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

A HANDBOOK FOR VICTIMS AND THEIR ADVOCATES

Frans Viljoen & Chidi Odinkalu

OMCT Handbook Series Vol. 3

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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 282 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 Handbook on the Prohibition of Torture and Ill-treatment in the African Human Rights System is the third of the series.

THE PROHIBITION OF TORTURE AND ILL-TREATMENT IN THE AFRICAN HUMAN RIGHTS SYSTEM: A HANDBOOK FOR VICTIMS AND THEIR ADVOCATES

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Note to Readers

This *Handbook* is meant to support NGOs, advocates, lawyers and indeed, the victims of torture themselves, in developing effective litigation strategies before the African Commission in respect of violations of the prohibition of torture and other ill-treatment under Article 5 of the African Charter on Human and Peoples’ Rights. As such, we have striven for comprehensive coverage of the relevant areas of substance and procedure but also for clarity and accessibility. We are continuously looking for ways to improve our materials and enhance their impact. Please help us do this by submitting your comments on this book, preferably in English or French, at: handbook@omct.org

Readers are also invited to visit our website featuring a page devoted to the *OMCT Handbook Series* which contains further reference materials: www.omct.org.
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Boris Wijkström,
Series Editor
October 2006

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PREFACE

Torture and other cruel, inhuman or degrading forms of treatment or punishment remain a matter of grave concern to the international community. Africa is no exception. Africa has struggled with Member States caught up in an environment that engages or condones acts of torture in times of war or armed conflict. However, this violation of an inherent human right also occurs within States where individuals have been deprived of their liberty for political, legal, or other non-conflict related reasons. In view of the fact that most domestic jurisdictions on the Continent prohibit torture or ill-treatment, the sad reality is that the increasing rhetorical commitment by African States to human rights since the ‘wave of democratisation’ of the early 1990s, does not reflect the reality on the ground - torture and other forms of ill-treatment remain pervasive amongst African communities.

For 25 years Article 5 of the African Charter of Human and Peoples’ Rights (1981), has proscribed all forms of ‘torture, cruel, inhuman or degrading punishment and treatment’. While most African countries have incorporated this prohibition into their national legal systems, there exists an urgent need for strengthened action by civil society at the supra-national level. This need is underlined by the inability of persons to effectively access judicial systems, coupled with the lack of appropriate remedies within domestic infrastructures.

Although comparatively embryonic, the African human rights system has matured into a relatively functional and credible organ, contributing to the development of international human rights jurisprudence. In addition, the advent of democratisation has afforded NGOs more operational freedom, thus amplifying their role and responsibilities in the fight against torture. Simultaneously, this has strengthened the implementation of both international and African principles relating to the prohibition of torture, promoting mechanisms for monitoring and applying these standards.

A key contributor to the literature on torture and the African human rights system is the World Organisation Against Torture (OMCT). This Handbook is an example of that contribution. It serves as a tool for action, combining rigorous academic analysis of the scope and content of the prohibition of torture under African human rights instruments with a practical approach to the litigation of individual cases before the African Commission.

Written by two of the most eminent experts on human rights in Africa, the book begins by offering a comprehensive treatment of the African human rights system. It is a critical analysis of the role played by the main institutions under both the Organization of African Unity (the “OAU”) and subsequently
the African Union ("AU") and examines their human rights work since the OAU’s inception in 1963. The book then moves on to consider various themes within the framework of African human rights, including the rights of women, the rights of the child, the concept of democracy, and the right to development.

An important aspect of the Handbook is dedicated to the AU’s institutional framework within which Africa’s human rights system functions. This encompasses consideration of the promotional mandate of the African Commission, including the role of NGOs at the Commission, the State reporting process, the system of Special Rapporteurs and, in particular, the Special Rapporteur on Prisons and Conditions of Detention in Africa. As the only such book of its kind, this work represents a critical and much needed tool for all civil society actors struggling to end impunity for torture in Africa.

With its dynamic and progressive interpretation of the African Charter in the context of the prohibition of torture, the Handbook will prove to be invaluable to advocates operating within the mechanisms of the African human rights system, and among them primarily the African Commission. It will also assist in furthering the accountability of Member States and seeking redress for torture victims. Moreover, the book will be a definitive point of reference. It effortlessly blends a step-by-step approach to filing and litigating a case before the African Commission with an in-depth analysis of the scope, content and meaning of Article 5 of the Charter and relevant provisions of other human rights instruments. Undoubtedly, this Handbook will prove to be an important research tool for human rights advocates, legal practitioners, and academics alike.

The crucial role played by the African Commission to ensure the protection and respect of human rights and, in particular, the prohibition of torture, is clearly identified in this Handbook. Looking into the future, however, the judges elected at the 6th Ordinary Session of the AU Assembly in January 2006 to serve on the African Court on Human and Peoples’ Rights, will need to complement the work of the Commission. It is imperative for the development of the African human rights system that these institutions be fully supported to ensure that they effectively discharge their mandates. Now, therefore, after a successful struggle for the entry into force of the Court, it will be of paramount importance that both the Commission and the Court are endowed with the requisite independence and financial capacity. This will ensure that they can operate with integrity and uphold the core principles of equality, human dignity, democracy, and human rights espoused by the African Charter on Human and Peoples’ Rights.

Adama Dieng
United Nations Assistant Secretary General & Registrar
International Criminal Tribunal for Rwanda (ICTR)
September 2006
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INTRODUCTION

This publication aims to provide a general introduction to the African regional human rights system, with a specific focus on the accomplishments, potential and challenges of this system, to deal with the pervasive problem of torture.

At the outset (in Part A), the broader African Union (‘AU’) institutional framework within which the system functions is set out. 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.

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). In Part C, the communications procedure is considered. 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. 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 significance of the Commission’s public sessions, the adoption of (non-binding) resolutions, promotional visits by Commissioners, State reporting and 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. Their role and responsibility in addressing torture is therefore now greater than ever before. With this audience in mind, the last part of this publication provides some conclusions and recommendations to NGOs concerned about torture in Africa.