intelligence services and held incommunicado for 22 days during which time he was also subjected to torture and inhuman and degrading treatment.⁴⁶¹ The State's defense consisted of a complete denial of the allegations and of any knowledge of the complainant's arrest and detention. The Court found that 'in the absence of any facts and circumstances from which the Court can say the plaintiff was not speaking the truth, and as the evidence stands unimpeached, the Court is able to accept the plaintiff's evidence and find the plaintiff was tortured by the defendant's security agents while in detention'.⁴⁶²

Governments have also on occasion argued that they have acted to uproot torture, for example by prosecuting officials alleged to have committed torture. While prosecution of officials is of course an important measure of accountability for torture, the Commission does not see prosecutions as the only required action and has been careful not to blindly accept such arguments. 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'.⁴⁶³ Indeed, the Commission has held that investigations and prosecutions of violations of the Charter and other human rights instruments are required to satisfy the State's obligations; however other forms of redress, including guarantees of non-repetition, will also be required.

National security is also invoked as justification for some forms of ill-treatment. In *Kevin Mgwanga Gunme et. al. v. Cameroon*, the complaint provided details of some victims who were subjected to torture, amputations and denial of medical treatment by Cameroonian law enforcement officers. The State responded to these allegations by stating that some South Cameroonian activists had perpetrated terrorist acts in the country, killing law enforcement officers, vandalising state property

460 *Ibid.*

461 ECOWAS Court of Justice, *Musa Saidykhan v. The Gambia*, Suit No. ECW/CCJ/APP/11/07 (16 December 2010).

462 *Ibid.*, para. 38.

463 ACHPR, *Zegveld and Ephrem v. Eritrea*, Comm. No. 250/02, para 56.

and stealing weapons.⁴⁶⁴ However, the Commission held that ‘even if the State was fighting alleged terrorist activity, it was not justified to subject victims to torture, cruel, inhuman and degrading punishment and treatment, and found the State to be in violation of Article 5.⁴⁶⁵ Although not presented as justifying torture as such, the Eritrean Government’s 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’.⁴⁶⁶

Related to arguments pertaining to national security are contentions about national legal standards and domestic sovereignty. In *Zegveld and Ephrem*, the Eritrean Government referred to its national laws, arguing that the detention of the 11 persons was ‘in conformity with the criminal code of the country’.⁴⁶⁷ 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.⁴⁶⁸

Another strategy used by States is to defend acts in violation of the Charter as being necessary in a context of war. In *Article 19 v. Eritrea*, the State argued that the alleged acts, including prolonged arbitrary detention and torture, were undertaken ‘against a backdrop of war when the very existence of the nation was threatened and that, as a result, the government was duty bound to take necessary precautionary measures (and even suspend certain rights’). The Commission pointed out, however, that unlike other human rights instruments, the African Charter includes no provisions allowing for derogation in times of war or emergency. The Commission held that ‘the existence of war, international or civil, or other emergency situation within the territory of a state party cannot therefore be used to justify violations of any rights set out in the charter’.⁴⁶⁹

10. Acceptable Limitations

The Commission has held that the prohibition of torture in Article 5 of the Charter is absolute and does not permit any exceptions or limitations.⁴⁷⁰ Moreover, the African Commission has consistently held that ‘contrary to other human rights instruments, the African Charter does not allow for derogation from obligations due

464 ACHPR, *Kevin Mgwanga Gunme et. al. v. Cameroon*, Comm. No. 266/03, para. 113.

465 *Ibid.*, para. 114.

466 ACHPR, *Zegveld and Ephrem v. Eritrea*, Comm. No. 250/02, para 47.

467 *Ibid.*

468 *Ibid.*, para 49.

469 ACHPR, *Article 19 v. Eritrea*, Comm. No. 275/03, para. 87.

470 ACHPR, *Huri-Laws v. Nigeria*, Comm. No. 225/98.

to emergency situations'.⁴⁷¹ 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'.⁴⁷² 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'.⁴⁷³

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.⁴⁷⁴ The Charter further authorises the Commission to 'take into consideration as subsidiary measures to determine the principles of law'⁴⁷⁵ other general or special international conventions, customs generally accepted as law, general principles of law recognized by African States, legal precedents and doctrine,⁴⁷⁶ as well as African practices consistent with international norms on human and peoples' rights.⁴⁷⁷ On a number of occasions, case law has highlighted the need to interpret provisions 'holistically',⁴⁷⁸ and in a manner that is 'responsive to African circumstances'.⁴⁷⁹ A golden thread in the early case law is the interpretation of rights *in favorem libertatis*, in favour of the individual and human rights, or 'generously'.⁴⁸⁰ The Commission explained in *Curtis Francis Doebbler v. Sudan*, that:⁴⁸¹

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.

471 ACHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Comm. No. 74/92; *Malawi Africa Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97, 210/98, para. 84.

472 *Ibid.*

473 ACHPR, *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v. Zambia*, Comm. No. 71/92. African Charter, *supra* note 9, Article 60.

474 *Ibid.*, Article 61.

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

477 *Ibid.*

478 Also in accordance with art. 31(1) of the Vienna Convention on the Law of Treaties, entered into force 27 January 1980, UN Doc. A/Conf.39/27 (23 May 1969), 1155 U.N.T.S. p. 331, 8 ILM 679; see also, ACHPR, *Legal Resources Foundation v. Zambia*, Comm. No. 211/98, 29th Ordinary Session (7 May 2001), para. 70: "The Charter must be interpreted holistically and all clauses must reinforce each other".

479 ACHPR, *SERAC and Another v. Nigeria*, Comm. No. 155/96, para. 68.

480 See, e.g., ACHPR, *Huri-Laws v. Nigeria*, Comm. No. 225/98; ACHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91, 89/93, para. 80: "Any restriction of rights should be the exception."

481 ACHPR, *Curtis Francis Doebbler v. Sudan*, Comm. No. 236/00, paras. 49-50; see also, ACHPR, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Comm. No. 224/98; ACHPR, *Huri-Laws v. Nigeria*, Comm. No. 225/98.

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 jurisprudence in its decision-making.⁴⁸² 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.⁴⁸³ Case law of the Inter-American Court of Human Rights served as interpretative inspiration in another important Commission decision, *Zegveld and Ephrem*.⁴⁸⁴ Today, the Commission routinely considers and refers to the jurisprudence of the European Court of Human Rights and the Inter-American Commission, as well as that of the UN Human Rights Committee and the UN Committee Against Torture, in its decisions.⁴⁸⁵

In giving more exact content to the provision of Article 5, the Commission has referred to the definition of torture under Article 1 of the UN Convention Against Torture (UNCAT).⁴⁸⁶ The Commission has also 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.⁴⁸⁷

Under Articles 3 and 7 of the African Court Protocol, the Court is empowered to consider ‘all cases and disputes concerning the application of the Charter, [the] Protocol and any other relevant human rights instrument ratified by the State

482 For instance in ACHPR, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Comm. No. 204/97, para. 44, the Commission referred to and relied on the UN Declaration on the Protection of All Persons from Enforced Disappearance, adopted 12 February 1993 at the forty-seventh session of the General Assembly by Resolution A/RES/47/133, 47 UN GAOR Supp. (No. 49) at 207, UN Doc. A/47/49(1992). In *SERAC and Another v. Nigeria*, Comm. No. 155/96, 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, Comm. No. 151/96, in which the Commission places similar reliance on the fair hearing jurisprudence of the European Court of Human Rights.

483 ACHPR, *Huri-Laws v. Nigeria*, Comm. No. 225/98, para. 41, relying on ECHR, *Ireland v. The United Kingdom*, App. no. 5310/71, 18 Jan. 1978; see also, European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, adopted 4 November 1950, entered into force 3 September 1953, ETS 5.

484 See ACHPR, *Zegveld and Ephrem v. Eritrea*, Comm. No. 250/02, relying on Inter-American Court of H.R., *Velásquez Rodríguez v. Honduras*, Series Case No. 4, Judgment of 29 July 1988.

485 See, e.g., ACHPR, *Sudan Human Rights Organisation and COHRE v. Sudan*, Comm. Nos. 279/03 & 296/0505, para.123; *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Comm. No. 334/06; *Kenyan Section of the International Commission of Jurists, Law Society of Kenya and Kituo Cha Sheria v. Kenya*, Comm. No. 263/02, 36th Ordinary Session (7 December 2004), para. 41.

486 See, e.g., ACHPR, *Sudan Human Rights Organisation and COHRE v. Sudan*, Comm. Nos. 279/03 & 296/05, para. 160.

487 See ACHPR, *John D. Ouko v. Kenya*, Comm. No. 232/99.

concerned'concerned'. However, the Court does not appear to have done so in its thus far limited jurisprudence.

The sub-regional bodies are also empowered to consider and rely on international law. Article 21(b) of the Protocol on the SADC Tribunal provides that the Tribunal shall develop its own jurisprudence, 'having regard to applicable treaties, general principles and rules of public international law'.⁴⁸⁸ In *United Republic of Tanzania v. Cimexpan (Mauritius) Ltd*, the SADC Tribunal defined torture by reference to the definition found in Article 1 of the UN Convention Against Torture.⁴⁸⁹

12. Remedy and Reparation

It is difficult to neatly delineate the remedies issued by the Commission. In the evolution of the Commission's practice, three approaches to remedies may be identified. First, during its earliest years, the Commission for the most part simply found a violation and refrained from making any statement about possible remedies. The root of this reticence lay in the fact that neither the Charter nor the Commission Rules of Procedure make mention of remedies. Second, the Commission later began to adopt vaguely formulated remedies, such as the recommendation that the State should 'take the necessary steps to bring its law into conformity with the Charter'. Third, the Commission sometimes recommends more detailed and direct remedies, such as an appeal 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. As a result, there are significant gaps between the practice of the Commission with regard to awarding reparation to victims of human rights violations, and international standards for reparation, including those found in the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.⁴⁹⁰

Over the years, the Commission has taken each approach described above in Article 5 cases. In *Rights International v. Nigeria*,⁴⁹¹ as well as in the *Huri-Laws* case,⁴⁹² for example, the Commission found Article 5 violations, but did not offer recommended remedies. The remedy recommended in *OMCT et al. v. Rwanda*,⁴⁹³ following a violation of Article 5 as well as other provisions, is couched in an open-ended

488 SADCT Protocol, *supra* note 130, Article 21(b).

489 SADCT, *United Republic of Tanzania v. Cimexpan (Mauritius) LTD and Others*, Case No. SADC (T) 01/2009.

490 REDRESS Report, "Reaching for Justice: The Right to Reparation in the African System" (October 2013).

491 ACHPR, *Rights International v. Nigeria*, Comm. No. 215/98.

492 ACHPR, *Huri-Laws v. Nigeria*, Comm. No. 225/98.

493 ACHPR, *OMCT and Others v. Rwanda*, Comm. Nos. 27/89, 49/91 & 99/93.

formulation urging the Government to 'adopt measures in conformity with' the Commission's decision. More detailed remedies requiring specific State action have been ordered in a number of cases. These have been varied, including recommendations for legislative changes, adequate compensation for victims, and improvement of conditions of detention. The following recommendations have been made in specific cases:

- (1) That the Government 'put an end to' violations of Article 5 and other violations;⁴⁹⁴
- (2) To 'improve' the 'conditions of detention' of civilians held in military detention centres;⁴⁹⁵
- (3) To ensure persons in detention are provided with medical treatment and care;⁴⁹⁶
- (4) To ensure regular supervision or monitoring in places of detention by qualified and/or experienced persons;⁴⁹⁷
- (5) To take 'appropriate measures' to ensure payment of 'adequate compensation in line with international standards' to victims of violations⁴⁹⁸ and ensure victims are given 'effective remedies, including restitution and compensation;⁴⁹⁹
- (6) To release persons who have been detained without charge or trial, or who have been convicted in a trial in violation of Article 7;⁵⁰⁰
- (7) To conduct effective official investigations into abuses and prosecute those responsible;⁵⁰¹
- (8) Legislative changes.⁵⁰²

The Commission's jurisprudence has been varied in its practice relating to awards of reparation in Article 5 cases, in some cases calling for payment of compensation to victims and in others making more general recommendations. For example, in the case of *Kevin Mgwanga Gunme et. al. v. Cameroon*, the Commission found the State

494 ACHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/91 & 89/93, para. 85.

495 ACHPR, *Civil Liberties Organisation v. Nigeria*, Comm. No. 151/96, para. 29.

496 ACHPR, *IHRDA v. Angola*, Comm. No. 292/04, para. 87.

497 *Ibid.* para. 87.

498 ACHPR, *Malawi Africa Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97, 210/98; Article 19 v. Eritrea, Comm. No. 275/03; *Egyptian Initiative for Personal Rights v. Egypt* Comm. No. 334/06.

499 ACHPR, *Sudan Human Rights Organisation and COHRE v. Sudan*, Comm. Nos. 279/03 & 296/05, para. 241.

500 ACHPR, *Egyptian Initiative for Personal Rights v. Egypt* Comm. No. 334/06.

501 ACHPR, *Sudan Human Rights Organisation and COHRE v. Sudan*, Comm. Nos. 279/03 & 296/05, para. 241; *Gabriel Shumba v. Zimbabwe*, Comm. No. 288/04.

502 See ACHPR, *Avocats Sans Frontieres v. Burundi*, Comm. No. 231/99, 28th Ordinary Session (6 November 2000), para. 34; *Egyptian Initiative for Personal Rights v. Egypt*, Comm. No. 334/06, para. 233.

to be responsible for torture in violation of Article 5.⁵⁰³ However its recommendations did not include individual reparation, such as compensation for the victims. The Commission recommended that Cameroon:

1. Abolish all discriminatory practices against people of Northwest and Southwest Cameroon, including equal usage of the English language in business transactions;
2. Stop the transfer of accused persons from the Anglophone provinces for trial in the Francophone provinces;
3. Ensure that every person facing criminal charges be tried under the language he/she understands. In the alternative, the Respondent State must ensure that interpreters are employed in Courts to avoid jeopardising the rights of accused persons;
4. Locate national projects, equitably throughout the country, including Northwest and Southwest Cameroon, in accordance with economic viability as well as regional balance;
5. Pay compensation to companies in Northwest and Southwest Cameroon, which suffered as a result of discriminatory treatment by banks;
6. Enter into constructive dialogue with the Complainants, and in particular, SCNC and SCAPO to resolve the constitutional issues, as well as grievances which could threaten national unity; and
7. Reform the Higher Judicial Council, by ensuring that it is composed of personalities other than the President of the Republic, the Minister for Justice and other members of the Executive Branch.

In cases where the Commission has recommended individual reparations, this has usually been unspecified, calling for States to ‘pay adequate compensation’⁵⁰⁴ or to ‘take appropriate measures to ensure compensation’.⁵⁰⁵ In *IHRDA v. Angola*, the complainants made specific requests for compensation for the inhuman and degrading treatment they suffered, and the Commission recommended that a Commission of Inquiry be established to investigate the violations as well as to ensure payment of ‘adequate compensation’.⁵⁰⁶ However, the Commission has not yet clarified or provided States with guidance as to what constitutes ‘adequate reparation’ or what would be considered ‘appropriate measures’ to ensure reparation for victims of violations of the Charter.

503 ACHPR, *Kevin Mgwanga Gunme et. al. v. Cameroon*, Comm. No. 266/03, para. 114.

504 ACHPR, *Gabriel Shumba v. Zimbabwe*, Comm. No. 288/204, para. 194; ACHPR, *Haregewoin Gebre-Sellassie & IHRDA (on behalf of former Dergue Officials) v. Ethiopia*, Comm. No. 301/05.

505 ACHPR, *Curtis Francis Doebbler v. Sudan*, Comm. No. 236/00; ACHPR, *Malawi Africa Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97, 210/98; *Article 19 v. Eritrea*, Comm. No. 275/03.

506 ACHPR, *IHRDA v. Angola*, Comm. No. 292/04, para. 87.

As of November 2013, the Commission had recommended a specified quantum of reparation in only one case, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Sudan*.⁵⁰⁷ This complaint was submitted by four women who alleged to have been sexually harassed, intimidated and abused by members of the National Democratic Party during a peaceful protest, in the presence of the police who failed to intervene to stop the treatment, and who also participated in the violence. The victims alleged a violation of Article 5, among others, and requested compensation in the amount of 57,000 Egyptian Pounds (equivalent to approximately US\$8,300) each.

The Commission found that the sexual molestation suffered by the victims amounted to cruel, inhuman and degrading treatment in violation of Article 5, as well as violations of Articles 1, 2, 3, 9, 16, 18 and 26 of the Charter, and requested the State to pay compensation in the amount requested to each of the victims, as well as investigate the alleged violations and prosecute those responsible, and undertake a number of law reform efforts to ensure future violations do not occur. The Commission did not clarify its reasoning for awarding the specific amount of compensation; however the case may be indicative that applicants should include in their submissions to the Commission specific requests for reparation.

It should be pointed out that the African Commission has been clear in its jurisprudence that the obligation to provide reparation to victims is not extinguished if the government responsible for the abuses is no longer in power. Any subsequent governments inherit the responsibility to provide reparation to victims, even if this is for violations committed by a previous government.⁵⁰⁸

In contrast with the Charter, which governs the Commission, the Court Protocol provides explicitly for 'appropriate orders' to remedy violations.⁵⁰⁹ Although it does not contain an exhaustive list, the relevant provision mentions 'compensation' and 'reparation' specifically.⁵¹⁰ However, the Court has yet to conclude a case where an award of reparation would be required. For cases referred to before the African Court which have been referred by the Commission,⁵¹¹ some commentators have pointed out that the Commission's Rules of Procedure do not provide complainants in a referral case the opportunity to make a separate submission on reparation, as is the case in other regional human rights systems, which may impede on victims' right to reparation for violations of the Charter.⁵¹²

507 ACHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Sudan*, Comm. No. 323/06, para. 275.

508 ACHPR, *Krishna Achuthan and Amnesty International v. Malawi*, Comm. Nos. 64/92, 68/92 & 78/92.

509 African Human Rights Court Protocol, *supra* note 22, Article 27(1).

510 African Human Rights Court Protocol, Article 27(1): If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

511 For more information on the referral process, see section A(IV) above.

512 REDRESS Report, *supra* note 490.

Victims of human rights violations can also submit complaints to the sub-regional justice mechanisms, namely the ECOWAS Court of Justice, the EAC Court of Justice and the SADC tribunal, in an effort to obtain remedy and reparation. The ECOWAS Court of Justice has been the most progressive of these bodies in terms of reparation, making awards in specific and significant amounts.

Though the Supplementary Protocol, which mandates the ECOWAS Court of Justice to consider complaints relating to alleged violation of human rights, does not provide for reparation, the Court has held that it can do so under article 19(1) of the 1991 Protocol of the Court, which allows it to apply the 'body of laws as contained in article 38(1) of the Statute of the International Court of Justice', including:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The ECOWAS Court has in its jurisprudence made several awards of reparation that are particularly noteworthy. In the case of *Musa Saidu Khan v. The Gambia*, the complainant requested compensation in the amount of US\$2 million. The Court, finding a violation of Articles 5, 6, and 7 of the African Charter, considered 'the loss of job and... loss of earnings, illegal detention for 22 days as well as physical injury which no doubt would have caused him pain and suffering, in assessing the damages for the plaintiff'.⁵¹³ The Court awarded the complainant damages in the amount of US\$200,000. In the case of *Hadijatou Mani Korua v. Niger*, the ECOWAS Court awarded the complainant compensation in the amount of 10,000,000 Niger francs (equivalent to approximately US\$20,500) for the slavery and related human rights violations she was subjected to over a period of nine years.⁵¹⁴ In the case of *Djot Bayi and 14 Others v. Nigeria and 4 Others* the Court called on Nigeria to compensate the ten applicants who had been subjected to prolonged arbitrary detention in the amount of US\$42,720 each.⁵¹⁵

513 SADCT, *Musa Saidu Khan v. The Gambia*, Suit No. ECW/CCJ/APP/11/07.

514 ECOWAS Court of Justice, *Hadijatou Mani Koroua v. Niger*, App. No. ECW/CCJ/APP/08/08.

515 ECOWAS Court of Justice, *Djot Bayi & Others v. Nigeria & Others*, App. No. ECW/CCJ/APP/10/06.

13. Enforcement of Decisions

The biggest challenge currently facing the African Human Rights System is regards the implementation of its decisions. Though the Commission's Rules of Procedure provide for monitoring and follow-up of the measures taken by States to implement its decisions,⁵¹⁶ there are still serious deficiencies in this regard. According to some commentators, States have failed to comply with the Commission's decisions in more than 60 per cent of cases, and full compliance has been reported in only 14 per cent of cases.⁵¹⁷ This has been attributed to a number of factors, including, notably, the lack of political will on behalf of States to implement recommendations.

Monitoring and follow-up of the Commission's decisions is carried out by its Working Group on Communications, which is mandated to 'coordinate follow-up on decisions of the Commission on communications, by concerned Rapporteurs'.⁵¹⁸ However, this recent expansion of the Working Group's mandate still falls short of an effective enforcement mechanism as exists for other regional juridical bodies such as the Committee of Ministers of the Council of Europe, which is the enforcement mechanism for decisions of the European Court of Human Rights. The procedure for follow-up and monitoring of the implementation of Commission recommendations is also unclear. Upon the adoption and dissemination of a decision, the Commission has provided little clarification on the follow-up process, and it is not clear whether the Commission's practice includes following-up with States directly. While Rule 112 does set out the procedure for follow-up, there are no binding mechanisms to ensure enforcement. As a result, and as has been pointed out by commentators, 'the burden of enforcement in the majority of cases to date rests on the complainants'.⁵¹⁹

The Commission's Rules of Procedure do enable it to bring situations of non-compliance to the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of Decisions of the African Union; however as of November 2013, this procedure had not led to any formal sanctions against States for failure to implement recommendations of the Commission. In addition, Rule 112 of the Rules of Procedure provide for the inclusion of information regarding the follow-up procedures in its annual activity reports. However short of this unwanted attention, there are no meaningful consequences for States that have failed to implement the Commission's

516 ACHPR, Rules of Procedure, *supra* note 43, Rule 112.

517 REDRESS Report, *supra* note 490, p. 26.

518 ACHPR, Resolution on the expansion of the mandate of the working group on communications and modifying its composition, ACHPR/Res.255(LII)12, 52nd Ordinary Session (22 October 2012).

519 REDRESS Report, *supra* note 490, p. 89.

recommendations, which undoubtedly contributes to the enforcement problem faced by the Commission.

Another factor contributing to the lack of enforcement of Commission decisions is the fact that they are termed 'recommendations', which may be perceived as non-binding on States. With the establishment of the Court, it is anticipated that enforcement of the Commission's decisions will be strengthened through the referral of cases by the Commission to the Court, which issues binding decisions. It is as yet too early in the Court's functional existence to comment on its impact on enforcement of decisions in referral cases.

Furthermore, recommendations of the Commission are often vague and imprecise. For example, recommendations for 'legislative amendments' do not include specific detail as to what such changes should consist of, which poses problems not only in terms of implementation but also for the effective monitoring of such implementation. Commentators have also pointed to the challenges faced by States with regard to implementation, in terms of a lack of financial resources to compensate victims as well as and inadequate or insufficient coordination amongst State parties, under whose remit the implementation of Commission decisions falls.⁵²⁰

Though the sub-regional bodies also face challenges regarding enforcement of decisions, the binding nature of these decisions goes some way in effectuating implementation. The 2005 Protocol to the Treaty establishing the ECOWAS Court of Justice includes a requirement that execution of the Court's judgments must take the form of a Writ of Execution, which the Chief Registrar must submit to the relevant State.⁵²¹ States are required to establish or identify the national authority responsible for implementing judgments of the Court. Decisions of the EAC Court of Justice are binding and can be subject to appeal. Though the EAC Treaty establishing the Court includes provisions for ensuring implementation of decisions, there are no procedures to initiate consequences for States that fail to do so.⁵²²

X. Inter-State Communications

As of the time of writing, the Commission has finalised one inter-State communication. The case *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*⁵²³ 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

520 *Ibid.*

521 Protocol on the Ecowas Cort of Justice, Article 24.

522 EAC Treaty, Articles 30-33.

523 ACHPR, *DRC v. Burundi, Rwanda and Uganda*, Comm. No. 227/99.

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.⁵²⁴ 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).⁵²⁵ 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 5.⁵²⁶

XI. On-Site and Fact-Finding 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 missions, also known as ‘country visits’. These visits are undertaken usually when numerous communications against a particular State have been received and the purpose of these visits is for the Commission to explore the possibilities for amicable settlement or to investigate facts relating to the communication. The Commission may also undertake fact-finding missions when there are reports of widespread human rights violations in a State party or allegations of a general nature. The Commission is not required to have received a prior communication in order to justify undertaking a fact-finding mission. One of the drawbacks of these procedures 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 and fact-finding missions, to Mali, Senegal, Mauritania, Nigeria, Zimbabwe, Sahrawi Arab Democratic Republic and Sudan, among others. To examine the process more closely, we turn to the mission to Zimbabwe.

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

524 *Ibid.*, para 6.

525 *Ibid.*, para 89.

526 *Ibid.*, para 98.

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'.⁵²⁷ 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.⁵²⁸

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.⁵²⁹

527 ACHPR, Executive Summary of the Report of the Fact-finding Mission to Zimbabwe, Annex II, EX.CL/109 (V), para. 3.

528 See Robben Island Guidelines, *supra* note 63.

529 ACHPR, 17th Annual Activity Report.

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.⁵³⁰ 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 criticised 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 complaints and obtaining government responses only to specific allegations.

530 Comments by the Government of Zimbabwe on the Report of the Fact-Finding Mission, contained in Annex II of the ACHPR, 17th Activity Report.

PART D

TORTURE IN THE PROMOTIONAL MANDATE OF THE AFRICAN COMMISSION

XII. NGOs with Observer Status

NGOs may obtain observer status with the African Commission.⁵³¹ Observer status entitles NGOs to ‘participate in its [[the Commission’s] sessions without voting rights’.⁵³² Although NGOs (including those without observer status) are generally entitled to propose agenda points to the Secretariat of the Commission and to receive copies of the provisional agenda of sessions,⁵³³ in practice these opportunities are only really open to NGOs with observer status, as information from the Secretariat is only sent to them.

To obtain observer status, an NGO must submit a ‘documented application’.⁵³⁴ Within three months before the session in which its application is to be considered, an NGO must submit the following documents: its statutes, information about its constituent organs, proof of its legal existence, a list of all its members, its sources of funding and a statement of its activities.⁵³⁵ It should be clear from its statute and stated activities that the applying NGO works in the field of human rights and that its objectives are in line with the AU Constitutive Act and the African Charter.⁵³⁶

From its inception in 1987 through its Fifty-fourth Ordinary Session in November 2013, the Commission has granted observer status to 466 NGOs. Among these are a number of NGOs that provide for the prevention of torture in their mandates. These NGOs include both international NGOs (such as Association pour la Prévention de la Torture (APT), Organisation Mondiale Contre la Torture (OMCT) and Penal Reform International (PRI), and African NGOs (such as the Medical Rehabilitation Centre for Trauma Victims, based in Lagos, Nigeria and Prison Fellowship of Ethiopia). Some of the most recent NGOs to obtain observer status are Avocats Sans Frontières, Global Initiative for Economic Social and Cultural Rights, and the Women’s League Centre (South Africa), among others.⁵³⁷ Many more of the NGOs (both international and Africa-based) include the prevention of torture and ill-treatment directly or implicitly in their mandates.

531 National human rights institutions (NHRIs) are also encouraged to obtain a special form of observer status with the Commission, termed ‘affiliate status’.¹⁹ NHRIs attended the Commission’s Thirty-ninth Session. The role of these institutions in the work of the Commission and at the sessions, however, has not always been clear.

532 ACHPR, Rules of Procedure, *supra* note 43, Rule 62.

533 *Ibid.*, Rules 32(3)(e), and 33.

534 ACHPR, Resolution on the criteria for granting and enjoying observer status to non-governmental organisations working in the field of human rights with the African Commission on Human and Peoples’ Rights, ACHPR/Res.33(XXV)99, 25th Ordinary Session (5 May 1999), para. 1.

535 *Ibid.*, para. 3.

536 *Ibid.*, para. 2.

537 ACHPR, Final Communiqué of the 54th Ordinary Session (22 October – 5 November 2013), para. 25.

XIII. Attendance of and Participation in NGO Fora and Public Sessions

NGOs but not only attend the NGO Forum, which precedes most of the Commission's sessions. Generally, NGOs at the NGO forum have observer status, but other NGOs are welcome to participate. Initially organised by the International Commission of Jurists (ICJ), the NGO Forum is at present organised by the African Centre for Democracy and Human Rights, based in Banjul, The Gambia. The aim of this forum is to provide a non-threatening space within which NGOs may exchange experiences and devise common strategies, as well as foster closer collaboration for the protection and promotion of human rights. Often, resolutions taken at the NGO Forum are pursued at the Commission's public sessions. Preceding the Commission's Seventeenth Ordinary Session, for example, the NGO Workshop adopted a resolution on prisons in Africa.⁵³⁸ This subsequently served as a draft for the Commission's resolution on this issue.

Public sessions provide an opportunity for 'dialogue' between State delegates and NGO representatives. Under the agenda item 'human rights situation in Africa', NGOs with observer status may make brief statements about the human rights situation in a particular country or about an issue of general concern. Frequently, government delegates make use of the opportunity to reply. On the one hand, these sessions serve to inform and sensitise the Commissioners, other NGOs and others present at the sessions; on the other hand, these sessions can be used to 'name and shame' recalcitrant States. In particular, allegations of serious human rights violations, such as torture, have proven to be issues to which States will respond, either by denial or with the promise to investigate and rectify the situation if required.

XIV. Seminars

To promote awareness of the Charter, the Commission organises 'seminars' in partnership with NGOs or other entities. One of the earliest was a pan-African Seminar on Prison Conditions in Africa, organised under the auspices of the African Commission with PRI, other NGOs and the Ugandan Government. It culminated in the adoption of the 'Kampala Declaration on Prison Conditions in Africa',⁵³⁹ out of which the post of Special Rapporteur on Prisons and Conditions of Detention was established. Another more recent example is the Regional Consultative Seminar

538 See F. Viljoen, "The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities", 27 *Human Rights Quarterly* 125 (2005).

539 Kampala Declaration on Prison Conditions in Africa, adopted at the International Seminar on Prison Conditions in Africa, Kampala, Uganda (19 – 21 September 1996) [hereinafter 'Kampala Declaration'].

on ‘Key Human Rights Issues Affecting Women Living with HIV in Africa’, organised by the Committee for the Protection of the Rights of People Living with HIV (PLHIV) and Those At Risk, Vulnerable to and Affected by HIV in Africa of the African Commission together with UNAIDS in Dakar, Senegal, from 3 to 5 October 2013. The Seminar culminated in the drafting of a resolution on ‘Involuntary Sterilisation and Protection of Human Rights in Access to HIV Services’⁵⁴⁰, which served as the basis for the Commission’s resolution with the same name adopted at the Fifty-fourth session in November 2013.⁵⁴¹

XV. Resolutions

Under its promotional mandate, the Commission adopts resolutions, which are recommendatory in nature and may be thematic or country-specific.

1. Thematic Resolutions

Torture and other ill-treatment are most likely to occur in places of detention. This issue became the focus of the Commission’s first resolution related to torture and other ill-treatment, when it adopted the ‘Resolution on Prisons in Africa’ in 1995.⁵⁴² In July 2003, the AU Assembly of Heads of State and Government endorsed the Fair Trial Guidelines, which contain due process standards for the prevention of torture and the protection of victims of such practices.⁵⁴³ At the same summit, the African Union also adopted the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa (Robben Island Guidelines).⁵⁴⁴

Both the Fair Trial and Robben Island Guidelines are ‘soft law’ standards developed by the African Commission to amplify and supplement the provisions of the African Charter and other analogous treaty instruments prohibiting torture in Africa. In particular, these guidelines aim to clarify the range of measures that States and their representatives may undertake to comply with relevant treaty standards. Various measures include legislation, procedural safeguards, oversight mechanisms, evidentiary rules, police standards, measures relating to prosecutorial and judicial conduct (such as training), and measures of inter-departmental and inter-State co-operation. In this way, the guidelines help define the scope of victims’ entitlement to remedies. They are now discussed in more detail.

540 ACHPR, Press Statement on the Regional Seminar on Key Human Rights Issues Affecting Women Living with HIV in Africa (5 October 2013).

541 ACHPR, Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services, ACHPR/Res.260, 54th Ordinary Session (5 November 2013).

542 ACHPR, Resolution on Prisons in Africa, No. 19, 17th Ordinary Session (22 March 1995).

543 Fair Trial Guidelines, *supra* note 63.

544 Robben Island Guidelines, *supra* note 63.

a. Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

In 1999, the Commission adopted a resolution fleshing out the details of the fair trial rights under the Charter, particularly Article 7. The resolution deals with a wide array of issues, including the independence and impartiality of tribunals, the right to an effective remedy, sentencing issues and the role of prosecutors and legal aid. As far as the role of prosecutors is concerned, the Guidelines stipulate, *inter alia*, the following:⁵⁴⁵

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the judicial body accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

A section entitled 'Provisions applicable to arrest and detention', addresses the 'right to humane treatment'.⁵⁴⁶ States are required to ensure that no lawfully detained person is 'subjected to torture or to cruel, inhuman or degrading treatment or punishment'.⁵⁴⁷ Special measures are to be taken to protect women and juveniles. Interrogation may not comprise elements of violence or methods or threats that impair an individual's dignity, 'capacity of decision' or 'judgement'.⁵⁴⁸ Complaints regarding torture or ill-treatment must be allowed and an effective system for the investigation of such complaints must be in place. Also under these Guidelines, victims of torture are entitled to remedies, including rights to compensation and a State duty to investigate, prosecute and/or levy administrative measures against the perpetrators.⁵⁴⁹

In November 2006, the Commission adopted Resolution 100 on 'the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System', which sets out in considerable detail the measures that States must undertake to ensure access to legal aid within their criminal justice systems.⁵⁵⁰

545 Fair Trial Guidelines, *supra* note 63, para. F(l).

546 *Ibid.*, Section M(7).

547 *Ibid.*, para. M(7)(b).

548 *Ibid.*, para. M(7)(e).

549 *Ibid.* para. M(7)(j).

550 The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, adopted at the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa, Lilongwe, Malawi (22 - 24 November 2004).

b. Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)

The Robben Island Guidelines are divided into three parts, dealing with the prohibition of torture, the prevention of torture and the needs of the victims of torture.⁵⁵¹

Under the Guidelines, the primary obligation of States is effectively to prohibit torture under their domestic laws and legal systems. This means, first, that torture has to be criminalised in accordance with the definitional elements of Article 1 of the Convention Against Torture.⁵⁵² Second, an accessible and effective system for investigating allegations of torture has to be in place.⁵⁵³ If an investigation reveals that the allegations are substantiated, effective prosecution must be instituted. Lastly, upon conviction, perpetrators should be punished appropriately.⁵⁵⁴

Under national law, torture must also be made an extraditable offence, but no one may be expelled or extradited where he or she is at risk of being subjected to torture in the receiving State.⁵⁵⁵ In these respects, the Guidelines draw heavily from the Convention Against Torture.

In the formulation of laws pertaining to torture, and in domestic courts' interpretation of these laws, States may not invoke any of the following as substantive 'justification' of torture or other ill-treatment: a state or threat of war, internal political instability or public emergency.⁵⁵⁶ States also may not justify ill-treatment on the following legal grounds: necessity, a declared state of emergency, public order (*ordre public*) or superior orders.⁵⁵⁷ By pre-empting and disallowing these justifications or 'explanations', the Guidelines go beyond the Convention Against Torture, and appropriately address concerns of particular importance in Africa.

States must also take measures to prevent torture from occurring. Prevention of torture depends on the existence and implementation of safeguards during the

551 Robben Island Guidelines, *supra* note 63.

552 *Ibid.*, para. 4. Many, though not all, African Constitutions prohibit torture explicitly (see e.g. the Constitutions of Benin (art. 18), Central African Republic (art. 3), Djibouti (art. 16), Malawi (art. 19(3)), Mali (art. 3), Mauritius (art. 7(1)), Nigeria (art. 34(1)(a)), South Africa (art. 12(1)(d)) Tanzania (art. 13(6)(e)) and Togo (art. 21)). Almost all African Constitutions contain guarantees against inhumane treatment, and of liberty, bodily security and dignity. These Constitutions are reprinted in C. Heyns, *Human Rights Law in Africa*, Vol. 2, Leiden: Martinus Nijhoff (2004).

553 Robben Island Guidelines, *supra* note 63, paras. 17-19.

554 *Ibid.*, para. 12.

555 *Ibid.*, para. 7.

556 *Ibid.*, para. 9.

557 *Ibid.*, para. 10.

pre-trial process. Most importantly, national law and practice must prohibit *incommunicado* detention; must ensure that the use of ‘unauthorised places of detention’ is prohibited and punished; that the relevant written records are kept, and that *habeas corpus* is observed (allowing challenges to the lawfulness of detention).⁵⁵⁸ The importance of an independent and effective national complaints mechanism is emphasised, as is the role of an independent judiciary, legal profession, medical profession and NGOs. Acknowledging the long term value of training and awareness-raising, the Guidelines also require States to engage in human rights training of law enforcement and security personnel and awareness-raising of the general public.⁵⁵⁹

Conditions of detention may also amount to torture or ill-treatment. By dealing in some detail with conditions of detention, the relevance of the Guidelines to the work of the Special Rapporteur is underscored. Among other duties, States are required to ensure the separation of pre-trial detainees from those already convicted,⁵⁶⁰ and of juveniles and women from adult male detainees.⁵⁶¹ Both of these issues are central to the mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa. Similarly, States are called upon to reduce over-crowding by encouraging non-custodial sentences for minor crimes.⁵⁶²

Part III of the Guidelines addresses the needs of victims. It calls on States to ensure that victims of torture and their families are ‘protected from violence’ and it also enjoins States to ‘offer reparations’ to victims ‘irrespective of whether a successful criminal prosecution’ has been brought. Finally, States should ensure medical care, access to rehabilitation as well as compensation and support to victims and ‘their dependents’.⁵⁶³

As resolutions of the Commission, these Guidelines are not binding, but serve a recommendatory role. However, their authority has been enhanced by Commission findings that invoke them. For example, in *Rights International v. Nigeria* the Resolution on the Right to Recourse and Fair Trial was relied upon to interpret the fair trial right in Article 7(1)(c) of the Charter to include the right of an individual to be informed of the reason for his or her arrest or detention.⁵⁶⁴ The Commission did the same in the more recent case of *Gabriel Shumba v. Zimbabwe*.⁵⁶⁵ In the case

558 *Ibid.*, paras. 21-32.

559 *Ibid.*, paras. 45-46.

560 *Ibid.*, para. 35.

561 *Ibid.*, para. 36.

562 *Ibid.*, para. 37.

563 *Ibid.*, para. 50.

564 ACHPR, *Rights International v. Nigeria*, Comm. No. 215/98, 26th Ordinary Session (15 November 1999), paras. 28-29.

565 ACHPR, *Gabriel Shumba v. Zimbabwe*, Comm. No. 288/04, para. 172.

of *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, the Commission invoked Section 20 of the Robben Island Guidelines to interpret the basic safeguards against torture for detainees, including the right to an independent medical examination.⁵⁶⁶

The Robben Island Guidelines Monitoring Committee ('Follow-up Committee') was established at the Commission's Twenty-Ninth Session in 2002 to ensure that the Guidelines do not gather dust. The Follow-up Committee is comprised of the African Commission, the Association for the Prevention of Torture and any prominent African experts as the Commission may determine. In 2009, the Commission adopted a resolution changing the Follow-Up Committee's name to the Committee for the Prevention of Torture in Africa (CPTA), without changing its mandate. The mandate assigned to the Follow-up Committee is as follows:

- It may organise, with the support of interested partners, seminars to disseminate the Robben Island Guidelines to national and regional stakeholders.
- It should develop and propose to the African Commission strategies to promote and implement the Robben Island Guidelines at the national and regional levels.
- It must promote and facilitate the implementation of the Robben Island Guidelines within Member States.
- It must make a progress report to the African Commission at each Ordinary Session.^{OS}

The mandate of the Committee is much less detailed than that of other special mechanisms under the African Commission, indicative of a more promotional and preventive approach, rather than an investigatory one. Commentators have criticised the ambiguity of the Committee's mandate, and in particular its relationship to the Special Rapporteur on Prisons and Conditions of Detention in Africa, as one of the factors contributing to its lack of effectiveness.⁵⁶⁷ The Follow-up Committee adopted its rules of procedure and first strategic plan of action, when it held its first meeting, hosted by the University of Bristol School of Law, in 2005. Since then, a number of subsequent strategic action plans have been adopted, with the most recent in 2011.⁵⁶⁸

566 ACHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Comm. No. 334/06, para. 174.

567 See, for example, D. Long and L. Muntingh, "The Special Rapporteur on Prisons and Conditions of Detention in Africa and the Committee for the Prevention of Torture in Africa: The Potential for Synergy or Inertia?", *SUR International Journal of Human Rights*, Vol. 13 (2010).

568 Committee for the Prevention of Torture in Africa (CPTA), *Strategic Plan of the Committee for the Prevention of Torture in Africa 2012-2014*, available at: http://www.achpr.org/files/news/2011/07/d29/cpta_strategic_plan.pdf.

Like its predecessor, the CPTA's ability to fully and effectively implement its mandate has been significantly inhibited by a chronic lack of adequate funding and resources. The Commission had no funding available for the Follow-up Committee, which was in existence for three years before it held its first meeting in 2005. It was only at this meeting that the Committee adopted its rules of procedure and drafted its first strategic plan of action, though the implementation of the latter has again been negatively impacted by the lack of funding and resources. Indeed, none of the activities outlined in the 2005-2007 plan of action were carried out for this reason. Since then, a number of subsequent strategic plans have been adopted, with the most recent of which was adopted in 2011 (covering 2012-2014). Implementation has improved yet there is still some way to go. In particular, the Committee has not yet carried out the requisite studies and adopted policy documents aimed at developing a clear and effective strategy for combating torture and other ill-treatment in Africa, as is included in its mandate.⁵⁶⁹

In the implementation of its action plans, the Committee has organised a number of training seminars with various stakeholders on a range of issues relating to the prevention of torture and aimed at disseminating the Robben Island Guidelines. These have been held in Nigeria (2008), Liberia (2009), Benin (2009), Senegal (2011) and Cameroon (2012). The Committee has also organised a regional seminar on the OPCAT in Senegal (2012) and a commemorative conference on the 10th anniversary of the Robben Island Guidelines in South Africa (2012). In addition, the Committee has also carried out country missions aimed at the promotion of the prohibition and prevention of torture to Uganda (2009), Benin (2009), Algeria (2010), DRC (2011) and Mauritania (2012). Regrettably, due to the lack of funding as well as research and administrative resources available to the Committee, the only such mission for which a mission report has been prepared is that to Mauritania. The failure to issue mission reports contributes to the lack of transparency of the preparation and methodology of promotion missions carried out by the Committee.

Other activities of the CPTA include the 2008 publication of the 'Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: A Practical Guide for Implementation', as well as the launching of the bi-annual 'Africa Torture Watch' newsletter in 2008 which is aimed at sharing information with the public about the work of the Committee and clarifying the provisions of the Robben Island Guidelines.

569 For further information regarding the work undertaken by the CPTA, see: ACHPR website, 'Special Mechanisms - Committee for the Prevention of Torture in Africa', available at: <http://www.achpr.org/mechanisms/cpta/>.

2. Country-specific Resolutions

In furtherance of its promotional mandate under Article 45, the Commission also adopts country-specific resolutions, usually to denounce human rights violations in a particular State. On a number of occasions, such resolutions have made reference to torture, arbitrary detention and other ill-treatment. For example, the Commission's 2004 resolution on Côte d'Ivoire referred to gross human rights violations in the context of the events since 1999. In its resolution, the Commission noted that it 'deplores the grave and rampant human rights violations committed against the civilian populations, such as summary and arbitrary executions, torture and arbitrary detention and disappearances'.⁵⁷⁰ The Commission also decided to undertake a fact-finding mission to investigate human rights violations committed in Côte d'Ivoire since the beginning of the crisis.

Similarly, at its Fourth Extraordinary Session in February 2008, the Commission adopted a resolution on the situation of human rights in Somalia in which it decided to send a fact-finding mission to Somalia. More recently, at its Fifty-fourth session in November 2013, the Commission adopted a resolution condemning the cases of summary execution and enforced disappearances in Mali, and calling on the government to take the necessary measures to end these human rights violations and hold perpetrators accountable, including by conducting an independent investigation.⁵⁷¹ At its Fourteenth Extraordinary Session in July 2013, the Commission adopted several country resolutions in which it referred to torture and other forms of ill-treatment and violence, including the resolutions on the human rights situations in Egypt⁵⁷², Democratic Republic of the Congo⁵⁷³, Guinea⁵⁷⁴ and Central African Republic.⁵⁷⁵

As engagement with the African human rights system increased, government representatives began taking issue with these resolutions. When certain country-specific resolutions have been brought before the AU Executive Council and Assembly their publication has sometimes been blocked.⁵⁷⁶ In previous years, the Commission had routinely included such resolutions in its Activity Reports to the

570 ACHPR, Resolution on Côte d'Ivoire, ACHPR/Res.67(XXXV)04, 35th Ordinary Session (4 June 2004).

571 ACHPR, Resolution on Summary Execution and Enforced Disappearances in Mali, ACHPR/Res.258, 54th Ordinary Session (5 November 2013).

572 ACHPR, Resolution on the Human Rights Situation in the Arab Republic of Egypt, ACHPR/Res.240, 14th Extraordinary Session (24 July 2013).

573 ACHPR, Resolution on the Human Rights Situation in the Democratic Republic of Congo, ACHPR/Res.241, 14th Extraordinary Session (24 July 2013).

574 ACHPR, Resolution on the Human Rights Situation in Guinea, ACHPR/Res.242, 14th Extraordinary Session (24 July 2013).

575 ACHPR, Resolution on the Human Rights Situation in Central African Republic, ACHPR/Res.243, 14th Extraordinary Session (24 July 2013).

576 AU, Decision on the 19th Activity Report of the ACHPR, Assembly/AU/Dec 101(VI) (January 2006).

OAU Assembly, and the Assembly without fail approved the resolutions as part of the larger reports.

It is not clear on what basis the Commission has included country-specific resolutions in its Activity Reports. They are adopted as part of the Commission's promotional mandate, and the publication of resolutions therefore does not depend on 'authorisation' by the Assembly. Viewed in this light, the resolutions have been included merely as a courtesy, to provide the Assembly with a full picture of the Commission's work.

In its response to the Commission's Nineteenth Activity Report, however, the AU Assembly decided that the Commission must first provide a period of three months to the States concerned to allow them to present their views on the resolutions. In addition, the AU Assembly called on the African Commission to 'ensure that in future, it enlists the responses of all States Parties to its resolutions and decisions before submitting them to the Executive Council and/or the Assembly for consideration'. Governments argued that the resolutions, even if they purport to be part of the Commission's promotional mandate, amounted to protective measures. Under the guise of promotional resolutions, the argument continued, the Commission engages in findings of fact and law that amount to findings ('decisions') of violations under the Charter.

The substantive basis for the Assembly decision is not clear, and should be viewed as a procedural matter. When the State responded, the resolutions and the State response were included in the Commission's Twentieth Activity Report.⁵⁷⁷ Resolutions are also available online through the website of the African Commission.⁵⁷⁸

XVI. Promotional Visits

As has been pointed out, the promotional role of the Commission is crucial to its impact and effectiveness. To accomplish this part of its mandate, the Commission members divide the 53 States parties to the Charter among themselves and undertake occasional visits to these States. The purpose of these missions is to promote further ratification and implementation of the Charter, as well as to encourage States that are delayed in their reporting or have failed to submit any report to do so.⁵⁷⁹ Despite financial and logistical constraints, Commissioners have made over forty visits. The current country assignments follow:⁵⁸⁰

577 ACHPR, 20th Activity Report, EX.CL/279 (IX), adopted at 9th Ordinary Session of AU Executive Council (25 - 29 June 2006).

578 Resolutions are available online via the ACHPR website at: <http://www.achpr.org/search/?t=841>.

579 For further information regarding missions see: [http://www.achpr.org/mission-reports/about/...](http://www.achpr.org/mission-reports/about/)

580 ACHPR's website, "About ACHPR". Retrieved from: <http://www.achpr.org/about/>.

COMMISSIONER	COUNTRIES
Lawrence Murugi Mute	Ethiopia, Gambia, Liberia and Sudan
Lucy Asuagbor	Uganda, Nigeria, Zimbabwe, Rwanda and Malawi
Maya Sahli Fadel	Burkina Faso, Tunisia, Guinea, Senegal and Egypt
Reine Alapini-Gansou	Cameroon, Democratic Republic of Congo, Mali, Cape Verde and Togo
Med S. K. Kaggwa	South Africa, Botswana, Eritrea, Somalia and Zambia
Faith Pansy Tlakula	Lesotho, Namibia, Swaziland, Mauritius, South Sudan and Sierra Leone
Mohamed Bechir Khalfallah	Chad, Sahrawi Arab Democratic Republic, Central African Republic and Mauritania
Pacifique Manirakiza	Kenya, Mozambique, Benin, Tanzania and Guinea-Bissau
Soyata Maiga	Angola, Republic of Congo (Brazzaville), Niger, Libya and Equatorial Guinea
Yeung Kam John Yeung Sik Yuen	Comoros, Madagascar, Ghana, Sao Tome and Principe and Seychelles
Zainobo Sylvie Kayitesi	Burundi, Algeria, Cote d'Ivoire, Djibouti and Gabon

XVII. State Reporting

Under Article 62 of the African Charter, each State Party to the African Charter undertakes to submit once every two years a report on the measures it has taken 'with a view to giving effect to the rights and freedoms recognized and guaranteed by the ... Charter'. To facilitate this process, the Commission adopted Guidelines for National Periodic Reports in 1988.⁵⁸¹ The Guidelines require States Parties to report on constitutional, legislative, administrative and other practical measures taken to implement the provisions of the Charter. States Parties are also required

581 ACHPR, "Guidelines for National Periodic Reports Under the African Charter" reprinted in R. Murray and M. Evans (eds.), *Documents of the African Commission on Human and Peoples' Rights* (2001) 49; and in C. Heyns (ed.) *Human Rights Law in Africa*, Vol. 1 (2004), 507 [hereinafter 'Reporting Guidelines'].

to report on the forms and measures of redress available to persons whose rights under the Charter are violated.

The Reporting Guidelines require States to report on the following questions regarding all civil and political rights under the Charter, including the prohibition of torture and ill-treatment:⁵⁸² (1) Is the right included as a justiciable right under the national constitution? (2) Does domestic law allow for derogation or limitation of the right; if so, under what circumstances? (3) What remedies are available if this right has been violated? The State report should also describe the formal framework of legislative, administrative and other measures that give effect to the right, as well as the steps taken towards, and difficulties experienced in, the practical implementation of the right.

Once a report has been submitted, its examination is placed on the agenda of a forthcoming Commission session. On the scheduled date, a representative of the State Party introduces the report. Thereafter, Commissioners pose questions, followed by the Government's responses. In principle, the Commission then adopts 'concluding observations', which identify positive and negative features and make recommendations to the State Party.⁵⁸³

From the earliest examinations, there has been a tension between formal compliance, in terms of legal provisions, on the one hand, and substantive compliance on the other.

Increasingly, Commissioners who also hold positions in Working Groups or as Special Rapporteurs have focused their questions on the particular issue under their mandates. When Namibia's initial report was examined at the Commission's Twenty-ninth Session, in April 2001, Commissioner Chirwa, Special Rapporteur on Prisons, asked questions regarding crowding and segregation in prisons. At the Commission's Thirty-seventh Session, Commissioner Monageng, a member of the Working Group on Follow-up of the Robben Island Guidelines, asked the Rwandan delegation whether Rwanda had implemented those Guidelines and whether it had criminalised torture as a stand-alone offence.⁵⁸⁴

One of the major drawbacks of the State reporting procedure is the failure of some States to submit their reports. The following 11 States have never submitted a report to the Commission: Comoros, Djibouti, Eritrea, Guinea Bissau, Equatorial Guinea, Liberia, Malawi, Sao Tomé and Príncipe, Sierra Leone, Somalia and South Sudan.⁵⁸⁵

582 See *ibid.*, paras. I.3, 4 and 8.

583 Check: <http://www.achpr.org/states/reports-and-concluding-observations>.

584 37th Session, 27 April to 11 May 2005, Banjul, The Gambia.

585 ACHPR, 34th Activity Report of the ACHPR, adopted at the 54th Ordinary Session of the ACHPR (22 October - 5 November 2013), section IV, para. 14.

Only 8 States are up-to-date with their periodic reports; 8 others have one periodic report overdue; 6 have two reports overdue and 6 have 3 reports overdue, while 15 are overdue by more than three reports.⁵⁸⁶ National NGOs should remain informed about the status of State reporting in their particular countries and should encourage States to submit timely reports.

Rule 74 of the Commission's Rules of Procedure, as revised in 2010, provides for a participatory role for civil society organisations in the State reporting process, in particular in the form of 'shadow reports', which are submitted as supplements to a governmental report. Under Rule 74, 'institutions, organisations or any interested party wishing to contribute to the examination of a [State] Report and the human rights situation in the country concerned, shall send their contributions, including shadow reports, to the Secretary at least 60 days prior to the examination of the Report'. Under this Rule, 'the Commission shall explore all the pertinent information relating to the human rights situation in the State concerned, including statements and shadow reports from National Human Rights Institutions and NGOs'. In preparing a shadow report on the general situation in a State Party, a copy of the State report is not necessarily required. Ideally, though, NGOs should obtain the State report and submit targeted comments and questions arising from its content.

Another approach is NGO participation in report drafting at the national level. In fact, questions routinely posed suggest that the Commission mandates such an approach. NGOs should not be required to participate; NGOs that choose to participate, however, should make sure to retain the right to submit dissenting alternative reports.

What seems clear is that NGOs must play a role in follow-up. NGOs should attempt to obtain 'concluding observations', which contain recommendations to States, and should use them as lobbying and advocacy tools.⁵⁸⁷ The Commission's concluding observations may be a powerful basis for advocacy efforts because they represent an objective and distinctly African analysis of States' human rights obligations.

XVIII. Special Rapporteurs

Due to frustration with States' refusal to comply with reporting obligations, and the need to address issues of particular concern, the Commission has established a number of Special Rapporteurs. The Special Rapporteur on Prisons and Conditions of Detention in Africa is particularly relevant to the issue of ill-treatment and deserves our particular attention.

⁵⁸⁶ *Ibid.* For further information, see: www.achpr.org/states/reports-and-concluding-observations/

⁵⁸⁷ For further information on civil society organisations' engagement in the framework of the State reporting procedure, see: <http://co-guide.org/mechanism/african-commission-human-and-peoples-rights-state-reporting-procedure>.

1. Special Rapporteur on Prisons and Conditions of Detention in Africa⁵⁸⁸

The Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP) was established at the Commission's Twentieth Ordinary Session, which took place in Mauritius in October 1996. The Commission's purpose in establishing the SRP was to contribute to the improvement of conditions in places of detention in Africa; the SRP mandate and functioning are of particular relevance to the issue of torture and other ill-treatment.

Initially, whether to appoint a Commission member or a non-member was the subject of debate, however all of the SRPs have been appointed from the ranks of the Commission. The post is currently held by Commissioner Med S.K. Kaggwa currently holds the post.

Importantly, the mandate covers more than merely 'prisons' and 'prisoners'.⁵⁸⁹ As the mandate of the SRP is to examine the situation of persons 'deprived of their liberty', it extends to other detention centres, such as reform schools and police holding cells. The mandate therefore concerns itself with the situation of all detained persons, sentenced as well as non-sentenced. Non-sentenced detainees include those detained pending trial and those under other forms of 'provisional' detention. Also, the reference in the SRP's title to 'conditions' of detention is misleading because the mandate has been interpreted to be more expansive. An investigation into the causes of human rights violations of detainees also extends to aspects of criminal justice, such as the legal regime that permits detention and oversight of the detention of persons on remand. Put another way, the interaction required by the SRP's mandate is not only with ministries of prison affairs and their officials, but also with ministries dealing with criminal justice and detention in police cells. The issue of torture and other ill-treatment figures largely in the SRP mandate as both sentenced and non-sentenced detainees, in prisons as well as in other places of detention, may be tortured.

The mandate is directed primarily at the examination and investigation of prison conditions through on-site country visits, and situations and conditions contributing to the violation of detainees' rights, either by way of visits or 'studies'. These visits and studies result in written reports on the SRP's findings. There is a specific and a general focus: individual countries should be investigated, but research about the continent as a whole should also be addressed.

588 See generally, F. Viljoen, "The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities", 27 *Human Rights Quarterly* 125 (2005). The full texts of the first seven SRP reports are available at: http://www.penalreform.org/english/frset_pub_en.htm.

589 ACHPR, Terms of Reference for the Special Rapporteur on Prisons and Conditions of Detention in Africa, reproduced in Annex 5.

As of 2013, the Special Rapporteur had visited thirteen countries (three of them twice) in the following sequence:

Zimbabwe	23 February - 3 March 1997
Mali	20 - 30 August 1997
Mozambique	14 - 24 December 1997
Madagascar	10 - 20 February 1998
Mali	27 November - 8 December 1998 (2nd visit)
The Gambia	21 - 26 June 1999
Benin	23 - 31 August 1999
Central African Republic	19 - 29 June 2000
Mozambique	4 - 14 April 2001 (2nd visit)
Malawi	17 - 28 June 2001
Namibia	17 - 28 September 2001
Uganda	11 - 23 March 2002
Cameroon	2 - 15 September 2002
Benin	23 January - 5 February 2003 (2nd visit)
Ethiopia	15 - 29 March 2004
South Africa	14 - 30 June 2004

The Special Rapporteur also visited prisons in Swaziland in May 2008 when the Commission held its Forty-third Ordinary Session there, however this was not an official visit and no report on conditions of detention in Swaziland was issued. Similarly, the Special Rapporteur has carried out *ad hoc* prison visits in the context of promotional missions, for example to Algeria in 2009, or in his capacity as a member of the Committee on the Prevention of Torture in Africa, as was the case in Liberia in 2008. These visits have not been documented in a report by the Special Rapporteur.

The above list does not necessarily reflect the countries in which the abuse of detainees' and prisoners' rights is of particular concern. The dearth of reports on northern countries is problematic because various reports regularly indicate that detainees' and prisoners' rights may be at risk in, for example, Tunisia, Egypt and Libya. The lack of State consent to SRP visits is the main reason for the lack of visits to these countries. However, despite the dire situation of thousands of detainees in Rwandan prisons, the SRP has not visited Rwanda for a different reason. The

rationale is that a visit would have very little impact because the authorities are embarking on their own efforts to address the situation through mechanisms such as the *gacaca* system of justice.⁵⁹⁰

The ability of the Special Rapporteur to fulfil the mandate as set out by the Commission has been significantly hampered by a lack of funding for carrying the activities of this role. Indeed, from January 2006 to September 2008, the Special Rapporteur carried out no visits to African countries for the purpose of monitoring prisons and places of detention due to lack of funding.⁵⁹¹ It should also be noted that the Special Rapporteur's office was largely supported in both resources and funding by external sources, in particular Penal Reform International. However, this has significantly decreased over time and resulted in the drastic reduction in visits by the Special Rapporteur. In addition, the lack of willingness of States to receive visits from this mandate holder has been a major impediment. The most recently planned visit of the Special Rapporteur to Tunisia in 2010 was cancelled due to a lack of response from the Tunisian government. Commentators have also criticised the Special Rapporteur for not playing a more robust and proactive role in securing authorisations from States.⁵⁹²

The structure of each SRP visit is generally along the following lines:

- Press conference followed by preliminary interviews with government officials from ministries dealing with prisons and police detention, and possibly also with NGOs.
- Prisons and places of detention are visited, usually first in the capital and then in rural areas. The SRP interviews officials in each of these institutions. The SRP may be granted permission to pay unscheduled visits to places of detention.
- NGOs working in relevant fields are interviewed. These interviews may also occur prior to some or all detention centre visits; additional interviews are conducted in the capital during which specific issues may then be taken up with government officials. Ideally, the head of State is then met and briefed on the visit and the SRP's major findings.
- The visit ends with a final press conference.

590 *Gacaca* courts are Rwandan community courts responsible for trying persons accused of certain crimes in connection with the 1994 genocide. See Organic Law No. 40/2000 of January 26 2001 (Rwanda), available at: <http://jurisafrika.org/docs/statutes/ORGANIC%20LAW%20N0%2040.pdf>.

591 ACHPR, 20th Activity Report; 21st Activity Report, EX.CL/322 (X), adopted at the 10th Ordinary Session of AU Executive Council (25 – 29 June 2006); 22nd Activity Report, EX.CL/364 (XI) adopted at the 11th Ordinary Session of AU Executive Council (25 – 29 June 2007); 23rd Activity Report, EX.CL/446 (XIII) (Annex 1), adopted at the 13th Ordinary Session of AU Executive Council (24 – 28 June 2008); 24th Activity Report, EX.CL/446 (XIII) (Annex 2), adopted at the 13th Ordinary Session of AU Executive Council.

592 F. Viljoen, *International Human Rights Law in Africa*, Oxford University Press: Oxford (2012), p. 374.

The prison visit format is as follows:

- A preliminary interview with the head of the institution takes place.
- Visits are then undertaken to places of detention and to medical facilities. In the detention facilities, the SRP addresses the inmates. The SRP then visits and inspect the cells, taking notes. Thereafter a selected number of detainees are interviewed privately, in camera, with no officials present.
- The SRP returns to the officer in charge, making on-the-spot recommendations if required.

After the visit, a draft visit report is prepared and sent to the highest government penal affairs official for his or her comments. The Special Rapporteur is not required to amend reports based on the comments of States, unless they refer to clear inaccuracies, however such comments are attached to the report when it is published by the Commission. In some cases, these comments are indicative of the constructive dialogue between the Special Rapporteur and States, for example the comments from Malawi which included an expression of gratitude for the comprehensive nature of the report, and assurances that the authorities had noted areas for action which it highlighted.⁵⁹³

Although not all data is available, reports are generally published just over a year after the visit, though in some cases it has been over two years after the visits, as was the case for the SRP reports on the Special Rapporteur's visits to Uganda and Namibia in 2001, and over three in the case of report on the visit to Cameroon in 2002. While the timeline for the publication of many other Commission documents can be up to a year, a delay of just over two or three years is excessive as reports can be published within nine months of visits. The potential impact of the report and its recommendations depends heavily on its immediacy and currency, and the delay in publication should therefore be reduced, with nine months as a maximum. No reports examining prisons and conditions of detention have been adopted or published since 2005.

The entire Commission examines the SRP's reports. Prior to release of the first SRP report on Zimbabwe, a preliminary report was ready at the time of the Commission's session. The Commission discussed the preliminary report, which was then contained in the Commission's Tenth Activity Report. In subsequent Commission sessions, the SRP submitted reports regarding its activities and presented oral summaries of findings. In these sessions the full report – the one to be published – was never placed before the Commission, discussed or adopted. The final published reports are therefore not the product of the Commission, but of the SRP. Members of the Commission merely receive copies after publication.

593 F. Viljoen, *International Human Rights Law in Africa*, Oxford University Press: Oxford (2012), p. 375.

These reports have thus not been included in the Activity Reports that have been examined by the AU Heads of State and Government.

Once published, the reports are disseminated. Reports are sent to government officials of all African countries, preferably to the address of a 'focal point', such as government departments dealing with justice and prison services. Reports are also sent to NGOs with a particular interest in penal affairs. There are two main avenues of dissemination: public distribution at sessions of the Commission and other Commission-related events, and mailings to relevant people and organisations.

There does not seem to be a strategy in place to ensure that reports reach all officials and NGOs that participated in the SRP visit. For example, towards the end of September 2002, SRP Chirwa had a single copy of the Malawi Report, published the month prior, in her possession. On numerous occasions (in The Gambia, Malawi, Mali and Mozambique) during the evaluation the impression was left that high-ranking as well as middle-level officials had not received copies of SRP reports in respect of their countries.

The nature and content of the reports vary considerably. The following basic structure is followed in the most recent reports: Introduction, Findings, Areas of Concern, Good Practices and Recommendations. The most elaborate section is the 'Findings' section. The sections are no longer organised by locality or chronology, but by substantive issues. Reports contain specific examples but generally provide an overview and broader picture of the situation. Under 'Findings', particular issues are dealt with in a set sequence. The prison system is described first. 'Conditions of detention' are then analysed in terms of prison population, buildings, bedding, food, outside contact, leisure, open air restrictions, relationship between staff and wardens, discipline, complaints and external and internal control. Lastly, health matters are dealt with in some detail. Findings and recommendations are sometimes not clearly formulated.

Additionally, they are overly deferential to governments, and aimed at avoiding clear findings of violations of international standards.⁵⁹⁴ The lack of focus on the legal conditions of detention in the Special Rapporteur's reports, which for the most part address the material conditions, has been noted by some commentators as problematic, particularly in light of the excessively long periods of remand detention documented in some countries where visits have taken place.⁵⁹⁵

Three follow-up visits have taken place so far, to Mali, Mozambique and Benin. The ease of organising the first visit and the general willingness of the government to

594 For an example of undue deference, consult the SRP report on the Central African Republic.

595 F. Viljoen, *International Human Rights Law in Africa*, Oxford University Press: Oxford (2012), p. 373.

cooperate with the SRP facilitate follow-up visits. In the case of the follow-up visit to Mali, the SRP made a conscious effort to contrast the current reality with the recommendations made about two years earlier. However, this method achieved only partial success because there is no rigorous comparison of issues that were the subject of recommendations, and no ultimate finding of adherence or non-adherence. The lack of continuity between the first and second visits is especially apparent in respect of the visits to Mozambique. The most obvious explanation is that the two visits were undertaken by different SRPs. Another reason is the lack of specificity in the original recommendations.

Urgent appeals are requests for the SRP's assistance outside the ambit of a country visit. Such requests are usually of an urgent nature. They may be received from someone in a country already visited by the SRP or from a person in another country falling within the SRP's mandate. The SRP can respond to such a request in two ways:

- The request may be transferred to the individual communication system developed by the Commission.⁵⁹⁶
- The SRP could handle the request directly, through personal intervention directed at an amicable settlement. Such interventions emanate from personal pressure by the SRP, not the Commission. The main advantage of this alternative is that it allows the requester to circumvent the requirement that local remedies be exhausted.⁵⁹⁷

There is no clear policy or systematic guidelines addressing urgent appeals. On some occasions, for example when SRP Dankwa visited The Gambia, the first approach was applied. In a number of other cases the second option was employed, including in November 1999 when the SRP reacted to the detention without trial of a person in Angola by writing to the President of the country. In this case the person was released within two weeks and was able to speak with the British Broadcasting Corporation (BBC). This second option was also applied in Kenya, when the SRP urged the Kenyan authorities to provide proper health care to a prisoner (William Mwaura Mwangi) who was in danger of losing his life. The SRP was informed, by way of a letter from the Commissioner of Police, that his intervention caused the authorities to refer the detainee to one of the country's best hospitals for treatment.⁵⁹⁸ When subsequently visiting Kenya as part of a promotional visit, the SRP was able to confirm that his appeal had succeeded.

596 See Part C, Section VIII of this volume.

597 See Part C, Section VIII, Subsection 4(f) of this volume.

598 See letter by the SRP dated 28 May 1998; letter by the Commissioner of Police dated 16 June 1998, on file at PRI offices, Paris.

Not all intervention attempts, however, have been met by a positive – or any – government response. In the case of Ken Saro-Wiwa, for example, the Nigerian Government did not only fail to respond, but also completely disregarded the SRP's (and Commission's) concerns. Additionally, in response to an appeal from 282 prisoners on hunger strike in Djibouti, Commissioner Dankwa wrote to the Government, but received no response.

One of the objectives of the SRP's mandate is the promotion of prisoners' rights and instruments on the protection of prisoners in Africa. Specific aspects of this objective include the promotion of the Kampala Declaration,⁵⁹⁹ which sets forth African-generated standards for penal conditions and reform, as well as promotion of the existence and activities of the SRP. Success in this endeavour is certainly difficult to quantify, but the SRP's activities have themselves promoted awareness of the SRP's existence and mandate. However, although efforts have been made to disseminate SRP reports, the SRP still lacks significant visibility in Africa. This problem is related to the lack of visibility of the Commission as a whole, as well as the lack of funding available to the SRP's Office to enable it to effectively fulfil its mandate.⁶⁰⁰

2. Other Special Rapporteurs

The first special mechanism established under the African Charter was the Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions in Africa. Born from the atrocities in Rwanda during 1994, the current relevance of this mechanism is without question. The relationship to torture and other ill-treatment is evident in the Rapporteur's mandate and in related jurisprudence of the Commission. Unfortunately, the position of this Special Rapporteur has been defunct since 2001, in large part due to the recalcitrance of States. Other related rapporteurships are the Special Rapporteur on the Rights of Women in Africa and the Special Rapporteur on Human Rights Defenders in Africa.

The Working Group on the Death Penalty and Extra-judicial, Summary and Arbitrary Killings in Africa is also relevant to the mandate of the SRP. The Working Group was originally established in 2005 during the Thirty-eighth Ordinary Session of the Commission, as the Working Group on the Death Penalty, mandated to:

- Elaborate further a Concept Paper on the Death Penalty in Africa;
- Develop a Strategic Plan(s), including a practical and legal framework on the abolition of the Death Penalty;

599 See Kampala Declaration, *supra* note XX.

600 See, for example, ACHPR, Inter-session Activity Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, 40th Ordinary Session (15th – 29th November 2006). Available at: <http://www.achpr.org/sessions/40th/intersession-activity-reports/mumba-malila/>.

- Collect information and continue to monitor the situation of the application of the Death Penalty in African States;
- Develop a funding proposal with a view to raising funds to meet the costs of the work of the Working Group;
- Submit a progress report at each Ordinary Session of the African Commission,⁶⁰¹

In 2012, at its Fifty-second Ordinary Session, the Commission adopted Resolution 226 on The Expansion of the Mandate of the Working Group on Death Penalty in Africa, which included changing the name of the Working Group to include 'Extra-judicial, Summary and Arbitrary killings in Africa'. The Working Group is also now mandated to:

- Monitor situations relating to extra-judicial, summary or arbitrary killings in all its ramifications;
- Collect information and keep a database of reported instances of situations concerning extra-judicial, summary or arbitrary killings in Africa;
- Undertake studies on issues of relevance to extra-judicial, summary or arbitrary killings;
- Advise the Commission on urgent measures to be taken to address situations of extra-judicial, summary or arbitrary killings that require immediate attention;
- Respond effectively to information that comes before it, in particular when an extra-judicial, summary or arbitrary killing is imminent or when such a killing has occurred;
- Submit its findings, conclusions and recommendations on the situation of extra-judicial, summary or arbitrary killings to each session of the Commission.

Under its mandate, the Working Group is required to collaborate with other partners, including national and international organisations, as well as governmental bodies. It is composed of two Commissioners from the African Commission and five experts 'chosen to represent the different legal systems and the different regions in Africa'.⁶⁰² The activities of the Working Group include drafting proposed resolutions to the Commission regarding the abolition of the death penalty, organising and participating in regional and national conferences and seminars on the death penalty and responding to Urgent Appeals. The Working Group has also carried out a study on the question of the death penalty in Africa, as required

601 ACHPR, Resolution on the Composition and Operationalisation of the Working Group on the Death Penalty, ACHPR/Res.79(XXXVIII)05, 38th Ordinary Session (5 December 2005).

602 *Ibid.*

under its mandate, which was published in 2012.⁶⁰³ As part of the drafting process, the Working Group organised two regional conferences on the issue of the death penalty in Kigali, Rwanda for Central Eastern and Southern Africa in 2009, and in Cotonou, Benin for North and West Africa in 2010. The regional conferences brought together representatives from States and civil society, and culminated in the adoption of the Kigali Framework Document on the Abolition of the Death Penalty in Africa and the Cotonou Framework Document Towards the Abolition of the Death Penalty in Africa.⁶⁰⁴ These framework documents provide detailed recommendations for the abolition of the death penalty in Africa, including the need for an African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa.⁶⁰⁵

The efforts of the Working Group have been relatively successful – in 2012, only five African countries reportedly carried out executions, indicative of States' respect for the moratorium on the death penalty adopted by the African Commission during its Forty-fourth Ordinary Session in 2008.⁶⁰⁶

603 ACHPR, Study on the Question of the Death Penalty in Africa, submitted by the Working Group on the Death Penalty in Africa in accordance with Resolution ACHPR/Res.79(XXXVIII)05, adopted by the ACHPR at 50th Ordinary Session (7 November 2011).

604 The Kigali Framework Document on the Abolition of the Death Penalty in Africa, adopted by the First Sub-Regional Conference for Central, Eastern and Southern Africa on the Question of the Death Penalty in Africa, 25 September 2009; The Cotonou Framework Document Towards the Abolition of the Death Penalty in Africa, adopted by the Second Regional Conference for North and West Africa on the Question of the Death Penalty in Africa, 15 April 2010.

605 *Ibid.*

606 ACHPR, Resolution Calling on State Parties to Observe a Moratorium on the Death Penalty, ACHPR/Res.136, 44th Ordinary Session (24th November 2008).

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ANNEXES

ANNEX 1: AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

PREAMBULE

The African states member of the Organization of African Unity, parties to the present Convention entitled "African Charter on Human and Peoples' Rights";

Recalling Decision 115(XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights";

Considering the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples";

Reaffirming the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

Taking into consideration the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights;

Recognising on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand, that the reality and respect of peoples' rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedom also implies the performance of duties on the part of everyone;

Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism, and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion;

Reaffirming their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

Have agreed as follows:

PART I: RIGHTS AND DUTIES

CHAPTER I: Human and Peoples' Rights

Article 1

The member states of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5

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.

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
 - (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulation and customs in force;
 - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
 - (c) the right to defence, including the right to be defended by counsel of his choice;
 - (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

Article 10

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.

Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a state party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Article 13

1. Every citizen shall have the right to participate freely in the Government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 15

Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.

Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17

1. Every individual shall have the right to education.
2. Every individual may freely take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognised by the community shall be the duty of the state.

Article 18

1. The family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical and moral health.
2. The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.
3. The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 20

1. All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.
3. All peoples shall have the right to the assistance of the state parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law.
4. State parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. State parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 23

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between states.
2. For the purpose of strengthening peace, solidarity and friendly relations, state parties to the present Charter shall ensure that:
 - a. any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other state party to the present Charter;
 - b. their territories shall not be used as bases for subversive or terrorist activities against the people of any other state party to the present Charter.

Article 24

All people shall have the right to a general satisfactory environment favourable to their development.

Article 25

State parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Article 26

State parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

CHAPTER II: DUTIES

Article 27

1. Every individual shall have duties towards his family and society, the state and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 29

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the state whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

PART II: MEASURES OF SAFEGUARD

CHAPTER I: Establishment and Organisation of the African Commission on Human and Peoples' Rights

Article 30

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Article 31

1. The Commission shall consist of eleven members 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.
2. The members of the Commission shall serve in their personal capacity.

Article 32

The Commission shall not include more than one national of the same state.

Article 33

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the state parties to the present Charter.

Article 34

Each state party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the state parties to the present Charter. When two candidates are nominated by a state, one of them may not be a national of that state.

Article 35

1. The Secretary-General of the Organization of African Unity shall invite state parties to the present Charter at least four months before the elections to nominate candidates.
2. The Secretary-General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

Article 36

The members of the Commission shall be elected for a six-year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of the three others, at the end of four years.

Article 37

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

Article 38

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 39

1. In case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary-General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary-General of the Organization of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

Article 40

Every member of the Commission shall be in office until the date his successor assumes office.

Article 41

The Secretary-General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the costs of the staff and services.

Article 42

1. The Commission shall elect its Chairman and Vice-Chairman for a two-year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form a quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The Secretary-General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

Article 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

Article 44

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

CHAPTER II: MANDATE OF THE COMMISSION

Article 45

The functions of the Commission shall be:

1. To promote human and peoples' rights and in particular:
 - a. To collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and, should the case arise, give its views or make recommendations to governments;
 - b. To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations;
 - c. Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a state party, an institution of the Organization of African Unity or an African organisation recognised by the Organization of African Unity.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

CHAPTER III: PROCEDURE OF THE COMMISSION

Article 46

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary-General of the Organization of African Unity or any other person capable of enlightening it.

COMMUNICATION FROM STATES

Article 47

If a state party to the present Charter has good reason to believe that another state party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that state to the matter. This communication shall also be addressed to the Secretary-General of the Organization of African Unity and to the Chairman of the Commission. Within three months of the receipt of the communication the state to which the communication is addressed shall give the enquiring state written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

Article 48

If, within three months from the date on which the original communication is received by the state to which it is addressed, the issue is not settled to the satisfaction of the two states involved through bilateral negotiation or by any other peaceful procedure, either state shall have the right to submit the matter to the Commission through the Chairman and shall notify the other state involved.

Article 49

Notwithstanding the provisions of Article 47, if a state party to the present Charter considers that another state party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary-General of the Organization of African Unity and the state concerned.

Article 50

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

Article 51

1. The Commission may ask the states concerned to provide it with all relevant information.

2. When the Commission is considering the matter, states concerned may be represented before it and submit written or oral representation.

Article 52

After having obtained from the states concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings. This report shall be sent to the states concerned and communicated to the Assembly of Heads of State and Government.

Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

Article 54

The Commission shall submit to each ordinary session of the Assembly of Heads of State and Government a report on its activities.

OTHER COMMUNICATIONS

Article 55

1. Before each session, the Secretary of the Commission shall make a list of the communications other than those of state parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

Article 56

Communications relating to human and peoples' rights referred to in Article 55, received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter request anonymity;
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter;
3. Are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organization of African Unity;
4. Are not based exclusively on news disseminated through the mass media;
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and
7. Do not deal with cases which have been settled by the states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

Article 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the state concerned by the Chairman of the Commission.

Article 58

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

Article 59

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

CHAPTER IV: APPLICABLE PRINCIPLES**Article 60**

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provision of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the parties to the present Charter are members.

Article 61

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or specialised international conventions laying down rules expressly recognised by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognised by African states, as well as legal precedents and doctrine.

Article 62

Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.

Article 63

1. The present Charter shall be open to signature, ratification or adherence of the member states of the Organization of African Unity.
2. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary-General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary-General of the instruments of ratification or adherence of a simple majority of the member states of the Organization of African Unity.

PART III: GENERAL PROVISIONS**Article 64**

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant articles of the present Charter.
2. The Secretary-General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

Article 65

For each of the states that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that state of its instrument of ratification or adherence.

Article 66

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

Article 67

The Secretary-General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.

Article 68

The present Charter may be amended if a state party makes a written request to that effect to the Secretary-General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the state parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring state. The amendment shall be approved by a simple majority of the state parties. It shall come into force for each state which has accepted it in accordance with its constitutional procedure three months after the Secretary-General has received notice of the acceptance.

ANNEX 2:
SAMPLE COMMUNICATION: INTRODUCTION LETTER
AND ADMISSIBILITY BRIEF



Via Email, Fax and Post

Secretary
African Commission on Human and Peoples' Rights
Kairaba Avenue
P.O. Box 673
Banjul
The Gambia
Fax: + 220 4392 962
Email: achpr@achpr.org

16 November 2005

Dear Sir,

Introduction of complaint: Mr. --- v. Egypt

Pursuant to Article 55 and 56 of the African Charter on Human and People's Rights (the Charter) read with Rule 102 of the Rules of Procedure of the African Commission on Human and People's Rights (the Commission), this letter is submitted as an introduction of a communication, on behalf of Mr. --- (the Applicant). The Applicant requests that the Commission recognise this as the initiation of a complaint for the purpose of seizure, and notes that a full communication will be submitted shortly.

The Applicant is a citizen of Egypt born on ---. Prior to his arrest and detention, he lived at --- in Cairo, Egypt. By profession, the Applicant is an engineer and Muslim scholar.

The Applicant is represented by:

A. Hossam Baghat

Egyptian Initiative
for Personal Rights
2 Howd El-Laban Street
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Cairo
Egypt
Tel/fax: + 202 795 0582- 796 2682

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B. Andrea Coomber

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The communication is filed against the state of Egypt (the Respondent State), which ratified the African Charter on 20 March 1984.

The Applicant confirms that pursuant to Article 56(7) of the Charter, he has not submitted this complaint to any other procedure of international investigation or settlement.

Statement of Facts

The Applicant received his religious training at --- University in Cairo—the oldest and highest religious authority in Sunni Islam—where he obtained two bachelor degrees in Islamic Law and Arabic.

The Applicant finished his religious studies in 2001, and between 1999 and May 2003 he distributed copies of his unpublished religious research widely. Among others, he sent copies to the President Hosni Mubarak, the then Crown Prince of Saudi Arabia, the Secretary General of the League of Arab States, the then Iraqi President, and President Mubarak's political adviser Ossama Al Baz. He also sent copies to different universities and religious scholars in Egypt. The Applicant's study focuses on the idea of "coercion in Islam", which he believes has been falsely construed. The study relies on his training in linguistics and *fiqh* (Islamic jurisprudence) to refute two opinions often held among mainstream Muslim scholars, namely that it is the religious duty of Muslims to kill converts from Islam to other religions and that there is prohibition on Muslim women marrying non-Muslim men.

In March 2003, the Applicant was summoned for questioning at State Security Intelligence (SSI) headquarters in Giza several times. During these sessions officers discussed with the Applicant the ideas that he had expressed in his research and brought religious scholars from --- University to debate these ideas and to refute them.

On 18 May 2003, the Applicant was arrested at his home in Cairo by the SSI. He was given no reasons for his arrest. Following his arrest, the Applicant spent 10 days in unlawful incommunicado detention at SSI headquarters in Giza and then in Istiqlal Tora Prison, where he remained until November 2003.

On 28 May 2005, the Interior Ministry issued an administrative detention order against him pursuant to Article 3 of Law 162/1958 on the State of Emergency (the Emergency Law). The Respondent State has been in an official State of Emergency since 1981. The relevant part of Article 3 allows the President, or the Minister for the Interior to order, orally or in writing, the arrest and detention of those who "pose a threat to public security".

Article 3 of Law 50/1982 on Amending the Emergency Law stipulates that detainees or their representatives may appeal their arrest or detention orders when 30 days lapse after the orders are issued. These appeals are considered by the Supreme State Security Emergency Court (the Emergency Court). If the Emergency Court finds in favour of the detainee the Ministry of the Interior has a window of 15 days to appeal the Court's decision, which is then considered final. A detainee has the right to file a new appeal against his/her detention order one month after the rejection of the previous appeal.

On 3 July 2003, the Applicant was transferred to the State Security Prosecutor's office where he was charged with "contempt of the Islamic religion" under article 98 (f) of the Penal Code. This section provides fines or imprisonment for any person who "exploits religion in order to promote or advocate extremist ideologies by word of mouth, in writing or in any other manner with a view to stirring up sedition, disparaging or contempt of any divinely-revealed religion or its adherents, or prejudicing national unity or social harmony."

The Applicant's case was registered as number ---/2003 (Supreme State Security). On 29 October 2003, the State Security Prosecutor's office ordered the Applicant's release pending investigation. To this day, no action on the investigation has been taken although the Applicant understands that the case file is still open.

Despite the order for his release, the Applicant was kept in detention until a new administrative detention decree was issued under Article 3 on 8 November 2003. He was transferred to Wadi Al-Natroun Prison.

The Applicant has filed seven appeals before the Emergency Court challenging the legality of his detention. In each of these cases the Court has held in his favour and ordered his immediate release (in orders dated 19 August 2003, 25 January 2004, 11 April 2004, 13 May 2004, 1 November 2004, 24 July 2005, 3 October 2005). However none of these court judgments has ever been implemented. Each time the Emergency Court has ordered the Applicant's release the Minister for the Interior, Mr. Habib El-Adli has issued a new administrative detention decree under Article 3 of the Emergency Law. The most recent release order was issued on 3 October 2005 in response to appeal number ---/2005.

Until June 2005, the Applicant was held in Wadi Al-Natroun Prison. While in prison, he was routinely harassed and abused by other prisoners and prison guards on account of alleged disrespect of Islam. Rumours were spread among detainees from the Al Gamaa Al Islameya and Al Jihad groups that he was an apostate, he was called

“Satan” and “Pig” routinely and he was attacked on numerous occasions. In his complaint to authorities dated 20 January 2003, for example, the Applicant reports that while at Istiqbal Tora Prison another detainee by the name of --- had advocated his murder, amid rumours that he was an “infidel” who denied the Prophet’s legacy. Shortly after, --- and another detainee called --- assaulted the Applicant causing facial swelling and bleeding.

On 19 June 2004, the Applicant complained to the authorities about their lack of response to his beating at the hands of --- and ---, stating that the failure to investigate had escalated assaults against him. The Applicant asked to be referred to the forensic medical authorities so his injuries could be documented, but no action was taken. His request to appear before the public prosecutor to file a complaint against the other detainees was denied by the authorities.

On many other occasions, the Applicant lodged official complaints concerning his treatment (specifically on 29 October 2003; 20 January 2004; 10 March 2004; 14 April 2004; 19 April 2004; 27 April 2004; 14 May 2004; 1 June 2004; 20 June 2004; 28 August 2004; 29 August 2004; 20 September 2004), requesting protection and investigation, but no action was taken. In October 2003, his request for special protection in view of fears for his life resulted in the Applicant being moved to a cell in solitary confinement. His cell had no sunlight, no electricity and was infested with mosquitoes.

The failure of the authorities to take his ill-treatment seriously resulted in the Applicant embarking upon a number of hunger strikes in 2004 and in June 2005.

On 30 June 2005, the Applicant was transferred to the remote Al-Wadi Al-Gadid Prison, apparently to punish him for staging the hunger strike. Initially, he was subjected to harassment and occasional violence by Islamist inmates because of his religious beliefs. Despite reports, the administration did nothing to protect him. He now stays in the hospital ward of the prison, where he is kept away from the mainstream prison population.

In addition to the abovementioned complaints, the Applicant has submitted a number of complaints to both the State Security Prosecutor’s Office and to the National Council for Human Rights, drawing attention to the circumstance of his detention. He has not received any response to any of these complaints.

Despite the repeated release orders of the Emergency Court, the Applicant remains detained at Al-Wadi Al-Gadid Prison to this day.

Outline of violations of the Charter

The Applicant submits that his rights have been violated under Articles 2, 5, 6, 7 (1)(d), 8, and 9(2) of the Charter. The nature of these violations is set out briefly below. The full application will provide a more comprehensive review of the Commission’s case law, along with relevant international and comparative jurisprudence.

As a preliminary matter, the Applicant notes that the violations of his rights outlined below have been made possible by the Respondent State’s Emergency Law. On a number of occasions, this Commission has had the opportunity to consider the possibility of derogation from Charter rights during times of emergency. By reference to Article 1 of the Charter, the Applicant notes that the Commission has repeatedly emphasised that the Charter does not permit states to derogate from their responsibilities during states of emergency, and that this is “an expression of the principle that the restriction of human rights is not a solution to national difficulties” *Amnesty International/Sudan*, 48/90, paragraph 79; see also paragraph 42; see also *Media Rights Agenda/Nigeria*, 224/98, paragraph 73; *Commission Nationale des Droits de l’Homme et des Libertés/Chad*, 74/92, paragraph 21.

The Applicant respectfully urges the Commission to confirm that the fact that the Respondent State maintains a 24-year long State of Emergency cannot justify violations of his human rights in contravention of the Charter.

Article 2

The Applicant submits that he has been discriminated against in his enjoyment of Charter rights on the basis of his religious beliefs. This Commission has confirmed that Article 2 “abjures discrimination on the basis of any of the grounds set out”, noting that “[t]he right to equality is very important.” *Legal Resources Foundation/Zambia No. 211/98*, paragraph 63. Similarly, it has emphasized that Article 2 of the Charter “lays down a principle that is essential to the spirit of this Convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings” *Association Mauritanienne des Droits de l’Homme/Mauritania No. 210/98*, paragraph 131.

It is submitted that central to the Applicant's treatment by the authorities and his continued detention is the fact that he holds particular religious views. The discrimination is based not on the Applicant's religion *per se*, namely Islam, but his understanding of his religion. His approach to the religion has singled him out for discriminatory treatment in violation of Article 2. This is evidenced by the fact that his initial detention was a direct response to the distribution of his religious study, his interrogation about his beliefs at SSI headquarters in Giza and that he was originally charged with the offence of "contempt of the religion of Islam". The Applicant is being treated differently from other scholars purely on the basis of his religious beliefs, and this distinction is not reasonably justified. Accordingly, his rights under Article 2 have been violated.

Article 5

The Applicant submits that the conditions of his detention from May 2003 until June 2005 were inhuman in violation of Article 5. First, the Applicant notes that while in detention he endured prison conditions undermining of human dignity. As noted in the facts above, the Applicant was subjected to harassment and beatings, was held in solitary confinement and inhuman conditions. The full application will go into greater detail about specific incidents and the conditions of detention. It is submitted that this ill-treatment reaches the necessary threshold for inhuman treatment under Article 5 of the Charter.

Second, the Applicant submits that the Respondent State failed in its positive obligation to prevent ill-treatment, and its procedural obligation to effectively investigate the ill-treatment. This Commission has recognised that Article 1 of the Charter requires that States not only recognise rights, but requires that they "shall undertake... measure to give effect to them". *Legal Resources Foundation/Zambia*, 211/98, paragraph 62. When read with Article 5, it is submitted that this gives rise to positive obligations of States to take measures to protect against ill-treatment, and to effectively investigate allegations of ill-treatment when they occur.

Meaningful protection under Article 5 requires that States take measures to ensure that individuals within their jurisdiction are not subjected to inhuman treatment. This may include taking steps to protect individuals from harm from third parties, where the authorities knew or ought to have known that the individual was at risk (see *European Court of Human Rights in Z. v. U.K.*, judgment of 10 May 2001, paragraph 73; and *Pantea v. Romania*, judgment of 3 June 2003, paragraph 118). On numerous occasions (specifically on 29 March 2003; 29 October 2003; 20 January 2004; 10 March 2004; 19 April 2004; 26 April 2004; 14 May 2004; 1 June 2004; 20 June 2004; 28 August 2004; 29 August 2004; 25 September 2004), the Applicant wrote to the authorities reporting the abuse and requesting they intervene to stop him being mistreated by other prisoners. However no effective protective measures were taken and the Applicant continued to suffer abuse while in detention. The Applicant's situation has only improved because he is now separated from other prisoners in a hospital block.

The Applicant also submits that the State failed in its procedural obligations to effectively investigate his allegations of ill-treatment, as required to ensure meaningful protection under Article 5. Such an investigation should be capable of identifying and bringing to justice those responsible for such abuse (See *McCann and Others v. the United Kingdom* judgment of 27 September 1995, paragraph 161). Despite numerous official complaints over a long period of time, no efforts have been taken to investigate the repeated allegations made by the Applicant, nor to bring those responsible to account. Accordingly, the Applicant submits that the State has failed in its procedural obligation under Article 5.

Article 6 and 7

As noted by this Commission, those rights enshrined in Article 6 and Article 7 rights are "mutually dependant, and where the right to be heard is infringed, other violations may occur, such as detentions being rendered arbitrary". *Amnesty International/Sudan*, 48/90, paragraph 62. It is submitted that in this case, denials of process under Article 7 have led to arbitrary arrest and detention in violation of Article 6. Accordingly, the articles will be considered together.

The Applicant notes that his arrest was arbitrary in that he was not given any reasons for his arrest, and has been detained subsequently without charge, trial, conviction or sentence by a court of law. See paragraph 2(b), Resolution 4(XI)92 on the Right to Recourse and Fair Trial (1992) *Media Rights Agenda/Nigeria*, 224/98, paragraph 44 and paragraph 74.

The Applicant recalls the importance that this Commission has placed on effective remedies with respect to arbitrary detention (Article C (c)(4) Fair Trial Guidelines). While the Applicant has been able to challenge his detention before the Emergency Court on seven occasions and seven orders have been made for his release, he remains detained. The Applicant submits that the execution of judgments given by the Emergency Court must be regarded as an integral part of his right to due process under Article 7. The Respondent State's domestic legal system has repeatedly allowed the final, binding judicial order of the authorised Emergency Court to be circumvented by a new administrative decree each time his release is ordered. In the Applicant's case, each of these administrative decrees under Article 3 of the Emergency Law has been made on precisely the same basis as the previous decrees that the Emergency Court has deemed unlawful. The Applicant argues that in his case the guarantees afforded by Article 7 are rendered illusory by the continued application of the Emergency Law.

Further, with respect to Article 7(1)(d), the Applicant submits that his detention pursuant to the Emergency Law has denied him the right to be heard within a reasonable time. He has been held without trial since May 2003. By this Commission's own case law, a delay of over two years amounts to unreasonable delay and a violation of Article 7(1)(d). *Annette Pagnouille (on behalf of Abdoulaye Mazou)/Cameroon, 39/90*, paragraph 19.

Finally, it should be noted that this Commission has found that to detain someone on account of their political beliefs, especially where no charges are brought against them, renders the deprivation of liberty arbitrary *per se*. *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria, 140/94, 141/94, 145/95*, paragraph 51. The Applicant submits that the same is true, *mutatis mutandis*, with respect to detention based on religious beliefs.

Article 8

The Applicant submits that his right to profess his religion has been violated. At the heart of this case, is the Applicant's understanding of Islam – a religion to which he has dedicated his personal and work life. An integral aspect of freedom of religion is the ability of individuals to express religious beliefs and ideas. The Respondent State has severely interfered with the Applicant's freedom of religion by detaining him, and this interference cannot be objectively justified.

It is recognised that in certain circumstances freedom of religion can be restricted. Article 27(2) of the Charter requires rights to be exercised “with due regard to the rights of others, collective security, morality and common interest”. The Applicant's interpretation of Islam poses no threat to the collective security, morality or common interest in the Respondent State; indeed far from “inciting radicalism”, the Applicant professes a peaceful and tolerant approach to Islam. Even if there were some justification for interfering with the Applicant's right to freedom of religion, the measure of arbitrarily detaining the Applicant would not be a proportionate response. To allow such an interference with freedom of religion would erode the right “such that the right itself becomes illusory”. *Mutatis mutandis, Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria, 140/94, 141/94, 145/95*, paragraph 42.

Article 9(2)

As recognised by this Commission, freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and to the conduct of public affairs and democracy of a state. *Constitutional Rights Project and Others/Nigeria 104/94, 141/94, 145/95* paragraph 36, *Amnesty International/Zambia 212/98*, paragraph 79; also recognised in Resolution on Freedom of Expression, ACHPR/Res.54 (XXIX) 01

The Applicant submits that his right to freedom of expression guaranteed by Article 9(2) has been violated. The Applicant recalls that the Commission has noted, specifically with respect to freedom of expression, that there is no derogation in times of emergency, as “the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law” *Amnesty International/Sudan, 48/90*, paragraph 79.

The Charter strictly provides for freedom of expression and dissemination of opinions ‘within the law.’ This must not, however, be understood as covering only speech that is lawful under national law, but should be interpreted in line with international norms of free speech. *Amnesty International/Sudan 48/90, 50/91, 52/91, 89/93*, paragraph 79, 101/93 *Civil Liberties Organisation/Nigeria*, paragraph 15. This Commission has recognised that an individual's exercise of freedom of expression may be legally curtailed through the law of defamation. However where

governments opt to arrest and detain individuals without trial, Article 9 has plainly been violated. *Huri-Laws/Nigeria*, 225/98, paragraph 28.

In this case, the content of the Applicant's written work is plainly "within the law" – in none of his writing has the Applicant promote extremism, sedition or contempt of Islam, nor does he pose any threat to national unity or social cohesion in the Respondent State. To the contrary, the Applicant's writings advocate greater tolerance within Islam. Accordingly, there is no objective justification for the violation of the Applicant's right to freedom of expression under Article 27(2) of the Charter. The Applicant's free expression has in this case been exercised "with due regard to the rights of others, collective security, morality and common interest".

Exhaustion of domestic remedies

As noted above, the Applicant has appealed his detention numerous times before the State Security Emergency Court, the only judicial body designated for that purpose under the Emergency Law. The Court has issued seven judgments ordering his release. None of these rulings have been implemented. These rulings were, in consecutive order -

1. Appeal No. 21045/2003, pronounced on 19 August 2003
2. Appeal No. 40334/2003, pronounced on 25 January 2004
3. Appeal No. 7865/2004, pronounced on 11 April 2004
4. Appeal No. 15402/2004, pronounced on 13 May 2004
5. Appeal No. 32471/2004, pronounced on 1 November 2004
6. Appeal No. 15506/2005, pronounced on 24 July 2005
7. Appeal No. 21618/2005, pronounced on 3 October 2005

The Emergency Court is the final court in the Respondent State to adjudicate on the Emergency Law, and accordingly, the Applicant has exhausted all available domestic remedies.

In addition, the Applicant has submitted five complaints to the State Security Prosecutor's office and ten complaints to the National Council for Human Rights. He has not received any responses to these complaints.

On 29 December 2004 the Egyptian Initiative for Personal Rights raised the Applicant's case in a complaint submitted to the General Prosecutor's Office (Number 18323/2004). The complaint requested the Applicant's immediate release, and asked for an investigation to be conducted in order to identify and hold accountable those responsible for his continued unlawful detention. No reply has been received.

Conclusion

The Applicant submits this introductory letter without prejudice to the later submission of additional facts and legal arguments under the Charter. In requesting the Commission to examine his case, the Applicant seeks the following -

1. recognition by the Commission of violations of the abovementioned articles of the Charter;
2. his immediate release from detention;
3. harmonisation of the Respondent State's legislation in line with the Fair Trial Guidelines; and
4. an order for compensation.

For the reasons set out above, the Applicant respectfully requests that the Commission be seized of this matter for the purposes of article 56(6) of the Charter. A detailed communication will be submitted in due course.

Yours sincerely,

Hossam Baghat
Director
Egyptian Initiative for Personal Rights



Andrea Coomber
Legal Officer
INTERIGHTS



Via Email, Fax and Post

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16 February 2006

Dear Sir,

Communication 312/2005 – INTERIGHTS and the Egyptian Initiative for Personal Rights (on behalf of ---) v. Egypt

We refer to your letter dated 19 December 2005, confirming that the African Commission on Human and Peoples' Rights (the Commission) has decided to be seized of this matter. As detailed in the introductory letter dated 16 November 2005, this communication concerns the arbitrary detention of the Mr. --- (the applicant) following his expression of particular religious beliefs. The applicant submits that his rights have been violated under Articles 2, 5, 6, 7 (1)(d), 8, and 9(2) of the African Charter on Human and Peoples' Rights (the Charter).

Further to your request, the following are the applicant's submissions on admissibility.

Article 56 of the Charter which sets out the admissibility criteria for complaints provides:

Communication relating to Human and Peoples' Rights referred to in Article 55 received by the Commission, shall be considered if they:

- 1. indicate their authors even if the latter request anonymity,*
- 2. are compatible with the Charter of the Organisation of African Unity or with the present Charter.*
- 3. are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity.*
- 4. are not based exclusively on news disseminated through the mass media,*
- 5. are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged,*
- 6. are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter, and*
- 7. do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.*

The applicant submits that all of these criteria are satisfied, and that the only criterion requiring explanation to the Commission is the exhaustion of domestic remedies in the case.

The other criteria have been met incontrovertibly. In brief, the applicant in this communication has been identified and his relevant details provided to the Commission, along with the details of those individuals and organisations representing him. The communication is plainly compatible with the Constitutive Act of the African Union and with the Charter. The communication is presented in polite and respectful language, and is based on information provided by the applicant and on court documents, not on media reports. The applicant confirms that he has not submitted this complaint to any other procedure of international investigation or settlement.

Exhaustion of domestic remedies

In its jurisprudence the Commission has noted the exhaustion of domestic remedies under Article 56(5) to be one of the most important conditions for the admissibility of communications, as it gives the State concerned the opportunity to remedy the alleged violation through its domestic legal system (*Jawara/The Gambia*, 147/95, paragraphs 30 and 31).

In this case, the applicant submits that domestic remedies do exist in the Respondent State which would allow for his effective release. These remedies have been exhausted and indeed resolved in the applicant's favour, but the court orders have not been respected by the Interior Ministry. The State Security Emergency Court (the Emergency Court) is the only domestic court charged with overseeing detention under Law 162/1958 on the State of Emergency (the Emergency Law). As noted in the letter introducing this communication, the applicant was arrested on 18 May 2003. Since then, the applicant has applied to the Emergency Court for his release on eight occasions, and each time this Court has ordered his release, most recently in January 2006.

In consecutive order, these release orders have been -

1. Appeal No. 21045/2003, pronounced on 19 August 2003
2. Appeal No. 40334/2003, pronounced on 25 January 2004
3. Appeal No. 7865/2004, pronounced on 11 April 2004
4. Appeal No. 15402/2004, pronounced on 13 May 2004
5. Appeal No.32471/2004, pronounced on 1 November 2004
6. Appeal No.15506/2005, pronounced on 24 July 2005
7. Appeal No. 21618/2005, pronounced on 3 October 2005
8. Appeal No. 29398/2005, pronounced on 19 January 2006

None of these eight rulings have been implemented, and following each release order the Interior Ministry has issued a new administrative detention order under the same provision of the Emergency Law. As a result, the applicant has been continuously detained for 33 months. Through this process, the Government has been given numerous opportunities to remedy the violations of the Charter alleged by the applicant, as required by the Commission (*Amnesty International and Others/Sudan*, 48/90, paragraph 32). It has simply chosen not to implement the judgments of its own Emergency Court.

In this regard, the applicant draws the Commission's attention to the European Court of Human Rights case of *Assanidze v. Georgia* (judgment dated 8 April 2004), which similarly concerned the detention of a person whose final release had been ordered by a competent court. In considering the admissibility of the case, the European Court noted that where a final release order was made, "the principle of legal certainty - one of the fundamental aspects of the rule of law - precluded any attempt by a non-judicial authority to call that judgment into question or to prevent its execution" (paragraph 131). Accordingly, the European Court found that domestic remedies had been exhausted.

In this case, the Interior Ministry has repeatedly prevented the execution of the Emergency Court's orders for the applicant's release, and there is no other court or body to which he can appeal.

In an effort to seek implementation of the Court's orders, the applicant has also submitted five complaints to the State Security Prosecutor's office and ten complaints to the National Council for Human Rights. He has not

ANNEXES

received any responses to these complaints. On 29 December 2004 the Egyptian Initiative for Personal Rights raised the applicant's case in a complaint submitted to the General Prosecutor's Office (Number 18323/2004). The complaint requested the applicant's immediate release, and asked for an investigation to be conducted in order to identify and hold accountable those responsible for his continued unlawful detention. No reply has been received.

As a result of the above, the applicant has gone further than required to exhaust all available domestic remedies for the purpose of Article 56(5). He has also submitted the communication within a reasonable time of exhaustion of domestic remedies pursuant to Article 56(6). As noted above, the violations alleged are ongoing in that the applicant has not been released. The communication was submitted within two months of the seventh final order for the applicant's release.

Official copies of the eight Emergency Court release orders, as well as copies of the complaints to the State Security Prosecutor, the National Council for Human Rights and the General Prosecutor's Office were sent to the Commission via post.

It is submitted that this communication satisfies the admissibility requirements of Article 56 of the African Charter on Human and Peoples' Rights in all respects. For the abovementioned reasons, the applicant respectfully requests the African Commission to declare this communication admissible.

Yours sincerely,

Hossam Baghat
Director
Egyptian Initiative for Personal Rights



Andrea Coomber
Legal Officer
INTERIGHTS

ANNEX 3: PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The member states of the Organization of African Unity hereinafter referred to as the OAU, state parties to the African Charter on Human and Peoples' Rights:

Considering that the Charter of the Organization of African Unity recognises that freedom, equality, justice, peace and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples;

Noting that the African Charter on Human and Peoples' Rights reaffirms adherence to the principles of human and peoples' rights, freedoms and duties contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, and other international organisations;

Recognising that the twofold objective of the African Charter on Human and Peoples' Rights is to ensure on the one hand promotion and on the other protection of human and peoples' rights, freedoms and duties;

Recognising further, the efforts of the African Commission on Human and Peoples' Rights in the promotion and protection of human and peoples' rights since its inception in 1987;

Recalling Resolution AHG/Res 230 (XXX) adopted by the Assembly of Heads of State and Government in June 1994 in Tunis, Tunisia, requesting the Secretary-General to convene a Government Experts' Meeting to ponder, in conjunction with the African Commission, over the means to enhance the efficiency of the African Commission and to consider in particular the establishment of an African Court on Human and Peoples' Rights;

Noting the first and second Government Legal Experts' Meetings held respectively in Cape Town, South Africa (September 1995) and Nouakchott, Mauritania (April 1997) and the Third Government Legal Experts Meeting held in Addis Ababa, Ethiopia (December 1997), which was enlarged to include diplomats;

Firmly convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights;

HAVE AGREED AS FOLLOWS:

Article 1: Establishment of the Court

There shall be established within the Organization of African Unity an African Court on Human and Peoples' Rights (hereinafter referred to as "the court"), the organisation, jurisdiction and functioning of which shall be governed by the present Protocol.

Article 2: Relationship between the Court and the Commission

The court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission"), conferred upon it by the African Charter on Human and Peoples' Rights, hereinafter referred to as "the Charter".

Article 3: Jurisdiction

1. The jurisdiction of the court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned.
2. In the event of a dispute as to whether the court has jurisdiction, the court shall decide.

Article 4: Advisory Opinions

1. At the request of a member state of the OAU, the OAU, any of its organs, or any African organisation recognised by the OAU, the court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.
2. The court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a

separate or dissenting opinion.

Article 5: Access to the Court

1. The following are entitled to submit cases to the court:
 - a. The Commission;
 - b. The state party which has lodged a complaint to the Commission;
 - c. The state party against which the complaint has been lodged at the Commission;
 - d. The state party whose citizen is a victim of a human rights violation;
 - e. African Intergovernmental Organisations.
2. When a state party has an interest in a case, it may submit a request to the court to be permitted to join.
3. The court may entitle relevant non-governmental organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.

Article 6: Admissibility of Cases

1. The court, when deciding on the admissibility of a case instituted under Article 5(3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible.
2. The court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.
3. The court may consider cases or transfer them to the Commission.

Article 7: Sources of Law

The court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned.

Article 8: Consideration of Cases

The Rules of Procedure of the Court shall lay down the detailed conditions under which the court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the court.

Article 9: Amicable Settlement

The court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.

Article 10: Hearings and Representation

1. The court shall conduct its proceedings in public. The court may, however, conduct proceedings in camera as may be provided for in the Rules of Procedure.
2. Any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require.
3. Any person, witness or representative of the parties, who appears before the court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the court.

Article 11: Composition

1. The court shall consist of eleven judges, nationals of member states of the OAU, elected in an individual capacity from among jurists of high moral character and of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights.
2. No two judges shall be nationals of the same state.

Article 12: Nominations

1. State parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that state.
2. Due consideration shall be given to adequate gender representation in the nomination process.

Article 13: List of Candidates

1. Upon entry into force of this Protocol, the Secretary-General of the OAU shall request each state party to the Protocol to present, within ninety (90) days of such a request, its nominees for the office of judge of the court.
2. The Secretary-General of the OAU shall prepare a list in alphabetical order of the candidates nominated and transmit it to the member states of the OAU at least thirty days prior to the next session of the Assembly of Heads of State and Government of the OAU hereinafter referred to as “the Assembly”.

Article 14: Elections

1. The judges of the court shall be elected by secret ballot by the Assembly from the list referred to in Article 13(2) of the present Protocol.
2. The Assembly shall ensure that in the court as a whole there is representation of the main regions of Africa and of their principal legal traditions.
3. In the election of the judges, the Assembly shall ensure that there is adequate gender representation.

Article 15: Term of Office

1. The judges of the court shall be elected for a period of six years and may be re-elected only once. The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years.
2. The judges whose terms are to expire at the end of the initial periods of two and four years shall be chosen by lot to be drawn by the Secretary-General of the OAU immediately after the first election has been completed.
3. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor's term.
4. All judges except the President shall perform their functions on a part-time basis. However, the Assembly may change this arrangement as it deems appropriate.

Article 16: Oath of Office

After their election, the judges of the court shall make a solemn declaration to discharge their duties impartially and faithfully.

Article 17: Independence

1. The independence of the judges shall be fully ensured in accordance with international law.
2. No judge may hear any case in which the same judge has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the court.
3. The judges of the court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law.
4. At no time shall the judges of the court be held liable for any decision or opinion issued in the exercise of their functions.

Article 18: Incompatibility

The position of judge of the court is incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the office, as determined in the Rules of Procedure of the court.

Article 19: Cessation of Office

1. A judge shall not be suspended or removed from office unless, by the unanimous decision of the other judges of the court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the court.
2. Such a decision of the court shall become final unless it is set aside by the Assembly at its next session.

Article 20: Vacancies

1. In case of death or resignation of a judge of the court, the President of the Court shall immediately inform the Secretary-General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.

2. The Assembly shall replace the judge whose office became vacant unless the remaining period of the term is less than one hundred and eighty (180) days.
3. The same procedure and considerations as set out in Articles 12, 13 and 14 shall be followed for the filling of vacancies.

Article 21: Presidency of the Court

1. The court shall elect its President and one Vice-President for a period of two years. They may be re-elected only once.
2. The President shall perform judicial functions on a full-time basis and shall reside at the seat of the court.
3. The functions of the President and the Vice-President shall be set out in the Rules of Procedure of the court.

Article 22: Exclusion

If a judge is a national of any state which is a party to a case submitted to the court, that judge shall not hear the case.

Article 23: Quorum

The court shall examine cases brought before it, if it has a quorum of at least seven judges.

Article 24: Registry of the Court

1. 1. The court shall appoint its own Registrar and other staff of the registry from among nationals of member states of the OAU according to the Rules of Procedure.
2. The office and residence of the Registrar shall be at the place where the court has its seat.

Article 25: Seat of the Court

1. The court shall have its seat at the place determined by the Assembly from among state parties to this Protocol. However, it may convene in the territory of any member state of the OAU when the majority of the court considers it desirable, and with the prior consent of the state concerned.
2. The seat of the court may be changed by the Assembly after due consultation with the court.

Article 26: Evidence

1. The court shall hear submissions by all parties and if deemed necessary, hold an enquiry. The states concerned shall assist by providing relevant facilities for the efficient handling of the case.
2. The court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.

Article 27: Findings

1. If the court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the court shall adopt such provisional measures as it deems necessary.

Article 28: Judgment

1. The court shall render its judgment within ninety (90) days of having completed its deliberations.
2. The judgment of the court decided by majority shall be final and not subject to appeal.
3. Without prejudice to sub-article 2 above, the court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure.
4. The court may interpret its own decision.
5. The judgment of the court shall be read in open court, due notice having been given to the parties.
6. Reasons shall be given for the judgment of the court.
7. If the judgment of the court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.

Article 29: Notification of Judgment

1. The parties to the case shall be notified of the judgment of the court and it shall be transmitted to the member states of the OAU and the Commission.
2. The Council of Ministers shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.

Article 30: Execution of Judgment

The state parties to the present Protocol undertake 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.

Article 31: Report

The court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a state has not complied with the court's judgment.

Article 32: Budget

Expenses of the court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the court.

Article 33: Rules of Procedure

The court shall draw up its Rules and determine its own Procedures. The court shall consult the Commission as appropriate.

Article 34: Ratification

1. This Protocol shall be open for signature and ratification or accession by any state party to the Charter.
2. The instrument of ratification or accession to the present Protocol shall be deposited with the Secretary-General of the OAU.
3. The Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited.
4. For any state party ratifying or acceding subsequently, the present Protocol shall come into force in respect of that state on the date of the deposit of its instrument of ratification or accession.
5. The Secretary-General of the OAU shall inform all member states of the entry into force of the present Protocol.
6. At the time of the ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the court to receive petitions under Article 5(3) of this Protocol. The court shall not receive any petition under Article 5(3) involving a state party which has not made such a declaration.
7. Declarations made under sub-article (6) above shall be deposited with the Secretary-General, who shall transmit copies thereof to the state parties.

Article 35: Amendments

1. The present Protocol may be amended if a state party to the Protocol makes a written request to that effect to the Secretary-General of the OAU. The Assembly may adopt, by simple majority, the draft amendment after all the state parties to the present Protocol have been duly informed of it and the court has given its opinion on the amendment.
2. The court shall also be entitled to propose such amendments to the present Protocol as it may deem necessary, through the Secretary-General of the OAU.
3. The amendment shall come into force for each state party which has accepted it thirty days after the Secretary-General of the OAU has received notice of the acceptance.

ANNEX 4: GUIDELINES AND MEASURES FOR THE PROHIBITION AND PREVENTION OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN AFRICA (THE ROBBER ISLAND GUIDELINES)

PART I: PROHIBITION OF TORTURE

A. Ratification of Regional and International Instruments

1. States should ensure that they are a party to relevant international and regional human rights instruments and ensure that these instruments are fully implemented in domestic legislation and accord individuals the maximum scope for accessing the human rights machinery that they establish. This would include:
 - a) Ratification of the Protocol to the African Charter of Human and Peoples' Rights establishing an African Court of Human and Peoples' Rights;
 - b) Ratification of or accession to the UN Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment without reservations, to make declarations accepting the jurisdiction of the Committee against Torture under Articles 21 and 22 and recognising the competency of the Committee to conduct inquiries pursuant to Article 20;
 - c) Ratification of or accession to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and the First Optional Protocol thereto without reservations;
 - d) Ratification of or accession to the Rome Statute establishing the International Criminal Court;

B. Promote and Support Co-operation with International Mechanisms

2. States should co-operate with the African Commission on Human and Peoples' Rights and promote and support the work of the Special Rapporteur on prisons and conditions of detention in Africa, the Special Rapporteur on arbitrary, summary and extra-judicial executions in Africa and the Special Rapporteur on the rights of women in Africa.
3. States should co-operate with the United Nations Human Rights Treaty Bodies, with the UN Commission on Human Rights' thematic and country specific special procedures, in particular, the UN Special Rapporteur on Torture, including the issuance of standing invitations for these and other relevant mechanisms.

C. Criminalisation of Torture

4. States should ensure that acts, which fall within the definition of torture, based on Article 1 of the UN Convention against Torture, are offences within their national legal systems.
5. States should pay particular attention to the prohibition and prevention of gender-related forms of torture and ill-treatment and the torture and ill-treatment of young persons.
6. National courts should have jurisdictional competence to hear cases of allegations of torture in accordance with Article 5 (2) of the UN Convention against Torture.
7. Torture should be made an extraditable offence.
8. The trial or extradition of those suspected of torture should take place expeditiously in conformity with relevant international standards.
9. Circumstances such as state of war, threat of war, internal political instability or any other public emergency, shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.
10. Notions such as "necessity", "national emergency", "public order", and "ordre public" shall not be invoked as a justification of torture, cruel, inhuman or degrading treatment or punishment.
11. Superior orders shall never provide a justification or lawful excuse for acts of torture, cruel, inhuman or degrading treatment or punishment.
12. Those found guilty of having committed acts of torture shall be subject to appropriate sanctions that reflect the gravity of the offence, applied in accordance with relevant international standards.

13. No one shall be punished for disobeying an order that they commit acts amounting to torture, cruel, inhuman or degrading treatment or punishment.
14. States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends.

D. Non-Refoulement

15. States should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture.

E. Combating Impunity

16. In order to combat impunity States should:
 - a) Ensure that those responsible for acts of torture or ill-treatment are subject to legal process.
 - b) Ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law.
 - c) Ensure expeditious consideration of extradition requests to third states, in accordance with international standards.
 - d) Ensure that rules of evidence properly reflect the difficulties of substantiating allegations of ill-treatment in custody.
 - e) Ensure that where criminal charges cannot be sustained because of the high standard of proof required, other forms of civil, disciplinary or administrative action are taken if it is appropriate to do so.

F. Complaints and Investigation Procedures

17. Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment.
18. Ensure that whenever persons who claimed to have been or who appear to have been tortured or ill-treated are brought before competent authorities an investigation shall be initiated.
19. Investigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and effectively, guided by the UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol) .

PART II: PREVENTION OF TORTURE

A. Basic Procedural Safeguards for those deprived of their liberty

20. All persons who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty. these include:
 - a) The right that a relative or other appropriate third person is notified of the detention;
 - b) The right to an independent medical examination;
 - c) The right of access to a lawyer;
 - d) Notification of the above rights in a language, which the person deprived of their liberty understands;

B. Safeguards during the Pre-trial process

States should:

21. Establish regulations for the treatment of all persons deprived of their liberty guided by the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment .
22. Ensure that those subject to the relevant codes of criminal procedure conduct criminal investigations.
23. Prohibit the use of unauthorised places of detention and ensure that it is a punishable offence for any official to hold a person in a secret and/or unofficial place of detention.
24. Prohibit the use of incommunicado detention.
25. Ensure that all detained persons are informed immediately of the reasons for their detention.

26. Ensure that all persons arrested are promptly informed of any charges against them.
27. Ensure that all persons deprived of their liberty are brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice.
28. Ensure that comprehensive written records of all interrogations are kept, including the identity of all persons present during the interrogation and consider the feasibility of the use of video and/or audio taped recordings of interrogations.
29. Ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made.
30. Ensure that comprehensive written records of those deprived of their liberty are kept at each place of detention, detailing, inter alia, the date, time, place and reason for the detention.
31. Ensure that all persons deprived of their liberty have access to legal and medical services and assistance and have the right to be visited by and correspond with family members.
32. Ensure that all persons deprived of their liberty can challenge the lawfulness of their detention.

C. Conditions of Detention

States should:

33. Take steps to ensure that the treatment of all persons deprived of their liberty are in conformity with international standards guided by the UN standard minimum rules for the treatment of prisoners .
34. Take steps to improve conditions in places of detention, which do not conform to international standards.
35. Take steps to ensure that pre-trial detainees are held separately from convicted persons.
36. Take steps to ensure that juveniles, women, and other vulnerable groups are held in appropriate and separate detention facilities.
37. Take steps to reduce over-crowding in places of detention by inter alia, encouraging the use of non-custodial sentences for minor crimes.

D. Mechanisms of Oversight

States should:

38. Ensure and support the independence and impartiality of the judiciary including by ensuring that there is no interference in the judiciary and judicial proceedings, guided by the UN Basic Principles on the Independence of the Judiciary.
39. Encourage professional legal and medical bodies, to concern themselves with issues of the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment.
40. Establish and support effective and accessible complaint mechanisms which are independent from detention and enforcement authorities and which are empowered to receive, investigate and take appropriate action on allegations of torture, cruel, inhuman or degrading treatment or punishment.
41. Establish, support and strengthen independent national institutions such as human rights commissions, ombudspersons and commissions of parliamentarians, with the mandate to conduct visits to all places of detention and to generally address the issue of the prevention of torture, cruel, inhuman and degrading treatment or punishment, guided by the UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights.
42. Encourage and facilitate visits by NGOs to places of detention.
43. Support the adoption of an Optional Protocol to the UNCAT to create an international visiting mechanism with the mandate to visit all places where people are deprived of their liberty by a State Party.
44. Examine the feasibility of developing regional mechanisms for the prevention of torture and ill-treatment.

E. Training and Empowerment

45. Establish and support training and awareness-raising programmes which reflect human rights standards and emphasise the concerns of vulnerable groups.
46. Devise, promote and support codes of conduct and ethics and develop training tools for law enforcement and security personnel, and other relevant officials in contact with persons deprived of their liberty such as lawyers and medical personnel.

F. Civil Society Education and Empowerment

47. Public education initiatives, awareness-raising campaigns regarding the prohibition and prevention of torture and the rights of detained persons shall be encouraged and supported.
48. The work of NGOs and of the media in public education, the dissemination of information and awareness-raising concerning the prohibition and prevention of torture and other forms of ill-treatment shall be encouraged and supported.

PART III: RESPONDING TO THE NEEDS OF VICTIMS

49. Ensure that alleged victims of torture, cruel, inhuman and degrading treatment or punishment, witnesses, those conducting the investigation, other human rights defenders and families are protected from violence, threats of violence or any other form of intimidation or reprisal that may arise pursuant to the report or investigation.
50. The obligation upon the State to offer reparation to victims exists irrespective of whether a successful criminal prosecution can or has been brought. Thus all States should ensure that all victims of torture and their dependents are:
 - a) Offered appropriate medical care;
 - b) Have access to appropriate social and medical rehabilitation;
 - c) Provided with appropriate levels of compensation and support;

In addition there should also be a recognition that families and communities which have also been affected by the torture and ill-treatment received by one of its members can also be considered as victims.

ANNEX 5: TERMS OF REFERENCE FOR THE SPECIAL RAPPORTEUR ON PRISONS AND CONDITIONS OF DETENTION IN AFRICA

MANDATE

1. In accordance with its mandate under Article 45 of the African Charter on Human and Peoples' Rights (the Charter), the African Commission on Human and Peoples' Rights (the Commission) hereby establishes the position of Special Rapporteur on Prisons and Conditions of Detention in Africa.
2. The Special Rapporteur is empowered to examine the situation of persons deprived of their liberty within the territories of State Parties to the African Charter on Human and Peoples' Rights.

METHODS OF WORK

The Special Rapporteur shall:

- 3.1. examine the state of the prisons and conditions of detention in Africa and make recommendations with a view to improving them;
- 3.2. advocate adherence to the Charter and international human rights norms and standards concerning the rights and conditions of persons deprived of their liberty, examine the relevant national law and regulations in the respective State Parties as well as their implementation and make appropriate recommendations on their conformity with the Charter and with international law and standards;
- 3.3. at the request of the Commission, make recommendations to it as regards communications filed by individuals who have been deprived of their liberty, their families, representatives [,] NGOs or other concerned persons or institutions;
- 3.4. propose appropriate urgent action.
4. The Special Rapporteur shall conduct studies into conditions or situations contributing to human rights violations of prisoners deprived of their liberty and recommend preventive measures. The Special Rapporteur shall co-ordinate activities with other relevant Special Rapporteurs and Working Groups of the African Commission and the United Nations.
5. The Special Rapporteur shall submit an annual report to the Commission. The report shall be published and widely disseminated in accordance with the relevant provisions of the Charter.

DURATION OF MANDATE

6. This mandate will last for an initial period of two years which may be renewed by the Commission.
7. The Special Rapporteur shall seek and receive information from State Parties to the Charter, individuals, national and international organisations and institutions as well as other relevant bodies on cases or situations which fall within the scope of the mandate described above.
8. In order to discharge his mandate effectively, the Special Rapporteur should be given all the necessary assistance and co-operation to carry out on-site visits and receive information from individuals who have been deprived of their liberty, their families or representatives from governmental or non-governmental organisations and individuals.
9. The Special Rapporteur shall seek co-operation with State Parties and assurance from the latter that persons, organisations, or institutions rendering co-operation or providing information to the Special Rapporteur shall not be prejudiced thereby.
10. Every effort will be made to place at the disposal of the Special Rapporteur resources to carry out his or her mandate.

MANDATE PRIORITIES FOR THE FIRST TWO YEARS

11. In order to establish his or her mandate in the first two years, the Special Rapporteur shall focus on the following activities, while paying special attention to problems related to gender:
 - 11.1. Make available an evaluation of the conditions of detention in Africa, highlighting the main problem areas.

This should include areas such as: prison conditions; health issues; arbitrary or extra-legal detention or

imprisonment; treatment of people deprived of their liberty; and conditions of detention of especially vulnerable groups such as refugees, persons suffering from physical or mental disabilities, or children.

The Special Rapporteur shall draw on information and data provided by the States.

- 11.2. Make specific recommendations with a view to improving the prisons and conditions of detention in Africa, as well as reflect on possible early warning mechanisms in order to avoid disasters and epidemics in places of detention.
- 11.3. Promote the implementation of the Kampala Declaration.
- 11.4. Propose revised terms of reference, if necessary, at the end of this two-year period to the African Commission and an overall programme for the following stage.

