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
OPERATING THE SOS-TORTURE NETWORK

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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

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Boris Wijkström,
Series Editor
October 2006

DISCLAIMER

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

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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.

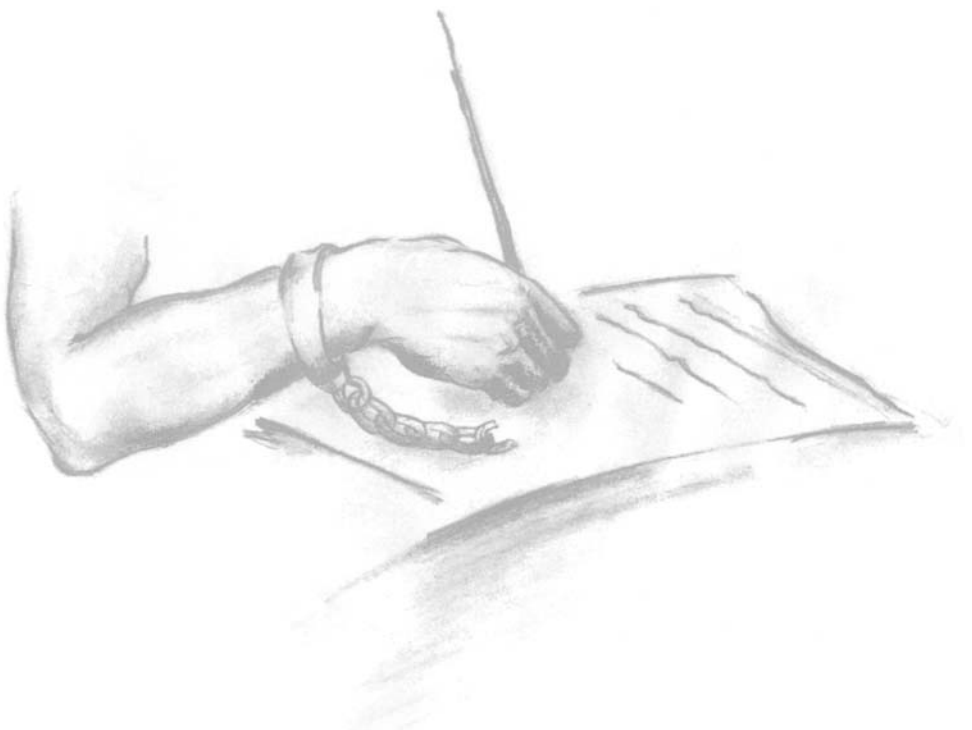
The main substantive norms of a binding nature are then extracted from the African Charter and are discussed in the light of the Commission's interpretation of these norms in specific cases (in Part B). In Part C, the communications procedure is considered. The phases through which an individual petition 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.

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 OAU (1963 - 2001/2) and the AU (since 2001/2). It is necessary briefly to introduce these two institutions.

The Organization of African Unity (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 mandates 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 commits Member States to abide by a number of bedrock principles, including the principle of the 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

1 Charter of the Organization of African Unity, 479 U.N.T.S. 39, entered into force on 13 September 1963, reprinted in 2 I.L.M. 766 (1963) [hereinafter 'OAU Charter'].

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

3 *Ibid.*, art. II(1)(e); Universal Declaration of Human Rights, 10 Dec. 1948, GA res. 217A (III), UN Doc A/810 at 71 (1948).

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

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

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

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]

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') in 1987, there came into existence a continental mechanism for

7 *Ibid.*, art. VII.

8 The OAU only adopted rules on consultative arrangements with civil society organizations in 1993. 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 its is an African organization, 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), arts. 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 and 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, Sections XI-XII of this volume. Under the AU Constitutive Act, the Economic and Social Council (ECOSOCC) is the organ for organizing civil society relations with the AU. The AU established its ECOSOCC in 2004. ECOSOCC is undertaking a review of rules for AU-civil society consultation.

9 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5 entered into force on 21 October 1986, reprinted in (1982) 21 ILM 58 [hereinafter 'African Charter', 'the Charter'], included as Annex 1 to this volume.

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 – 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.

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10 The African Commission on Human and Peoples' Rights is established under art. 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.

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, CAB/LEG/23.15 [hereinafter 'AU Constitutive Act'], entered into force on 26 May 2001.

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

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

14 *Ibid.*, art. 4(j). The States Parties to the AU Constitutive Act reject 'unconstitutional changes of governments'. *Ibid.*, art. 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.*, art. 30.

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

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

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

18 *Ibid.*, art. 5.

19 *Ibid.*, art. 20.

The Assembly, Executive Council and AU Commission play various roles in supporting and reinforcing the effectiveness of regional human rights mechanisms in Africa. These political institutions of the African Union play a significant role in implementing regional human rights norms.[20] For instance, AU political organs such as the AU Assembly and Executive Council have treaty responsibility for ensuring that States Parties comply with the decisions of the African Commission.

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 peace-keeping 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 body remains the African Commission, established under the main human rights treaty in the African system, the African Charter. Its main features are now discussed.

20 For a description of the organs of the OAU and their functions in the promotion and protection of human rights, see, M. Garling and C. A. Odinkalu, *Building Bridges for Rights: Inter-African Initiatives in the Field of Human Rights*, INTERIGHTS report (2001), 45-51.

II. The African Charter on Human and Peoples' Rights

The African Charter[21] 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 the deposit of Eritrea's instrument of ratification.[23] In other words, all 53 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]

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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, Kampala, Uganda, 1990, entered into force on 29 November 1999, OAU Doc. CAB/LEG/24.9/49 [hereinafter 'African Children's Rights Charter']; 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, Ouagadougou, Burkina Faso, on 9 June 1998, OAU/LEG/AFCHPR/PROT (III), reprinted in 6 *International Human Rights Reports* 891 [hereinafter 'African Human Rights Court Protocol'], included as Annex 3 to this volume; 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, Maputo, Mozambique, July 2003 Assembly/AU/Dec. 14(II), July 2003 [hereinafter 'African Women's Rights Protocol'].

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', (1984) 6 *Human Rights Quarterly* 141, 158.

26 Communication 155/96, *Social and Economic Rights Action Centre and Another v. Nigeria*, Fifteenth Activity Report; (2001) AHRLR 60 (ACHPR 2001), para. 68 [hereinafter '*SERAC*'].

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 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]

Like the American Declaration on the Rights and Duties of Man, the Charter contains provisions on both rights and duties of the individual.[30] Unlike the international covenants, the Charter guarantees a right to property, omits express guarantees of privacy and citizenship or nationality as human rights,[31] prohibits collective expulsion of foreign nationals and creates an entitlement to asylum.[32]

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

27 Communications 105/93, 128/94, 130/94, 152/96, *Media Rights Agenda and Others v. Nigeria*, Twelfth Activity Report, (2000) AHRLR 200 (ACHPR 1998).

28 Communication 74/92,*Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Ninth Activity Report, (2000) AHRLR 66 (ACHPR 1995) [hereinafter '*Commission Nationale des Droits de l'Homme*']; Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of the Episcopal Conference of East Africa v. Sudan*, Thirteenth Activity Report; (2000) AHRLR 297 (ACHPR 1999) [hereinafter '*Sudan* cases']; Communications 54/91, 61/91, 98/93, 164-169/97, 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop/UIDH/ RADDHO, Collectif des Veuves et Ayanst-droit and Association Mauritanienne des Droits de l'Homme v. Mauritania*, Thirteenth Activity Report; (2000) AHRLR 149 (ACHPR 2000) [hereinafter '*Mauritania* cases'].

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

30 African Charter, *supra* note 9, arts. 27-29; see also, American Declaration on the Rights and Duties of Man, 1949, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003); 43 AJIL Supp. 133 (1949).

31 The African Commission has, however, read the right to nationality as implicit in the guarantee of legal status in art. 5 of the Charter. See Communication 97/93, *John K. Modise v. Botswana*, Fourteenth Activity Report; (2000) AHRLR 30 (ACHPR 2000) [hereinafter '*Modise*'].

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

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'. As the concept of 'people' is not defined in the Charter, it may be interpreted as referring to the inhabitants or nationals of a State, or to smaller units – religious, ethnic or linguistic minorities – within a State. The Commission has refrained from explicitly accepting that this provision entitles minority groups to special status or would legitimate claims to secession.

III. The African Commission on Human and Peoples' Rights

Until the entry into force of the Protocol establishing the African Court on Human and Peoples' Rights in January 2004, the African Commission, established under Article 30 of the Charter, was the only mechanism for the implementation of the African Charter.[33]

1. Membership and Functioning

Article 30 of the African Charter establishes the African Commission as an independent expert body comprised of eleven 'persons of the highest reputation', nationals of States Parties to the Charter 'known for their high morality, integrity, impartiality and competence in the field of human and peoples' rights'[34] and functioning in their individual capacities, that is, not as representatives of their Governments or countries. The Charter empowers the Commission to 'promote human and peoples' rights and ensure their protection in Africa'.[35]

As the eleven Commissioners serve part-time, the permanent secretariat based in Banjul, The Gambia plays an important role. The Commission secretariat is headed by a Secretary.[36]

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33 See African Charter, *supra* note 9, art. 30; First Activity Report of the African Commission on Human and Peoples' Rights 1987-88, ACHPR/RPT/1st, para. 4; see also, African Human Rights Court Protocol, *supra* note 22.

34 African Charter, *supra* note 9, art. 31(1).

35 *Ibid.*, art. 30.

36 As of this writing, the Commission is made up of the following people: Salamata Sawadogo (Burkina Faso) as Chairperson; the Vice-Chair is Yassir Sid Ahmed El Hassan (Sudan); the other members are Abdellahi Ould Babana (Mauritania), Kamel Rezag-Bara (Algeria), Musa Ngary Bitaye (The Gambia), Reine Alapini-Gansou (Benin), Mumba Malila (Zambia), Angela Melo (Mozambique), Sanji Mmasenono Monageng (Botswana), Bahame Tom Mukirya Nyanduga (Tanzania) and Faith Pansy Tlakula (South Africa). Their contact details can be found on the Commission's web site: <www.achpr.org>.

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 'inter-session'). 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.

2. Protective Mandate

Aggrieved parties may submit complaints alleging the violation of Charter provisions to the African Commission. Both States[37] and non-State entities, including individuals, may initiate cases and communications before the Commission.[38] Under the first possibility, one State Party to the African Charter may submit a complaint that another State Party is in violation of the African Charter ('inter-State communication'). The second possibility entails the submission of a complaint by an individual or NGO ('individual communication'). The African Charter grants the African Commission the competence to consider both 'inter-State' and 'individual' communications in respect of all States Parties. There is therefore 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. The Commission is empowered under the Charter to supervise and monitor all rights, including economic, social and cultural rights, as well as group rights.

So far, only one inter-State communication has been submitted to the Commission. Given States' reluctance to interfere in the 'domestic affairs' of other States, and the small role human rights plays in foreign policy and international relations, this procedure is not likely to be used frequently – especially not in respect of torture.

The Charter authorises the Commission to consider complaints from individuals whose rights under the Charter have been violated. Unlike the European

37 *Ibid.*, arts. 47-54. Communication 227/98, *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*, Twentieth Activity Report Annex IV, is the only inter-State communication so far registered by the African Commission.

38 African Charter, *supra* note 9, arts. 55-57.

and Inter-American human rights courts, however, 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'.[39] 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 massive violations' of Charter provisions.[40] It is arguable that every situation of torture creates an emergency. However, under the Charter, emergency situations are those that reveal a pattern of serious or massive violations. Such pattern could be shown to exist through evidence of impunity or absence of consequences for acts in violation of Article 5 of the Charter.

The Commission may 'resort to any method of investigation'[41] including a request of information from 'the Secretary General of the Organization of African Unity or any other person capable of enlightening it'.[42] In relation to the prevention of and protection against torture and other cruel, inhuman and degrading treatment, this could involve the use of experts, interim measures of protection, receiving testimonies from victims, survivors and perpetrators, and mechanisms for the collection of evidence that do not endanger the victims.

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39 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, 16 Dec. 1966, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), Part IV.

40 African Charter, *supra* note 9, arts. 58 (1)-(3). For an analysis of art. 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*, (1996) INTERIGHTS; R. Murray, 'Serious and Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms', (1999) 17 *Netherlands Quarterly of Human Rights* 109.

41 African Charter, *supra* note 9, art. 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.

42 African Charter, *supra* note 9, art. 46.

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 become sensitive to criticism or condemnation by the Commission, 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. Unfortunately, the Executive Council at its most recent meeting decided to prevent the publication of a decision against Zimbabwe contained in the Commission's Twentieth Activity Report.[43] The Executive Council decision allows the Zimbabwean Government another opportunity to comment on the case, although it has already participated in the hearing of the matter.

3. Promotional Mandate and Special Procedures (Rapporteurs)

Under Article 45 of the Charter, the responsibilities of the African Commission include promotional work through awareness-raising programs such as conferences, seminars and symposia,[44] 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',[45] and advisory work, including the interpretation of the Charter 'at the request of a State Party, an institution of the OAU or an African organization recognized by the OAU'.[46]

The Commission also receives and considers periodic reports that States Parties are required to submit under Article 62. The Commission monitors State compliance with Charter provisions by receiving and considering these reports.[47]

43 African Commission, Twentieth Activity Report, EX.CL/Dec.310(IX), adopted in June 2006.
44 African Charter, *supra* note 9, art. 45(1)(a).
45 *Ibid.*, art. 45(1)(b).
46 *Ibid.*, art. 45(3).
47 *Ibid.*, art. 62.

Over time, however, the Commission took 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: the Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions in Africa (in 1994), the Special Rapporteur on Prisons and Conditions of Detention 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 and the Special Rapporteur on Human Rights Defenders in Africa.

The Commission also appoints working groups, consisting of one or more Commissioners as well as members of civil society organisations or other experts. Another distinction between special rapporteurships and working groups is that the latter are usually appointed for a specific *ad hoc* purpose. Examples of Working Groups of the African Commission are those on Indigenous Peoples/Communities in Africa and on the Implementation of the Robben Island Guidelines.[48]

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 Protocol to the Charter[49] establishing an African Human Rights Court entered into force in 2004. A major cause of the delay in setting up the Court is the AU Assembly's decision to 'merge' the African Human Rights Court and the AU Court of Justice.[50] The merging process is ongoing and will in all likelihood culminate in a single court with a human rights chamber or section. As at 31 July 2006, 23 States have ratified the African Human Rights Court Protocol.[51] In any event, the merger of the two courts would only become possible once the Protocol on the AU Court of Justice has entered into force, something that has not yet happened. Although the African Human Rights Court's seat has been

48 For further discussion of the Robben Island Guidelines, see Part D, Section XIV(1)(b). The Guidelines are included in Annex 4 to this volume.

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

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

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

assigned (it will be located in Tanzania, most likely in Arusha), it is not yet fully operational. It is too early to say how this Court will affect the system of human rights promotion and protection on the African continent, especially in relation to the enforcement of individual claims.[52]

The African Human Rights Court has been established 'to complement the protective mandate of the African Commission on Human and Peoples' Rights'.[53] In other words, the Court does not replace the Commission, but supplements its mandate to examine individual and inter-State communications. 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. After their election early in 2006, the eleven judges were sworn in on 3 July 2006.[54] The judges shall serve a term of six years, which may be renewed once.[55] The quorum for a sitting of the Court shall be seven.[56] Unlike the Commission, whose secretariat was initially staffed by the secretariat of the OAU, and later by the Commission of the AU, the Court will have its own registry with dedicated staff.[57] Its functioning will be governed by the Protocol and by Rules of Procedure to be adopted by the Court itself.

The Protocol empowers the Court to provide legal assistance to litigants before it if 'the interests of justice so require'.[58] The Court will sit and conduct its pro-

52 The Commission of the African Union adopted in November 2005 a budget for the operation of the Court in 2006, suggesting that the African Human Rights Court will become operational sometime in 2006.

53 African Human Rights Court Protocol, *supra* note 22, art. 2.

54 The following were elected judges: Mr Fatsah Ouguergouz (Algeria) (4 year term), Mr Jean Emile Somda (Burkina Faso) (2 years), Mr Gerard Niyungeko (Burundi) (6 years), Ms Sophia Akuffo (Ghana) (2 years), Mrs Kelello Justina Masafo-Guni (Lesotho) (4 years), Mr Hamdi Faraj Fanoush (Libya) (4 years), Mr Modibo Tounty Guindo (Mali) (6 years), Mr Jean Mutsinzi (Rwanda) (6 years), Mr El Hadji Guisse (Senegal) (4 years), Mr Bernard Ngoepe (South Africa) (2 years) and Mr George Kanyiehamba (Uganda) (2 years).

55 African Human Rights Court Protocol, *supra* note 22, art. 15: '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.'

56 *Ibid.*, art. 23.

57 *Ibid.*, art. 55.

58 *Ibid.*, art. 10(2).

ceedings in public,[59] and shall deliver its decisions within ninety days of conclusion of its deliberations.[60] A judgment of the Court shall be binding on States Parties, who shall therefore be obliged to guarantee its execution.[61]

V. Other Human Rights Treaties and Treaty Bodies

Since the adoption of the African Charter, African States under the auspices of the now defunct OAU[62] and its successor, the AU, have negotiated and agreed upon other human rights treaties, the most notable of which include the African Children's Rights Charter[63] and the African Women's Rights Protocol.[64] 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').[65] Its mandate mirrors that of the African Commission, but as yet it has not examined any State reports or considered any communications. As a protocol that adds to the substance of the African Charter, the African Women's Rights Protocol does not create a new monitoring body. The African Commission and the African Human Rights Court 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,[66] the two 1977 Optional Protocols thereto,[67] the International Covenant on Civil and

59 *Ibid.*, art. 10(1).

60 *Ibid.*, art. 28.

61 *Ibid.*, art. 30.

62 See Section I above.

63 African Children's Rights Charter, *supra* note 22.

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

65 African Children's Rights Charter, *supra* note 22, art. 32.

66 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug. 1949, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, 12 Aug. 1949, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 UNTS 287.

67 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

Political Rights[68] and the Convention against Torture.[69] Common Article 3 of the Geneva Conventions prohibits torture and other forms of cruel treatment, and these Conventions have been ratified by all 53 African UN Member States, while 50 and 49 States have ratified or acceded to Additional Protocols I and II to the 1949 Geneva Conventions, respectively.[70] 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.[71] Of these States only 32 have ratified the Optional Protocol to ICCPR[72] allowing for individual complaints. The Convention against Torture, which sets forth in more precise detail the State obligations that ICCPR Article 7 entails, has been accepted as binding by 41 AU Member States.[73] However, many fewer have made a declaration accepting the right of individuals or other States to bring complaints against the State,[74] and even fewer have ratified the Optional Protocol to the Convention against Torture[75] allowing for regular visits by independent international and national bodies to places of detention within States Parties.[76]

68 ICCPR, *supra* note 39.

69 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), 1465 UNTS 85 [hereinafter 'Convention Against Torture'].

70 See <www.icrc.org> (accessed on 31 July 2006).

71 For status of ratification of UN human rights treaties, see <www.ohchr.org> (accessed 31 July 2006).

72 Optional Protocol to the International Covenant on Civil and Political Rights, 16 Dec. 1966, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966); 999 UNTS 302.

73 The only AU Member States not parties to the Convention against Torture are Angola, the Central African Republic, Comoros, Eritrea, The Gambia, Guinea-Bissau, Rwanda, Sahrawi Arab Democratic Republic, São Tomé e Príncipe, 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.

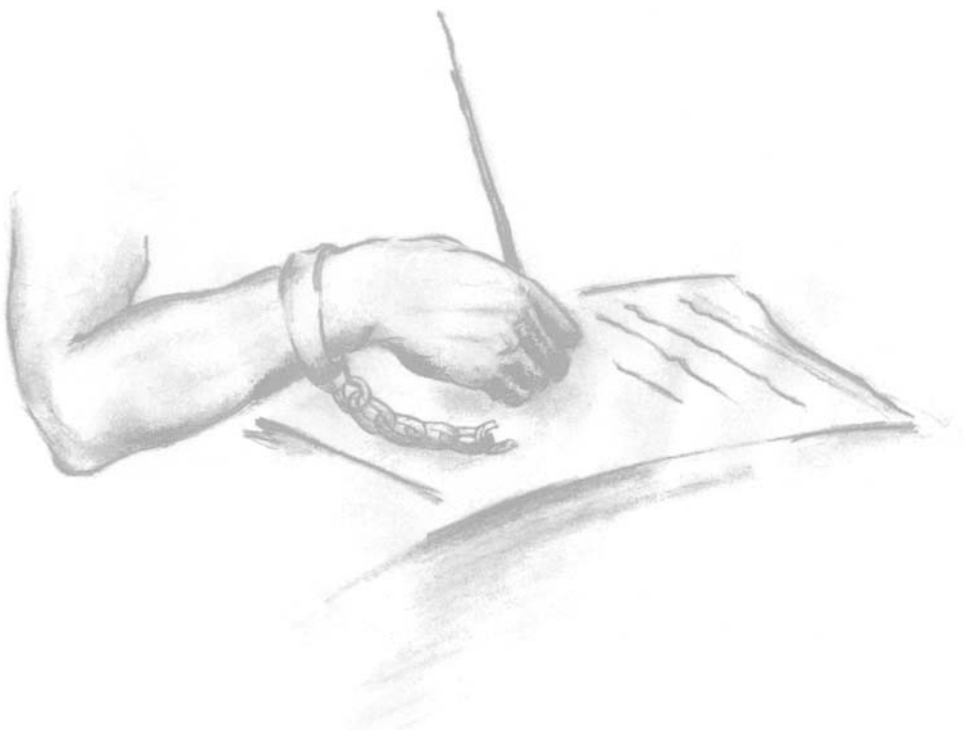
74 Nine African States accepted the Committee against Torture's competence under art. 22 to consider individual communications: Algeria, Burundi, Cameroon, Ghana, Senegal, Seychelles, South Africa, Togo and Tunisia. Two of them (Burundi and Seychelles) did not make a similar declaration under art. 21,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

75 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 Dec. 2002, GA res. 57/199, UN Doc. A/RES/57/199 (2003), 42 ILM 26 (2003).

76 As of 31 July 2006, three of the 22 States Parties to the Optional Protocol were African: Liberia, Mali and Mauritius.

PART B

SUBSTANTIVE NORMS ON TORTURE IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM



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

The prohibition against torture and ill-treatment is contained in a body of treaty and non-treaty norms applicable to African countries. Foremost among the relevant treaties is the African Charter. Similar prohibitions are contained in the African Children's Rights Charter[77] and the African Women's Rights Protocol.[78] 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*, in the context of refugee law and protection, to a country in which an individual's 'life, physical integrity or liberty would be threatened'.[79] Although resolutions adopted by the Commission provide interpretative guidance to the treaty norms, they do not in themselves have binding authority. In part XIV below, the history and scope of 'soft-law' standards (such as resolutions) adopted under the OAU/AU are discussed.

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:[80]

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

It should be noted that a right to human dignity is guaranteed separately from the prohibition of torture. The right to human dignity is the positive dimension

77 African Children's Rights Charter, *supra* note 22.

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

79 Adopted in 1969, OAU Doc. No. CAB/LEG/24.3, entered into force in 1974, art. 2(3) [hereinafter 'OAU Refugee Convention'].

80 African Charter, *supra* note 9, art. 5.

of the obligations contained in Article 5. When the State or its agents breach this obligation, the prohibition against torture, cruel, inhuman and degrading treatment or punishment is almost invariably also breached. The expression 'all forms of', casts the net of Article 5 wide enough to include a prohibition of both State and non-State conduct.[81]

Article 5 is reinforced and supplemented by other Charter provisions, such as guarantees of equal protection of the law,[82] the right to life and integrity, including the guarantee against 'arbitrary deprivation' of that right,[83] the right to personal liberty and security[84] and fair trial and due process guarantees.[85]

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 disparate though 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 treatment and punishment as 'examples' of exploitation and degradation. Issues pertaining to slavery and the slave trade are conceptually and factually usually quite distinct from the other examples on the list, and are not canvassed here. When finding an Article 5 violation, the Commission often does not distinguish between failure to respect 'dignity' and a violation of the prohibition of 'cruel, inhuman and degrading treatment and punishment'.[86]

81 See *Uzoukwu v. Ezeonu II*, (1991) 6 *Nigeria Weekly Law Reports* (Pt. 200) 708, in which the Supreme Court of Nigeria held that the prohibition against slavery and other forms of inhuman and degrading punishment or treatment was not limited to acts of the State but also extended to slavery in private arrangements.

82 African Charter, *supra* note 9, art. 3(2).

83 *Ibid.*, art. 4.

84 *Ibid.*, art. 6.

85 *Ibid.*, art. 7.

86 See, e.g., *Sudan* cases, *supra* note 28, para. 57.

This limited analysis and clarity undermines attempts to come to a clear understanding of the distinct Article 5 elements. Not only are these two main elements often conflated, but very seldom is any attempt made at distinguishing or disentangling the potentially subtle distinctions among 'torture' and other forms of ill-treatment, such as 'inhuman' and 'degrading' treatment. This tendency is explained with reference to two main factors.

First, the facts presented in communications before the Commission are usually very crude and cumulative, and clearly reveal excessive ill-treatment or punishment, such that a careful judicial analysis is rendered redundant. For example, in the earliest interpretation of Article 5 of the African Charter, the Commission considered conditions of detention and summary and arbitrary executions. In *Krishna Achutan (on behalf of Aleke Banda) v. Malawi*,[87] the State Party allegedly chained prisoners for days without access to sanitary facilities, detained them without access to natural light, water or food, beat them with sticks and iron bars and permanently shackled their hands, depriving them of autonomous activity and movement even within the cells. It was also alleged that many of the prisoners were kept in solitary confinement, while others were held in conditions of excessive overcrowding, to the extent that cells built for 70 prisoners were occupied by over 200 persons. The Commission decided that these facts violated the guarantee of personal dignity in Article 5 of the Charter.[88] The Commission has also 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 of these individuals amount to inhuman treatment both of the detainees and their families'.[89] Also, in the *Commission Nationale des Droits de l'Homme* case,[90] the Commission affirmed that Article 5 prohibits summary, arbitrary and extrajudicial executions.[91] Thus the Commission had no difficulty finding that 'the

87 Communication 64/92, *Krishna Achutan (on behalf of Aleke Banda) v. Malawi*, Seventh Activity Report, (2000) AHRLR 143 (ACHPR 1994).

88 Communication 64/92, *Krishna Achutan (on behalf of Aleke Banda) v. Malawi*, *ibid.*, joined with Communications 68/92 and 78/92, *Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, (1994), (2000) AHRLR 143 (ACHPR 1994), reprinted in (1996) 3 *International Human Rights Reports* 134.

89 Communications 222/98, 229/98, *Law Office of Ghazi Sulaiman v. Sudan*, Sixteenth Activity Report, (2003) AHRLR 134 (ACHPR 2003), para.62.

90 *Commission Nationale des Droits de l'Homme* case, *supra* note 28, para. 22.

91 *Ibid.*; Communications 27/89, 49/91, 99/93*, Organisation Mondiale Contre la Torture v. Rwanda*, Tenth Activity Report, (2000) AHRLR 282 (ACHPR 1996) [hereinafter '*OMCT et al. v. Rwanda* case'].

deaths of citizens who were shot or tortured to death' by law enforcement agents violated Article 5 of the Charter.[92]

Second, 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, and then concluded that a violation of the provision had occurred without attempting to show how the particular legal provisions relate or are applied to the specific facts.[93] Although later findings are more expansive and more rigorously substantiated, the depth of analysis can 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 and careful distinction is elaborated in the case-law. In *John D. Ouko v Kenya*[94], 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 constituted inhuman and degrading treatment, but fell short of torture, and presumably also of 'cruel' treatment.[95] 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.[96]

There is some contradiction in the *Ouko* finding, however, placing in doubt the persuasiveness of the distinction apparently drawn. In the paragraph before the Commission declines to find a violation of the right to be free from torture in

92 Communication 204/97, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Fourteenth Activity Report, (2001) AHRLR 51 (ACHPR 2001), 57.

93 See, e.g., Communications 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group and Others v. Zaire*, Ninth Activity Report, (2000) AHRLR 74 (ACHPR 1995), para. 41('The torture of 15 persons by a military unit … as alleged in [the] communication constitutes a violation of [Article 5]').

94 Communication 232/99, *John D. Ouko v. Kenya*, Fourteenth Activity Report, (2000) AHRLR 135 (ACHPR 2000), reprinted in (2002) 9 *International Human Rights Reports* 246 [hereinafter '*Ouko*'].

95 *Ibid.*, para. 23.

96 *Ibid.*, para. 26.

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.[97] 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 is found to have been violated to the extent of constituting inhuman and degrading treatment, and not cruelty or torture. However, such an interpretation is by no means clear from the Commission's reasoning.

In *Civil Liberties Organisation v. Nigeria*,[98] the complaint itself alleges the lesser 'inhuman and degrading treatment' rather than the more serious 'torture' or 'cruel treatment'.[99] The outcome does not mirror the distinction suggested by the allegation: The Commission finds that deprivation of family visits constitutes 'inhuman treatment' and that deprivation of light, insufficient food and lack of access to medicine or medical care constitute 'violations of Article 5'.[100] The reference to 'Article 5', in this context, should be to 'inhuman and degrading treatment'.

The Commission provides its clearest explanation of Article 5 in *International Pen, Constitutional Rights Project, INTERIGHTS (on behalf of Ken Saro-Wiwa Jr.) and Civil Liberties Organisation v. Nigeria*:[101]

> 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.

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

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

98 Communication 151/96, *Civil Liberties Organisation v. Nigeria*, Thirteenth Activity Report, (2000) AHRLR 243 (ACHPR 1999).

99 *Ibid.*, paras. 5, 25.

100 *Ibid.*, para. 27.

101 Communications 137/94, 139/94, 154/96 & 161/97, *International Pen, Constitutional Rights Project, INTERIGHTS (on behalf of Ken Saro-Wiwa, Jr.) and Civil Liberties Organisation v. Nigeria*, Twelfth Activity Report, (2000) AHRLR 212 (ACHPR 1998), para. 78 [hereinafter '*Ken Saro-Wiwa, Jr.*'].

must depend 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.[102]

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. Violations of Human Dignity

Article 5 of the African Charter guarantees an entitlement to human dignity and prohibits torture and cruel, inhuman and degrading treatment. According to the African Commission: [103]

> 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. It is therefore an inherent right, which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.

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. 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,[104] the author was rendered stateless when the Respondent State cancelled his Botswana nationality and deported him 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

102 Communication 225/98, *Huri-Laws v. Nigeria*, Fourteenth Activity Report, (2000) AHRLR 273 (ACHPR 2000), para. 41 [hereinafter '*Huri-Laws*'].

103 Communication 241/2001, *Purohit and Moore v. The Gambia*, Sixteenth Activity Report, (2003) AHRLR 96 (ACHPR 2003), para. 57 [hereinafter '*Purohit and Moore*'].

104 *Modise* case, *supra* note 31.

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'.[105] 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, 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'.[106] 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,[107] 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 Mauritanians 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.[108]

c. Conditions of Pre-Trial Detention and Incarceration

Conditions of detention are the most frequently alleged violations of Article 5. The conditions of detention alleged in communications decided by the Com-

105 *Ibid.*, para. 32.
106 *Purohit and Moore*, *supra* note 103, para. 77.
107 The *Mauritania* cases, *supra* note 28.
108 *Ibid.*, para. 122.

mission may be subdivided into three groups: those dealing with specific official misconduct; those of a more systemic nature that pertain to 'physical' or even 'psychological' 'conditions' and those related to the bare necessities of life (or 'socio-economic rights') such as food and medical attention.

The abuse of official discretion in places of detention often constitutes inhuman and degrading treatment. Examples include the following: beatings, shackling with leg irons in the absence of flight risk, handcuffs, shackling and excessive solitary confinement. 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.[109]

Physical conditions amounting to inhuman and degrading treatment may take the following forms: dark, airless or dirty cells or overcrowding. In one case, the Commission held that confining detainees in a 'sordid and dirty cell under inhuman and degrading conditions' without contact with the outside world was cruel, inhuman and degrading.[110] 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.[111] In *Media Rights Agenda v. Nigeria*, the victim allegedly suffered [112]

> [h]is legs and hands 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.

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

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

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109 The *Commission Nationale des Droits de l'Homme* case, *supra* note 28; see also, *Krishna Achutan (on behalf of Aleke Banda) v. Malawi*, *supra* note 87.

110 *Huri-Laws* case, *supra* note 102 para. 40.

111 *Ouko* case, *supra* note 94 para. 22.

112 Communication 224/98, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Fourteenth Activity Report, (2000) AHRLR 262 (ACHPR 2000), para. 70 [hereinafter '*Niran Malaolu*'].

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.[113]

However, the Commission has curiously also concluded in *Civil Liberties Organisation v. Nigeria*, that holding a detainee in a military camp was 'not necessarily inhuman' although it acknowledged 'the obvious danger that normal safeguards on the treatment of prisoners will be lacking'.[114]

d. Mental Heath Detainees

In *Purohit and Moore*,[115] the allegations were 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: [116]

> 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 beings. 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.

113 *Ken Saro-Wiwa Jr.* case, *supra* note 101, para. 79.
114 *Civil Liberties Organisation v. Nigeria*, *supra* note 98, para. 26.
115 *Purohit and Moore*, *supra* note 103.
116 *Ibid.*, paras. 59-60.

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'.[117] 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.[118]

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.[119]

e. Death Penalty

The African Charter does not explicitly prohibit capital punishment. The Charter merely prohibits the 'arbitrary' deprivation of human life.[120] 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.[121]

In *INTERIGHTS (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, the Commission confirmed that capital punishment was not incompatible with the

117 *Ibid.*, para. 57.

118 In violation of art. 6 of the Charter; see *ibid.*, paras. 64-68. The Commission 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.

119 *Ibid.*, para. 68.

120 *Ibid.*, art. 4.

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

Charter.[122] 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 begins with the premise that 'there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed'.[123] 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 which 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'.[124]

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 as such 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'.[125] 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 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

122 In this case, the Commission claimed that 'there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed'. See Communication 240/2001, *INTERIGHTS(on behalf of Mariette Sonjaleen Bosch) v. Botswana*, (Merits) Seventeenth Activity Report, para. 50 [hereinafter '*Bosch*']. 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.

123 *Ibid.*, para. 31.

124 *Ibid.*, para. 37.

125 *Ibid.*, para. 5.

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'.[126] In support of this statement, the Commission quotes 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'.[127]

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. 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.[128]

f. Judicial 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

126 *Ibid.*, para. 41.
127 *Guerra v. Baptiste*, United Kingdom Privy Council, (1996) Appeal Cases, 397, 418.
128 *Ken Saro-Wiwa, Jr.*, *supra* note 101, para. 78.

humiliating and incompatible with the high degree of respect to women accorded by Sudanese society.[129] 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 the very nature of this human rights treaty.[130]

g. 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-martial sexual intercourse. For offences such as theft, the penalty is amputation of a person's hand. These forms of punishment were raised in *INTERIGHTS (on behalf of Safiya Yakubu Husaini et al v. Nigeria*[131] for example, but did not in that instance lead to a finding of a violation, as the case was withdrawn. In an appropriate case, the Commission is – based on its general approach – likely to find that Article 5 of the Charter is violated.

h. Procedural and Judicial Safeguards

The Fair Trial[132] and Robben Island Guidelines[133] emphasise the interrelatedness of procedural safeguards and the right to be free from torture and other forms of ill-treatment. In its case-law, the Commission has held that the deprivation of procedural safeguards, for example, detention without charges, constitutes an 'arbitrary deprivation of liberty' and therefore violates Article 6.[134]

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129 Communication 236/2000, *Curtis Francis Doebbler v. Sudan*, Sixteenth Activity Report, (2003) AHRLR 153 (ACHPR 2003), paras. 42-44.

130 *Ibid.*, para. 55.

131 Communication 269/2003, *INTERIGHTS (on behalf of Safiya Yakubu Husaini and Others) v. Nigeria*, Twentieth Activity Report.

132 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'].

133 Robben Island Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa, Sixteenth Activity Report, Annex VI 33, ACHPR /Res.61(XXXII) 02 (2002) [hereinafter 'Robben Island Guidelines'], included as Annex 4 to this volume.

134 Communication 102/93, *Constitutional Rights Project and Another v. Nigeria*, Twelfth Activity Report, (2000) AHRLR 191 (ACHPR 1998), para. 55.

In *Zegveld and Ephrem v. Eritrea*,[135] 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 'their rights with regards to physical and mental health must be protected'.[136] The Commission adds 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.[137] 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.

An important procedural safeguard is a procedure to ensure that the legality of detention may be reviewed in *habeas corpus* or similar proceedings. In cases involving torture or similar violations of physical integrity, the best evidence is 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.[138] 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 it was established that the Nigerian Government had denied certain detained journalists the right of access to *habeas corpus* through the use of ouster clauses. In reasoning that is not remarkable for its clarity, the Commission concluded that 'deprivation of the right of *habeas corpus* alone does not automatically violate Article 6 (personal liberty)'.[139] The Commission did find 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'.[140] The

135 Communication 250/2002, *Zegveld and Ephrem v. Eritrea*, Seventeenth Activity Report [hereinafter '*Zegveld and Ephrem*'].

136 *Ibid.*, para. 55.

137 *Ibid.*, para. 56.

138 Communication 153/96, *Constitutional Rights Project v. Nigeria*, Thirteenth Activity Report, (2000) AHRLR 248 (ACHPR 1999), para. 10.

139 *Ibid.*, para. 24.

140 *Ibid.*, para. 25.

Commission's decision disappointingly declines to answer this question. However, it appears to answer it in the affirmative in another decision,[141] and, in yet another case, the Commission finds in any event that the denial of the right to *habeas corpus* violates the right to be heard under Article 7(1)(a).[142]

The Commission elaborated on the prohibition against torture and safeguards against the arbitrary deprivation of life in the *Sudan* cases[143] and *Mauritania* cases.[144] 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.[145] 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.[146]

Allegations of torture made in the *Mauritania* cases 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 until they lapsed into unconsciousness, spraying their eyes with pepper and administering high voltage electric current to their genitalia. The security agents also burnt detainees and buried them in the sand of the desert to die a slow death, routinely beat them and raped female prisoners.[147] The Commission found that these acts constituted a violation of Article 5:[148]

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141 Communication 205/97, *Kazeem Aminu v. Nigeria*, Thirteenth Activity Report, (2000) AHRLR 258 (ACHPR 2000), para.21.

142 *Constitutional Rights Project v. Nigeria*, *supra* note 138, para. 18.

143 The *Sudan* cases, *supra* note 28.

144 The *Mauritania* cases, *supra* note 28.

145 *Ibid.*, para. 5.

146 *Ibid.*, para. 57.

147 *Ibid.*, paras. 115-117.

148 *Ibid.*, para. 118.

> 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 following trials conducted in breach of the Article 7 due process guarantees violated the prohibition against arbitrary deprivation of life in Article 4 of the Charter.

Where conduct constituting a violation of Article 4 or 5 occurs, the State is obliged to investigate it independently and to ensure appropriate punishment for those implicated. 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'.[149] Noting that the Government had provided 'no specific information on the said executions', the Commission continued:

> 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.

149 The *Sudan* cases, *supra* note 28, para. 48; see also, the *Mauritania* cases, *supra* note 28, para. 119.

The Commission further 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 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.[150]

The *Sudan* communications alleged that the 28 officers executed on 24 April 1990 were allowed no legal representation. The Government stated 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. Before the Special Courts the accused has the right to be defended by a friend, subject to Court approval. The Government argued that the court procedures were strictly followed in the case of these officers. Based on contradiction of testimony between the Government and the complainant, the Commission concluded that in the case of the 28 executed army officers basic standards of fair trial were not met.[151] Indeed, the Sudanese Government gave the Commission no convincing reply as to the fair nature of the cases that resulted in the execution of the 28 officers. The Commission deemed insufficient the Government's statement that the executions were carried out in conformity with its internal legislation. The Government 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 scrupulously respected.[152]

i. *Refoulement* and forced displacement

Article 5 of the Charter also obliges States Parties to refrain from returning refugees to a place where they may be subject to torture, cruel, inhuman and degrading treatment. The State is obliged to comply strictly with due process norms before removing refugees or persons seeking protection as refugees.[153] 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.[154] The Commission has elaborated

150 The *Sudan* cases, *supra* note 28, paras. 65-66.
151 *Ibid.*
152 See, *Ken Saro-Wiwa, Jr.*, *supra* note 101, paras. 101-103.
153 *OMCT et al. v. Rwanda*, *supra* note 91, para. 34.
154 *Ibid.*

that the right of the individual in Article 7 includes a State duty to establish structures to enable the exercise of this right.[155] This implies a State duty to extend legal and other material assistance to persons seeking refuge within the State's territory 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 to respect for human dignity and the right to due process.[156]

In addition, Article 12(3) of the Charter provides that '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'. The prohibition of *refoulement*, as part of general international law, is read into the Charter on the basis of this provision and of Article 5.

Furthermore, the Charter guarantees 'national and international peace and security' as a right of peoples.[157] The African Commission has interpreted this provision to include State 'responsibility for protection' of nationals.[158] In *Commission Nationale des Droits de l'Homme*,[159] the Commission concluded that Article 23(1) included a duty on States to provide security and stability to the inhabitants of their territories, including victims of forced displacement. This makes the Charter provisions on human dignity relevant even in situations of forced displacement.[160]

j. Incommunicado Detention

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 and families. In a communication brought on their behalf, *Zegveld and Eprhem*, the Com-

155 Communication 87/93, *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v. Nigeria*, Eighth Activity Report,(2000) AHRLR 183 (ACHPR 1995), reprinted in (1996) 3 *International Human Rights Reports* 137, [hereinafter '*Lekwot*].

156 African Charter, *supra* note 9, art. 12(5); *Modise* case, *supra* note 31.

157 African Charter, *supra* note 9, art. 23(1).

158 The *Mauritania* cases, *supra* note 28, para. 138.

159 *Commission Nationale des Droits de l'Homme* case, *supra* note 28, para. 22.

160 Cf., *Elmi v. Australia*, Committee against Torture, Twenty-second Session, U.N. Doc. CAT/C/22/D/120/1998 (25 May 1999), available at <http://unbisnet.un.org/webpacbin/wgbroker?110618 4915075418274+1+scan+select+1+0>.

mission 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 Commission describes *incommunicado* detention as 'a gross human rights violation that can lead to other violations such as torture and ill-treatment'.[161] 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. The Commission adds, however, that *incommunicado* detention, of itself, may constitute cruel, inhuman or degrading treatment or punishment if it is 'prolonged' and entails 'solitary confinement'.[162] 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.

In the course of its decision, 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'.[163]

VII. 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 (African Children's Rights Charter) 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'.[164]

In addressing the problem of torture relevant to children in Africa, the African Children's Rights Charter identifies five specific aspects of the prohibition

161 *Zegveld and Ephrem*, *supra* note 135, para. 55.

162 *Ibid.*

163 *Ibid.*

164 African Children's Rights Charter, *supra* note 22, Preamble. Note also that the African Children's Rights Charter defines a child as a person under the age of 18. *Ibid.*, art. 2.

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.[165] 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.[166] In this context, the African Children's Rights Charter prohibits the betrothal of both male and female children and prescribes 18 years as the age of marital consent.[167] 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 African Children's Rights Charter includes provisions that address torture and other ill-treatment of children as committed by non-State actors.[168]

The range of measures that a State may take to discourage harmful practices become clearer on reading those provisions of the African Children's Rights Charter 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,[169] 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'.[170]

Similarly, the African Children's Rights Charter requires States to take 'legislative, administrative, social and educational measures' to protect children from torture, inhuman and degrading treatment.[171] The African Children's Rights Charter emphasises the prohibition of 'physical or mental injury or abuse, neglect or maltreatment, including sexual abuse' of children.[172] Measures of protection for the purposes of the Charter include: [173]

165 *Ibid.*, art. 1(3).
166 *Ibid.*, arts. 21 (1)(a)-(b).
167 *Ibid.*, art. 21(2).
168 *Ibid.*, arts. 1(3), 10, 15, 16, 19(1), 20-21.
169 *Ibid.*, arts. 15(2)(c)-(d).
170 *Ibid.*, art. 15(1).
171 *Ibid.*, art. 16(1)
172 *Ibid.*
173 *Ibid.*, art. 16(2).

> 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 African Children's Rights Charter prohibits the application of capital punishment to children[174] and the torture or ill-treatment of children deprived of their liberty.[175] The Charter specifically requires that children deprived of their liberty are separated from adults in their place of detention or imprisonment[176] 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.[177]

In situations of armed conflict, including internal armed conflict,[178] States Parties to the African Children's Rights Charter 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.[179] 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.[180] 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. As was mentioned above, the monitoring mechanism of this treaty, the African Children's Rights Committee, has not yet expounded on any of these provisions in concrete cases.

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 African Children's Rights Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('African

174 *Ibid.*, art. 5(3).
175 *Ibid.*, art. 17(2).
176 *Ibid.*, art. 17(2)(b).
177 *Ibid.*, art. 17(4).
178 *Ibid.*, art. 22(3).
179 *Ibid.*, arts. 22(1)-(2).
180 *Ibid.*, art. 23(1) and (4).

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, in particular, 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'.[181] 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 or armed conflicts or of war.[182]

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.[183] 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'.[184] 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.[185]

In situations of armed conflict, including internal armed conflict, States Parties to the African Women's Rights Protocol agree thereunder 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 instruments of war. Such acts are recognized as war crimes or crimes against humanity under the Protocol.[186] These provisions are yet to be clarified in the context of communications presented to either the African Commission or the African Human Rights Court.

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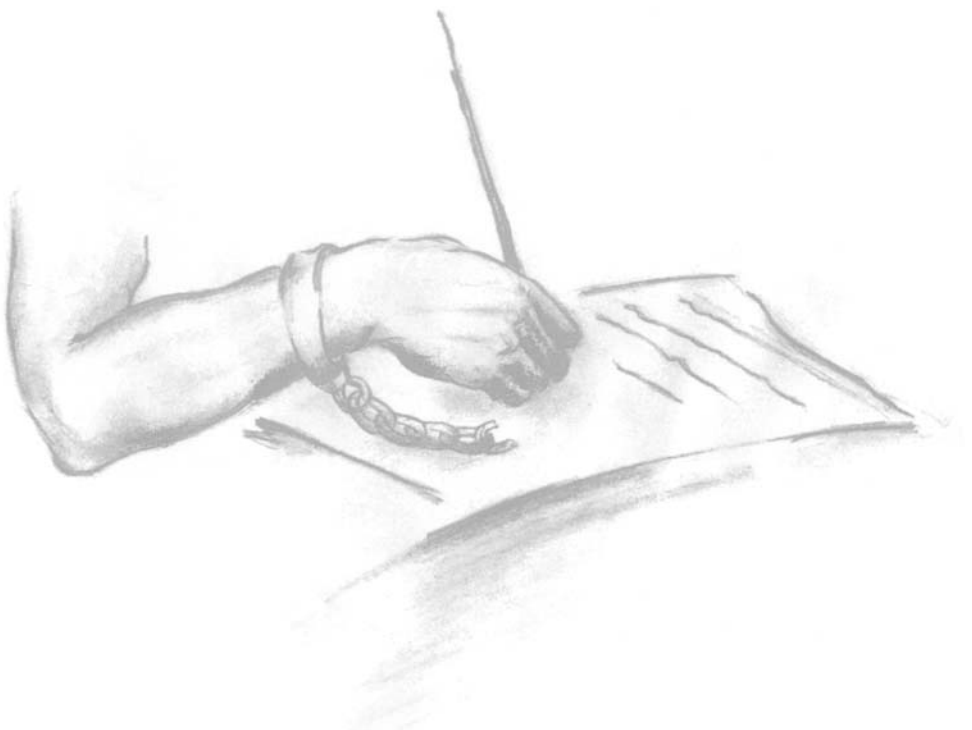
181 African Women's Rights Protocol, *supra* note 22, art. 1.
182 *Ibid.*
183 *Ibid.*, arts. 4-5.
184 *Ibid.*, art. 3(4).
185 *Ibid.*, art. 4.
186 *Ibid.*, art. 11.

PART C

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



VIII. Individual Communications

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

1. Overview

Article 56 of the African Charter and Chapter 17 of the Commission's Rules of Procedure lay out the essential components of an individual petition before the African Commission system. Any person may initiate a communication before the Commission. The author need not be a lawyer or the victim. Authors or victims may engage lawyers to assist them, but this is not mandatory. Unlike the procedure before the United Nations Human Rights Committee the hearing and consideration of communications under the African Commission system is not exclusively in writing.[187] 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;

187 See, First Optional Protocol to the International Covenant on Civil and Political Rights, adopted 16 Dec. 19966, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966), 999 UNTS 302.

(f) measures taken by the author to exhaust local remedies, or an explanation as to why local remedies will be futile; and

(g) the extent to which the same issue has been settled by another international investigation or settlement body.[188]

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.[189] When it receives the communication, the Commission's Secretariat will assign a number to it and open a file. The file is first reviewed by the Commission's Secretariat to ensure that the case is suitable to be considered by the Commission. The Commission, for instance, will not receive cases against individuals, non-African States, or African States not parties to the African Charter.

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

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

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

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

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

2. Choice of Forum

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

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

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

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

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

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

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

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

3. *Locus Standi*

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

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

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

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

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

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

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

193 Communication 25/89 (1997), *Organisation Mondiale Contre la Torture et al. v. Zaire* (Merits), reprinted in (1997) 4 *International Human Rights Reports* 89, 92.
194 Communication 31/89, *Baes v. Zaire*, Eighth Activity Report, (2000) AHRLR 72 (ACHPR 1995).
195 African Human Rights Court Protocol, *supra* note 22, art. 5(1).
196 *Ibid.*, arts. 5(3), 34(6).

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

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

4. Admissibility

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

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

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

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197 *Ibid.*, art. 4.

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

a. Communications Must Disclose Authors and Their Contact Information[199]

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

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

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

c. Communications Must Be Compatible with the AU Constitutive Act and the African Charter[204]

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

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

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

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

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

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

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

is party to both the African Charter and the AU Constitutive Act. Communications may not be initiated against a non-African State or against an African State that is not party to both instruments. In respect of the former, the Commission has dismissed as 'irreceivable' communications brought against such non-African States as Bahrain, Yugoslavia and USA.[205] The Commission has similarly declared 'irreceivable' communications brought against African States who were not parties to the Charter.[206] 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,[207] or if it does not identify a recognisable adverse party.[208]

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

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

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

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

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

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

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

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

regime'. The African Commission held that these allegations did not disclose any violations of the Charter. Similarly, allegations such as, 'there is no justice in Algeria',[211] 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',[212] have been declared inadmissible.

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

d. The Language of the Communication Must not Be Insulting

Article 56(3) of the African Charter prohibits communications written in 'disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity (African Union)'. The Charter does not precisely define 'insulting language'. In *Ligue Camerounaise des Droits de l'Homme v. Cameroon*,[214] 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

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

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

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

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

Cameroon and declared the Communication inadmissible. About this decision, it has been said that:[215]

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

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

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

Article 56(4) of the Charter lays down, as a condition for admissibility, the requirement that authors must ensure that their communications 'are not based exclusively on news disseminated through the mass media'. The African Commission considered the import of this requirement for the first time in *Sir Dawda K. Jawara v. The Gambia*.[216] 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:[217]

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

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

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

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

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

f. Local Remedies Must First Be Exhausted[218]

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

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

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

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

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

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

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

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

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

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

'a remedy is available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the complaint'.[224]

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

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.[228] This is applicable in many cases to victims of torture and forced displacement.

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

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

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

226 *Ibid.*, para. 12.

227 *Ibid.*, para. 15.

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

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

230 *Ibid.*

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

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

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

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

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

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

233 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

In a subsequent case, *Rights International v. Nigeria*,[243] 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*,[244] a previous head of State submitted a complaint related

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

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

242 *Ibid.*, para. 6.

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

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

to his deposition and events following the *coup d'etat* that removed him from power. Finding that the complainant does not have to exhaust domestic remedies in The Gambia, the Commission observed that it would be an affront to logic and common sense to require the ex-President to risk his life to return to The Gambia. In the other case, *Kazeem Aminu v. Nigeria*,[245] 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*,[246] the Commission seems to have deviated from its own jurisprudential approach, without justification. In this case, the Commission required exhaustion of local remedies by a complainant in a situation analogous to those just discussed. The complainant was a Nigerian journalist, based in The Gambia, who was ordered to leave The Gambia after his reporting caused embarrassment to the Nigerian Government. Ostensibly, the journalist was deported to 'face trials for crimes he committed in Nigeria'. His deportation took place within a very short time, and he had no opportunity to challenge his deportation. On arrival in Nigeria, he was not arrested or prosecuted. Despite the uncontested allegation presented as part of his argument that he cannot return to The Gambia because the deportation order was still valid, the Commission found that the complainant should first have exhausted remedies in The Gambia. Declaring the communication inadmissible, the Commission for the first time – and in clear disregard of its jurisprudence, including two findings taken during the very same session – required that a complainant that had fled or was otherwise forced to leave a country to instruct counsel in the country that he had left. This requirement may place an unreasonable and insurmountable financial and logistical burden on victims in similar circumstances.

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

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

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

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

An important element of this admissibility requirement is the onus of proof. In *Ilesanmi v. Nigeria*,[248] 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.[249] The importance of the onus is illustrated in *Anuak Justice Council v. Ethiopia*.[250] Merely alleging that domestic remedies are not effective does not suffice to convince the Commission that local remedies need not be exhausted.

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

g. Other Admissibility Conditions Should Also Be Observed

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

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

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

249 *Ibid.*, para. 45.

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

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

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

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

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

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

5. Interim Measures

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

The African Commission has clarified that 'in circumstances where an alleged violation is brought to the attention of the Commission and where it is alleged that irreparable damage may be caused to the victim, the Commission will act expeditiously appealing to the State to desist from taking any action that may cause irreparable damage until after the Commission has had the opportunity to examine the matter fully'.[258] 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.[259] In the *Lekwot* case, the Commission successfully indicated provisional measures to stop an impending execution.[260]

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

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

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

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

259 *Ibid.*

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

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

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

6. Amicable Settlement

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

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

261 *Ken Saro-Wiwa, Jr.*, *supra* note 101.
262 The *Bosch* case, *supra* note 122.
263 African Human Rights Court Protocol, *supra* note 22, art. 27(2).
264 *INTERIGHTS (on behalf of Safia Yakubu Husaini and Others) v. Nigeria*, *supra* note 131.

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

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

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

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

Complainants bear the initial onus of laying a factual foundation in support of their allegations. The Commission requires that allegations of torture should be substantiated by the persons making them.[265] 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.[266] The Commission will not find a violation of Article 5 in the absence of such information.[267]

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.[268] A list of the names of the alleged victims was also provided.

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

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

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

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

Where an author provides these particulars, the State against whom they are made is obliged to respond to them. In the absence of such response, the Commission bases its judgment on the information provided by the author.[269] 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.[270]

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.[271] Consideration of the merits takes place in a separate session, and culminates in a finding as to whether the relevant rights have been violated. Over the years, the procedure during these hearings has become increasingly formal. Victims are in most cases represented by lawyers, often members of NGOs who provide this service free of charge. They prepare written arguments, are allowed to present oral arguments and, more exceptionally, may call witnesses.

9. Government Justifications

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

269 The *Mauritania* cases, *supra* note 28, paras. 92, 103.
270 The *Sudan* cases, *supra* note 28, para. 57.
271 Commission Rules of Procedure, *supra* note 188, Rule 119(2).
272 *Ibid.*, Rules 117(4), 119(2).

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

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

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

One State strategy is to dispute or deny the facts as presented by the complainant. In *Zegveld and Ephrem*,[273] 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'.[274] 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.[275] The defence also fails on another ground: it does not address the essence of the detainees' claim, namely that they were detained secretly and without access to lawyers and family. The Commission was equally unimpressed by the Eritrean Government's assurance that the detainees in *Zegveld and Ephrem* would be brought before an appropriate court of law 'as early as possible'.[276]

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

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

273 *Zegveld and Ephrem*, *supra* note 135.
274 *Ibid.*, para 54.
275 *Ibid.*
276 *Ibid.*
277 *Ibid.*, para 56.

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

Related to arguments pertaining to national security are contentions about national legal standards and domestic sovereignty. In *Zegveld and Ephrem*, the Government referred to its national laws, arguing that the detention of the 11 persons was 'in conformity with the criminal code of the country'.[279] 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.[280]

10. Acceptable Limitations

The Commission has held that the prohibition of torture in Article 5 of the Charter is absolute and does not admit of any exceptions or limitations.[281] The African Commission has consistently held that 'contrary to other human rights instruments, the African Charter does not allow for derogation from obligations due to emergency situations'.[282] 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'.[283] 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'.[284]

278 *Ibid.*, para 47.
279 *Ibid.*
280 *Ibid.*, para 49.
281 The *Huri-Laws* case, *supra* note 102.
282 *Commission Nationale des Droits de l'Homme* case, *supra* note 28; the *Mauritania* cases, *supra* note 28, para. 84.
283 *Commission Nationale des Droits de l'Homme* case, *supra* note 28; the *Mauritania* cases, *supra* note 28, para. 84.
284 The *RADDHO* case, *supra* note 225.

11. Methods of Interpretation

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

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

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

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

286 *Ibid.*, art. 61.

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

288 *Ibid.*

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

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

291 See Justinina's Digest 29.2.71.pr.

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

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

dence in its decision-making.[294] 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.[295] Case-law of the Inter-American Court of Human Rights served as interpretative inspiration in another important Commission decision, *Zegveld and Ephrem*.[296]

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

12. Remedies

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

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

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

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

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

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

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

(1) Recommendation that the Government 'put an end to' Article 5 and other violations;[301]

(2) Recommendation to 'improve' the 'conditions of detention' of civilians held in military detention centres;[302]

(3) Recommended legislative changes[303] and compensation.[304]

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

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

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

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

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

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

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

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

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

IX. Inter-State Communications

As of this writing, the Commission has finalised one inter-State communication. This case, *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*,[306] arose from an undeclared 'war' involving four States in the 'Great Lakes' area. The DRC directed allegations of serious human rights violations against the armed forces of the countries named above, committed mainly within the territory of the DRC, but also in Rwanda. The abduction and deportation of members of the civilian population to 'concentration camps' in Rwanda featured among the allegations by the DRC.[307] 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).[308] 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.[309]

X. On-Site Missions

1. Legal Basis and Conduct of Missions

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

2. Selected Missions

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

306 *DRC v. Burundi, Rwanda and Uganda*, *supra* note 37.
307 *Ibid.*, para 6.
308 *Ibid.*, para 89.
309 *Ibid.*, para 98.

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

Beyond the contentious issue of land reform and the right to property under the African Charter, the mission also investigated allegations related to torture. The mission received 'testimony from witnesses who were victims of political violence and other victims of torture while in police custody'.[310] 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.[311]

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

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

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

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.[313] However, its opportunity came after the Commission had adopted the report, and the Government viewed this as a procedural irregularity, as the rules of natural justice had not been complied with. It is unclear, however, whether the Zimbabwean Government communicated any of these concerns to the Commission before the 'bomb' burst at the AU summit.

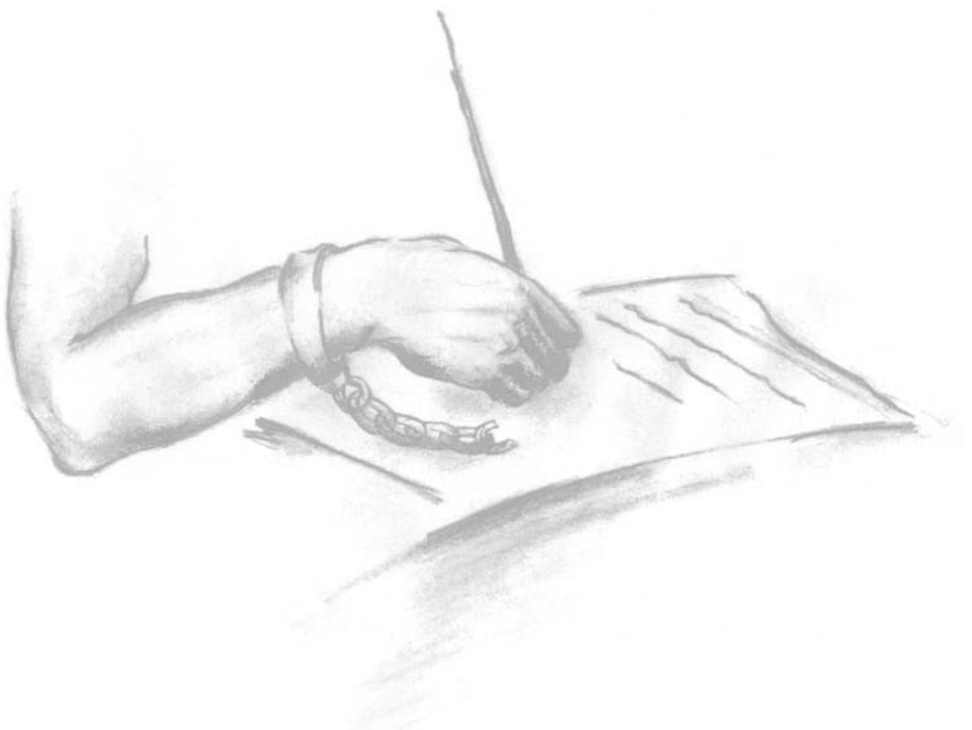
In its comments, the Government criticises the mission and report on a number of grounds. The length and scope of the mission, which lasted only four days and was restricted to Harare, was in its view not adequate to discern the 'truth'. The nature of the fact-finding process also came under scrutiny,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

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

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

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 Mauritania[322] 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]

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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.

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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 Principé, 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 Africa[361]

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/frset_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 (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 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.

CONCLUSION

As this volume illustrates, civil society generally, and NGOs in particular, have played and continue to play an important role in ensuring the optimal effectiveness and success of the African regional human rights system and its aim to prohibit and prevent torture and other ill-treatment in Africa.

Academic engagement has been insufficient, however. No comprehensive text regarding this topic has been published. It is necessary that universities and research institutions prioritise these issues in their activities, and thereby contribute to awareness-raising and creative solutions.

Where possible, NGOs must include torture and other ill-treatment of detainees and prisoners in their domestic programmes. It is ultimately through the work of NGOs that the provisions of the Charter are converted into concrete and effective guarantees.

Regarding engagement at the regional level, NGOs are advised to pursue more actively the following strategies:

> **Standard-setting:** NGOs play a crucial promotional and lobbying role in ensuring that the normative framework evolves to address human rights needs as they arise. NGOs have already contributed to the normative expansion of the Charter. Consideration should be given to the possibility of drafting a set of binding norms on torture to supplement the substantive content of the Charter and the non-binding Guidelines adopted by the Commission.
>
> **Observer status:** NGOs that have not yet done so should consider applying for observer status with the African Commission. Keeping informed of developments and being present at Commission sessions provide NGOs with an opportunity to impact the work of the Commission, to engage with States and to raise awareness about these issues in public sessions.
>
> **State reporting:** NGOs should monitor State compliance with reporting obligations under Article 62 of the Charter, and should spearhead debate on the potential of these reports. When a report is prepared, NGOs should attempt to become involved in its drafting. If excluded from the drafting process, or if crucial issues are silenced in the report, NGOs should collaborate to produce 'shadow' or parallel reports and

submit them to the Commission. Commissioners should be lobbied before the examination of reports to ensure that pertinent questions are raised. When 'concluding observations' are issued, NGOs should obtain copies and integrate them into their programmes of action. When a State submits a later report, these 'concluding observations' should serve as starting points to measure progress. When a State does not report at all, this fact, together with the importance of the state reporting procedure, should become a matter of public debate.

Individual complaints ('communications'): NGOs should provide legal assistance to victims of torture and other ill-treatment at the domestic level. If domestic remedies fail or are inaccessible, NGOs should submit individual communications to the African Commission. The complaints procedure provides a means to focus international attention on human rights violations in a State by allowing for a finding of an independent body, the African Commission. Such a finding serves both as an impartial assessment and as a potential source of remedy. With the advent of the African Human Rights Court, the possibility of approaching the Court should also be explored.

The African Charter allows for wide standing before the African Commission: both individuals and NGOs may submit cases on their own behalf, but also on behalf of another person, even without that person's express authorisation.

When a complaint has been submitted, it first proceeds through the admissibility phase. The main requirement is that the complainant must have exhausted local remedies at the national level. However, adopting a progressive approach, the Commission has quite often exempted complainants from attempting to obtain remedies before national courts, such as in a situation of massive or serious violations of human rights in the respondent State. Nevertheless, when NGOs are involved in the submission of complaints, they must provide as much information as possible about what remedies have been exhausted domestically, or explain fully why these remedies have not been used.

If a communication has been declared admissible, it proceeds to the second phase, during which the merits are considered. The Commission then decides whether a violation has occurred. As of this writing, most of the communications alleging torture and ill-treatment have revealed

serious human rights violations, particularly during detention. Article 5 of the Charter forms the clearest substantive basis for a complaint regarding torture or other ill-treatment. Other findings of violations have related to forms of punishment or non-compliance with fair trial guarantees.

If a violation is found, the Commission may proceed to a third phase, during which it considers an appropriate remedy.

NGO involvement with communications does not end after a favourable finding has been made. Because the Commission's recommendations are not formally legally binding on States, some efforts are often required to ensure that States give effect to the recommended remedies. This process, sometimes referred to as "follow-up" (or "implementation"), frequently plays itself out in the political, rather than the legal, arena. Social mobilisation and mass participation may strengthen the hand of an NGO trying to convince a State to comply with a recommendation that entails some economic or political cost to the government.

It is anticipated that the decisions of the African Human Rights Court will be more effectively implemented, given that the Court's findings will be unequivocally binding on States that have accepted the Court Protocol.

Special mechanisms: The Commission has set up two special mechanisms that are of particular relevance: the Special Rapporteur on Prisons and Conditions of Detention in Africa, and the Follow-up Committee to ensure the effective implementation of the Robben Island Guidelines. NGOs should engage with these mechanisms by providing them with information when they undertake visits or studies.

Promotional activities: The Commission has always emphasised that its eleven members cannot alone shoulder the responsibility of promoting the Charter and the importance of the issues highlighted here. NGOs should supplement their domestic promotional activities (such as translation of regional norms into indigenous languages, for instance) by supporting the Commission's efforts, when possibilities arise.

The magnitude of the task should not invite despair, but should encourage NGOs to forge collaboration with each other and with other important role players such as media institutions, academic and research centres and national human rights institutions.

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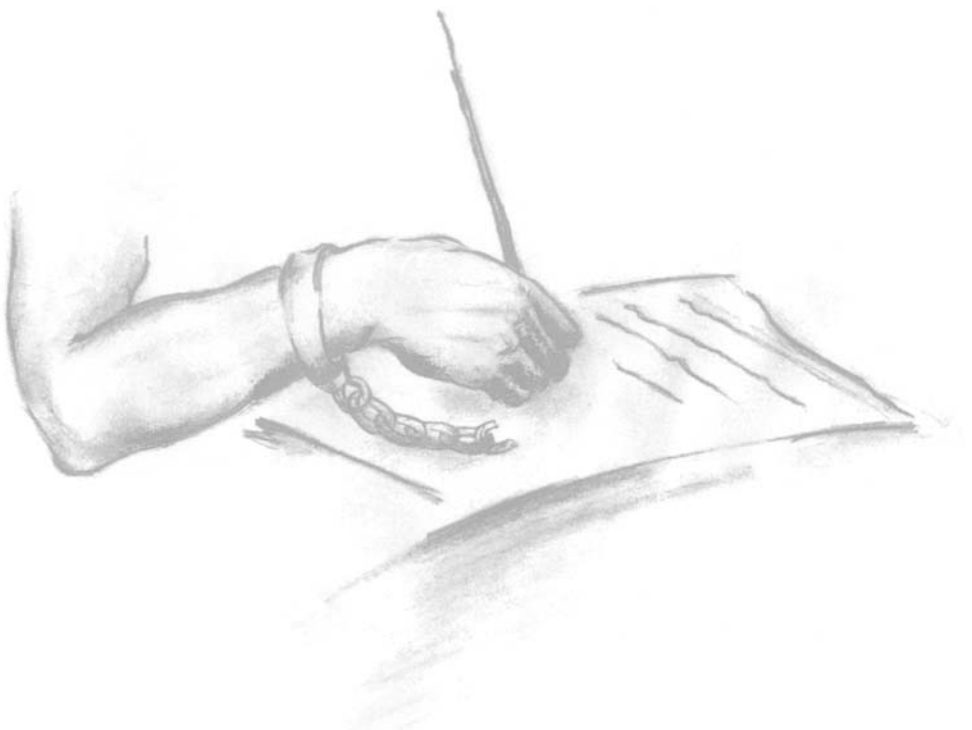

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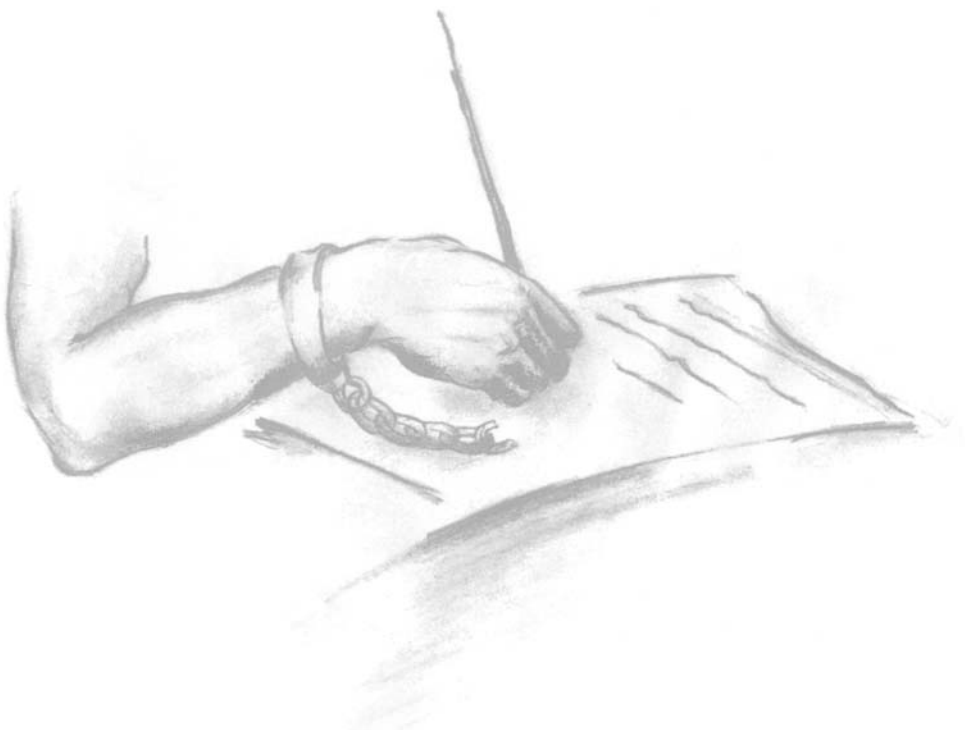
APPENDICES



AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS*

PREAMBLE

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;

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* Available on the websites of the African Commission and the African Union: www.achpr.org and www.africa-union.org

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.

SAMPLE COMMUNICATION: INTRODUCTORY 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
Garden City, App. 11
Cairo
Egypt
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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 Istiqbal 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 Libertes/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 Pagnoulle (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 defama-

tion. 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 No32471/2004, 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.

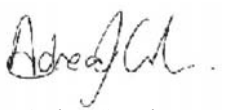
Conclusion

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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African Commission on Human and Peoples' Rights
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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 form 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 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

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.

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* Available on the websites of the African Commission and the African Union: www.achpr.org and www.africa-union.org

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. 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.

GUIDELINES AND MEASURES FOR THE PROHIBITION AND PREVENTION OF TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN AFRICA (THE ROBBEN 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 Treaties 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.

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* Available on the websites of the African Commission and the African Union: www.achpr.org and www.africa-union.org

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) .

E. 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.

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 [,] NG0s 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.

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* Available on the websites of the African Commission and the African Union: www.achpr.org and www.africa-union.org

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.

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