

PART D

TORTURE IN THE PROMOTIONAL MANDATE OF THE AFRICAN COMMISSION



XI. NGOs with Observer Status

NGOs may obtain observer status with the African Commission.³¹⁴ Observer status entitles NGOs to ‘participate in the public session of the Commission’.³¹⁵ Although NGOs generally (including those without observer status) are entitled to propose agenda points to the Secretariat of the Commission and to receive copies of the provisional agenda of sessions,³¹⁶ in practice these opportunities are 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’.³¹⁷ 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.³¹⁸ 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.³¹⁹

From its inception in 1987 through its Thirty-ninth Ordinary Session in May 2006, the Commission has granted observer status to 349 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 (OMT) 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). One of the most recent NGOs to obtain observer status is the Sudan Organisation Against Torture (SOAT), based in

314 National human rights institutions (NHRIs) are also encouraged to obtain a special form of observer status with the Commission, termed ‘affiliate status’. Although the number of affiliate NGOs has increased over the years, to the extent that 19 NHRIs attended the Commission’s Thirty-ninth Session, the role of these institutions in the work of the Commission and at the sessions has not always been clear.

315 Commission Rules of Procedure, *supra* note 188, Rule 75.

316 *Ibid.*, Rules 6(3), 7(3).

317 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 (1999), Annex: Criteria for the Granting of and Maintaining Observer Status with the African Commission on Human and Peoples’ Rights, para. 1.

318 *Ibid.*, para. 3.

319 *Ibid.*, para. 2.

the United Kingdom.³²⁰ Many more of the 349 NGOs (both international and Africa-based) include directly or implicitly in their mandates the prevention of torture and ill-treatment.

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

NGOs, mostly those enjoying observer status, attend the NGO Forum, which precedes most of the Commission's sessions. Initially organised by the International Commission of Jurists (ICJ), it is at present organised by the Centre for Human Rights and Democracy, based in Banjul, The Gambia. The aim of these fora is to provide a non-threatening space within which NGOs may exchange experiences and devise common strategies. 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.³²¹ 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, and on the other, to 'name and shame' recalcitrant States. In respect of two States in particular, namely Mauritania³²² and Zimbabwe,³²³ the Commission sessions have provided a platform for the exchange of views between civil society and government. 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.

320 Final Communiqué of the Thirty-eighth Ordinary Session of the African Commission (21 November – 5 December 2005).

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

322 For example, at the Thirtieth Session, a Mauritanian NGO raised the issues of slavery and Government non-compliance with a Commission decision; the Government delegate responded by arguing that much progress had been achieved.

323 Confrontation between Zimbabwean NGOs and Government delegates has characterized numerous sessions, including the Thirty-seventh and Thirty-eighth sessions.

XIII. 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’,³²⁴ which contains a call for the establishment of a Special Rapporteur to take responsibility for this issue on a continuous basis. Another example is the workshop on health in African prisons, held under the auspices of the African Commission and organised by PRI and the Ugandan Prison Services, from 12 to 13 December 1999. The workshop culminated in the report *Health in African Prisons*.

XIV. 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 ill-treatment are often most visible in places of detention. This issue became the focus of the Commission’s first resolution related to torture and ill-treatment, when it adopted the ‘Resolution on Prisons in Africa’ in 1995.³²⁵ 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.³²⁶ 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).³²⁷

324 Kampala Declaration on Prison Conditions in Africa (1996), U.N. Doc. E/CN.15/1997/L.18 (30 Apr. 1997) [hereinafter ‘Kampala Declaration’].

325 Adopted at the Commission’s Seventeenth Ordinary Session.

326 Fair Trial Guidelines, *supra* note 132.

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

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, including legislation, procedural safeguards, oversight mechanisms, evidentiary rules, police standards, measures relating to prosecutorial and judicial conduct (such as training) and measures of inter-departmental or 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.

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.³²⁸

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’.³²⁹ States are required to ensure that no lawfully detained person is ‘subjected to torture or to cruel, inhuman or degrading treatment or punishment’.³³⁰ Special measures are to be taken to protect women and

328 Fair Trial Guidelines, *supra* note 132, para. F(l).

329 *Ibid.*, Section M.

330 *Ibid.*, para. M(7)(b).

juveniles. Interrogation may not comprise elements of violence or methods or threats that impair an individual's dignity, 'capacity of decision' or 'judgement'.³³¹ 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.³³²

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, in turn dealing with the prohibition of torture, the prevention of torture and the needs of the victims of torture.³³³

Under the Guidelines, the primary obligation of States is effectively to prohibit torture under their domestic laws and legal systems. This means, in the first place, that torture has to be made a crime, following the definitional elements of Article 1 of the Convention against Torture.³³⁴ Second, an approachable and effective system for investigating allegations of torture has to be in place.³³⁵ If an investigation reveals that the allegations are substantiated, prosecution must be instituted not only as a matter of legal formality, but also effectively. Lastly, upon conviction, perpetrators should be punished appropriately.³³⁶

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.³³⁷ In these respects, the Guidelines draw heavily from the Convention against Torture.

331 *Ibid.*, para. M(7)(e).

332 *Ibid.*, para. M(7)(j).

333 Robben Island Guidelines, *supra* note 133.

334 *Ibid.*, para. 4. Although not all African Constitutions prohibit torture explicitly, many do so (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 of them 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).

335 Robben Island Guidelines, *supra* note 133, paras. 17-19.

336 *Ibid.*, para. 12.

337 *Ibid.*, para. 7.

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.³³⁸ 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.³³⁹ 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 pre-trial process. Most importantly, national law and practice must prohibit *incommunicado* detention, must ensure that 'unauthorised places of detention' are prohibited, that the relevant written records are kept and that *habeas corpus* is observed (allowing challenges to the lawfulness of detention).³⁴⁰ 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.³⁴¹

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,³⁴² and of juveniles and women from adult male detainees.³⁴³ 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.³⁴⁴

338 *Ibid.*, para. 9.

339 *Ibid.*, para. 10.

340 *Ibid.*, paras. 21-32.

341 *Ibid.*, paras. 45-46.

342 *Ibid.*, para. 35.

343 *Ibid.*, para. 36.

344 *Ibid.*, para. 37.

Part III addresses the needs of victims and is the most ambitious section of the Guidelines. Not only does it call on States to ensure that victims of torture and their families are ‘protected from violence’, it also calls on 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’.³⁴⁵ States may well argue that the financial implications of these guidelines render them idealistic.

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. An example is *Rights International v. Nigeria*, in which 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.³⁴⁶

One method to address the Guidelines’ non-binding nature would be the adoption of a regional treaty against torture, which would convert these standards into binding norms. It may be argued that such norms essentially exist in the CAT, and that African States need only ratify that Convention and implement its standards. However, a specific treaty within the AU framework may be more likely to address specific issues of concern to Africa, and therefore be more likely to lead to full implementation. In support of this contention, one may point to the European system, in which the Council of Europe in 1987 adopted the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment of Punishment.³⁴⁷ Since that time, the Convention has been accepted by most European States and has had a very positive impact.

A Follow-up Committee to ensure that the Robben Island Guidelines do not gather dust, comprising of the African Commission, the Association for the Prevention of Torture and any prominent African experts as the Commission may determine, was established at the Commission’s 29th Session, in 2002. 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.

345 *Ibid.*, para. 50.

346 *Rights International v. Nigeria*, *supra* note 243, paras. 28-29.

347 See European Convention on Human Rights, *supra* note 295.

- 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.

As of this writing, the Committee has accomplished few of these objectives.

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 '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'.³⁴⁸ 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.

In its Thirty-eighth Session, the Commission adopted a resolution on the situation of human rights in Ethiopia.³⁴⁹ In the resolution's preamble, the right to fair trial is 'recalled', as well as 'the situation going on in Ethiopia since June 2005', and 'arbitrary arrests and other serious human rights violations directed at suspected members and supporters of opposition groups, students and human rights defenders', including 'the arbitrary detention of opposition leaders and journalists in Ethiopia'. The Commission then called on the Ethiopian authorities to 'release arbitrarily detained political prisoners, human rights defenders and journalists' and 'to observe fair trial guarantees'. The Commission further urged the Government 'to ensure the impartiality, independence

348 African Commission, Resolution on Côte d'Ivoire, ACHPR /Res.67(XXXV)04, adopted on 4 June 2004.

349 Adopted 5 December 2005.

and integrity of the National Parliamentary Commission investigating the recent acts of violence in the country and to bring the perpetrators of human rights violations to justice’.

As engagement with the African human rights system increased, government representatives began taking issue with these resolutions. When the Ethiopian resolution and other country-specific resolutions were brought before the AU Executive Council and Assembly as part of the Commission’s Nineteenth Activity Report, their publication was blocked.³⁵⁰ In previous years, the Commission had routinely included such resolutions in its Activity Reports to the 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.³⁵¹

350 African Commission, Nineteenth Activity Report, Assembly/AU/Dec 101(VI), January 2006.

351 African Commission, Twentieth Activity Report, Adopted by the AU Assembly in July 2006.

XV. 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 Charter States among themselves and undertake occasional visits to these States. Despite financial and logistical constraints, Commissioners have made numerous visits. The current country assignments follow:³⁵²

Commissioner	Countries
H.E. Salamata Sawadogo	Algeria, Benin, Republic of Congo (Brazzaville), Ethiopia, Gabon and Niger
Mr. Yaser El Hassan	Egypt, Djibouti, Chad, Libya, Mauritania and Somalia
H.E. Amb. Kamel Rezag Bara	Burkina Faso, Central African Republic, Comoros, Madagascar and Saharawi Arab Democratic Republic
Madame Reine Alapini-Gansou	Cameroon, Democratic Republic of Congo, Senegal, Togo and Tunisia
Mr Musa Ngary Bitaye	Ghana, Nigeria, Sierra Leone and Zimbabwe
Adv. Faith Pansy Tlakula (Ms)	Gambia, Namibia, Swaziland and Zambia
Mr Mumba Malila	Kenya, Malawi, Uganda and Tanzania
Dr. Angela Melo	Angola, Sao Tome & Principe, Cape Verde, Equatorial Guinea and Guinea Bissau
Mr. Mohamed A. Ould Babana	Burundi, Côte d'Ivoire, Guinea, Mali, Rwanda and Sudan
Ms. Sanji M. Monageng	Liberia, Lesotho, Mauritius and Mozambique
M. Bahame Tom M. Nyanduga	Eritrea, Botswana, Seychelles and South Africa.

³⁵² African Commission, Nineteenth Activity Report, Assembly/AU/Dec 101(VI), January 2006, Annex II.

XVI. 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 1988.³⁵³ 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 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:³⁵⁴ (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. A persistent problem has been that these 'concluding observations' have not been given publicity and remain confidential.

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. During examination of the Egyptian state report, at the

353 African Commission, Guidelines for National Periodic Reports, 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'].

354 See *ibid.*, paras. I.3, 4 and 8.

Commission's Eleventh session (in March 1992), for example, Commissioner Beye asked the Egyptian delegate to respond to numerous allegations of torture that he had received from NGOs and other sources, and challenged the Government to assure the Commission that as a State Party to CAT it would accept the inquiry and individual complaints procedures allowed for under CAT.³⁵⁵ Sidestepping the crucial part of the question, the State delegate answered in general terms by stating that Egyptian penal law has criminalised torture since 1937 and by listing the legal guarantees to accused persons during criminal investigations.³⁵⁶

A perusal of more recent examinations reveals additional concerns of the Commission. 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 29th Session, in April 2001, Commissioner Chirwa, Special Rapporteur on Prisons, asked questions regarding crowding and segregation in prisons. At the Commission's 37th 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.³⁵⁷

One of the major drawbacks of the State reporting procedure is the failure of some States to submit their reports. The following 16 States have never submitted a report to the Commission: Botswana, Comoros, Côte d'Ivoire, Djibouti, Eritrea, Ethiopia, Guinea Bissau, Gabon, Equatorial Guinea, Kenya, Liberia, Malawi, Madagascar, Sao Tomé and Príncipe, Sierra Leone and Somalia.³⁵⁸ National NGOs should remain informed about the status of State reporting in their particular countries and should encourage States to submit timely reports.

Although neither the Charter nor the Commission Rules of Procedure provide for a participatory role for civil society organisations in the State reporting process, in practice NGOs have on occasion submitted 'shadow reports' as supplements to a government's account. In respect of the Cameroon report

355 African Commission, Examination of State Reports, Eleventh Session, March 1992, Egypt – Tanzania, (1995), 32.

356 *Ibid.*, 34.

357 Thirty-seventh Session, 27 April to 11 May 2005, Banjul, The Gambia.

358 African Commission, Twentieth Activity Report, *supra* note 43, section II, para. 9.

examined at the Commission's 39th Session, for example, information was placed before the Commission indicating that the rights of a number of men detained on 'sodomy' charges had been violated. During the examination of the report, a number of Commissioners posed questions based on this information. 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. Although the Commission Rules of Procedure suggest that submitted reports are public documents,³⁵⁹ the practice has been that the specific consent of the Secretary is required, and it is granted on an *ad hoc* basis.³⁶⁰

Another approach is NGO participation in report drafting at the national level. In fact, questions routinely posed suggest that such an approach is mandated by the Commission. It is suggested that 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. 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.

XVII. Special Rapporteurs

Arising from frustration with States' refusal to comply with reporting obligations, and from the need to address issues of particular concern, the Commission 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, deserves our particular attention.

359 The reports are contained as part of the agenda, which is a public document.

360 Commission Rules of Procedure, *supra* note 188, Rule 82.

1. Special Rapporteur on Prisons and Conditions of Detention in Africa³⁶¹

The Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP) was established at the Commission's 20th 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, and 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, but the first three SRPs have been appointed from the ranks of the Commission: Commissioner Dankwa, in October 1996, Commissioner Chirwa, in November 2000 and Commissioner Malila, in November 2005. The success of the first two has much to do with their personal commitment and characteristics. Commissioner Dankwa was at the time of his appointment a previous Chairperson of the Commission. Commissioner Chirwa, herself a former prisoner in Africa, brought tremendous moral authority and personal insight to the position.

It should be stressed that the mandate covers more than merely 'prisons' and 'prisoners'.³⁶² 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, as 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

361 See generally F. Viljoen, 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities', (2005) 27 *Human Rights Quarterly* 125. The full text of the first seven SRP reports are available at <http://www.penalreform.org/english/friset_pub_en.htm> (accessed 31 July 2006).

362 African Commission, Terms of Reference for the Special Rapporteur on Prisons and Conditions of Detention in Africa, included at Annex 5.

other ill-treatment figures largely in the SRP mandate, in that it may occur against both sentenced and non-sentenced detainees, in prisons as well as in other places of detention.

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.

As of 2005, the Special Rapporteur had visited thirteen countries (three of them twice), averaging around two visits per year, 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 (2 nd visit)
The Gambia	21 - 26 June 1999
Benin	23 - 31 August 1999
Central African Republic	19 - 29 June 2000
Mozambique	4 - 14 April 2001 (2 nd 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 (2 nd visit)
Ethiopia	15 - 29 March 2004
South Africa	14 - 30 June 2004

The list does not necessarily reflect the countries in which the abuse of detainees' and prisoners' rights is of particular concern. The dearth of 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.³⁶³

The structure of each SRP visit is generally along the following lines:

- The visit begins with a press conference.
- Preliminary interviews with government officials from ministries dealing with prisons and police detention, and possibly also with NGOs, are held.
- Thereafter the 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. In Cameroon, for example, Commissioner Chirwa and the delegation passed by a prison not on the list of places to be visited.
- NGOs working in relevant fields are interviewed. These interviews may also occur prior to some or all detention centre visits. In Namibia, for example, NGOs urged the SRP to visit political detainees in the Caprivi.
- Additional interviews are conducted in the capital. Specific issues may then be taken up with government officials. In Uganda, for example, the SRP addressed the high number of remand prisoners with the Chief Justice.
- 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.

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.

³⁶³ *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 26 Jan. 2001 (Rwanda), available at < <http://www.inkiko-gacaca.gov.rw/pdf/Law.pdf>>.

- The SRP returns to the officer in charge, making on-the-spot recommendations if required. Both Commissioner Dankwa and Commissioner Chirwa made on-the-spot recommendations to prison officials. When the SRP visited Namibia, she learnt that HIV-positive prisoners were not allowed to work in the kitchen. She immediately advised the officials that discrimination against people suffering from HIV/AIDS is unlawful.

After the visit, a draft visit report is prepared and sent to the highest government penal affairs official for his or her comments. The government response sometimes dwells on details in the report with which the government takes issue. In other instances there are blanket denials. For example, in his findings on The Gambia, the SRP observed that the 72-hour constitutional limit on detention without trial, which seemed well known in the country, was not being complied with. The SRP referred to evidence of ‘rife’ disregard at the Police Headquarters Station, where the unlawful detention period ranged from 7 to 90 days.³⁶⁴ In his response, the Secretary of State unhelpfully made the following denial: ‘It must be pointed out that the constitutional limit of 72 hours detention without trial is fully understood by all security personal [sic] ... and has always been fully complied with’.

Reports are, on a very rough average (not all necessary data is available), published just over a year after the visit. Compared to the publication timeline for many other Commission documents, this period is not excessive. However, it has been demonstrated that 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.

The entire Commission examines the SRP’s reports. Prior to release of the first SRP report, regarding Zimbabwe, a preliminary report was ready at the time of the Commission’s session. The Commission discussed the 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. These reports have thus not been included in the

³⁶⁴ Finding 9, p. 37 of the report.

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.

There does not seem to be a strategy in place to ensure that reports in respect of a particular country visited reach all officials and NGOs that participated in the 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'. 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.³⁶⁵

Three follow-up visits have taken place so far, to Mali, Mozambique and Benin. It is clear that in respect of repeat visits important factors include the ease with which the first visit had been organised and the general willingness of the government to cooperate with the SRP. In the case of the follow-up visit

365 For an example of undue deference, consult the SRP report on the Central African Republic.

to Mali, the SRP made a conscious effort to contrast the current reality with the recommendations made about two years earlier. However, this method meets with 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.³⁶⁶
- 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.³⁶⁷

There is no clear policy addressing urgent appeals. It is therefore unsurprising that no systematic guidelines exist either. Although very few urgent appeals have been dealt with, there are some examples: on some occasions the first approach was applied (for example, SRP Dankwa during the visit to The Gambia). In a number of cases the second option was employed. For example, in November 1999 the SRP reacted to the detention without trial of a person in Angola by writing to the President of the country. Within two weeks the person was released and was able to speak with the British Broadcasting Corporation (BBC). In Kenya, the SRP raised the case of a prisoner (William Mwaura Mwangi) who was refused proper medical care and who was in danger of losing his life. The SRP appealed to the Kenyan authorities to provide the prisoner with health care. The SRP was informed, by way of a letter from

³⁶⁶ See Part C, Section VIII of this volume.

³⁶⁷ See Part C, Section VIII, Subsection 4(f) of this volume.

the Commissioner of Police, that his intervention caused the authorities to refer the detainee to one of the country's best hospitals for treatment.³⁶⁸ The SRP had occasion, when subsequently visiting Kenya as part of a promotional visit, to confirm that his appeal had succeeded.

Not all intervention attempts 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,³⁶⁹ 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. In the process, the SRP's activities have highlighted the issue of detainees' rights. 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.

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 vacant for the last few years. Other related rapporteurships are the Special Rapporteur on the Rights of Women in Africa and the Special Rapporteur on Human Rights Defenders in Africa.

368 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.

369 See Kampala Declaration, *supra* note 324.

