SAFEGUARDING THE RIGHT TO FREEDOM FROM TORTURE IN AFRICA: THE ROBBEN ISLAND GUIDELINES

A DISSERTATION SUBMITTED TO THE CENTER FOR HUMAN RIGHTS, FACULTY OF LAW, UNIVERSITY OF PRETORIA IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF A MASTER OF LAWS DEGREE (LLM IN HUMAN RIGHTS AND DEMOCRATISTION IN AFRICA)

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DECLARATION

I, **Mujuzi Jamil Ddamulira,** hereby declare that this dissertation is original and has never been presented in any other academic institution. Where other people's works have been used and or referred to, acknowledgments have been made. It is in this regard that I declare this dissertation as my brainchild.

Signed ……..

Date …….

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Signature ……

Date……..

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DEDICATION

To all torture victims on the Africa Continent.

Together against Torture.

LIST OF ABBREVIATIONS

AARACHPR Annual Activity Report of the African Commission

APT Association for the Prevention of Torture

CAT Convention against Torture

CEDAW Convention on the Elimination of all forms of Discrimination against Women

CRC Convention on the Rights of a Child

HRC Human Rights Committee

ICC International Criminal Court

ICCPR International Covenant on Civil and Political Rights

ICTR International Criminal Court for Rwanda

OPCAT Optional Protocol to CAT

PARA Paragraph

RIG Robben Island Guidelines

SCSL Special Court for Sierra Leone

SR Special Rapporteur

SRP Special Rapporteur on Prisons

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CHAPTER I

1.0 Introduction

1.1 Background to the study

When African states were under colonisation, the colonial masters violated the rights of the African people – men, women and children- with impunity.[1] The protection and promotion of human rights was, however, not high on the agenda of African countries at independence. This is reflected in the 1963 Charter of the Organisation of African Unity, which does not accord the promotion and protection of human rights the status they deserve. The preamble to the OAU Charter states that the states are to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.[2] It is against that background, that many African states violated human rights in the immediate post-independence era[3] and continue to do so.[4]

More recently, African countries have taken steps to follow the world trends of the promotion and protection human rights.[5] This has resulted in the adoption of the African Charter on Human and Peoples' Rights (that has mechanisms of ensuring that human rights are promoted and protected in Africa),[6] the desire to establish the African Court on Human and Peoples' Rights, the adoption of the African Charter on the Rights and Welfare of the Child, the Grand Bay Declaration, the Protocol on the Rights of Women,

[1] In the Democratic Republic of Congo, for example, during colonialism the Belgians cut off peoples' ears and committed other forms of mutilations in cases where people could not afford to pay their rubber taxes. Women were taken hostage, children killed with guns butts and an innumerable number of men were murdered. See R Anstey, *King Leopard's Legacy: The Congo under Belgian Rule 1908-1960* (1966) 7.

[2] Article 2 (1) (e).

[3] See generally G J Naldi 'Future Trends in Human Rights in Africa: The Increased Role of the OAU?' In M Evans & R Murray (Eds) *The African Charter on Human and Peoples Rights: The System in Practice, 1986 – 2000* (2004) 1-35.

[4] This is reflected in the current human rights crisis in Darfur, Sudan.

[5] It is my opinion that the reason why Africa has followed this trend is the whole world, especially in Europe and America, is advocating for the promotion and protection of human rights. This has resulted in the adoption of international treaties (see Chapter II) and regional treaties (see Chapters III and IV).

[6] For a discussion of the work of the African Commission, see Chapter IV.

and the adoption of the Constitutive Act of the African Union. The Constitutive Act of the African Union emphasises the protection and promotion of human rights.[7]

However, one scholar has doubts whether by adopting the Constitutive Act of the African Union African leaders were genuinely committed to the protection and promotion of human rights and he is of the view that the 'treaty could actually provide a cover for Africa's celebrated dictators to continue to perpetrate human rights abuses.'[8]

Torture continues to feature as a serious human rights violation in Africa.[9] This explains why during its 32nd ordinary session held in Banjul, The Gambia, the African Commission on Human and Peoples' Rights (the African Commission) resolved to adopt the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines (RIG)).[10] This is a new development in Africa aiming at 'operationalising' article 5 of the African Charter.[11] The RIG are phrased in a seemingly ambitious language but their implementation by the African States remains doubtful because they are not legally binding. This has to be viewed in the light of the fact that many African countries are States Parties to major regional[12] and international human rights instruments[13] but human rights violations still persist.

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[7] The preamble to the Constitutive Act of the AU states that African states are 'determined to promote and protect human and peoples rights'. It also provides that it is one of the objectives of the African countries to 'promote and protect human rights in accordance with the African Charter on Human and Peoples Rights and other relevant human rights instruments' (article 3 (h)). It provides further in its principles that the Union shall function in accordance with the following principles 'the right of the Union to intervene in a member state pursuant to the decision of the Assembly in respect of grave circumstances namely: war crimes, genocide and crimes against humanity' (article 4 (h)), it further provides for the promotion of gender equality (article 4 (l)). The Constitutive Act also provides for the respect for democratic principles, human rights, the rule of law and good governance (article 4(m)), respect for sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities (article 4 (o)), and condemnation and rejection of unconstitutional change of governments (article 4(p)). For the background of the Constitutive Act of the African Union, see NJ Udombana 'A Harmony or a Cacophony? The music of integration in the African Union Treaty and the New Partnership for Africa's Development', (2002) 13 *Ind. Int'l L & Comp. L. Rev*. 185, paras 206-209.

[8] NJ Udombana 'Can the leopard change its spots? The African Union Treaty and Human Rights', (2002) 17 *Am. U. Int'L.Rev.*1177, para 1183.

[9] See Chapter IV.

[10] For the background and a detailed discussion of the Robben Island Guidelines see Chapter IV.

[11] Article 5 prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment (see Chapter IV).

[12] See Chapter IV.

1.1.1 Definition of torture

The exact meaning of torture is still debated in the academic world.[14] Torture is differently defined in the Convention against Torture[15] and in the Inter-American Convention to Prevent and Punish Torture.[16] However, for the purposes of this discussion, the definition of torture in the Convention against Torture (article 1) will be adopted. Torture is defined to mean,

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

1.1.2 The right to freedom from torture as *jus cogens*

Jus cogens is a technical name given to the basic principle of international law which States are not allowed to contract out of.[17] The concept of *jus cogens* is founded 'upon an acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in the domestic legal orders.'[18] Some examples of *jus cogens* have been given particularly during the discussions by the International Law Commission on the topic, and they include unlawful use of forces, piracy, slave trading[19] and, recently, torture.[20]

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[13] See Chapter II.

[14] See A Cullen 'Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights' (2003) 34 *Cal. W. Int'l L.J. 29*, where he calls for a need for a less definitive and broader view of the concept of torture; E Gross 'Legal Aspects of Tackling Terrorism: the Balance of the Right of a Democracy to Defend itself and the Protection of Human Rights' (2001) 6 *UCLA .J. Int'l L. & Foreign Aff*. 89, who argues that there is no clear definition of the term torture. His argument is based on the fact that in *The Republic of Ireland v The United Kingdom case* (see Chapter III, 3.3.2), judges at the European Court of Human Rights did not agree on the exact meaning of the term torture ,see para 94.

[15] See Chapter II, 2.2.1.

[16] See Chapter III, 3.2.4.

[17] See articles 53, 64 and 71 of the 1969 Vienna Convention on the Law of Treaties

[18] MN Shaw *International Law* (4th Ed) (1997) 97.

[19] As above.

[20] HJ Steiner & P Alston *International Human Rights in Context: Law, Politics, Morals* (2nd Ed) (2000), 77. The authors argue that at present very few rules pass the test of *jus cogens* and that torture is one of them.

For a rule to qualify as *jus cogens*, a two stage approach is involved in the light of article 53:[21] the first is the establishment of the proposition as a rule of general international law and, second, the acceptance of that rule as a peremptory norm by the international community of States as a whole.[22] The fact that torture is a *jus cogens* has practical consequences for the community of States in general and for the African States in particular. The House of Lords, in *Ex Parte Pinochet Uguarte* [2000], observed that 'the *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture whenever it is committed.' [23] The only correct interpretation that can be given to the above observation is that every State has a duty to punish the crime of torture for so long as the perpetrators are within the jurisdiction of that State. It does not matter whether the offence was committed within that State or in another State. It also does not matter whether the crime was committed against the nationals of a particular State or not.[24]

State immunity[25] is not a defence in cases where torture has been alleged. According to *Jones v. Saudi Arabia*,[26] victims of Saudi torture could claim compensation in the United

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[21] See n 17 above.

[22] See n 18 above. In *Siderman de Blake v. Republic of Argentina* 965 F.2d 699 (9th Cir. 1992) where the Sidermans sued the government of Argentina in the United States court for, *inter alia,* torture, the Ninth Circuit Court of Appeals rightly observed, para 717, that '[t]hat States engage in official torture cannot be doubted, but all States believe it is wrong, all that engage in torture deny it, and no State claims a sovereign right to torture its own citizens…under international law, any State that engages in official torture violates *jus cogens.*' See also MJ Leavy 'Discrediting Human Rights Abuse as an ' Act of State' : A Case study on the Repression of the Falun Gong in China and Commentary on International Human Rights Law in U.S. Courts' (2004) 35 *Rutgers L.J*. 749, para 780.

[23] *Ex Parte Pinochet Uguarte (NO.3*) [2000] 1 A.C. 147,198 (H L. 1999), see also DM Amann 'Abu Ghraib' (2005) 153 *U. Pa. L. Rev.* 2085, para 125.

[24] J Bacchus 'The Garden' (2005) 28 *Fordahm Int'l L.J*. 308, para 332.

[25] It is a principle of international law which is to the effect that States are equal sovereigns and that domestic courts in a given State have no jurisdiction in cases where a foreign State is the respondent. For a detailed discussion of this subject, see MN Shaw (n 18 above) 491-540. The Special Court for Sierra Leone held that 'the principle of State immunity derives from the equality of sovereign States' see, *Prosecutor v Charles G Taylor*, SCSL-2003-01-I-AR72 (E), para 51.

[26] *Jones v. Saudi Arabia* [2005] U.K.H.R.R. 57, cited in C Miéville 'Anxiety and the Sidekick State: British International Law after Iraq' (2005), 46 *Harv. Int'l L.J*.441, where the author argues that this decision was 'constructed from a complete lattice of international law, European human rights law, British human rights law, and the prohibition of torture as *jus cogens*' and that the case vividly illustrates the slippery boundaries between these various elements, see para 451. See also *Siderman de Blake v. Republic of Argentina* (n 22 above).

Kingdom despite Saudi Arabia's claim of State immunity. It has been rightly stated that the prohibition upon torture prevails over State immunity because of the normative characteristics of that prohibition, not because the rules on State immunity should or should not allow this.[27] It is also vital to note that ex-heads of State cannot claim immunity from prosecution for the crime of torture.[28]

Though State practice, international humanitarian law, international law and human rights law all consider torture as *jus cogens*,[29] there is an unpopular view that torture should be allowed in some situations. Professor Alan Dershowitz has, reviewing current instances where the United States has used torture, argued for example that, 'of course it would be best if we didn't use torture at all, but if the United States is going to continue to torture people, we need to make torture legal and accountable'.[30] It is submitted that the fact that a State violates its obligations under international law does not mean that other States should also follow suit. The argument that torture should be legalised because countries like the United States have disregarded their international obligations does not hold water.[31]

Bagaric and Clarke have argued that '…torture is …morally defensible, not just pragmatically desirable.'[32] Their unpopular view is based on 'the harm minimisation rationale' which is based on a hypothetical case of a terrorist leader having instigated the planting of a bomb on an aircraft which is about to explode and the police arrest him and he refuses to reveal the details of the aircraft on which the bomb was planted. It is

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[27] A Orakhelashvili, 'Restrictive interpretation of human rights treaties on the recent jurisprudence of the European Court of Human Rights' (2003) 14 *Eur. J. Int'l L.*529, para 562.

[28] Lord Browne-Wilkinson observed that the facts that torture is an offence of universal character, that the international community is obliged to outlaw and punish it and that it is committed by government officials are indicative that ex-heads of States are not immune from jurisdiction when they are being accused of torture. He said that continued immunity contradicts the Torture Convention, see F Sullivan Jr., 'A Separation of Powers Perspective on Pinochet' (2004) 14 *Ind. Int'l & Comp. L.Rev.* 409, para 499.

[29] See Chapter II.

[30] As quoted in J Silver, 'Why America's Top Liberal Lawyer Want to Legalise Torture?' Scotsman (Scotland) 22 May 2004. It is quoted again in M Bagaric & J Clarke, 'Not Enough Torture in the World? The Circumstances in which Torture is morally Justifiable' (2005) 39 *U.S.F.L. Rev*. 581, para 582.

[31] Prof. A Dershowitz has been criticised, see S F Kreimer, 'Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror' (2003) 6 *U.Pa. J. Const. L*. 278.

[32] See M Bagaric & J Clarke (n 30 above).

argued by them that torture is morally defensible in such circumstances to get information and prevent the loss hundreds of lives. Good enough, the authors themselves realise that their argument is 'hypothetical' and that it 'is not the one that has occurred in the real world.'[33]

1.2 Research question

The question to be addressed in this dissertation is whether the RIG are effective in addressing the problem of torture in Africa. This question will be answered in the light of the likely challenges to the implementation of the RIG, viewed from a comparative study of the international[34] and the two other regional human rights systems[35] and their approach to safeguarding the right to freedom from torture. Africa, unlike the Inter-American and the European human rights systems, has developed a declaration rather than a treaty, to address the problem of torture. This is a development which should be examined to determine the extent to which African leaders are committed to combating torture on the continent in the light of the fact that torture is now regarded as an international crime which merits serious attention.

1.3 Research methods

Research for this dissertation has been mainly library based. This involved reading relevant textbooks, journals and human rights reports and also on the Internet for the material that could not be found in textbooks. The Association for the Prevention of Torture (APT), Geneva, was approached for the documents that preceded the adoption of the RIG[36] and those documents have been attached to this dissertation. The websites of the following organisations were also browsed for relevant information: United Nations, Office of the United Nations Commissioner for Human Rights, African Commission on Human and Peoples' Rights, Organisation of the American States, International Rehabilitation Council for Torture Victims, Centre for Human Rights (University of Pretoria), University of Minnesota, Redress, Human Rights Watch,

[33] As above para 583.

[34] See Chapter II.

[35] See Chapter III.

[36] See History of the RIG in Chapter IV, 4.4.2.

Amnesty International, European Committee for the Prevention of Torture, European Union, Organisation for Security and Cooperation of Europe, Inter-American Commission on Human Rights, Association for the Prevention of Torture and other relevant websites.

1.4 Limitation of the study

The study of the international human rights treaties and mechanisms will be limited only to that jurisprudence that is directly related to Africa. Though to date the African Commission has seventeen annual activity reports, this study will only consider seven reports, six of which are available at the African Commission's website. The 17th annual activity report, though adopted by the African Union at its Ordinary Fourth Session and the African Union allowed the African Commission to publish the report,[37] the report was not available on the Africa Commission's website at the time of the writing of this dissertation. The author was fortunately able to find an unedited version at the website of the human rights section of the University of Minnesota. The study will also be limited by the fact that to date there is no academic work, to the knowledge of the author, about the RIG.

The first to the ninth annual activity reports are not available on the website of the African Commission. With regard to the analysis of the reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa, it is only the first report (which is not detailed) that is published with the tenth report of the African Commission. The subsequent reports are not available on the website (because they are not attached to the reports). In analysing the work of the Special Rapporteur on Prisons, the author will therefore rely on secondary sources such as textbooks. Attempts by the author to get the reports from the Secretary of the African Commission were futile. The author could not travel to the African Commission, in Banjul (The Gambia), because of financial constraints.

1.5 Literature review

[37] Assembly/AU/Dec.56 (VI).

There is no literature in the form of books or articles on the RIG. This is because they have been recently adopted by the African Commission. The objective of this paper is to contribute to this area of human rights law in Africa. Much of the discussion will be based on the annual activity reports of the African Commission. In the case of the RIG, the discussion will be primarily based on the *travaux préparatoires* to which the author had access from the Association for the Prevention of Torture.[38]

Little has been written about torture in Africa. Heyns writes that 'often the Commission finds violations of article 5 on the basis of torture being practiced, but provides no more information on what actions amounted to this.'[39] This could be attributed to the fact that the African Charter does not define torture. In her book entitled 'Human Rights in Africa, From the OAU to the AU',[40] Murray does not cover torture at all. Ouguergouz[41] deals with some aspects of torture in Africa and in particular the jurisprudence of the African Commission on Human and Peoples' Rights but in a rather brief way.

1.6 Significance of the study

As mentioned above, little has been written about torture in Africa. This study aims at studying torture in detail in Africa and in particular it will look at the mechanisms and instruments in place to address torture. The study will bring to light the fact that those instruments and mechanisms in place are not sufficient to address the increasing problem of torture in Africa and it will recommend for the need for a torture-specific treaty in Africa. This is significant in a sense that if torture is to be dealt with seriously, there is a need for commitments towards that. The study has examined the international and the two regional human rights systems (European and Inter-American) to emphasise this point.

1.7 Objectives of the study

This study aims at achieving the following specific objectives:

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[38] See Chapter IV.

[39] C Heyns 'Civil and Political Rights in the African Charter' in M Evans & R Murray (n 3 above) 151.

[40] R Murray *Human Rights in Africa: From OAU to AU* (2004).

[41] F Ouguergouze *The African Charter on Human and Peoples' Practice, A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003).

1. Analysing the international human rights regime and its approach to addressing the problem of torture.
2. Analysing the two regional human rights systems, the European and the Inter-American, approach to torture. This would provide a firm background for the discussion of the African human rights system.
3. Assessing the African human rights systems and its approach to torture. Emphasis will be put on the work of the African Commission, and its strengths and weaknesses in addressing the problem of torture will be highlighted.
4. The study will indicate that the RIG are not yet effective in addressing the problem of torture in Africa.
5. The study aims at indicating that there is a need for the African countries to adopt a torture-specific treaty if torture is to be substantially minimised on the continent.
6. Lastly, the study aims at indicating that there is a need for immediate and practical steps to be taken towards the drafting and adopting of the torture-specific treaty. As a result, a treaty entitled the 'Draft African Charter for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment' is proposed, drafted and annexed to this dissertation to help African States, civil society and human rights activists to have a spring board when they are advocating for the drafting and adopting of a torture-specific treaty in Africa.

1.8 Division of chapters

Chapter I has covered the proposal which includes the background to the study, research question, research methodology, limitation of the study, definition of torture, torture as *jus cogens*, literature review, and the division of chapters. Chapter II covers a synopsis of the international instruments and mechanisms to combat torture. Chapter III deals with the European and American systems' approach to combating torture. Chapter IV covers the African Human Rights system and torture and finally Chapter V includes the general conclusion and recommendations. A draft of the recommended African Charter on the Prevention of Torture which has been drafted after looking at international, the European and Inter -American conventions on torture has been attached as the main recommendation.

CHAPTER II

A SYNOPSIS OF INTERNATIONAL INSTRUMENTS AND MECHANISMS FOR THE FIGHT AGAINST TORTURE

2.1 Introduction

The international community has developed a number of instruments and mechanisms covering different areas in an attempt to combat torture. This is reflective of the fact that there has been a determined attempt at the international level to combat torture. These instruments and mechanisms range from treaties, declarations, principles, codes of conduct, and guidelines. With treaties to which States are parties, they are obliged to respect their obligations under those treaties.[42]

Treaties apart, the question may be raised with regard to the obligations of states under the declarations, principles, codes of conduct and guidelines most of which are adopted by the United Nations General Assembly as resolutions. Ordinarily, these resolutions are not binding on member States unless they are concerned with general norms of international law.[43] It is argued that in situations where those resolutions are aimed at ensuring that measures are put in place to strengthen a State's position in observing its treaty obligations, States should be very reluctant to object to their implementation. Put the other way, though it is true that resolutions are of no binding force on the States, States should endeavour to implement them provided they are meant to ensure that all loopholes that could be exploited to violate the right to freedom from torture are eliminated. This is based partly on the fact that the right to freedom from torture has acquired the status of *jus cogens*[44] and any measure put in place to ensure its protection and promotion should be supported.

This Chapter aims at dealing with the International human rights instruments and mechanisms to combat torture. It will in particular look at the Convention against Torture (CAT), the Optional Protocol to CAT, the International Covenant on Civil and Political

[42] See Articles 2(1) (b), 11-15 of the (1969) Vienna Convention on the Law of Treaties. 'Treaties create legal obligations the observance of which does not dissolve the treaty obligation' see I Brownlie *Principles of Public International Law* (5th Ed) (1998) 12.

[43] I Brownlie as above 15.

[44] See Chapter I para 1.1.2.

Rights and International Humanitarian law among others. It is beyond the scope of this Chapter to discuss all the United General Assembly Resolutions on torture but suffice it to say that the Universal Declaration of Human Rights[45] which specifically prohibits torture[46] has acquired the status of customary international law.[47]

2.2 Main instruments

2.2.1 The Convention against Torture

The major international treaty dedicated wholly to the fight against torture is the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[48] The majority of African countries have ratified CAT[49] and this could be interpreted to mean that they realise that torture is a serious problem on the continent and there is a will to eradicate it. This treaty lays down, in detail, some of the steps that States Parties have to take to ensure that torture is brought to an end. It obliges a State Party to take effective legislative, administrative, judicial and other measures to prevent acts of torture.[50] It emphasises the absolute nature of the right to freedom from torture by providing that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.[51]

An order from a superior officer or a public authority may not be invoked as a justification of torture.[52] This treaty requires States Parties not to expel, return or extradite a person

[45] Adopted and proclaimed by the General Assembly resolution 217A(III) of 10 December 1948

[46] Article 5.

[47] See M.N.Shaw (n 18 above) 196 and I Brownlie (n 42 above) 11.

[48] Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987.

[49] Only eight African countries had not ratified CAT at the time of this publication: Angola, Central African Republic, Eritrea, Liberia, Mauritania, Rwanda, Tanzania and Zimbabwe, <http://www.unhchr.ch/pdf/report.pdf> accessed on 23 September 2005.

[50] Article 2(1).

[51] Article 2(2).

[52] Article 2(3).

to a country where there is a substantial danger that they may be tortured.[53] It requires States Parties to criminalize all acts of torture and to have jurisdiction to try torture whenever and wherever it is committed.[54] Another important aspect of this treaty is the fact that it makes torture an extraditable offence and requires States to cooperate and offer assistance in respect of criminal proceedings in the case(s) of torture.[55] It requires States Parties to educate all personnel responsible for the custody, interrogation or treatment of any person deprived of their liberty that torture is prohibited.[56]

States Parties are also obliged to keep under systematic review interrogation rules, methods and practices and also to ensure that public authorities immediately investigate allegations of torture.[57] Individuals who allege that they have been subjected to torture have a right to complain and have their cases promptly investigated, and are entitled to fair and adequate compensation in case they were subjected to torture.[58] The treaty also prohibits courts from relying on any statement that has been extracted from the accused through torturous means.[59]

2.2.1.1 The Committee against Torture

The Treaty establishes a Committee against Torture (the Committee) [60] with jurisdiction to carry out inquiries into the alleged violations of the treaty by States Parties,[61]entertain inter-State communications[62] and individual communications.[63] The Committee has

[53] Article 3.

[54] Articles 4, 5and 7.

[55] Articles 8 and 9.

[56] Article 10.

[57] Articles 11 and 12.

[58] Article 13 and 14.

[59] Article 15.

[60] Article 17.

[61] Article 20. Rules 69-84 of the Rules of Procedure of the Committee against Torture adopted by the Committee at its first and second sessions and amended at its thirteenth, fifteenth and twenty-fifth sessions, CAT/C/3/Rev.4.

[62] Article 21and rules 85-95.

carried out its inquiries in four countries under article 20 including Egypt and in the case of Egypt it was after '…Amnesty International …had notified the Committee of systematic torture practices'.[64] Unfortunately some African States entered reservations to article 20,[65] and Burundi does not recognise inter-state communications. The question that remains to be answered is why is it that it is only Tunisia that has been brought before the Committee by individuals who allege the violation of the treaty, yet all African countries parties to CAT recognise this procedure?[66] It could be because the violations, where they take place, are addressed through local remedies, because civil society in those countries is not strong enough, or because States Parties have not created awareness about CAT amongst its population. It could also be attributed to the fact that the Committee has not taken endeavours to create awareness of its existence in States Parties or that victims use other available bodies like the African Commission. All these possibilities would need a detailed study, which is beyond the limit of this dissertation.

2.2.2 The Optional Protocol to CAT

A very important treaty that indicates the prospect of combating the use of torture in detention facilities is the Optional Protocol to CAT (OPCAT).[67] The objective of OPCAT is to 'establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.' [68] A Subcommittee on the Prevention of Torture (a Subcommittee on Prevention) is to be established and States are required to cooperate with it for the implementation of the Protocol.[69]

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[63] Article 22 and rules 96-115.

[64] C Ingelse, *The UN Committee against Torture, An Assessment* (2001) 159.

[65] Equatorial Guinea and Morocco do not recognise the competence of the Committee under article 20. <http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm> accessed on 10 August 2005.

[66] *Mr Bouabdallal LTAIEF v Tunisia*, Communication No.189/2001, CAT/C/31/D/189/2001; *Mr Imed ABDELLI v Tunisia*, Communication No.188/2001, CAT/C/31/D/188/2001; and *B.M.B (name deleted) on behalf of Faisal Barakat and family Tunisia,* Communication No.14/1994,CAT/C/14/D/14/1994.

[67] Adopted by the UN General Assembly by General Assembly Resolution 57/199 on 18 December 2002 but it has not yet entered into force.

[68] Article 1.

[69] Articles 2, 12, and 14.

2.2.2.1 Subcommittee on Prevention of Torture

The Subcommittee on Prevention has the mandate to visit the places of detention 'and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.'[70] It also has the mandate to advise and assist States Parties to establish national preventative mechanisms, to maintain direct, and if necessary confidential, contact with the national preventive mechanisms and to offer them training and technical assistance with a view to strengthening their capacities; and to advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

The Subcommittee also has the mandate to make recommendations and observations to the States Parties with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment; and to cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organizations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.[71] The unfortunate thing is that African countries have not been eager to ratify this treaty and at the time of writing, only three African States, Sierra Leone, Senegal and Mali, have ratified this treaty. This could be attributed to the fact that it is only three years since its adoption. The author remains optimistic that more countries will ratify it.

It is argued that strengthening national preventative mechanisms is a very strong step towards the fight against torture. This is because, national entities like the national human rights commissions and non-governmental organisations are 'on the ground' and posses the capacity to visit detention facilities in any part of the country, including rural areas, where the 10 members of the Subcommittee would probably never go, and

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[70] Article 11(a).

[71] Article 11.

at a cheaper cost. However, many of these organisations lack expertise on inspecting places of detention and their networking with the Subcommittee would be of great advantage.

It is also vital to note that by linking with the Subcommittee, it is less likely that governments will harass non-governmental organisations working in the field of torture. This is because the Subcommittee could interpret that as an attempt to frustrate its work and few governments, if any, would wish to be identified with that. The Subcommittee is, however, likely to face some challenges during its work because some States in Africa maintain incommunicado detention facilities for 'security reasons' and it is unlikely that the Subcommittee will ever know about their existence and location even though it is allowed to visit 'any place, within the jurisdiction of State party where persons deprived of their liberty are being held.[72] States may also withhold relevant information regarding persons detained for security reasons, which would frustrate the working of the Subcommittee.

As discussed in chapter III, under the European system on human rights, this mechanism of visiting places of detention has been an effective way of preventing torture and the African States should be encouraged to ratify the OPCAT as soon as possible in order to introduce this mechanism.

2.2.3 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR),[73] to which many African countries are parties, also prohibits torture. Some African countries signed this treaty before it came in force, others at a later stage[74] and some have just ratified the treaty.[75] The ICCPR expressly provides in article 7 that no one shall be subjected to

[72] Article 4(1).

[73] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200(XXI) of 16 December 1966 and entered into force on 23 March 1976 in accordance with article 49.

[74] See <http://www.ohchr.org/english/countries/ratifications/4.htm>, accessed on 10 August 2005, which indicates that some African countries like Liberia, Guinea and Tunisia signed this treaty as early as 1967 and 1968 long before the treaty came into force.

[75] On 17 February 2005 Mauritania became the 154th State Party to the ICCPR. See <http://www.ohchr.org/english/bodies/hrc/ > accessed on 10 August 2005.

torture or to cruel, inhuman or degrading treatment or punishment.[76] It is worth noting that the Human Rights Committee (HRC),[77] in its General Comment 20 of 10 March 1992, has interpreted article 7 in broad terms that reflect steps that African countries party to this treaty can take to eradicate torture.

This interpretation is vital in a number of ways. In the first place, it makes it clear that article 7 has to be read together with other relevant articles of the treaty if its aim, to protect both the dignity and the physical and mental integrity of the individual, is to be fully achieved.[78] The HRC clarifies that 'the prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates, ''All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person''.'[79] This clarification is vital in a sense that those who are deprived of their liberty are more vulnerable to torture and the requirement to treat them with humanity strengthens their protection.[80]

2.2.3.1 The Human Rights Committee and torture

The HRC has also been careful not to define torture, cruel, inhuman or degrading treatment or punishment. It comments that the 'Committee [does not] consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.'[81] This approach will help to keep States constantly rethinking their punishments and treatment, in any form, so that they are not of such a nature that they would be declared by the HRC as a violation of article 7.

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[76] Article 7 also provides that no one shall be subjected without his free consent to medical or scientific experimentation.

[77] Established under article 28 of the ICCPR with the mandate to monitor the implementation of that treaty.

[78] The HRC expressly puts it that the aim of article 7 is to protect both the dignity and the physical and mental integrity of the individual, para 2 of General Comment 20.

[79] Para 2 as above.

[80] Most cases and reports of torture indicate that those in detention are more vulnerable. The HRC also indirectly observes this in para 11. The HRC also requires States to read article 7 in conjunction with article 2(3) (see para 14).

[81] Para 4.

The extension of the applicability of article 7 to protect pupils, children, and patients in teaching and medical institutions[82] applies with great force in many African countries where schools and institutions frequently mistreat pupils in the name of instilling discipline.[83] This interpretation clearly calls upon African countries to ensure that they regulate the conduct of private persons, including private schools, as their conduct could lead to the State breaching its obligation under article 7. One way through which this could be achieved is indirectly suggested by the HRC: that States should disseminate to the population at large, relevant information relating to the ban on torture and the treatment prohibited under article 7.[84]

The HRC includes, in the net of potential violators of article 7, those who encourage, order, tolerate or perpetrate the prohibited acts. Much as this may sound encouraging, it may present some difficulties when it comes to the interpretation of some of those terms. For instance, does it mean that a junior military officer who learns of the fact that a senior military officer is committing acts of torture and fails to point it out to the latter that what he is doing is wrong could be held liable as having tolerated torture and therefore acted in violation of article 7? The answer could be yes. But very few, if any, junior military officers would be in position to report to the relevant authorities their superiors commit torture.

Article 4 of ICCPR provides that the right to freedom from torture is an absolute right, which must never be suspended even 'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed…' In General Comment 5 of 31 July 1981, the HRC stated that the protection of human rights, especially the non-derogable rights like the right to freedom from torture, should be prioritised in cases of a state of emergency.

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[82] Para 5.

[83] In Kenya, Uganda, South Africa and Zambia governments have made legislative moves that outlaw corporal punishment and the judiciary has been supportive of this especially in South Africa and Uganda. However, corporal punishment still takes place in many African countries. See GO Odongo 'Kenyan Law on Corporal Punishment by Parents' (2005) *Corporal Punishment of Children in the Spot Light: Article 19* (a publication of the Children's Rights Project of the Community Law, University of the Western Cape, Vol.1, No.1) 6 who argues that corporal punishment is still practiced in Kenya. See also M O'Sullivan 'Corporal Punishment in Kenya' (2005) *Juvenile Justice Quarterly* (a publication of the CRADLE and The Regional Africa Juvenile Justice Network Vol.2, Issue 1)12.

[84] Para 10. Under para 13, the HRC makes it clear that the State has a duty to ensure that when private individuals violate article 7, they should be punished.

2.2.4 Optional Protocol to ICCPR

The Optional Protocol to the ICCPR[85]to which 35 African States are Parties,[86] gives the HRC jurisdiction to entertain communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant, provided the State recognises the competence of the HRC to receive and consider communications.[87] The right to freedom from torture being one of the rights protected under the Convention, its violations has led to many communications being filed against various African States and the HRC has in some cases found violations and ordered the respective States to compensate the victims and bring an end to torture,[88] and in others found no violations.[89]

The HRC requires that communications be filed after the authors have exhausted all the domestic remedies.[90] Authors of the communications are required to adduce sufficient evidence to the HRC that they have been victims of torture. The HRC seems to be interested in, among other things, medical evidence to be adduced if the author is to

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[85] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

[86] The following are the African States that had not ratified the Optional to the ICCPR at the time of this publication: Zimbabwe, Tanzania, Tunisia, Swaziland, Sudan, Rwanda, Nigeria, Mozambique, Morocco, Mauritania, Liberia, Kenya, Ethiopia, Gabon, Eritrea, Egypt, Comoros, Burundi, and Botswana, see <http://www.unhchr.ch/pdf/report.pdf > accessed 23 September 2005.

[87] Preamble to Optional Protocol and article 1.

[88] In *Marcel Mutezi v Democratic Republic of Congo*, Communication No.962/2001,CCPR/C/81/D/962, the DRC was held to have violated article 7 of CCPR (see para 5.3); *Albert Womah Mukong v Cameroon*, Communication No.458/1991,CCPR/C/51/D/458/1991, the HRC held that detaining the author incommunicado in inhuman conditions amounted to cruel, inhuman and degrading treatment, and Cameroon was in breach of article 7 of CCPR (see para 9.4); in *Primo Jose` Essono Mika Miha v Equatorial Guinea*, Communication No.414/1990,CCPR/C/51/D/414/1990, the State was held to have violated article 7 when the author was tortured for several days and also denied food (see para 6.4); in *Youssef El-Megreisi v Libya Arab Jamahiriya,* Communication No.440/1990,CCPR/C/50/D/440/1990, the HRC held that subjecting the author to prolonged incommunicado detention in an unknown location amounted to torture, cruel, inhuman and degrading treatment and therefore a violation of article 7 (see para 5.4); and in *Isidore Kanana Tshiongo a Minanga v Zaire,* Communication No.366/1989,CCPR/C/49/D/366/1989, where the author remained strapped to the concrete floor of his cell for close to four hours and thereafter was subjected to acts of torture, Zaire was found to have violated article 7 (see para 5.3).

[89] *Bernard Lubuto v Zambia*, Communication No.390/1990,CCPR/C/55/D/390/1990, the HRC dismissed the allegations of torture on a ground that the author had not adduced sufficient evidence (para 4.3).

[90] Article 5(2) (b) of the Optional Protocol to the ICCPR. In *Famara Kone v Senegal*, Communication No. 386/1989, CCPR/C/52/D/386/1989, the Communication was held inadmissible on the ground that the author had not exhausted domestic remedies (para 5.3).

substantiate an allegation of torture.[91] It is also vital to remember that communications that are filed against a State Party for the acts that were committed before it became a party to the treaty are not admissible, unless it can be shown that the effects of the violation still continue to affect that victim.[92]

It is argued that the HRC, or any other judicial body presiding over a case in which allegations of torture have been made, should always be conscious of the fact that torture, especially psychological torture, has long lasting effects on the victims and therefore to dismiss a communication or case on the ground that there is no evidence of continuous effects on the victim would need the intervention of psychiatrists, social-workers, and trauma counsellors. It is unfortunate that some of the African countries do not appear before the HRC to defend the communications filed against them,[93] and this brings into question their commitment to the protection and promotion of the rights in the treaty.

2.3 International Humanitarian Law

International Humanitarian Law[94] has for a long period of time endeavoured to ensure that limits are put to the manner in which an armed conflict[95] can be conducted and has, among other things, regarded the use of torture as inappropriate. Common article 3 of the Four Geneva Conventions[96] provides that cruel treatment and torture 'shall remain prohibited at any time and in any place whatsoever.' It should be mentioned that all

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[91] In *Primo Jose Essono Mika Miha v Equatorial Guinea* (n 88 above) the HRC relied heavily on the medical evidence adduced by the author to hold the State to have breached article 7.

[92] *A.I.E (name deleted) v Libyan Arab Jamahiriya*, Communication No.457/1991,CCPR/C/43/D/457/1991.

[93] *Nina Mutabe and another v Zaire*, Communication No.124/182,CCPR/C/22/D/124/1982, Zaire never submitted any clarifications despite the constant reminders by the HRC.

[94] For a detailed analysis of the history and purpose of International Humanitarian Law see F Kalshoven & L Zegveld, *Constraints on the Waging of War, An Introduction to International Humanitarian Law* (3rd Ed) (2001) 11-36 and LC Green *The Contemporary Law of Armed Conflict* (2nd ed)(2000) 20-53.

[95] International Humanitarian Law distinguishes between a Non-International Armed Conflict and an International Armed Conflict.

[96] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, all of 12 August 1949.

African countries have ratified the Four Geneva Conventions[97] and scholars of humanitarian law,[98] international law[99] and human rights law[100] agree that the many provisions of the Four Geneva Conventions and the two Additional Protocols are now part of Customary International Law. The Two Protocols Additional to the Geneva Conventions[101] also prohibit torture.[102] It is vital to note also that all African countries apart from Eritrea, Morocco, Somalia and Sudan are Parties to Protocol I[103] and that a apart from the above - mentioned four countries and Angola, all the African countries are parties to Protocol II.[104]

2.3.1 The International Criminal Tribunal for Rwanda and torture

The international community, and Africa in particular, has taken the issue of international humanitarian law seriously, and this is reflected, as mentioned above, in fact that all African countries are States Parties to the Four Geneva Conventions and that only a few States[105] have not ratified the Two Additional Protocols, and also in the two tribunals (the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone) that

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[97] <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf >accessed on 04 August 2005.

[98] See generally JM Henckaerts and L Doswald-Beck (Eds), *Customary International Humanitarian Law, Volume II: Practice, Part 2* (2005), and T Meron, 'The Geneva Conventions as Customary International Law' (1987) 81 Am .*J.Int'l L*.348.

[99] T Voon 'Pointing the finger: Civilian Causalities of the NATO Bombing in the Kosovo Conflict' (2001) 16 *Am.U.Int'l L.Rev*.1083, where its argued that 'it is widely accepted that the rules contained in the Fourth Geneva Convention and many of the rules in Additional Protocol I have attained the status of customary international law' (para 1092).

[100] D Jinks & D Sloss, 'Is the President Bound by the Geneva Conventions?' (2004) 90 *Cornell L.Rev*.97, where it is argued that the Geneva Conventions have become part of customary international law (para 168).

[101] For the history of these two Protocols, see F Kalshoven & L Zegveld (n 94 above) 83-154.

[102] See article 75(2) (a) (ii) of Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), of 8 June 1977 and article 4(2) (a) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), of 8 June 1977.

[103] See n 97 above.

[104] As above.

[105] As above.

have been established in Africa[106] to try war crimes and crimes against humanity which include acts of torture.

The International Criminal Tribunal for Rwanda (ICTR) based in Arusha - Tanzania, was established with 'the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994 …'[107]

The ICTR has jurisdiction to try those who committed crimes against humanity that include torture[108] as well as those who violated common article 3 to the Four Geneva Conventions by, among other things, committing acts of torture.[109] In some of its decisions, the Tribunal has found the accused guilty of torture and has convicted them accordingly.[110]

2.3.2 The Special Court for Sierra Leone and the International Criminal Court and torture

Another tribunal, the Special Court for Sierra Leone (SCSL) based in Freetown, Sierra Leone, was established to 'prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the

[106] The Nuremberg and Tokyo Tribunals were the first to be established to try those who committed atrocities during World War II. They were followed by the one in The Hague to put on trial individuals who committed breaches of International Humanitarian Law in the Territory of the Former Yugoslavia, but further discussion of these tribunals is beyond the scope of this dissertation.

[107] Article 1 of the Statute of the International Criminal Tribunal for Rwanda. This statute was introduced through an Annex to UN Doc S/RES/955/ (1994).

[108] Article 3(f) as above.

[109] Article 4(a) as above.

[110] See *The Prosecutor v Jean- Paul Akayesu,* Case No. ICTR –96-4-T (paragraphs 593-595,599,681-683 where the accused was convicted of torture); *The Prosecutor v Laurent Semanza*, Case No. ICTR-97-20-T (paragraphs 439, 479-505 where the accused was convicted of perpetrating and instigating torture); *The Prosecutor v Omar Serushago,* Case No. ICTR-98-39-S (paragraphs 4, 9, 26, 35 and 42 in which the accused pleaded guilty to torture, among other crimes, and was convicted and sentenced accordingly).

peace process in Sierra Leone.'[111] All the accused are charged with the 'crimes against humanity, violation of article 3 common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law in violations of articles 2, 3 and 4 of the Statute….'[112] The Rome Statute of the International Criminal Court (ICC)[113] which, at the time of this publication has been ratified by 27 African countries,[114] also prohibits torture and gives the ICC jurisdiction over a range of crimes including torture.[115]

2.4 Other instruments

2.4.1 Convention on the Rights of the Child

Another treaty that prohibits torture is the Convention on the Rights of the Child (CRC).[116] It is believed to be the most ratified treaty in the world and all African countries but Somalia have ratified it.[117] It provides in the relevant part that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.[118] The CRC establishes a Committee on the Rights of the Child,[119] which has jurisdiction to

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[111] Article 1(1) of the Statute of the Special Court for Sierra Leone.

[112] Both articles 2 and 3 mention torture as an offence. See *The Prosecutor v Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* Case No.SCSL-03-14-1, Indictment (Civil Defence Forces); *The Prosecutor v Issa Hassan Sasey, Morris Kallon and Augustine Gbao,* Case No.SCSL-2004-15-PT, Indictment (Revolutionary United Front); *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santiegie Borbor Kanu,* Case No.SCSL-2004-16-PT, Indictment (Armed Forces Revolutionary Council); *The Prosecutor v Charles Ghankay Taylor,* Case No.SCSL-03-01, Indictment; and *The Prosecutor v Johnny Paul Koroma (also known as JPK),*Case No.SCSL-03-I, Indictment.

[113] Adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, and entered into force on 01 July 2002.

[114] African countries that had ratified the Rome Statute by 12 May 2005 are: Burkina Faso, Senegal, Ghana, Mali, Lesotho, Botswana, Sierra Leone, Gabon, South Africa, Nigeria, Central African Republic, Benin, Mauritius, Democratic Republic of Congo, Niger, Uganda, Namibia, The Gambia, Tanzania, Malawi, Djibouti, Zambia, Guinea, Congo, Burundi, Liberia and Kenya, see <http://www.icc-cpi.int/region&id=3.html> accessed on 23 September 2005.

[115] Article 7(1) (f) and 8(2) (ii).

[116] It was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

[117] Somalia became a signatory on 9 May 2002, <http:// www.unhchr.ch/pdf/report.pdf> accessed on 06 August 2005.

[118] Article 37(a).

[119] Article 43.

examine reports submitted by the States Parties on its implementation.[120] It has issued two General Comments that call upon States, among other things, to ratify and respect their obligations in almost all human rights instruments, including those dealing with torture.[121]

2.4.2 Convention on the Elimination of all Forms Racial Discrimination

The International Convention on the Elimination of all Forms of Racial Discrimination[122] also indirectly prohibits torture when it recognises the right to security of person and protection by State against violence or bodily harm. Government officials, individuals or groups of individual are obliged to respect this right.[123] This provision, unlike article 1 of CAT,[124] puts obligations on individuals, whether acting in their official or private capacity to respect this right. All African countries but Angola are party to this treaty.[125]

2.4.3 Convention on the Elimination of all Forms of Discrimination against Women

The Convention on the Elimination of all Forms of Discrimination against Women,[126] to which, as of 18 March 2005, all-African countries but Somalia and Sudan are States Parties,[127] does not directly prohibit torture but, among other things, it outlaws gender-

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[120] Article 44.

[121] General Comment No.6 (2005) on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6 UNEDITED (para f) ; and Annex I to General Comment No.5 (2003), General Measures of Implementation of the Convention on the Rights of the Child (articles 4, 42 and 44 para 6), CRC/GC/2003/5.

[122] It was adopted and opened for signature and ratification by General Assembly resolution 2106(XX) of 21 December 1965 and entered into force on 4 January 1969.

[123] Article 5(b).

[124] Article 1 of CAT only prohibits torture by people in official capacities. See definition of torture in Chapter (1.1.1).

[125] <http://www.unhchr.ch/pdf/report.pdf> accessed on 06 August 2005.

[126] It was adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981.

[127] See <http://www.un.org/womenwatch/daw/cedaw/states.htm > accessed on 23 September 2005.

based violence. In its General Recommendation 19 on Violence against Women,[128] the Committee on the Elimination of Discrimination against Women (CEDAW Committee)[129] recommended that among the rights women are entitled to enjoy, is the right to freedom from torture.[130] The Committee also examines reports submitted by States parties on the implementation of the treaty, and some States reported on the measures they have taken to protect the right to freedom from torture of women in their jurisdictions.[131]

2.4.4 Convention on Apartheid

The International Convention on the Suppression and Punishment of the Crime of Apartheid[132] defines policies and practices of Apartheid to include the infliction upon the members of a racial group or groups of serious bodily or mental harm, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.[133] Many African countries, apart from Kenya and needless to say South Africa (at whom the treaty was originally aimed) are party to this treaty.[134]

2.4.5 Convention on Migrant Workers and Members of Their Families

[128] CEDAW General Recommendation 19, A/47/38 (on Violence against Women).

[129] Established under article 17.

[130] Para 7(b).

[131] Algeria in its Initial Report mentioned measures that had been taken to protect women against torture. See CEDAW/C/DZA/1 of 01 September 1998. However, many States restrict their reporting to the provisions on the implementation of the provisions in the treaty and the right to freedom from torture is never mentioned. See combined 4th and 5th periodic report by Angola CEDAW/C/AGO/4-5 of 08 June 2004 and combined Initial, 2nd, 3rd, 4th and 5th periodic reports by Congo, CEDAW/C/COG/1-5 of 08 April 2002.

[132] Adopted and opened for signature and ratification by General Assembly Resolution 3068(XXVIII) of 30 November 1973 and entered into force on 18 July 1978.

[133] Article II (ii).

[134] <http://www.unhchr.ch/html/menu3/b/treaty8_asp.htm> accessed on 06 August 2005.

The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[135] which has been ratified by 13 African countries,[136] provides that 'no migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[137] To protect the rights of the migrant workers and their families, the treaty establishes the Committee on the Protection of the Rights of the Migrant Workers and Members of Their Families.[138] This Committee has jurisdiction to examine periodical reports relating to the implementation of the provisions of the treaty and make comments,[139] the treaty establishes an inter-state communications procedure,[140] and an individual communication procedure.[141]

2.5 Conclusion

The above discussion has covered the extent to which the international community is committed to the fight against torture and has illustrated that African countries have actively participated in this campaign, not only by ratifying a number of instruments but also by utilising the mechanisms established by those instruments. It is argued that all mechanisms complement each other in order to achieve the promotion and protection of human rights. However, there is still a gap between the ratification of the treaties by the African States and the implementation of the treaty provisions in many countries. This is reflected by the fact that human rights abuses, especially the violation of the right to freedom from torture, are a daily activity in many African States as will illustrated in Chapter IV. The fact that the violation of the right to freedom from torture seems to be occurring on a larger scale in Africa is unfortunate when viewed in the light of the other human rights systems, in particular the European system, discussed in the next Chapter, where it has reduced drastically.

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[135] Adopted by General Assembly Resolution 45/158 of 18 December 1990 and entered into force on 01 July 2003.

[136] These countries are: Algeria, Burkina Faso, Cape Verde, Egypt, Ghana, Guinea, Lesotho, Libya Arab Jamahiriya, Mali, Morocco, Senegal, Seychelles, and Uganda. <http://www.ohchr.org/english/countries/ratification/13.htm> accessed 25 September 2005.

[137] Article 10.

[138] Article 72.

[139] Article 74.

[140] Article 76.

[141] Article 77.

CHAPTER III

AN APPRAISAL OF THE INTER-AMERICAN AND THE EUROPEAN SYTEMS OF HUMAN RIGHTS ON TORTURE

3.1. Introduction

The protection of the right to freedom from torture is not confined to the international level. The three regional human rights systems, the Inter-American human rights system, the European human rights system and the African human rights system have both general human rights instruments that specifically contain provisions that prohibit torture, and also have torture-specific instruments. These aim at ensuring that the regional mechanisms monitor States alongside the international human rights mechanisms.

Both the Inter-American system and the European system of human rights have been the subject of innumerable literary works and considerable effort has been dedicated to the evaluation of those two systems. As will be discussed later in Chapter IV, in the African system of human rights, however, not much has been written about torture apart from reports compiled by international human rights organizations like Amnesty International and Human Rights Watch. The rationale behind including the Inter-American and the European systems of human rights in this piece of work is for comparative purposes. It aims at critically analysing how those two systems work differently to achieve the same objective - combating torture.

This Chapter will cover the human rights systems in the two regions with specific reference to torture. It will evaluate the instruments that are dedicated to the promotion and protection of the right to freedom from torture and the mechanisms.

3.2. The Inter-American system of human rights and the right to freedom from torture

3.2.1 The American Declaration of the Rights and Duties of Man

The American Declaration of the Rights and Duties of Man[142] provides in article XXV that 'every individual … has a right to humane treatment during the time he [she] is in custody.' The strength of this provision lies in the fact that it is those who are deprived of their liberty that are most vulnerable to torture. As discussed earlier (Chapter II, 2.2.2.3), torture in almost all cases is inflicted on people when they are in custody. Article XXVI entitles to every person the right 'not to receive cruel, infamous or unusual punishment.' It does not specifically enact against torture, but it can be interpreted in broad terms to include torture because all methods of torture are cruel, infamous and unusual[143] and aim at making an individual lose their dignity.

The Inter-American Commission on Human Rights[144] (the Commission) (the enforcement body of the Declaration together with the Court) seems to have come to the conclusion that article XXVI could be interpreted to encompass torture in a number of cases alleging the violations of articles XXV and XXVI.[145] Both the Commission and the Inter-American Court (the Court) have held that today, the Declaration, though adopted not as a legally binding treaty, is a source of international obligations for the Organisation of American member States.[146] That notwithstanding, it was apparent that the Declaration had not provided enough protection with regard to among other rights,

[142] Adopted by the Ninth International Conference of American States, at Bogotá, Columbia, 1948.

[143] They include severe beatings; use of electric shocks devices; '*falanga*' - thrashing the sole of the feet; sexual abuse and rape; asphyxiation ('*submarino*') through near – death suffocation by excrement or contaminated water; ordering others to torture the victim; burning; and the use of mind-altering drugs. See C de Than & E Shorts, *International Criminal Law and Human Rights* (2003) 182.

[144] Which was created at the Fifth Meeting of Consultation of Ministers of Foreign Affairs at Santiago, Chile, 1959. For a brief history of the Inter-American Commission on Human Rights see, *The Basic Documents Pertaining to Human in the Inter-American System, General Secretariat of the Organization of the American States* (updated to May 2004) 6-9.

[145] See Case No.1757 (Bolivia) - where the Commission found that many women had been interned in concentration camps and prisons where they had been tortured, Communication dated 18 November 1972; Case No.1805 (Cuba) where the Commission found that many political prisoners had been tortured in Cuba; Case 1790 (Chile) where the Commission found that torture resulted in the subsequent death of Dr Enlique Paris Loa, former advisor to the President of Chile, who was publicly tortured; and Case No.1874 (Cuba) where the Commission found that there was evidence that the corpse of the deceased showed signs of beatings and torture. Annual Report 1975 Section 2-Part III, OEA/Ser.L/V/II.37, Doc.20 corr.1.

[146] See Inter-American Court of Human Rights, Advisory Opinion OC-10/89, *Interpretation of the American Declaration on the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights (Requested by the Government of the Republic of Colombia*), July 14, 1989, para 35-45; and recently in *Omar Humberto Maldonado Vargos et al. v. Chile*, 09 March 2005, Petition 285/03,Report 6/05 (where at para 22 the petitioners argued that the American Declaration was a source of international obligation for Chile and the Court did not dispute it).

the right to freedom from torture. There was therefore a need for a treaty to be drafted to ensure that torture was specifically mentioned, because, as has been indicated above with regard to the cases that were brought before the Commission, torture was on the increase.

3.2.2 The American Convention on Human Rights

In 1969, the Inter-American States adopted the American Convention on Human Rights,[147] which specifically provides that 'no one shall be subjected to torture or cruel, inhuman, or degrading punishment or treatment.'[148] It is argued that this was a crucial step in the fight against torture in two respects. First, unlike the American Declaration, this treaty specifically prohibits torture. Second, it was clear to the States that when they ratified this treaty, they were among other things required to ensure that 'all persons subject to their jurisdiction'[149] are not tortured.

The American Convention establishes the Inter-American Court of Human Rights[150] with the jurisdiction to preside over 'all cases concerning the interpretation and application of the provisions of the …Convention that are submitted to it….'[151] This ensures that the right to freedom from torture is not only provided for under the treaty, but that mechanisms are put in place for its enforcement. It is vital to note that during the period between which the American Convention was adopted and when it came into force, torture was still on the increase in this hemisphere.[152] Cruel methods were being used which led the Commission in one of the cases to observe that

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[147] Signed at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969 and entered into force on 18 July 1978.

[148] Article 5(2).

[149] Article 1(1).

[150] Chapter VIII of the American Convention on Human Rights.

[151] Article 62 (3).

[152] Case No.1802 (Paraguay); Case No. 2006 (Paraguay) - the Commission observed that the victims had been brutally tortured; Case No.2018 (Paraguay); Case No.2021 (Paraguay) the Commission observed that many cases of torture against women, the sick and the elderly had been reported; Case No.2029 (Paraguay) - the Commission observed that the victim Mariä Candelaria Ramirez, 'lost her unborn child under torture' by the Investigation Department; and in Case No.1870 (Uruguay) – the Commission observed that a professor of literature was 'tortured and killed all within a period of 10 hours on Saturday June, 29 1974'. See Annual Report 1977; Section 2-Part III, OEA/Ser.L/V/II.43, Doc.21 corr.1.

This is a case of an individual apprehended in a state of health and returned dead after having undergone tremendous punishment and torture for who knows how long, with marks on his body that bespeak the cruelty, the pathology, the malignancy, the barbarity and the savagery that, because of the acts committed, in some way typify his captors.[153]

3.2.3 The Inter-American Commission and the Court

As mentioned earlier, the Convention establishes the Inter-American Court with jurisdiction to interpret and oversee the application of the Convention. It requires States to make a declaration accepting the jurisdiction of the Court 'on all matters relating to the interpretation or application of [the] Convention.'[154] It is noteworthy that many countries accepted the jurisdiction of the Court only at a later stage.[155] The delay by the countries in accepting the jurisdiction of the Court has no serious impact on the protection of the right to freedom from torture, as the Commission continues finding violations basing on the Declaration and the American Convention.[156]

The strength of the Inter-American system also rests on the fact that even those countries like the United States that have never ratified the Convention which specifically prohibits torture, have been brought before the Commission on allegations of violation of the right to freedom from torture. The Commission, based on its broad interpretation of articles XXV and XXVI of the American Declaration, has either declared the communications admissible or inadmissible on other grounds (not that they are not alleging a violation of the right that is not protected under the American Declaration).[157]

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[153] Case No. 1783 (Uruguay) communication dated 02 October 1975. Annual Report 1977 (as above).

[154] Article 62(1).

[155] Basic Documents Pertaining to Human Rights in the Inter-America System (updated to May 2004) 56.

[156] Report No.35/96, Case 10.832 (Luis Lizardo Cabrera/Dominican Republic), OEA/Ser.L/V/II.98 doc.6 rev, where the Commission held that the continued imprisonment of Mr. Lizardo and his solitary confinement amounted to torture (paras 85-87); Report No.127/01, Case 12.183, (Joseph Thomas/ Jamaica) OEA/Ser./L/V/II.114.doc 5 rev, the Commission found that Jamaica had violated article 5(2) of the Convention by sentencing Mr. Thomas to a mandatory death sentence.

[157] Report No.51/96, Decision of the Commission as to the Merits of Case 10.675 (United States), OEA/Ser.L/V/II.95 Doc.7 rev. in which at para 10 allegations of torture were made that some people had been tortured at national penitentiary. The problem with this case is that the petitioners did not rely on articles XXV & XXVI of the Declaration (paras10-11) otherwise the United States would probably have been found to have violated the right to freedom from torture; Report No.57/96 Case 11.139 (William Andrews/United States of America) OEA/Ser.L/V/II.98, doc.6 rev, the petitioners argued that the death row phenomenon amounted psychological torture (para 12); and in Report No.97/03,Case 11.193 (Gary T.Graham now known as Shaka Sankoja/United States of America) it was argued that carrying out a lawfully imposed capital punishment constitutes cruel, infamous punishment and torture. The United States denied

It is unfortunate that when it comes to the Commission's exercise of jurisdiction over communications filed against the United States (US), the US seems to have no respect for the Commission especially when the Commission issues precautionary measures. In a number of cases the Commission has requested the US not to execute death sentences until the outcome of the decision of the Commission but the US has turned a deaf ear.[158] This is unfortunate because it puts the credibility of the Commission at stake and also it reflects the US as a country that has no confidence in or respect for the regional system of human rights.

3.2.4 The Inter-American Convention to Prevent and Punish Torture

For a long period, from the time the American Declaration was adopted till the time the American Convention came into force and thereafter, the Commission and later the Court dealt with cases alleging violations of the right to freedom from torture without having a clear definition of what torture was.[159] It would seem that the Commission knew that torture had been committed when the victims or the representatives of the victims alleged some facts, the cruelty of which went beyond what the Commission would have considered as cruel, infamous, unusual punishment (under the American Declaration), and later inhuman or degrading punishment (under the American Convention).

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that argument, saying that the prisoner had also committed torture on other people but the Commission found a violation of article XXVI of the Declaration (para 60).

[158] Report No.68/04, Petition 28/03 (John Elliot/ United States) where Mr. Elliot was executed despite the fact that the Commission had requested the United States to stay execution until the outcome of the decision, see OEA/Ser.L/V/II.118 Doc 5 rev 2; and in Report No.16/04, Petition 129/02 (Tracy Lee Housel/ United States) the United States did the same thing as in the Elliot case, see OEA/Ser.L/V/II.117 Doc.1 rev.2. Other countries like Venezuela have also on some occasions refused to comply with the ruling of the Commission and the Court. The Commission observed 'as regards the Inter-American system, the Commission has observed the Venezuelan State's repeated refusal to comply with the decisions of the Commission and the Inter-American Court', see OEA/Ser.L/V/II.118 Doc 5 rev.2 (para 56).

[159] Resolution No.4/87, Case 7864 (Honduras); Resolution No.5/87, Case 9619 (Honduras); Resolution No.30/86 Case 9726 (Panama); and Resolution No.18/87, Case 9426 (Peru) in OEA/Ser.L/V/II.71 Doc.9 rev.1. Resolution No.22/86 Case 7920 (Honduras) and Resolution No.3/86 Case 9170 (Nicaragua) in OEA/Ser.L/V/II.68 Doc.8 rev.1.Resolution No.05/85 Case No.9437 (Chile); Resolution No.4/84 Case No.9474 (Chile); and Resolution No.16/84 Case No.7951 (Honduras) in OEA/Ser.L/II.66 Doc.10 rev 1.

In 1985, the Inter-American Convention to Prevent and Punish Torture (the Convention to Prevent and Punish Torture) was adopted.[160] Unlike the American Declaration, which prohibited torture in express terms but without defining what it prohibited, the Convention to Prevent and Punish Torture defines torture in clear terms as

> …Any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.[161]

This definition clarified what torture is and from thereon the Commission and the Court knew what they were dealing with. It seems to be a ground breaking definition because even the International Criminal Court for the Former Yugoslavia has approved of it and relied on it.[162] Many cases have been brought before the Commission and the Court and have been adjudicated upon based on this definition.[163] The treaty also mentions which people can be held guilty of the crime of torture, but they either have to be a public servant or employee or persons acting at the instigation of a public servant.[164] It is argued by the author that this is problematic because it wrongly assumes that it is only government officials or people who act on their instigation who commit torture. Private individuals can, and indeed do, commit acts of torture and therefore they also need to be punished. The Convention to Prevent and Punish Torture renders the defence of superior orders useless[165] and makes torture a non-derogable right.[166]

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[160] Adopted at Cartagena de Indias, Colombia, on 9 December 1985, at the fifteenth regular session of the General Assembly and came into force on 28 February 1987.

[161] Article 2.

[162] See *Prosecutor v. Dragoljub Kunarac et al* Judgement of 22 February 2001, Trial Chamber II, at <http://www.un.org/icty/kunarac/trialc2/judgement/index.htm> accessed 27 August 2005 (para 476-477). Also see *Prosecutor v Dragoljub et al* Judgement of 12 June 2002 at <http://www.un.org/icty/kunarac/appeal/judgement/index.htm> accessed on 27 August 2005.

[163] See Daniel David Tibi Case (Ecuador) para 396-397 of the Annual Report of the Inter-American Commission on Human Rights 2004,OEA/Ser.L/V/II.122 Doc.5.rev.I; and Cantoral Benavidase Case (Peru) para 110, Annual Report of the Inter-American Commission on Human Rights 2000, OEA/Ser.L/V/II.111 doc.20 rev.

[164] Article 3.

[165] Article 4.

[166] Article 5.

It is important to remember, as mentioned earlier (3.2.1), that it is those deprived of their liberty that are most vulnerable to torture. Many prison warders or police officers torture prisoners or suspects on, amongst others, the ground that they (the prisoners or the suspects) are dangerous characters or are a security risk. The drafters of the Convention to Prevent and Punish Torture probably had that fact in mind and made it clear that 'neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.'[167]

This treaty calls upon States to criminalize torture and attempts to commit torture;[168] to take measures and train police officers and other persons responsible for the custody of persons to refrain from using torture during the interrogations, detentions or arrests;[169] it obliges States parties to promptly investigate any allegations of torture;[170] and also to include in their laws regulations guaranteeing suitable compensation for victims of torture as an additional measure to the right of compensation the victim may have by virtue of the existing laws.[171]

Furthermore, it makes evidence obtained through the use of torture inadmissible in courts of law except against the perpetrators of torture.[172] This is vital because it renders the use of torture for the purposes of acquiring information useless in two ways. First, this kind of evidence may never be admitted in any court of law hence it is of no use at all to acquire such evidence; and second, it puts the perpetrators at the risk of being prosecuted for the crime of torture. It would seem that if any person alleged that they were subjected to torture, the judicial body would have to hold a 'trial-within-a trial' and establish the validity of the allegations before declaring that evidence either admissible or inadmissible. States are also required to extradite persons accused or convicted of torture.[173] This provision, read together with article 12, aims at ensuring that there is

[167] Article 5.

[168] Article 6.

[169] Article 7.

[170] Article 8.

[171] Article 9.

[172] Article 10.

[173] Article 11. See also articles 13 and 14.

universal jurisdiction over the crime of torture. However, it is unlikely that States in the Inter-American System would be willing to do this when former heads of State and Governments or senior military officers are implicated.[174]

It is imperative to point out that the Inter-American Convention to Prevent and Punish Torture does not limit the provisions of the American Convention, other conventions on the subject of torture, or the Statute of the Inter-American Commission on Human Rights with respect to the crime of torture.[175] This helps to ensure that it supplements the existing human rights regime as some States are not yet Parties to the Inter-American Convention to Prevent and Punish Torture.[176]

The Commission has jurisdiction under article 17 to be informed about the measures States Parties have taken to combat torture. Article 17 enacts that 'States Parties undertake to inform the Inter-American Commission on Human Rights of any legislative, judicial, administrative, or other measures they adopt in application of this Convention.' This article is followed by another provision, which needs careful attention. It provides thus:

> In keeping with its duties and responsibilities, the Inter-American Commission on Human Rights will endeavour in its annual report to analyse the existing situation in the member states of the Organization of American States in regard to the prevention and elimination of torture.

When carefully examined, this provision gives the Commission power to impose its understanding of the appropriate measures to be taken by even States that are not party to the Inter-American Convention to Prevent and Punish Torture. In its annual reports about the situation of human rights in the OAS member countries, the Commission has always documented insistences of torture and brought them to attention, not only of the States concerned, but also of all the countries in the region through its presentation at the General Assembly.[177] This can be described as the 'name and shame' procedure

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[174] See C K Hall, 'Contemporary Universal Jurisdiction' in M Bergsmo (Ed) *Human Rights and Criminal Justice for the Downtrodden, Essays in Honour of Asbjørn Eide* (2003) 130-137.

[175] Article 16.

[176] States that have not yet ratified this treaty are Bolivia, Haiti, Honduras and Nicaragua. See <http://www.cidh.oas.org/Basicos/basic10.htm> accessed on 26 August 2005.

[177] 'Pueblo Bello Case' (José Álvarez Blanco et al) (Columbia) para 370; Case of Wilson Gutiérrez Soler (Columbia); para 371; Daniel David Tibi Case (Ecuador) paras 376-377; See Annual Report of the Inter-

which very few States, if any, are comfortable with especially in this era where the promotion and protection of human rights is the order of the day in national, regional and international politics. The Commission also conducts on-site visits and special visits in its bid to ensure that human rights are respected in the Americas. It also has Special Rapporteurs, some of whom addresses the Commission on the question of torture.[178]

The above discussion has covered the Inter-American system of human rights with specific reference to the instruments and mechanisms in place to prevent and punish torture. The definition of torture in the Inter-American Convention to Prevent and Punish Torture has not only clarified what torture is, but has also contributed to the development of this concept in international human rights law and international humanitarian law. Credit has to be given in this regard.

3.3 The European System of Human Rights and the right to freedom from torture

3.3.1 The European Convention on Human Rights

The European system of human rights, unlike the American one, clearly mentioned in its first human rights treaty that torture was prohibited. As discussed above (3.2.2), the American Convention, a treaty specifically prohibiting torture, entered into force almost 30 years after the American Declaration, and the latter had no provision specifically prohibiting torture. The European States decided to follow another route. In 1950, two years after the American Declaration, European countries adopted the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on

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American Commission on Human Rights 2004 OEA/Ser.L/V/II.122 Doc.5.rev.1 (published 23 February 2005); Mapiripán Case (Columbia) para 328 of the Annual Report of the Inter-American Commission on Human Rights 2003, OEA/Ser.L/V/II.118 Doc 5 rev.2 (published on 29 December 2003); Bulacio Case (Argentina) para 128, Juan Humberto Sánchez Case (Honduras) paras.141-142, Annual Report of the Inter-American Commission on Human Rights 2001,OEA/Ser.L/V/II.114 doc.5 rev (published 16 April 2002); Benavides Cevallos Case (Ecuador) para 96, Bácama Velázquez (Guatemala) para 97, Paniagua Morales Case (Guatemala) paras 100-111, Villagrán Morales et al ('Street Children') Case (Guatemala) para 102-103, Annual Report of the Inter-American Commission on Human Rights 2000, OEA/Ser./L/V/II.111 doc.20 rev (published 16 April 2001).

[178] Special Rapportuer Mr. Theo Van Boven addressed the Commission on the issue of torture. See para 12 (Chapter II), Annual Report of the Inter-American Commission on Human Rights 2003,OEA/Ser.L/V/II.118 Doc.5 rev.2.

Human Rights).[179] This Convention provides in clear terms that 'no one shall be subjected to torture, or to inhuman or degrading treatment or punishment.' [180]

3.3.2 Definition of torture attempted

Like the American Convention, the European Convention on Human Rights does not define torture. However, the European Commission of Human Rights attempted to develop what may be called a description (as opposed to a definition of torture as understood in article 3) in the famous *Greek case.*[181] In that case the Commission did not define torture but described all the acts committed on the victims as torture.[182] The author argues that this was not sufficient because there was a need for the Commission to define what the term was before relying on it. This would have helped to direct its conclusions in the future in a more systematic and predictable way. In *Ireland v the United Kingdom,*[183] the Commission also relied on the vague approach it had adopted in the *Greek case* to find that torture had been committed. In this case, the Commission found that the 'five techniques'[184] that had been applied to the victims amounted to torture. However, the European Court on Human Rights did not agree with the Commission and it came to an opposite conclusion. The Court, however, did not define torture, but found the techniques did not occasion suffering of the particular intensity and cruelty implied by the word torture.

Though the European Court on Human Rights has never defined torture as understood in article 3,[185] it has, thanks to the availability of the CAT at the time, partly adopted the

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[179] Signed by the States Members of the Council of Europe, at Rome, 0n 04 November 1950 and entered into force on 03 September 1963 and, as amended by Protocol No.11, on 1 November 1998.

[180] Article 3.

[181] *Greek Case*, Commission Report of 5 November 1969, Yearbook 12.

[182] The acts included *falanga* (n 143 above), severe beatings, electoral shock treatment, mock executions and threats to shoot and kill the victims.

[183] *Ireland v the United Kingdom*, 18 January 1978, Series A.no.25.

[184] Forcing the victims to stand against the walls for along period of time, hooding, deprivation of sleep, deprivation of food and drink, and subjection to noise.

[185] A Reidey, *The Prohibition of Torture: A Guide to the Implementation of article 3 of the European Convention on Human Rights, Human Rights Handbook*, No.6 (2003) 11 at <http://www.coe.int/T/E/Human_rights/hrhb6.pdf> accessed on 20 August 2005.

definition in CAT[186] in *Aksoy v Turkey*.[187] It can safely be concluded that this is an achievement because the Court, to a great extent, now knows what torture is.

3.3.3 Enforcement mechanisms for article 3

> At fifteen words, Article 3 of the Convention is one of the shortest provisions in the Convention. However, the brevity of the article should not belie its depth. National authorities cannot afford to be complacent when understanding what it means to respect and enforce this provision.[188]

The truth that lies in the above observation cannot be overstated. This has been reflected in the countless number of cases that have been adjudicated upon by both the former European Commission on Human Rights and its successor, the European Court on Human Rights.

3.3.3.1 The European Court of Human Rights

The European Court of Human Rights is established to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention…' and it is required to function on a permanent basis.[189] The jurisdiction of the European Court on Human Rights extends 'to all matters concerning the interpretation and application of the Convention…'[190] Needless to say its jurisdiction extends to matters of torture.

3.3.3.2 Inter-State procedure

The Convention provides for an inter-State complaints procedure, whereby 'any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention…by another High Contracting Party.'[191] Some States have in fact been brought before the Commission by other States on allegations that they have violated

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[186] See definition of torture in Chapter I (para 1.1.1).

[187] *Aksoy v Turkey Judgment* of 10 October 2000. See A Reidey (n 185 above) 11.

[188] A Reidey n 185 above.

[189] Article 19.

[190] Article 32.

[191] Article 33.

article 3 of the Convention.[192] It should be mentioned in passing that, like the African system under the African Charter on Human and Peoples' Rights and the International Human Rights systems which allow inter-State complaints procedures, States are very reluctant to drag other States before judicial bodies for political and diplomatic reasons. The European system is no exception either, though its jurisprudence in this regard is more developed compared to the other two regional human rights systems.[193]

3.3.3.3 Individual communications procedure

The Convention also provides for individual applications. It provides that

> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention…The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.[194]

Individuals have taken advantage of this provision and many communications alleging torture have been filed before the Court. Between 1 January 2005 and 30 June 2005 22,400 applications were lodged some of which alleged torture.[195] Between 1955 and 2004 (the period between which the Commission and later its successor the European Court of Human Rights have had jurisdiction to entertain individual complaints), a total of 341,501 individual complaints were registered many of which have alleged torture.[196]

3.3.3.4 Friendly settlements and just satisfaction

The Court has powers under article 38 of the Convention to call for friendly settlement proceedings. To ensure the effectiveness of this mechanism, the Court 'shall place itself

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[192] *Greek Case* and *Ireland v. United Kingdom* (n 181 and 183 respectively above).

[193] To date 21 State applications have been lodged in 13 cases (some of which like *Greek* and *Ireland* cases (as above) involved torture). See S C Prebensen, 'Inter-State Complaints Under Treaty Provisions- The Experience Under the European Convention on Human Rights' in G Alfredsson *et al International Human Rights Monitoring Mechanisms, Essays in Honour of Jakob Th. Möller* (2001) 535-537.

[194] Article 34.

[195] See European Court of Human Rights Statistics 2005 at <http://www.echr.coe.int/NR/rdonlyres/A1B76D3F-67C5-41F2-A254-1EC49C946F21/0/stats2005.pdf> accessed on 28 August 2005.

[196] European Court of Human Rights Survey of Activities 2004 Part V, Statistical Information at <http://www.echr.coe.int/NR/rdonlyres/461D3893-D3B7-4ED9-AC59-8BD9CA328E14/0/SurveyofActivities2004.pdf> accessed on 28 August 2005.

at the disposal of the parties concerned with the view of securing a friendly settlement of the matter on the basis of respect for human rights…' When a friendly settlement is effected, 'the Court shall strike the case out of its list ….' It should be mentioned that this is a very useful procedure because ordinarily it shows that the State has accepted its mistake and it is willing to settle the issues with the victims out of court. It also indicates that when the victims agree to settle the matter with their countries, they still believe that their country can remedy the wrong. This is advantageous, as both parties may save valuable time and money that would have been spent on a rigorous court trial. This is vital to torture victims, who in many cases need urgent treatment, counselling, rehabilitation and a guarantee of non-repetition. The Court also has the powers to order just satisfaction in cases where a violation has been established and if the internal law of the State concerned allows only partial reparation.[197]

The European Convention on Human Rights, despite the fact that it provides for the right to freedom from torture and the mechanisms to protect it, as discussed above, is not a sufficient instrument to be relied on if torture is to be fully addressed in Europe. This is because, as mentioned earlier (3.2.1), most cases of torture take place in places of detention and prisons. The European Court has always waited for a victim to approach it and allege that he/she has been subjected to torture and thereafter investigated and either found a violation or otherwise. Much as this is important, it has to be emphasised that if torture is to be prevented, there is a compelling need for the establishment of a mechanism that aims at addressing torture at its roots – particularly as regards places of detention. This means that it is vital to visit places of detention where the victims or potential victims are held, to talk to them in private, to interview the prison or police authorities, to find out whether there are instruments that may be used for torture, and to make the appropriate recommendations.

3.3.4 The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the European Convention on Torture)

[197] Article 41. For a detailed discussion of the jurisprudence of the European Court and just satisfaction see G Ress 'The effect of Decisions and Judgements of the European Court of Human Rights in the domestic legal order' (2005) 40 *Tex. Int'l L.J.*359 (paras 371-373), and J C Sims 'Compliance without remands: the experiences under the European Convention on Human Rights' (2004) 36 *Ariz. St. L.J.* 639, (paras 643-651).

The European Convention on Torture[198] supplements article 3 of the European Convention on Human Rights.[199] It expressly recognises that if torture is to be addressed, there is a need to look beyond judicial means.[200] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the Committee)[201] is established with the powers to visit places of detention and examine how persons deprived of their liberty are being treated.[202] Member States are required to cooperate with the Committee to enable it effectively carry out its visits.[203]

The Committee meets in camera[204] and in order to make its impact felt, it draws up a report about its findings and transmits it to the State Party concerned. The Committee may suggest steps to be taken to improve the protection of persons deprived of their liberty.[205] It is argued that this procedure helps to prevent a confrontational approach to preventing torture. When States are advised, as opposed to being compelled to observe their treaty obligations, they are likely to be more compliant and initiate voluntary strategies to address the problem of torture.

However, if the State Party fails to cooperate or refuses to improve the situation notwithstanding the Committee's recommendations, the Committee may decide, after the party has been given an opportunity to be heard, to make a public statement on the matter.[206] The combination of the two approaches, the friendly and the unfriendly, may be described as a carrot – stick approach. It seems that States will always find it

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[198] Signed by States Members of the Council of Europe, at Strasburg, on 26 November 1987 and entered into force entered into force on 1 February 1989 and, as amended by Protocols No.1 and 2, on 1 March 2002.

[199] In its Preamble, it states that '*having regard* to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms.'

[200] The Preamble provides that '*convinced* that the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventative character based on visits.'

[201] Article 1.

[202] Article 1.

[203] Article 2, 3, 8, and 15.

[204] Article 6.

[205] Article 10(1).

[206] Article 10(2).

preferable to implement or adopt means to implement the recommendations of the Committee rather than risk shame and embarrassment.

However, all the information gathered by the Committee during the visit remains confidential[207] and can only be published at the request of the State concerned[208] and no personal data shall be published without the express consent of the person concerned.[209] It can be safely said that, in general, States do not find it a problem to permit the Committee to publish their reports.[210] It is also imperative to note that the Committee's visits fluctuate every year but the positive aspect is that the trend seems to be shifting to an increased number of visits every year.[211] This could be a result of the Committee having gained enough experience in carrying out its activities or to improved human resources.[212]

However, it could also be attributed to the fact that the Committee has over along period of time developed its own language and it has been criticised as being what I may call 'user friendly' to the States, as it has always couched its findings in a way that carefully

[207] Article 11(1).

[208] Article 11(2).

[209] Article 11(3).

[210] During the period covering 1 August 2003 to 31 July 2004, of all the 44 countries in which the Committee carried out its visits, only 14 countries have not allowed the Committee to publish all the reports of the findings. These countries are Albania (of 5 reports it allowed 4 to be published), Andorra (out of 2 reports it allowed 1 to be published), Armenia (it allowed 1 of the 2 reports to be published), Azerbaijan (of the 2 reports none was allowed to be published), Bosnia and Herzegovina (the only report was not published), Croatia (of its 2 reports it allowed 1 to be published), Estonia (of the 3 reports it allowed only 2 to be published), Georgia (it allowed only 1 of its 2 reports to be published), Malta (of the 4 reports it allowed 3 to be published), Russian Federation (of the 9 reports received it allowed only 1 to be published), Spain (of the 8 reports it allowed 7 to be published), Turkey (of the 15 reports received it allowed only 9 to be published), Ukraine (of the 4 reports 3 were published) and the United Kingdom (of the 9 reports, 7 were published). See 14 General Report on the CPT's Activities, covering the period 1 August to 31 July 2004 (21 September 2004) CTP/Inf (2004) 28, Appendix 4, at <http://www.cpt.int/en/annual/rep-14.pdf> accessed on 28 August 2005.

[211] 1990 (5 visits), 1991 (7 visits), 1992 (7 visits), 1993 (8 visits), 1994 (11 visits), 1995 (7 visits), 1996 (11 visits), 1997 (13 visits), 1998 (13 visits), 1999 (16 visits), 2000 (15 visits), 2001 (18 visits), 2002 (19 visits), 2003 (22 visits), and 2004 (22 visits) see <http://www.cpt.coe.int/en/visits.htm> accessed on 28 August 2005.

[212] Under article 4, the Committee shall consist of a number of members equal to that of Parties and as at 16 September 2005, 45 States were Parties but the Committee had 38 members because seven countries, (Bosnia and Herzegovina, Georgia, Greece, Ireland, Russian Federation, Slovak Republic and Ukraine) had not yet appointed their representatives to the Committee. See <http://www.cpt.coe.int/en/members/en-list.pdf > accessed on 22 October 2005.

avoids mentioning that torture is being committed in a State visited.[213] However, in its latest report on the visit to Malta, the Committee has recommended to the government to investigate the case of the 220 Eritreans who were forcefully returned to Eritrea when there was a risk that they could be subjected to torture and when they were indeed subjected to torture.[214]

3.3.5 Conclusion

The above discussion has analysed the instruments and mechanisms in place to prevent and punish torture in both the Inter-American system and the European systems of human rights. The similarities in the two systems are that they both have Human Rights Courts, general human rights treaties with a provision specifically prohibiting torture, and torture - specific treaties. The major point of departure is with regard to the mechanisms in the two torture - specific instruments. Whereas the Inter-American looks at the Commission and the Court to prevent and punish torture, the European system is based on a non-judicial approach, which is aimed at visiting places of detention. It is argued that the European system approach is stronger in preventing torture. The Inter-American system has a mechanism of both special visits and on-site visits, which investigates the general human rights situation in OAS member States. The next discussion will analyse the African system and compare it with the two systems discussed above. This study will also critically evaluate the mechanisms in place to combat torture in Africa.

[213] The language it has developed and employs to summarize allegations of ill-treatment ranges from: 'none' or 'virtually none' ; to 'hardly any' or 'a few'; to 'a number' or 'certain number'; to 'a significant number', 'fairly large number' or 'large number'; to 'numerous', 'a considerable number', or 'extremely large number'. See M D Evans & R Morgan, *Preventing Torture, A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998) 224.

[214] See Report to the Maltese Government on the Visit to Malta Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (from 18-22 January 2004) CPT/Inf (2005) 15 para 32 (published on 25 August 2005) at <http://www.cpt.coe.int/documents/mlt/2005-15-inf-eng.pdf> accessed on 28 August 2005.

CHAPTER IV

THE AFRICAN HUMAN RIGHTS SYSTEM AND TORTURE

4.0 Introduction

Torture is so common in some African countries that its occurrence rarely makes headlines, even in local newspapers. From Algeria to Zimbabwe, if countries are to be put alphabetically, cases of torture are reported every year by either the international or national human rights organisations. The unfolding humanitarian crisis in Darfur, the Sudan, is still fresh in our memories, where torture has been committed against the innocent civilians on an unspeakably large scale. The civil wars that have ravaged some African countries like Sierra Leone, Liberia, Somalia and the Democratic Republic of Congo have been accompanied by gross human rights violations including torture on a large scale. Some dictatorial regimes in countries like Eritrea, Zimbabwe and the Sudan employ torture on a daily basis as a tool to weaken the opposition.

This chapter will cover the existing mechanisms to combat torture in Africa. It will in particular look at the African Charter on Human and Peoples' Rights (African Charter), the African Commission on Human and Peoples' Rights (the African Commission), and the Robben Island Guidelines.

4.1 The Situation of torture in Africa

The situation of torture in African is rightly summarised as follows:

> All reports by human rights organisations point to the same thing: torture is still a major problem in African society. Few African countries are free of this practice, employed by governments to counter all dissent, and by individual groups to impose their ideas or authority on others, to demand observance of a regime, to impose a reign of terror among entire populations...[215]

Though 'African States still relish and cherish the use of torture as [an] instrument of State policy,'[216] it is beyond the scope of this dissertation to discuss the situation of torture in every African country. However, a cursory perusal of the activity reports of the

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[215] Statement made at an international seminar 'African cultures and the fight against torture' which was held from 29 July 2005-1 August 2005 at Dakar, Senegal available at <http://ww2.fiacat.org/en/article.php3?id_article=41> accessed on 22 September 2005.

[216] NJ Udombana (n 8 above) para 1225.

African Commission (as discussed in detail below), and conclusions and recommendations made by the Committee against Torture (the Committee) (for a detailed discussion of the work of the Committee against Torture see Chapter II) on the reports of some African countries indicates that torture is a serious problem in Africa. For instance, the Committee has expressed its 'wide concern' at 'the widespread evidence of torture…of detainees by law enforcement agencies…' in Egypt;[217] the Committee expressed its 'concern over the increase in allegations of torture' in Morocco;[218] 'torture seemed to be a widespread practice in Cameroon…' and the Committee, still referring to Cameroon, was 'troubled by the sharp contradictions between consistent allegations of serious violations of the Convention and the information provided by the State…'[219] After examining Uganda's report, the Committee was concerned about the continued allegations of torture 'in a widespread manner by the State's security forces and agencies together with the apparent impunity enjoyed by the perpetrators.'[220]

4.2 The African Human rights instruments and torture

4.2.1 The African Charter

The right to freedom from torture is protected under article 5 of the Africa Charter[221] which provides that

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

The African Charter has been ratified by all the 53 States in Africa[222] and, unlike the other instruments like the CAT,[223] ICCPR,[224] CRC,[225] the American Convention on

[217] CAT/C/CR/29/4 (para 5 (b)), 23 December 2002.

[218] CAT/C/CR/31/2 (para 5(d)), 05 February 2004.

[219] CAT/C/CR/31/6 (para 4), 05February 2004.

[220] CAT/CO/34/UGA, (para 6(c)), 21 May 2005. See also the Committee's conclusions on the following reports: Egypt, A/54/44, paras.197-216, (para 206); Libyan Arab Jamahiriya, A/54/44, paras. 176-189 (para 182 (b)); Cameroon, A/56/44, paras. 60-66 (para 65); Tunisia, A/54/44, paras.88-105 (para 99); and Zambia, CAT/C/XXVII/Concl.4 (para 5).

[221] Also known as the Banjul Charter adopted on 27 June 1981 and entered into force on 21 October 1986.

[222] See <http://www.africa-union.org/home/Welcome.htm > accessed on 02 September 2005.

Human Rights[226] and the European Convention on Human Rights,[227] article 5 of the African Charter is not limited to only the right to freedom from torture, inhuman or degrading treatment or punishment but it also covers 'respect of the dignity inherent in a human being.' This is important because, as mentioned earlier,[228] torture aims at breaking down the individual to the level of losing their human dignity, and the right to freedom from torture is inseparable from the guarantee of human dignity.

Another unique feature about the African Charter is that it puts torture in the same category as slavery and slave trade, and categorises them as 'forms of exploitation and degradation.' It may be argued that by so doing it expressly enacts that torture has acquired the status of *jus cogens*[229] as is the case with slavery and slave trade.

4.2.2 The African Charter on the Rights and Welfare of the Child[230]

The African Charter of the Rights of the Child, which has been ratified by 37 of the 53 African States,[231] also prohibits torture. It requires States parties to take 'specific legislative, administrative, social and educational measures to protect the child from all forms of torture…'[232] Measures to ensure that this article is made effective are introduced, and they include:

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[223] See Chapter II, 2.2.1.

[224] See Chapter II, 2.2.3.

[225] See Chapter II, 2.4.1.

[226] See Chapter III, 3.2.2.

[227] See Chapter III, 3.3.1.

[228] See Chapter III (3.2.1).

[229] For a discussion of torture as *jus cogens* see Chapter I (para 1.1.2). It has been rightly argued that 'the prohibition of slavery and torture is *jus cogens*, prevailing over all other forms of international law' see A Smith 'Child Labor: The Pakistan effort to end a scourge upon humanity – is it enough?' (2005) 6 *San Diego Int'l L. J*. 461, para 492.

[230] Entered into force 29 November 1999.

[231] States that have not yet ratified this treaty are: Central African Republic, Cote D'Ivoire, Congo, Djibouti, Democratic Republic of Congo, Gabon, Guinea Bissau, Liberia, Mauritania, Sahrawi Arab Democratic Republic, Somalia, Sao Tome and Principe, Sudan, Swaziland, Tunisia and Zambia. See <http://www.africa-union.org/home/Welcome.htm> accessed on 04 September 2005.

[232] Article 16 (1).

[E]ffective procedures for the establishment of special monitoring units to provide necessary support for 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.

States Parties are also required to ensure that 'no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment.'[233]

Unlike the Inter-American and the European systems of human rights, the African system expressly extends the right to freedom from torture to children. This could be attributed to the fact that in many African countries, children still suffer maltreatment at the hands of both public and private individuals. In the former case, in some African countries children are detained in remand homes when they commit offences and they are at times detained in the same cells as adults.[234] The need for their protection against torture is therefore of utmost importance especially in cases where they have been deprived of their liberty.

4.3 Mechanisms to protect the right to freedom from torture in Africa

It is one thing to enumerate rights in an instrument and another thing to realise those rights. The African human rights system has put in place mechanisms to safeguard, among other rights, the right to freedom from torture. The discussion below will cover those mechanisms.

4.3.1 The African Commission on Human and Peoples' Rights (the African commission)

The African Commission is established under article 30 of the African Charter with the mandate to promote human and peoples' rights[235] by collecting documents, undertaking studies and research on African problems in the field of human and peoples' rights,

[233] Article 17(2) (a).

[234] In some instances some prison authorities 'inflate' children's ages and detain them with adults.

[235] Article 45. The Committee on the Rights and Welfare of the Child that is established under article 32 of the African Charter of the Rights of the Child has the same mandate as the African Commission. See article 42. Like the African Commission, it has the jurisdiction to entertain individual communications (article 44) and to examine reports from States Parties on the efforts taken to comply with the provisions of that treaty (article 43). However, it does not have jurisdiction to entertain inter-State communications. Its jurisprudence has not yet developed and therefore it will not be necessary to discuss it in detail here.

organising seminars, symposia and conferences, disseminating information, encouraging national and local institutions concerned with human and peoples' rights, and, where necessary, giving its views or making recommendations to Governments.

4.3.1.1 Seminars and Conferences

As mentioned above, one of the ways in which the African Commission is empowered to promote human and peoples' rights is by organising seminars and conferences. If implemented properly, this could be one of the best mechanisms to combat torture. Seminars and conferences could be used to create awareness about the prohibition on torture and also to call upon governments to ratify the relevant international treaties that prohibit torture.

However, it can safely be stated that the African Commission is very weak in this area. Very few seminars or conferences have been organised to specifically deal with torture as indicated by a cursory look at the Annual Activity Reports of the African Commission on Human and Peoples' Rights (AARACHPR), and the same applies to those at which the African Commission has been represented.[236] This could be attributed to factors like lack of sufficient funding[237] and also that there are many duties[238] and rights in the

[236] In the Tenth AARACHPR, none of the 4 workshops organised by the Commission was on torture apart from the fact that it was mentioned at a workshop on prison conditions held in Kampala Uganda (para 17); in the 11th AARACHPR, of the 7 seminars organised by the Commission, none was on torture (para 22). Torture is only mentioned in passing as one of the issues raised (para 24); in the 12th AARACHPR of all the 6 seminars and conferences the Commission organised none dealt specifically with torture and this applied to all the 6 seminars to which the Commission was represented, (para 21); in the 13th AARACHPR, of all the seminars and conferences to which the Commission was represented torture was not on the agenda (paras 20-22 (a-g)); in the 14th AARACHPR, of the 3 workshops (excluding those attended by the Chairperson of the Commission also none of which dealt with torture (para 16)), none of the seminars to which the Commission was represented dealt with torture (para 17). However, it is vital to note that of the eight seminars organised by the Commission during that period one was on torture (para 18); and in the 15th AARACHPR, the trend shifted towards the Commission getting interested in co-organising and attending seminars dealing specifically with torture, thanks to the role played by the Association for the Prevention of Torture (a Geneva - based non-governmental organisation (NGO)). Consequently, from 12-14 February 2002, Commissioners Andrew Chigovera and Barney Pityana attended a workshop on the Prevention of Torture and Ill -Treatment in Africa held at Cape Town and Robben Island, South Africa. This workshop was organised by APT in collaboration with the African Commission and resulted in the adoption of the RIG. Commissioner Ben Salem also maintained contacts with APT. Commissioner EVO Dankwa attended a seminar on the *Definition of Torture* organised by the APT from 10th -11th November 2001(see paras 17-21). The influential role of APT on the Commission in the area of torture also features highly in the 17th ARACHPR 2003-2004 (see paras 35 (one official from APT is a member of the Commission's Follow-Up Committee on RIG), para 39 (APT actively participated in the launching and publicising of the RIG on 11 July 2003 at Maputo, Mozambique), and para 40 (where APT together with the Commission held a Consultative Meeting about the implementation of RIG at Ouagadougou, Burkina Faso, 8th – 9th December 2003).

[237] The Commission has acknowledged that it lacks sufficient funding from the African Union to carry out its activities (see para 63 of the 17th AARACHPR 2003-2004). It was not until the intervention of APT that the Commission started concentrating on torture. Like other activities of the African Commission, it is the NGOs

Charter that the African Commission, consisting of eleven members[239] (who do not work on a full time basis) has to oversee.

4.3.1.2 Laying down rules and cooperating with African and international institutions

The African Commission is empowered 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 legislation and also to co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.[240]

In an attempt to fulfil these two duties with regard to the right to freedom from torture, the African Commission together with the APT[241] drafted and later adopted the RIG,[242] which will be discussed later in this chapter, and has ensured their distribution in some African countries.[243] It is assumed that African governments will base their legislation relative to torture on the RIG.[244] The African Commission has liaised with some institutions, especially prison authorities, in some European countries in effort to gain an insight on how, among other rights, torture can be prevented in places of detention[245] and also with

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who influence the activities of Special Rapporteurs. See M Evans and R Murray, 'The Special Rapporteurs in the African System' in M Evans and R Murray (n 3 above) 289.

[238] Articles 27-29.

[239] Article 30.

[240] Article 45 (1) (b) and (c).

[241] See Chapter I (1.3).

[242] See Chapter I (1.1 & 1.2).

[243] Commissioner Angela Mero distributed the RIG and the resolution leading to their adoption to the Ministries of Foreign Affairs, Justice and Interior, Parliaments and women NGOs in Lusophone countries. See 16th AARACHPR (2002-2003) (para 20).

[244] The African Commission has recommended to the government of Zimbabwe to study and implement the RIG after allegations of torture were made during its Fact-Finding Mission to Zimbabwe (see Executive Summary of the Report of the Fact-Finding Mission to Zimbabwe 24th -28th June 2002) Annex II, 17th AARACHPR 2003-2004. However, it should be noted that in the same report, the government of Zimbabwe has discredited the findings of the Fact-Finding Mission on among other grounds that the Commission did not carry out enough research to verify whether the alleged stories of torture had not been fabricated (see Comments by the Government of Zimbabwe on the Report of the Fact-Finding Mission in the 17th AARACHPR).

[245] The Special Rapporteur on Prisons and Places of Detention in Africa '…informed the Commission that he (Prof. E.V.O Dankwa) had visited various prisons in Paris, France…', see 13th AARACHPR (para 27); and 'As part of her (Commissioner Chirwa) mandate and to be able to study the practices of developed

various human rights institutions in Africa.[246] It has granted observer status to many NGOs that deal with torture.[247]

4.3.1.3 Inter-State and individual communications

The Commission has the mandate to entertain both inter-state[248] and individual communications.[249] Like in the inter-American and European systems of human rights, the inter-State procedure is rarely resorted to by African States notwithstanding the fact that some countries grossly violate the provisions of the African Charter.[250] Traditionally, African States have tended to emphasise the principle of non-interference, which originates in the Charter of OAU[251] and was recently re-introduced by the Constitutive Act of the African Union.[252] The African Commission therefore has no true practice in this respect[253] and consequently it is not going to be a subject of detailed discussion. However, it is vital to note that the inter-State complaint procedure has been rightly criticised, in the light of the inter-American and European procedures, as 'too state-centric' with the African Commission appearing to settle 'inter-State disputes rather than serving a watchdog of human rights transgressions.'[254]

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countries, the Special Rapporteur also visited one prison in Glasgow, United Kingdom on 9th April 2002.' 15th AARACHPR (para 30).

[246] C Heyns (Ed) *Human Rights Law in Africa* (2004) Vol.1, 611. The African Commission has to date granted affiliation status to 15 National Human Rights Institutions, see 17th AARACHPR (para 56).

[247] As above, 604-610. For a detailed discussion of the role of the NGOs in the African human rights system see A Motala, 'Non-Governmental Organisations in the African System' in M Evans and R Murray (n 3 above) 246-279.

[248] Articles 47-54.

[249] Articles 55-59.

[250] See Chapter III, 3.3.3.2. Countries like the Sudan that has violated human rights in Darfur should have been taken to the Commission by some African States. 'It is only recently that the Commission was seized for the first time with an inter-State communication [Communication 227/99, Democratic Republic of the Congo v. Burundi, Rwanda and Uganda] worthy of the name' see F Ouguergouz (n 41 above) 571.

[251] Article III (2) of the Charter of the OAU, adopted in Addis Ababa, Ethiopia, on 25 May 1963, entered into force on 13 September 1963. Replaced in 2001 by the Constitutive Act of the African Union. See O Umozurike, 'The Complaint Procedure of the African Commission on Human and Peoples' Rights' in G Alfredsson *et al* , *International Human Rights Monitoring Mechanisms, Essays in Honour of Jakob Th. Möller* (2001) 707.

[252] Accepted in Lomé, Togo, on 11 July 2000, and entered into force on 26 May 2001.CAB/LEG/23.15.

[253] F Ouguergouz, (n 41 above) 572.

[254] O Ojo and A Sesay, 'The OAU and Human Rights: Prospects for the 1980's and Beyond' (1986) 8 *HRQ* 89, quoted in J Pehman *International Human Rights Law, A Practical Approach* (2003) 255.

However, many individual communications have been filed, by both individuals and NGOs, to the African Commission alleging the violation of the right to freedom from torture. These communications indicate the extent to which the right to freedom from torture is violated in Africa, the brutality of the methods used,[255] the misunderstanding of the meaning of torture by the complainants,[256] and the failure by the African Commission to define torture (to date the African Commission has not defined what torture is, though it has in numerous communications held that the right to freedom from torture has been violated).[257] They also indicate the unfortunate instance where the Commission allowed the State to amicably settle with the victims a communication that alleged torture.[258] These communications also indicate the standard of proof of torture,[259] and an instance where the African Commission declared as inadmissible a communication which clearly alleged torture on the ground that it was couched in an insulting and disparaging

[255] In Communication 137/94,139/94,154/96 and 161/97 *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro Wiwa Jr. and Civil Liberties/ Nigeria,* International Pen alleged that Ken Saro Wiwa was kept in leg irons and handcuffs and subjected to beatings and held in cells which were airless. See the 12th AARACHPR, ANNEX V, para 80. In Communication 54/91 *Malawi African Association/ Mauritania; 61/91 Amnesty International/ Mauritania*; 98/93 *Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO/Mauritania*; 164/97 à 196/97, *Collectif des Veuves et Ayants-droit/Mauritani*a; and 210/98 *Association Mauritanienne des Droits de l'Homme/Mauritania*, it was alleged that many villagers were arrested and tortured. A method of torture called 'jaguar' was used where the victim's wrists are tied to his feet, he is then suspended from a bar and thus kept upside down, some times over a fire and he is beaten on the soles of the feet. Other forms of torture involved beating the victim, burning them with cigarette stubs or with a hot metal and as for women they were just raped (para 20). Other methods included electric shock to the genital organs as well as burns all over the bodies (para 22). Detainees at J'Reida Military Camp were allegedly undressed, had their hands tied behind their backs, were sprayed with cold water and beaten with iron bars (para 23). See the 13th AARACHPR, ANNEX V.

[256] In Communication 147/95 and 149/96 *Sir Dauda K Jawara/ The Gambia*, the complaints alleged the detaining of persons incommunicado and preventing them from seeing their relatives amounted to torture (para 56) and this was rightly rejected by the Commission. See 13th AARACHPR, ANNEX V.

[257] The African Commission has not attempted to define the meaning of the term torture. In Communication 225/98 *Huri-Laws/Nigeria*, the Commission relied on standards laid down in the case of *Ireland v. The United Kingdom* (para 41) of the 14th AARACHPR, ANNEX V. For the case of *Ireland v The United Kingdom,* see Chapter III, 3.3.2.

[258] Communication 133/94 *Association pour la Defence des Droits de l'Homme et des Liberties/Djibouti*, which alleged that torture had been committed against members of the *Afar* ethnic group and indicated that 26 people had been tortured (para1), the Commission opted for an amicable settlement because the government had requested so.

[259] The Commission has always required medical evidence to back up the allegations of torture for it to find a violation. In Communication 215/98 *Rights International/Nigeria* the communication (para 7) included medical evidence that the victim (Mr Charles B Wiwa) had been tortured and the Commission admitted it and found a violation. However, in Communication 205/97 *Kazeem Aminu/Nigeria*, which alleged that Mr. Ayodele Ameen had been tortured by the Nigerian security officials, and where no medical evidence was adduced to substantiate the allegations, the Commission did not find a violation of article 5 (para 16). See 13th AARACHPR, Annex V.

language.[260] Though the African Charter gives the Commission discretion to declare a communication inadmissible when it has been phrased in insulting and disparaging language,[261] it is argued that the Commission in this case should have looked at the substance of the communication and not the form.[262] It could be argued that not very many lawyers, victims of human rights and human rights activists know about the procedural technicalities involved at the Commission level[263] and the Commission should always give them the benefit of doubt in cases like this. The protection of human rights should take precedence over technical legal issues which may be beyond the understanding and appreciation of non-experts in the African human rights system.

4.3.1.4 Special Rapporteurs and torture

The African Charter does not provide for the institution of Special Rapporteurs (SR). However, because this institution has been effective under the United Nations human rights system, the African Commission also decided to include it in order to strengthen its promotional and protectional roles of human and peoples' rights.[264] The African Commission has appointed five SRs on thematic issues since its existence: one on extra-judicial executions, one on prisons and other conditions of detention, one on women's rights, and recently one on refugees and internally displaced persons in Africa, and one on human rights defenders in Africa.[265] It is vital to note that the SR on extra-judicial executions failed to carry out his work and that office was closed. Some authors rightly concluded that '…this has been largely a wasted opportunity and a matter of

[260] Communication 65/92 *Ligue Camerounaise des Droits de l'Homme/Cameroon*, the communication which alleged that between 1984 and 1989 at least 46 prisoners were tortured was declared inadmissible because, among other things, it referred to the ruling regime as a 'regime of torturers.' Tenth AARACHPR Annex X.

[261] Article 56(3).

[262] 'In principle, it appears diversionary to reject a communication because of the quality of the phraseology' see O Umozurike (n 251 above) 709.

[263] This is probably because the Commission has not created much awareness about its procedural aspects in many parts of Africa. It is rightly suggested that 'apparently, this problem is universal. African NGOs, like their Inter-American counterparts, have great difficulties in trying to use the African systems when seeking to vindicate the rights of the victims.' See M Hansungule 'Protection of Human Rights under the Inter-American System: An Outsider's Reflection,' in G Alfredsson (n 251 above) 689.

[264] M Evans and R Murray 'The Special Rapporteurs in the African System' in M Evans and R Murray (n 3 above) 280.

[265] The nomination of the last two is reported in the 17th AARACHPR 2003-2004 (para 34) and they are Commissioner Bahame Tom Mukirya Nyanduga (Special Rapporteur on Refugees and Internally Displaced Persons in Africa) and Commissioner Jainaba John (Special Rapporteur on Human Rights Defenders in Africa).

some considerable embarrassment for the reputation of the African human rights system in general and the African Commission in particular.'[266]

It is the work of the SR on Prisons and Prison Conditions in Africa (SRP) that is to be covered here. This is because, as mentioned earlier, it is those who are deprived of their liberty that are more vulnerable to torture and the work of the SRP focuses on exactly that.

The SRP is mandated, among other things, to examine the situation of prisons and prison conditions in Africa and to ensure the protection of persons in detention or in prisons.[267] The mandate of the SRP is based on many human rights treaties, declarations and codes of conduct including CAT and the African Charter. The SRP has generally been regarded as successful.[268]

Nevertheless, it can safely be argued that this institution has not been effective in preventing torture in Africa. This can be attributed to two factors: one is that the SRP has many issues to focus on during these visits to prisons or places of detention therefore there is not enough time to concentrate on investigating allegations of torture. Any investigation of torture would need at least the involvement of a physician and a psychologist to verify if the allegations correspond with the medical examination or a psychological assessment.[269]

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[266] M Evans and R Murray (n 3 above) 289.

[267] Mandate of the SRP at <http://www.achpr.org/english/_info/index_prison_en.html> accessed on 15 September 2005.

[268] M Evans and R Murray (n 3 above) 292. See also F Ouguergouz (n 41 above) 498-501. The SRP has carried out a number of prison visits to various African countries. The SRP has been to Zimbabwe (10th AARACHPR Annex VII); Mozambique, Madagascar and Mali (11th AARACHPR paras 30-31); Kenya, Cameroon, Zimbabwe (once again) and Uganda (12th AARACHPR paras 26-27); Mali (once again), The Gambia and Benin (13th AARACHPR para 26); Mozambique (once again) (14th AARACHPR para 22); Malawi, Namibia, and Uganda (once again) (15th AARACHPR para 30); Cameroon (once again), and Benin (once again) (16th AARACHPR para 25); and Ethiopia and Malawi (once again) (17th AARACHPR para 28).

[269] The European Committee for the Prevention of Torture (see Chapter III, 3.3.4), for instance, ensures that medics and psychologists form part of the teams that visit places of detention. See R Morgan & M D Evans (eds) *Protecting Prisoners, the Standards of the European Committee for the Prevention of Torture in Context* (1999) 13.

The second factor is that the SRP does not have enough time[270] and resources (both financial and human)[271] to visit all places of detention and prisons in all African countries (let alone in one country) every year. Consequently the visits of the SRP are limited to few countries and, needless to say, to a few prisons or places of detention in the capital cities or major towns. The issue of human resources is a vital one especially when in comes to investigating and documenting allegations of torture. The SRP or any member on the team should be able to spend enough time in a place of detention, talk to the prisoner or detainee in a language both the SRP and the prisoner understand, and to be able to verify the allegations of torture by carrying out a medical examination on the alleged victim.

It is unfortunate to note that the future of the SRP is highly uncertain. This is due to the fact that in 2003, Penal Reform International, a Paris - based NGO and the backbone of the SRP, withdrew its financial support[272] and the activities of the SRP were gravely affected.[273] Therefore, the discussion whether it is or it is not an effective way of preventing torture in Africa is of no practical importance unless the financial situation changes positively.

4.4 The Robben Island Guidelines (RIG)

4.4.1 Brief introduction to the RIG

As pointed out in Chapter I,[274] there is no academic work as yet done on the RIG and therefore this section will be based on the *travaux préparatoires*[275] and the text of the

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[270] On his first visit, the SRP spent 10 days in Zimbabwe (see F Ouguergouz (n 41 above) 498. SRP was in Malawi from 17th - 26th June 2001, Namibia from 17th – 28 September 2001, and Uganda from 11th - 23rd March 2002 (15th AARACHPR para 30); in Cameroon from 1st - 14th September 2002, Benin from 23rd January - 5th February 2003 (16th AARACHPR para 25); and Ethiopia from 15th - 29 March 2004 (17th AARACHPR para 28). This clearly shows that there is not much time available for the SRP to spend in a given country.

[271] The SRP has always depended on the funding provided by an NGO called Penal Reform International and as will be discussed later, when it with drew its funding the activities of SRP came to a standstill.

[272] The official reason for withdraw of the financial support is not given in the 17th AARACHPR.

[273] 17th AARACHP (para 27-28).

[274] See Chapter I, 1.5.

[275] The author was able to acquire this by fax and e-mail from the APT. The following documents were acquired and are attached to this dissertation: a copy of the letter dated 16th January 2001 in which the African Commission gave APT the go-ahead to organise the workshop (see Annex I); copy of the Introductory Paper containing proposals for the plan of action for the prevention of torture in Africa that was presented and discussed at the workshop in Cape Town and Robben Island, South Africa (see Annex II); a

RIG. Two factors spring immediately to the mind of the author as to why no commentary has appeared: one is that the RIG is a relatively new development (barely three years) and secondly, very few writers are interested in writing about torture in Africa.[276]

4.4.2 History of the RIG

Realising that there was a need to develop a torture-specific instrument in Africa, and that the prevention of torture is a multidimensional issue, APT made an oral presentation at the 29th Session of the African Commission in Tripoli, Libya, and informed the Commission that it was to organise 'a workshop that would reflect on measures and concrete strategies and that would draw up the draft of …a plan of action [for the prevention of torture in Africa].'[277] In the same presentation, APT proposed the objectives of the workshop,[278] the number of participants[279] as well as the date[280] and venue of the workshop.[281]

The African Commission, in a letter dated 16th January 2001,[282] informed APT that it was '…in agreement with … [the] proposal [for APT] to hold a workshop…' and urged APT to

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copy of the letter dated 6th August 2001 in which the African Commission notified APT that Commissioner Andrew Chigovera had been designated to work with the APT in preparing the workshop (See Annex III); and copy of the letter dated 1st November 2002 in which the African Commission informed APT that a Resolution has been passed at the 32nd Ordinary Session that adopted the RIG (See Annex IV).

[276] Some developments in Africa attract the attention of writers before they are even implemented. This was the case for example with the International Criminal Tribunal for Rwanda and also with the Special Court for Sierra Leone.

[277] See Oral presentation by APT at <http://www.apt.ch/africa/oralafr29.htm > accessed on 14 September 2005.

[278] It had '…the goal of drafting a plan of action for the prevention of torture and ill-treatment in Africa'.

[279] It proposed 15, including the Chair of the Commission, 3 members of the Commission, the Secretary of the Commission, a representative of the General Assembly of OAU (as it then was), as well as other international experts notably a representative of the International Committee of the Red Cross, the United Nations Committee Against Torture (for the work of this Committee see Chapter II, 2.2.1.1), the Inter-American Human Rights Commission and the European Committee for the Prevention of Torture (for details about these two systems see Chapter III). However, the workshop was not able to attract all the anticipated experts. Notably absent were experts from the UN Committee on Torture, the European Committee for the Prevention of Torture and the Inter-American Commission on Human Rights. It did, however, attracted participants from relevant human rights bodies. See List of participants at the Workshop on the Prevention of torture and ill-treatment in Africa Cape Town and Robben Island 12-14 February 2002 at <http//:www.apt.ch/Africa/rig/Robben%20Island%20Participants.pdf> accessed on 14 September 2005.

[280] It had proposed 12-14 December 2001.

[281] It had proposed Johannesburg, South Africa.

[282] ACHPR/ORG/MIS, Annex I to this dissertation.

follow up the matter. After that APT drafted an Introductory Paper,[283] which would later form the basis of the discussion and also of the Robben Island Guidelines. The paper proposed that the Plan of Action should include legal, control and training and empowerment measures for the prevention of torture.[284] It also indicated that around 20 African and international experts would be invited to the workshop[285]and the venue of the workshop would be at Robben Island, South Africa[286] from the 12th – 14th February 2002 among other things. The reason for holding the workshop at Robben Island was given:[287]

> Robben Island has been chosen for the final day[288] of the workshop and as a focus of the closing ceremony, because it is a place which has come to symbolise the fight against repression. To finalise the ' Robben Island Plan of Action' for the prevention of torture and ill – treatment and to hold a closing ceremony there, would have a powerful and symbolic impact.

The African Commission[289] notified APT that Commissioner Andrew Chigovera had been designated to work in collaboration with APT to organise the workshop. The workshop took place as indicated and the Robben Island Statement was adopted on the 14 February 2002 recommending, among other things, that the African Commission adopts 'a resolution endorsing the ''Robben Island Guidelines''.'[290] At its 32nd Ordinary Session[291] the African Commission adopted the *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa*.[292] In a letter dated 1st November 2002,[293] the African Commission informed APT that a resolution had been passed on the Robben Island Guidelines.

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[283] Annex II.

[284] Para II (a).

[285] Hence increasing the number from 15, see para II (b).

[286] Changing it from Johannesburg, see para II (c).

[287] As above.

[288] The paper states that 'For practical and logistical reasons the first two days of the workshop will be held in Cape Town, where better conference and accommodation facilities are located. The final day of the workshop will be held on Robben Island.'

[289] ACHPR/OBS/164, Annex III.

[290] Robben Island Statement at <http://www.apt.ch/africa/rig/Robben%20Island%20Statement.pdf> accessed on 14 September 2005.

[291] Held in Banjul, The Gambia, from 17th - 23rd October 2002

[292] See Annex VI to the 16th AARACHPR.

[293] ACHPR/SEM/3 Annex IV.

4.4.3 The RIG and its approach to torture

The RIG approaches the question of torture in three ways: prohibition, prevention, and responding to the needs of victims. Each way enumerates in detail the measures that should be taken in that regard. It is beyond the scope of this paper to reproduce whatever appears in the RIG but, that notwithstanding, an attempt will be made to briefly tackle what is required under each approach.

4.4.3.1 Prohibition of torture

African States are required to take six measures to prohibit torture: ratification of regional and international instruments;[294] promotion and support of cooperation with international mechanisms (including the African Commission, United Nations Human Rights Treaty Bodies and the UN Special Rapporteur on Torture);[295] criminalisation of torture;[296] and non-refoulement (no one is to be expelled or extradited to a country where he/she is at the risk of being subjected to torture).[297] RIG also requires States to combat impunity for both nationals and non-nationals who commit acts of torture;[298] and to establish complaints and investigation procedures to which all persons can bring their allegations of torture.[299]

4.4.3.2 Prevention of torture

States are required to establish basic procedural safeguards for those deprived of their liberty (the rights to an independent medical examination and of access to a lawyer);[300] to establish safeguards during the pre-trial process (this includes prohibiting the use of incommunicado detention and ensuring that comprehensive written records of all interrogations are kept, including the identity of all persons present during the

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[294] Part I A (1 a-d). For a detailed discussion of the international human rights instruments prohibiting torture see Chapter II.

[295] Part I B (2-3). For a detailed discussion of the UN Human Rights bodies see Chapter II.

[296] Part I C (4-14).

[297] Part I D (13).

[298] Part I E (16 a-e).

[299] Part I F (17-19).

[300] Part II A (20 a-d).

interrogation);[301] take steps to ensure that conditions of detention comply with international standards;[302] establish mechanisms of oversight (this includes ensuring the independence of the judiciary, of the national human rights bodies with the mandate to carry out visits to places of detention, encourage and facilitate visits by NGOs to places of detention, and support the adoption of the Optional Protocol to the UNCAT to create an international visiting mechanism with the mandate to visit all places of detention);[303] States are also required to train and empower (among others), law enforcement officers so that they refrain from using torture[304] and, finally, to educate and empower the civil society so that they disseminate information relating to the prohibition of torture.[305]

4.4.3.3 Responding to the needs of victims

States are required to ensure that all victims of torture and their dependants are offered appropriate medical care, have access to appropriate social and medical rehabilitation, and are provided with appropriate levels of compensation and support. In addition, families and communities which also have been affected by the torture and ill-treatment received by one of its members can also be considered as torture victims.[306]

4.5 Conclusion

The above discussion has covered torture in Africa and the mechanisms in place to address it. It has been largely based on the activity reports of the African Commission because it is not possible to find many books that have written about torture in Africa apart from, as mentioned earlier, the reports by human rights organisations like Amnesty International and Human Rights Watch.

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[301] Part II B (21-32).

[302] Part II C (33-37). In particular they should comply with the UN Standard Minimum Rules for the Treatment of Prisoners, UN ECOSOC Res.663 C (XXIV) 31 July 1957 as amended by UN ECOSOC Res.2076 (LXII), 13 May 1977.

[303] Part II D (38-44). For a detailed analysis of the Optional Protocol to UNCAT see Chapter II.

[304] Part II D (45-46).

[305] Part II E (47-48).

[306] Part III (49-50 a-c). This part attempts to draw a distinction between primary and secondary victims to torture.

Much as the RIG derives its provisions substantially from CAT,[307] it leaves a lot to be desired. In the first place, it is not binding on the States as it is a mere declaration and not a treaty. Its enforcement mechanism is very weak. A Follow - Up Committee was established but it has only five members with the mandate to organise, with the support of interested partners, seminars to disseminate the RIG; to develop and propose to the African Commission strategies to promote and implement the RIG at national and regional levels; to promote and facilitate the implementation of RIG within member States; and to make a progress report to the African Commission at each session.[308] This is clearly too much work for only five individuals.

The RIG does not give the Follow-Up Committee 'real power', such as by authorising it to visit places of detention nor do members of the Follow - Up Committee enjoy any immunity[309] when carrying out their work. This means that there is a need to establish a committee that has the same powers and privileges as that in the European system. It can only be achieved by having that committee established by a treaty and not a declaration, and therefore it is argued that there is a need for Africa to adopt a treaty on torture.

[307] See Chapter II, 2.2.1.

[308] See Resolution on the RIG adopted by the African Commission at its 32nd Ordinary session, 17-23 October 2002, Banjul, The Gambia (para 3).

[309] Members of the European Committee for the Prevention of Torture (see Chapter III, 3.3.4) enjoy immunity when carrying out their activities, see article 16 of the European Convention on Torture.

CHAPTER V
CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The discussion above has shown that many African countries are parties to various international human rights and humanitarian law instruments that aim at protecting the right to freedom from torture. Victims of torture in some African countries have resorted to international protection mechanisms like the Committee against Torture and the HRC for redress. However, as discussed above, this mechanism has not been very successful as few complaints have been lodged against some African countries. In the case of the Committee against Torture, complaints have been lodged against Tunisia only notwithstanding the fact that many African countries, State Parties to CAT, still commonly practice torture on a large scale. Some mechanisms, like the one under the Convention on the Elimination of all Forms of Discrimination against Women and that under the Convention on the Rights of the Child and other treaties that rely on State reporting have also been not very successful in addressing the problem of torture in Africa. This therefore indicates that the international human rights treaties and mechanisms are not sufficient if torture is to be eradicated in Africa.

In both the European and Inter-American systems of human rights there are torture-specific treaties. These treaties have been instrumental in the fight against torture in those countries because they complement the international human rights mechanisms. The European system relies on the non-judicial means of inspecting places of detention, has been very effective and this has been illustrated in the increased number of visits, the large number of States Parties to the European Convention for the Prevention of Torture and the willingness of the States to allow reports that contain the findings of the

Committee on Torture to be published. This, as discussed above, has resulted in more tangible results in the fight against torture.

In Africa, there is no treaty yet that specifically addresses the problem of torture. The RIG as discussed are not binding and States may not take them seriously despite the fact that torture is widely practiced in many African countries. When Penal Reform International withdrew its financial support for the SRP, the activities of the SRP were brought to a standstill. It should also be mentioned that even at the time the office of the SRP was fully functioning, it could not be relied on to address the problem of torture in Africa because, as discussed above, it lacked the essential financial and human resources that are needed to investigate, document and prevent torture in all African countries.

5.2 Recommendations

There is an immediate need for the African countries to adopt a treaty that specifically addresses torture. This treaty should be aiming at preventing torture by establishing a Committee that will be empowered to visit places of detention in Africa where those who are vulnerable to torture are to be found. The Committee should be multidisciplinary and its members should include doctors, psychiatrists, psychologists, and lawyers. Members of the Committee, if they are not experienced in investigating and documenting torture, should be trained in torture investigating and documenting skills as stipulated in the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).[310] The torture-specific treaty for Africa should be modelled on the one proposed, drafted and attached by the author on this dissertation.

When the Committee is established, it should work hand in hand with international, regional and national human rights institutions and non-governmental organisations that have experience in investigating and documenting torture. This will be helpful to the Committee members to share experience with people from those other institutions or organisations. In the case of national human rights institutions and organisations, they would be very instrumental to provide the necessary information regarding places of

[310] The Commission oh Human Rights, in its Resolution 2000/43, and the United Nations General Assembly, in its resolution 55/89, drew the attention of Governments to these Principles and strongly encouraged Governments to reflect upon the Principles as a useful tool in efforts to combat torture.

detention, in both rural and urban areas, to the Committee members especially in those countries where the Committee will be conducting its visits.

It is recommended that African countries should endeavour to implement the recommendations of both the African Commission on Human and Peoples' Rights and of the United Nations human rights bodies. African countries should ratify the Optional Protocol to the Convention against Torture because this would enable the Committee established under that treaty to carry out visits to places of detention in Africa. There is a need for African countries to criminalise torture in their domestic legislation and provide for severe penalties for those found guilty of torture. The civil society in Africa should work toward this.

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ANNEX A

THE DRAFT AFRICAN CHARTER FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

(Proposed and drafted by Mujuzi Jamil Ddamulira, LLM Human Rights and Democratisation in Africa, 2005)

PREAMBLE

The African member States of the African Union, parties to the present Charter entitled ' African Charter for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment;

Recalling article 5 of the African Charter on Human and Peoples' Rights that prohibits torture, inhuman or degrading punishment and treatment;

Having regard to article 3(h) of the Constitutive Act of the African Union wherein parties 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;

Recalling further article 4(m) of the Constitutive Act of the African Union wherein member States commit themselves to the respect for democratic principles, human rights, the rule of law and good governance;

Also recalling article 4(o) of the Constitutive Act of the African Union wherein member States commit themselves to the respect for sanctity of human life, and condemn and reject impunity;

Aware of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines) adopted by the African Commission on Human and Peoples' Rights at its 32nd Ordinary Session;

Alarmed that many African States still use torture and other cruel, inhuman or degrading treatment or punishment;

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout Africa;

Gravely concerned at the apparent reluctance by many African States to put in place mechanisms for preventing torture and other cruel, inhuman or degrading treatment or punishment;

Convinced that the protection of persons deprived of their liberty against inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventative character based on visits;

Reaffirming their determination to eradicate the use of torture and other cruel, inhuman or degrading treatment or punishment on the African Continent;

Have agreed as follows

PART I

Article 1

1. For the purposes of the Charter, the term ‘ torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions provided that they do not include the performance of acts or use of the methods referred to in this article.
2. For the avoidance of doubt, if a private person intentionally commits any act that results into severe pain or suffering with the aim or objective of achieving the aforementioned purposes, he or she shall be considered to have committed torture.
3. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application

Article 2

The objective of the present Charter is to establish a system of regular visits undertaken by the African Committee on the Prevention of Torture to places where people are deprived of their liberty and in order to prevent torture and other cruel, inhuman, degrading treatment or punishment.

Article 3

1. The States Parties to the present Charter undertake to prevent torture and other cruel, inhuman, degrading treatment or punishment in accordance with the terms of the present Charter.
2. The States Parties to the present Charter shall undertake to take all the necessary steps, in accordance with the provisions of their constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of the present Charter.
3. Nothing in the present Charter shall affect any provisions that are more conducive to the prevention of torture, and other cruel, inhuman or degrading treatment or punishment contained in the law of the State party or in any other international convention or agreement in force in the State.

PART II

ESTABLISHMENT AND ORGANISATION OF COMMITTEE ON THE PREVENTION OF TORTURE, AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Article 4

The African Committee on the Prevention of Torture and other cruel, inhuman or degrading treatment or punishment, hereinafter referred to as the Committee, shall be established within the African Union for the purpose of preventing torture, and other cruel, inhuman or degrading treatment or punishment in Africa.

Article 5

1. The Committee shall consist of 15 members of high moral character, integrity, impartiality, and known for their competence in the field of human rights or having professional experience in the investigation and documentation of allegations of torture, and other cruel, inhuman or degrading treatment or punishment, or inspecting places of detention, or in the various fields relevant to the treatment of persons deprived of their liberty which include, but are not limited to prison or police administration.
2. The members of the Committee shall serve in their personal capacity, shall be independent, impartial, and shall be available to serve the Committee efficiently.
3. For the avoidance of doubt, serving members of the African Commission on Human and Peoples' Rights and those of the African Court on Human and Peoples' Rights shall not be eligible to serve as members of the Committee.
4. In the composition of the Committee, due consideration shall be given to the equitable geographical distribution and to the representation of different legal systems of the States parties.
5. In this composition consideration shall also be given to the balanced gender representation on the basis of the principles of equality and non-discrimination.

Article 6

1. As soon as this Charter shall enter into force, the members of the Committee possessing the qualifications prescribed in article 5 above shall be elected by secret ballot by the Assembly of Heads of State and Government of the Union from a list of persons nominated by the States Parties to the present Charter.
2. Each State Party to the present Charter shall nominate not more than two persons.
3. The nominees shall have the nationality of a State Party to the Present Charter.
4. At least one of the two candidates shall have the nationality of the nominating State Party.
5. Before a State Party nominates a national of another State Party, it shall seek and obtain the consent of that State Party.
6. A person shall be eligible for re-nomination only once.

Article 7

1. The initial elections of members of the Committee under article 6 of the present Charter shall be held no later than twelve months of the date of the entry into force of the present Charter and thereafter after five years. At least five months before the date of each election, the Chairman of the Commission of the Union, herein after referred to as the Chairman of the Commission, under article 20 of the Constitutive Act of the African Union shall address a letter to States Parties inviting them to submit their nominations within three months. The Chairman of the Commission shall subsequently prepare a list in alphabetical order of all persons nominated indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Charter.
2. The elections shall be held at the ordinary session of the Assembly of Heads of State and Government of the African Union, hereinafter referred to as the Assembly of the Union, at the Headquarters of the African Union in Addis Ababa, Ethiopia under article 24 of the Constitutive Act of the African Union, or at any other place as may be decided by the Assembly of the Union from time to time. At those ordinary sessions, for which two-thirds of the State Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
3. The members of the Committee shall be elected for a term of five years. They shall be eligible for re-election only once if re-nominated.
4. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals, subject to the approval of the Committee.
5. Subject to paragraph 4 of this article, if a member of the Committee has ceased to carry out his/her functions as a result of any of the factors in paragraph 4 of this article, the Chairman of the Committee shall notify the Chairman of the Commission who shall then declare the seat of that member to be vacant. In the event of the death or resignation, the Chairman of the Commission shall declare the seat vacant from the date of the death or on the date on which the resignation took effect.

6. A member elected to replace a member whose term has not expired shall complete the term of the latter.
7. The Committee shall establish its own rules of procedure.
8. The Committee shall elect its officials for a period of two and a half years.
9. The Chairman of the Commission shall provide the necessary staff and facilities for the effective performance of function of the Committee under the present Charter.
10. With the approval of the Assembly of the Union, the members of the Committee established under the present Charter shall receive emoluments from the African Union resources on such terms and conditions as the Assembly of the Union may decide.
11. Decisions of the Committee shall be made by majority votes of the members present and voting. Seven members shall constitute a quorum.
12. In case of an equality of votes, the Chairman of the Committee or any other person acting on behalf of the Chairman of the Committee shall have a casting vote.
13. The working languages of the Committee shall be, if possible, the African languages, Arabic, English, French and Portuguese in accordance with article 25 of the Constitutive Act of the African Union.

MANDATE OF THE COMMITTEE

Article 8

1. Each State Party to the present Charter shall allow visits, in accordance with the present Charter, by the Committee to any place under its jurisdiction where persons are or may be deprived of their liberty. These visits shall be undertaken with a view of strengthening the protection of those persons against torture and other cruel and inhuman and degrading treatment or punishment.
2. For the purpose of the present Charter, deprivation of liberty shall mean any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person cannot leave at will by order of any judicial, administrative or other authority.

Article 9

1. In carrying out its activities, the Committee shall cooperate with the competent national authorities of the State Party concerned.
2. The Committee shall organise visits in accordance with article 8 of the present Charter as and when it appears to be required in the circumstances. During these visits, the Committee shall endeavour to visit places of detention in both urban and rural areas of the State Party concerned.
3. The Committee may, if it considers it necessary and for the sole purpose to enable it to carry out its activities efficiently and effectively, seek the assistance of experts and interpreters.

Article 10

1. After its visit or visits, the Committee shall write a report and make recommendations to a State Party concerned with regard to the protection of

persons deprived of their liberty against torture and other cruel, inhuman and degrading treatment or punishment.

2. If the State Party fails to cooperate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the State Party has had an opportunity to make known its views, and with the approval of the Assembly of the Union, by a majority of two – thirds of the members in both cases, to make a public statement on the matter.
3. The Committee shall cooperate, for the prevention of torture in general, with the relevant United Nations organ and mechanisms as well as with the international, regional and national institutions or organisations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman and degrading treatment or punishment.

Article 11

1. The information gathered by the Committee in relation to a visit, its reports and its consultations with the party concerned shall be confidential.
2. The Committee shall publish its reports together with any comments of the State Party concerned, whenever requested to do so by that State Party or whenever the Assembly of the Union passes a resolution to that effect under article 9 of the Constitutive Act of the African Union, whichever occurs first.
3. For the protection of the detainees and other people to whom the Committee might have talked during the visit, no personal data shall be published without the voluntary, express, and written and informed consent of the person concerned.

Article 12

Subject to the rules of confidentiality above and anywhere else in the present Charter, the Committee shall every year, at the ordinary session of the Assembly of the Union submit a general report of its activities which shall by a resolution of the Assembly of the Union be made public.

GENERAL OBLIGATIONS OF THE STATE PARTIES

Article 13

1. In order to enable the Committee to fulfil its mandate, the States Parties to the present Charter undertake to grant it:

(a) Unrestricted access to all relevant information concerning the number of persons deprived of their liberty in places of detention as defined in article 8 (2) of the present Charter as well as the number of places and their location.
(b) Unrestricted access to all relevant information referring to the treatment of those persons as well as their conditions of detention.
(c) Subject to paragraph 2 below, unrestricted access to all places of detention and their installations and facilities including, but not limited to, kitchens, toilets, bathroom/shower rooms, wards, punishment cells, and isolation cells.
(d) States Parties shall permit the Committee to interview persons deprived of their liberty and other persons whom the Committee deems fit to interview in private without any interference from State officials for the supply of relevant information. In the cases of persons deprived of their liberty, interviews can be carried out in

the sight but not the hearing of detaining authorities and States Parties guarantee not to harass such persons who were interviewed by the Committee after the departure of the Committee members.

(e) The liberty to choose the places it wants to visit and the persons it wants to interview.

2. Without prejudice to the aforementioned provisions, States Parties may object to a visit to a particular place of detention only on urgent and compelling grounds of national defence, public safety, natural disaster, or serious disorder in the place to be visited that temporarily prevents the carrying out of the visit. The existence of a declared State of emergency as such shall not be invoked by a State Party as a reason to object to a visit.
3. For the purposes of this article, relevant information shall mean relevant information in the opinion of the Committee.

PRIVILEGES AND IMMUNITIES

Article 14

In discharging their duties, members of the Committee shall enjoy the privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organisation of the African Unity (now African Union) (1965), read together with the Additional Protocol to the OAU General Convention on the Privileges and Immunities (1980).

Article 15

When visiting a State Party, the members of the Committee shall, without prejudice to the provisions and purposes of the present Charter and such privileges and immunities which they may enjoy:

(a) Respect the laws, regulations, cultural and religious practices of the visited State.
(b) Refrain from any action or activity incompatible with the impartial nature of their duties.

Article 16

1. This Charter shall not prejudice the provisions of domestic law or any international agreement which provides greater protection for persons deprived of their liberty.
2. Nothing in the present Charter shall be construed as limiting or derogating from the competence of the African Commission on Human and Peoples' Rights to visit places of detention through its mechanisms like the Special Rapporteur on Prisons and Conditions of Detention in Africa or from the obligations assumed by the States Parties under the African Charter on Human and Peoples' Rights.
3. The Committee shall not visit places which the representatives or delegates of the Protecting Powers or the International Committee of the Red Cross effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1948 and the two Additional Protocols of 8 June 1977 thereto.

FINANCIAL PROVISIONS

Article 17

The expenditure incurred by the Committee in the implementation of this Charter shall be borne by the African Union.

Article 18

The present Charter shall be open for signature by the member States of the African Union. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Chairman of the Commission.

Article 19

1. The present Charter shall enter into force three months after the reception by the Chairman of the Commission of the fifteenth instrument of ratification or instrument of accession.
2. For each State ratifying the present Charter or acceding to it after the deposit of the fifteenth instrument of ratification or instrument of accession, the present Charter shall enter into force with respect to that State three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20

The provisions of the present Charter shall extend to all parts of Federal States without any limitation or exceptions.

Article 21

No reservations may be made in respect of the provisions of the present Charter.

Article 22

2. Any State Party may, at any time, denounce the present Charter by means of notification addressed to the Chairman of the Commission.
3. Such denunciation shall become effective on the first day of the month following the expiration of a period of twelve months after the date of receipt of the notification by the Chairman of the Commission.
4. Such denunciation shall not have the effect of releasing the State Party to the present Charter from any obligations under the present Charter in regard to any act that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued visiting of places of detention already underway by the Committee prior to date on which the denunciation becomes effective.

INTERPRETATION

Article 23

Any matter relating to the interpretation of any provision of the present Charter shall be referred to the African Court on Human and Peoples' Rights under article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

AMENDMENT PROVISIONS

Article 24

1. Any member State may propose for the amendment or revision of the present Charter.
2. Proposals for amendment or revision shall be submitted to the Chairman of the Commission who shall transmit the same to member States within a period of thirty days of receipt thereof.
3. The member States upon the advice by the Chairman of the Commission, shall examine these proposals within a period of one year following the notification in accordance with paragraph 2 of this article.
4. The Chairman of the Commission shall request that States Parties notify him or her whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one-third of the States Parties favour such a conference, the Chairman of the Commission shall convene under the auspices of the Assembly of the Union under article 9(2) of the Constitutive Act of the African Union read together with article 20. Any amendment adopted by majority of the States Parties shall be submitted to the Chairman of the Commission for approval.
5. In the event that States Parties do not favour a conference pursuant to clause 4 of this article, such a proposed amendment or amendments shall be made at the Ordinary Session of the African Union.
6. Amendments shall come into force when they have been approved by the Assembly of the Union and accepted by a two-thirds majority of the States Parties to the present Charter in accordance with their constitutional processes.
7. When amendments come into force, they will be binding on those States Parties which have accepted them, other States Parties being bound by the provisions of the present Charter and any earlier arrangements which they have accepted.

Article 25

The Chairman of the Commission shall notify the member States of the African Union of:

(a) Any signature,
(b) The deposit of any instrument of ratification, acceptance or approval,
(c) The date of entry into force in accordance with article 19,
(d) Any other act, notification or communication relating to this Charter.

In witness whereof the undersigned, being duly authorised thereto, have signed this Charter.

The Original of the Charter, of which the Arabic, English, French and Portuguese texts are equally authentic, shall be deposited with the Chairman of the Union.

ANNEX I

African Commission on Human & Peoples' Rights

Kairaba Avenue
P.O. Box 673
BANJUL, The Gambia

OAU - OUA

Commission Africaine des Droits de l'Homme et des Peuples

Tel.: (220) 392962
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Email: achpr@achpr.gm

Association for the
Prevention of Torture (APT)

Fax: (00 4122) 7345649

Ref: ACHPR/ORG/MISC
Date: 16th January 2001

Dear Mr. Jean-Baptiste Niyizurugero,

RE: WORKSHOP ON THE PREVENTION OF TORTURE

Reference is made to the above-mentioned subject.

During the 28th Ordinary Session of the African Commission that was held in Benin, APT tabled a proposal to hold a workshop on torture in collaboration with the African Commission with the aim of drafting a declaration on torture.

I am glad to inform you that the Commission is in agreement with your proposal to hold a workshop and would therefore like to urge you to follow up on the matter.

Please do not hesitate to contact the Secretariat of the Commission if you have any questions on the matter.

While thanking you for your co-operation, I would like to take this opportunity to wish you well in your endeavours.

Yours Sincerely,

Germain Baricako
Secretary to the African Commission

94 | 19 FEV. 2001
A TRAITER : YBN | CC INFO : CHA | APT
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ANNEX II

Workshop on drafting On the prevention of torture and ill treatment in Africa

Introductory Paper

I. Justification / Motivation and Background

Article 5 of the African Charter on Human and Peoples' Rights states that: *"...torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited"*, and Article 2 of the UN Convention Against Torture (UNCAT) obliges State Parties to take measures to prevent acts of torture. Currently, 32 African States are Party to the UNCAT. Yet, despite this, no regional instrument has yet been established to ensure specifically the implementation of these articles in Africa.

Accordingly, the Association for the Prevention of Torture (APT), an international NGO with Observer Status to the African Commission on Human and Peoples' Rights, together with the Commission (which has the role of promoting and protecting human rights in Africa), have agreed to organise a workshop to propose concrete measures to prevent torture and ill treatment in Africa. The workshop will aim to draft a Plan of Action that could be applied both nationally and regionally throughout Africa and assist States to meet their national, regional and international obligations to prevent torture.

II. Implementation

(a) The Plan of Action

It is expected that the Plan of Action, will contain regional and national measures for the prevention of torture relating to three main themes:

- Legal measures (Normative frame work)
- Control measures (control mechanisms)
- Training and empowerment

These three main themes would include proposals relating to issues such as; judicial empowerment, implementation of human rights norms

within national legislation, penal reform, police training, and civil society empowerment.
It is anticipated that the Plan of Action will contain concrete proposals which can be promoted and implemented on both a national and regional basis by various actors including; Organisation of the African Unity (Note that it is changing the name to become African Union) Members, African Commission, parliamentarians, police, judges, lawyers, NGOs and other civil society actors.

(b) Participants

Accordingly, the African Commission and the APT intend to invite around 20 African and international experts to the workshop with a proven knowledge of these three thematic measures. The participants will include:

- The Chair, the Secretary and three other members of the African Commission,
- A representative of the Legal Division of the Organisation of the African Unity / African Union (OAU / AU),
- African and international NGOs representatives,
- Representatives for African monitoring mechanisms,
- African Experts on judicial empowerment and prison reform mechanisms,
- A representative from the Parliamentary Forum,
- An expert on providing human rights training to the police and prison officials,
- International experts (Members of CAT, CPT...)

(c)The venue of the Workshop

The African Commission and APT have agreed to hold the workshop on Robben Island, South Africa, from 12 to 14 February 2002. For practical and logistical reasons the first two days of the workshop will be held in Cape Town, where better conference and accommodation facilities are located. The final day of the workshop will be held on Robben Island. Robben Island has been chosen for the final day of the workshop and as the focus of the closing ceremony, because it is a place which has come to symbolise the fight against repression. To finalise the "Robben Island Plan of Action" for the prevention of torture and ill-treatment and to hold a closing ceremony there, would have a powerful and symbolic impact.

(d) Preparatory Stages

- *Meetings*

A preparatory meeting between the APT and the African Commission was held, in Banjul, on the 16 October 2001, coinciding with the 30th session of the African Commission. At this meeting, the initial draft programme for the workshop was discussed and the key people who should be invited to participate in the workshop were considered.

JBN
14/09/05

- *Materials for the workshop*

Following the preparatory meetings, certain participants with recognised expertise or knowledge of issues relevant to the three main themes and the possible measures within these themes such as; penal reform, judicial empowerment, police training and the establishment of visiting mechanisms and other control mechanisms, will be asked to prepare background papers for the workshop. These background papers will be distributed to all participants prior to the workshop and will be used as the basis for discussion and eventual drafting of the Plan of Action.

- *Logistical Arrangements*

Between October and December 2001, invitations and background papers will be sent out by the African Commission and the APT to experienced persons who have been selected to participate to the workshop. Invitations will be sent out in early November 2001, 3 months before the workshop. Participants who will be preparing background papers will also be contacted in early November 2001. Background papers will be forwarded to participants in mid-January 2002.

Also during this period, conference rooms on Robben Island and in Cape Town will be booked, training/drafting equipment will be arranged, facilities for a welcome reception will be booked and various travel, food and accommodation arrangements will be made.

Logistical and local arrangements will be co-ordinated between the APT (in Geneva), Commissioner Chigovera (in Harare), the Secretariat of the African Commission (in Gambia) and the Chair of the South African Human Rights Commission (Johannesburg).

III. Expected results

(a) Drafting of a Plan of Action

At the end of the workshop there will be a draft Plan of Action containing concrete measures related to prevention of torture and ill-treatment, such as:

1. *Legal Measures*

- Proposed national legislation to prevent torture, including measures to enable the judiciary to act appropriately on torture cases,
- Proposed steps for further ratifications of the International Convention against Torture,
- Proposed steps for further ratifications of the Protocol to the African Charter on Human and Peoples' Rights establishing an African Court on Human Rights,
- Proposals for the further consideration of the drafting of an African Declaration Against Torture

JBN
14/09/05

- Proposed legislation (measures) to implement the UN Convention Against Torture as well as Article 5 of the African Charter
- Proposed steps for the provision of compensation and rehabilitation for torture victims.

2. *Control Measures*
- Establishment of effective national visiting and other control mechanisms
- Promotion of codes of conduct and ethics for police and prisons' officials,
- Promotion of the work of the Special Rapporteur on prisons and conditions of detention in Africa.

3. *Training and Empowerment*
- Training programmes for the police and other security forces as well as for prisons' officials,
- Training programmes for the judiciary and lawyers,
- Promotion of a closer co-operation with NGOs, especially in relation to visits to places of detention.

(b) Adoption by the African Commission and appropriate OAU/AU authorities

It is expected that the draft Plan of Action will be presented to the African Commission during its 31st session (April 2002), for its adoption. The Plan of Action will then be promoted within the OAU/AU by the African Commission for its approval by the appropriate body of the OAU/AU.

(c) Dissemination

It is expected that the Plan of Action will be promoted and implemented throughout Africa by the African Commission on Human and Peoples' Rights, appropriate national authorities, NGOs and other actors. The proceedings of the workshop, including the Plan of Action, will also be published and widely disseminated by the APT and the African Commission.

IV. Follow up, Implementation and Evaluation

After the adoption of the "Robben Island Plan of Action" for the prevention of torture and ill-treatment in Africa by the African Commission and its approval by the OAU/AU, a seminar will be organised by the African Commission with the support of other interested organisations to explain and present the Plan of Action to national and regional actors. This seminar for the *"launching of the Plan of Action"* will be attended by States representatives, national institutions of human rights, parliamentarians, judges, police officials, lawyers, NGOs etc.

At each session of the African Commission, the Commissioner appointed to co-ordinate the Robben Island workshop with the APT will present a brief report to the Commission regarding the implementation of the Plan of Action. The APT will attend these sessions in order to lobby for and monitor the effective national and regional implementation of the Plan of Action, as well as preparing and presenting implementation strategies.

Further at these sessions the APT will be able to discuss with members of the African Commission, appropriate OAU authorities, national authorities and NGOs, possible follow up procedures to the adoption of the Plan of Action.

Therefore, each year, at the African Commission's sessions , it will be possible to evaluate the progress of the implementation of the Plan of Action.

The APT will also continue to assist national actors in promoting the effective implementation of the Plan of Action throughout Africa.

ANNEX III

African Commission on Human & Peoples' Rights

Kairaba Avenue
P.O. Box 673
BANJUL, The Gambia

OAU - OUA

Commission Africaine des Droits de l'Homme et des Peuples

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412 | 07 AOUT 2001

A TRAITER: JBN | CC INFO: MT | APT

Classement: C7.2.

ACHPR/OBS/165
Date: le 06 août 2001

Jean Baptiste Niyizurugero
Responsable du Programme Afrique
Association pour la Prévention de la Torture
Fax : (4122) 734 56 49
E-mail : apt@apt.ch

Cher Monsieur Niyizurugero,

J'accuse réception de votre message du 17 juillet 2001.

Je tiens à vous informer que la Commission Africaine des Droits de l'Homme et des Peuples a désigné le Commissaire Andrew Chigovera pour travailler en collaboration avec l'Association pour la Prévention de la Torture pour organiser le workshop afin d'élaborer un plan d'action de prévention de la torture et des peines ou traitements cruels, inhumains ou dégradants en Afrique.

Je regrette de vous annoncer que le Commissaire Chigovera ne sera pas disposé de participer à la réunion préparatoire qui devrait se tenir à Genève pendant 3 jours au cours du mois de septembre 2001. Il suggère néanmoins que celle-ci puisse se tenir au cours du mois de novembre 2001.

Dans l'attente de votre réponse, je vous prie de croire à l'expression de ma franche collaboration.

Omari Holaki
Secrétaire de la Commission a.i.

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AFRICAN UNION
الاتحاد الأفريقي
UNION AFRICAINE
UNIÃO AFRICANA

African Commission on Human & Peoples' Rights
Commission Africaine des Droits de 'Homme & des Peuples

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Ref: ACHPR/SEM/3
Date: 1st November 2002

Mark Thomson
Secretary General
Association for the Prevention of Torture

Email: apt@apt.ch

Dear Mr Thomson,

Re: Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

I am pleased to inform you that at its just concluded 32nd Ordinary Session, the African Commission by Resolution adopted the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines).

Please find attached herewith a copy of the Resolution and the Robben Island Guidelines in English and French.

The Secretariat of the African Commission would like to take this opportunity to express its gratitude to the Association for the Prevention of Torture (APT) for cooperating with the African Commission in undertaking this project and hereby encourages APT to follow up on the implementation of the Robben Island Guidelines.

Yours Sincerely,

Germain Baricako
Secretary to the African Commission

C.C Jean Baptiste Niyizurugero,
Programme Officer for Africa,
Email: jbn@apt.ch