

**THE AFRICAN COMMISSION ON HUMAN AND PEOPLES'
RIGHTS AND THE PROMOTION AND PROTECTION OF
PRISONERS' RIGHTS: AN ANALYSIS**

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
DEGREE LLM (HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)

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DECLARATION

I **RHODA NKIROTE IGWETA** declare that this dissertation: **the African Commission on Human and Peoples' Rights and the promotion and protection of prisoner's rights: an analysis** is my work and that it has not been submitted for any degree or examination in any other university. All the sources used or quoted have been duly acknowledged. It is in this regard that I declare this work as originally mine. It is hereby submitted in partial fulfilment of the requirements for the award of LLM (Human Rights and Democratisation in Africa).

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DEDICATION

This dissertation is dedicated to my husband, Ng'entu Murangiri Njeru, a precious gem and to my parents Joseph M. Igweta and Marcella K. Igweta for your guidance, love and support every single day of my entire life.

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and the Welfare of the Child
AHSG	African Heads of State and Governments
AIDS	Acquired Immune Deficiency Syndrome
APT	Association for the Prevention of Torture
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	United Nations Convention on the Rights of the Child
DRC	Democratic Republic of the Congo
ECPT	European Committee for the Prevention of Torture
ECtHR	European Court of Human Rights
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
NGO	Non Governmental Organisation
NHRI	National Human Rights Institution
OAU	Organisation of African Unity
OPCAT	Optional Protocol to the Convention against Torture
PRI	Penal Reform International
SR	Special Rapporteur
SRP	Special Rapporteur on Prisons and Conditions of Detention in Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNSMR	United Nations Standard Minimum Rules for the Treatment of Prisoners
WG	Working Group
WW2	World War Two

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CHAPTER ONE

THE STUDY

1.1 Introduction

There is an estimated one million prisoners in Africa and most of them are detained in overcrowded prisons and conditions that well below internationally accepted standards.¹ These prisons hold both sentenced prisoners and persons awaiting trial. What happens in prisons is usually unknown to the outside world leading to vulnerability of prisoners. For this reason, prisoners require specific recognition and protection. It is trite to say that how a society treats its prisoners, reveals a lot about its moral values, its commitment to the rule of law and democracy.²

Under international law, prisoners' rights enjoy considerable prominence despite the fact that they are relatively invisible in many domestic jurisdictions.³ There is a large body of standards and principles⁴ addressing the various aspects of prisoners' rights and the interaction with those in whose custody they are placed. These instruments apply in addition to all the human rights instruments that apply to all human beings, save for the limitations due to deprivation of liberty.

At the regional level, the African Charter on Human and Peoples' Rights⁵ (Charter) has no provisions that explicitly refer to detainee or prisoner rights. These rights are implied from

¹ J Sarkin 'An overview of human rights in prisons worldwide' in J Sarkin (ed) *Human rights in African prisons* (2008) 1; International Centre for Prison Studies 'Africa occupancy rates' http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=africa&category=wb_occupancy (accessed 31 October 2008).

² R Edney 'Judicial deference to the expertise of correctional administrators: The implications for prisoners' rights' (2001) *Australian Journal of Human Rights* <http://www.austlii.edu.au/au/journals/AJHR/2001/5.html#fn2> (accessed 3 September 2008); L Muntingh 'Prisons in South Africa's constitutional democracy' (2007) Centre for the Study of Violence and Reconciliation 5.

³ F Viljoen 'The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and possibilities' (2005) 27 *Human Rights Quarterly* 126.

⁴ These standards laid down by the United Nations include, among others, Standard Minimum Rules for the Treatment of Offenders (1977), Principles of Medical Ethics Relevant to the Role of Health Personnel Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel or Inhuman or Degrading Treatment and Punishment (1982), Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment (1988), The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Basic Principles for the Treatment of Offenders (1990).

⁵ OAU Doc. CAB/LEG/67/3 rev. 5, Adopted 27 June 1981, entered into force 21 October 1986)

reading the Charter and interpreting the rights therein in relation to detained persons. For example the right to dignity and the prohibition of cruel, inhuman or degrading treatment or punishment,⁶ the right to have his cause heard⁷ non-discrimination,⁸ equality before the law⁹ and freedom of conscience and religion¹⁰ also apply to detained persons.

The African Commission on Human and Peoples' Rights¹¹ (the Commission), which is the principal body mandated to promote and protect human rights in states parties to the Charter, has adopted several resolutions in relation to detained persons. They include the Dakar Declaration and Recommendations on the Right to a Fair Trial (1999)¹², Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa (Robben Island Guidelines on Torture) (2002),¹³ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)¹⁴ and the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa (2003).¹⁵ There also exist special mechanisms specifically related to prisons, in particular the Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP) whose mandate was first adopted by the Commission in 1996. Other important regional instruments that have been recognised and adopted by the Commission include the Kampala Declaration on Prison Conditions in Africa in 1996 and the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System (2006). These, read together with the Protocol to the African Charter on

⁶ Art 5.

⁷ Art 7.

⁸ Art 2.

⁹ Art 3.

¹⁰ Art 8.

¹¹ Created under article 30 of the Charter and commenced its operations in 1987.

¹² Provides an outline for more detailed principles.

¹³ Adopted to prohibit and prevent torture and makes specific reference to detainees.

¹⁴ The Commission expounds on its understanding on the content and scope on the standards outlined in the 1999 Dakar Declaration.

¹⁵ Was adopted with the intention of accelerating prison reforms in Africa and proposed the adoption of a Charter on the rights of prisoners.

Human and People Rights on the Rights of Women in Africa¹⁶ and the African Charter on the Rights and Welfare of the Child¹⁷ provide the basis for the rights of detained persons in Africa.

1.2 Problem statement

The Charter provides the dual mandate of the Commission as being to promote¹⁸ and protect¹⁹ human and peoples' rights. Prisoners fall within this mandate. Despite the resolutions and declarations on issues related to prisoners and prisons, the situation in African prisons remains bleak and a sustained focus on promoting and protecting prisoners' rights has not emerged.

The responsibility to operate prisons lies primarily with the state but other actors such as National Human Rights Institutions (NHRIs) and civil society play an important role in providing oversight. The Commission and the Charter provide a regional platform and framework supporting domestic institutions to promote and protect human rights.

The conditions in African prisons are generally poor leading to gross human rights violations of prisoners and the staff who are required to work under the existing conditions. Penal Reform International (PRI), an international organisation working on prisons reform, notes 'if the situation in African prisons was "inhuman" in 1996, the situation in 2006 is, if anything, worse.'²⁰ PRI notes that there are several common problems in African prisons such as lack of food, poor hygiene and sanitation, prison overcrowding and inadequate medical care.²¹ The United Nations Mission in the Democratic Republic of Congo describes Tschikapa prison as 'a "mortuary" where prisoners "resemble skeletons" even before they die of malnutrition.'²² This statement illustrates the severity of the challenges that many prisons in Africa face even as far as the most basic provisions are concerned. African prison systems have, for a variety of reasons,

¹⁶ OAU Doc CAB/LEG/66.6/Rev/1, adopted in July 2003 and entered into force on 25 November 2005.

¹⁷ OAU Doc. CAB/LEG/24.9/49 (1990), adopted 11 July 1999 and entered into force Nov. 29, 1999,

¹⁸ Art 45(1).

¹⁹ Art 45(2).

²⁰ A Stapleton 'Introduction and overview of legal aid in Africa' in Penal Reform International and Bluhm legal clinic of the Northwestern University School of law *Access to justice in Africa and beyond: Making rule of law a reality* (2007) 8.

²¹ 'Health in Prison' (2007) 59 (3) *Criminal Justice News* <http://www.penalreform.org/resources/new-2007-newsletter-59-en.pdf> (accessed 7 August 2008).

²² Tshikapa prison - a mortuary, <http://www.monuc.org/News.aspx?newsId=14793> (accessed 7 August 2008).

not been able to address fundamental and systemic problems and this has had dire consequences for prisoners.

1.3 Research questions

This study addresses the following questions:

- What is the human rights situation in prisons in Africa? What challenges do African prisons face in general?
- Is there a legal framework in place for the protection of prisoners' rights in Africa and how does it relate to other human rights instruments? What is the mandate of the Commission in relation to the prisoners' rights?
- What has the Commission done and achieved under its promotional and protection mandates in respect of prisoners' rights? Have the various mechanisms been fully utilised in relation to prisoners' rights? How has the Commission been able to optimise its relationship with the states, civil society and national human rights institutions to fully protect these rights?
- If the conclusion is reached that the Commission has not effectively addressed issues of prisoners' rights, how would it do so more effectively?

This study sets out the theoretical framework for prisoners' rights under the African human rights system (African system) and focuses on the practical expression of the Commission's mandate. The SRP has been the focal point of matters relating to the rights of prisoners. The study also investigates whether the creation of this mechanism has effectively excluded the other mechanisms in respect of prisoners' rights, and created a bureaucratic structure where all issues related to prisoners are referred to the SRP.

1.4 Significance of the study

Given the broad mandate provided by the Charter, the Commission is a powerful body that can create momentum for the effective promotion and protection of prisoners' rights. Through this study, a nexus between the various mechanisms of the Commission for the promotion and protection of prisoners' rights is analysed. The link between states, civil society and national human rights institutions in promoting and protecting human rights will also be considered and proposals for increasing effectiveness will be made. The study emphasises how the mandate of the Commission can be better utilised for the benefit of prisoners in Africa.

1.5 Literature survey

There is a significant body of literature on the mandate and effectiveness of the Commission but information relating to its role in relation to prisoners is limited to a few journal articles and a few chapters in books dealing with a general discussion of the Commission's work.

Evans and Murray are some of the leading writers on the African system and their book²³ provides a good summary of how the Commission functions, its general mandate and its operations. One chapter is dedicated to discussing the work of the SRP. However, the book is dated in respect of the promotion and protection of prisoners' rights and there is therefore a need for recent developments to be discussed and this study provides that information. Viljoen²⁴ addresses international human rights law in Africa from the global, regional, sub-regional and national perspectives. He draws from numerous published and unpublished works, bringing different perspectives into his book and is the most current publication on the African system. Viljoen provides an analysis of the Commission starting with the normative framework and explores the practical working of the Commission in some depth. Viljoen discusses prisons only from the perspective of the SRP and therefore his contribution fails to provide a complete picture of the Commission's interventions in relation to prisoners.

Sarkin²⁵ edited a compilation bringing together different aspects of prisons by different authors and is the most recent work on prisoners' rights but only one chapter by Murray deals with the work of the Commission and less emphasis is placed on prisoners' rights. Viljoen's²⁶ article looks at the SRP and reviews the achievements and possibilities of this mechanism within the regional human rights system. It is the most detailed review of the work of the SRP but does not look at the overall mandate of the Commission with regard to prisoners' rights. The research for the article included field visits and assessed a lot of primary information and is therefore a comprehensive account of the mechanism. It also makes recommendations for improvement. This study provides an update on the SRP and the progress towards the implementation of the recommendations made by Viljoen.

²³ M Evans & R Murray *The African Charter on Human and Peoples' Rights, The system in practice, 1986-2000* (2002).

²⁴ F Viljoen *International human rights law in Africa* (2007).

²⁵ Sarkin (n 1 above).

²⁶ Viljoen (n 3 above) 125–171.

Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law²⁷ compiled and edited papers that were presented at a conference in Lilongwe, Malawi, on legal aid in the criminal justice, the role of lawyers, non-lawyers and other service providers. The book provides a background for an integrated approach in relation to prisoners' rights and creates a basis for understanding the African criminal justice systems within which prisons and prisoners are situated.

Bernault²⁸ edited several chapters on the origins of prisons and confinement in Africa providing different perspectives from several Africa states. The book provides a detailed historical understanding of prisons in Africa by assessing the evolution of prisons in different African states. Foucault²⁹ provides detailed information on the evolution of prisons and the functions of imprisonment. His work is critical in understanding the origins of prisons in Western Europe predating the development of African prisons. Given the work that has been published so far, the author was unable to identify one that looks at the entire Commission through the lens of prisoners' rights thus there is a need for this study.

1.6 Methodology

This study relies on desk research to draw observations and conclusions from published works on the Commission in relation to prisoners' rights. The study engages with various viewpoints in the available literature and analyses primary sources such as activity reports of the Commission.

1.7 Limitation of the study

There already exists a substantial body of information on the work of the Commission in general, although it does not focus adequately on prisoners' rights. Time constraints placed a limit on the depth and scope of the analysis.

The information that should be on the Commission's website is not properly archived and there are many inactive links and thus excluding some primary information from the analysis. As a

²⁷ PRI & Bluhm Legal Clinic (n 20 above).

²⁸ F Bernault *Social history of Africa: A history of prison and confinement in Africa* (2003).

²⁹ M Foucault *Discipline and punish: The birth of prison* (1977).

result, there was a heavy reliance on secondary sources where the primary sources were unavailable within the Commission's or African Union's websites.

1.8 Chapter Breakdown

Chapter 2 – The evolution of human rights in African prisons

The chapter familiarises the reader with the history of prisons and the evolution of prisoners' rights in Africa. It highlights the functions of prisons and conducts an assessment of whether these functions have been achieved. It also provides a snapshot of the human rights situation in prisons.

Chapter 3 – Normative framework: The African human rights system and protection of prisoners' rights

The chapter highlights the legal framework under the African human rights system for the protection of prisoners' rights. It provides an overview of various instruments and the link with the rights of detainees and prisoners, including a review of soft law.

Chapter 4 – Promotion and protection of prisoners' rights: an analysis of the interventions of the African Commission on Human and Peoples' Rights

This chapter assesses how the mandate of the Commission has been used in relation to prisoners' rights. This assessment includes a description of how the Commission has interacted with states, civil society and NHRI to work towards the promotion and protection of prisoners' rights.

Chapter 5 – Conclusion and recommendations

This chapter will draw conclusions based on the research and make some recommendations to make the intervention by the Commission in relation to prisoners' rights more effective.

Key phrases

African Commission on Human and Peoples' Rights and prisoners' rights - prisoners' rights in Africa - prisons in Africa - promotion and protection of prisoners' rights - human rights in African prisons - states and prisoners' rights

CHAPTER TWO

THE EVOLUTION OF HUMAN RIGHTS IN AFRICAN PRISONS

2.1 Introduction

This chapter highlights the origins of prisons from ancient Rome and how they came to be in Africa, what developments in the prisons led to the concept of prisoners' rights and the nature of prison conditions in Africa.

2.2 The idea of punishment

Some of the legally authorised sanctions in Europe in the eighteenth century were death, penal servitude, imprisonment, corporal punishment, detention in a reformatory school, release on recognisance and fines.³⁰ According to Myrl E. Alexander;

[s]ociety's offenders have been dealt with in many ways. Until recent times, historically speaking, punishment was harsh; criminals were exiled, enslaved, tortured, mutilated, and executed. The use of imprisonment as a method of treating the offender is relatively new, dating back no further than the last quarter of the 18th century. Of course, jails, lockups, and places of detention of various kinds have been in existence for hundreds of years. But it was only 200 years ago that they were used for anything other than places of detention for offenders awaiting a harsher kind of punishment.³¹

This study does not engage with the philosophical arguments of whether imprisonment is an appropriate punishment or not. It accepts that use of imprisonment is an accepted and widely used punishment. A prison is understood as an institution where prisoners, criminal or civil, untried or convicted are physically confined in accordance with judicial orders.³²

³⁰ D Garland *Punishment and welfare* (1985) 6.

³¹ T Sellin 'A look at Prison History' (1967) 31 *Federal Probation* 18.

³² United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR), preliminary observations, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at

Foucault observes that the prison as a punishment was preferred because of its disciplinary potential and because liberty was perceived as a good to which every individual is attached thus to deprive one of liberty was an appropriate punishment.³³ Foucault further argues that the prison is the ‘clearest, simplest, and most equitable of penalties.’³⁴ The loss that all people who are imprisoned get is the same regardless of one’s place in society; it is an egalitarian punishment.

2.3 The origins of prisons

Prisons can be traced back to the Roman Empire when offenders were detained pending trial or sentence or by masters to punish disobedient servants.³⁵ In England, in the ninth century, prisons were used to remove the King’s enemies from circulation.³⁶ By the eleventh century, there was a need for prisons to hold those waiting to attend their trials or be executed.³⁷ Prisoners would pay for their own upkeep to those that managed the prison including sheriffs, local corporations, individual franchise holders and the church.³⁸ In the sixteenth century, Europe introduced houses of correction where able-bodied people could perform labour to address the increasing problem of petty offenders.³⁹ Through prison labour, it was expected that prisoners would understand the error of their ways and become law abiding citizens by using the skills that they had acquired in prison to work in the free world. In the seventeenth century, transportation from Europe to other locations where the prisoners could work was introduced and the destinations were colonies, mainly North America and Australia.⁴⁰ The ships that

Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

³³ Foucault (n 29 above) 232; see KC Hass & GP Alpert *The dilemmas of corrections: Contemporary readings* (1999).

³⁴ Foucault as above 232.

³⁵ R Tomasic & I Dobinson *The failure of imprisonment: An Australian perspective* (1979) 7.

³⁶ GD Treverton-Jones *Imprisonment: The legal status and rights of prisoners* (1989) 1.

³⁷ As above 1.

³⁸ GB Shaw *Imprisonment* (1924) 67.

³⁹ Tomasic & Dobinson (n 37 above) 7; See, KL Hall *Police, Prison and punishment: Major historical interpretation* 1987.

⁴⁰ Tomasic & Dobinson (as above) 8; also Treverton-Jones (n 38 above) 2.

transported them were considered prisons and once they arrived, the entire settlement was one vast prison.⁴¹

In America, the first prisons were designed around a programme developed by Dr. Benjamin Rush, one of the signatories of the Declaration of Independence.⁴² The Act that is regarded as the beginning of the modern system of prison administration in America is the law of 5 April 1790. It established the principle of solitary confinement, the basis of the Pennsylvania and Auburn systems of discipline.⁴³ This evolved into the reformatory system where education and trade training were considered central features.⁴⁴ Between 1900 and 1935, the industrial prison provided labour for industries but this changed with the depression between 1929 and 1933 and with the passage of legislation by congress restricting the sale of prison products in the open market.⁴⁵ Due to the success of the American prison systems, European penologist and reformers visited America to observe the systems of Pennsylvania and New York which formed the basis of solitary confinement in most European prisons since the 1800s.⁴⁶ The solitary system was intended to produce honest and obedient citizens who would not revert to their criminal ways.⁴⁷

In pre-colonial Africa, few societies used containment and where it was used, it was only until compensation, which was the main form of punishment, was paid.⁴⁸ During the slave trade era, although not considered imprisonment in the modern sense of the term, slaves were held in prison-like facilities prior to transportation to overseas destinations and generating

⁴¹ As above 9.

⁴² H Gill 'State prisons in America, 1787 – 1937' in GG Killinger et al *Penology: The evolution of corrections in America* (1979) 61.

⁴³ As above 61.

⁴⁴ As above 62.

⁴⁵ As above 62.

⁴⁶ New York Correction History Society 'The evolution of the New York System' <http://www.correctionhistory.org/html/chronicl/state/html/nyprisons.html> (accessed 31 October 2008).

⁴⁷ GA de Beaumont and A de Tocqueville *On the Penitentiary System in the United States and its Application in France* (1964) 59 cited in New York Correction History above.

⁴⁸ S Pete 'A brief history of human rights in the prisons of Africa' in Sarkin 40; According to Pete, several centralised societies used imprisonment as it is used today such as the Kingdom of Dahomey, the Empire of Samori Toure and the Mandara Kingdom.

infrastructure for confinement to be used later on.⁴⁹ Only towards the end of the nineteenth century did the use of prisons become widespread in Africa, except in Southern Africa where prisons had already been established. Imprisonment was an important tool in achieving colonial control over indigenous people through enforcing tax collections and obtaining forced labour from the locals.⁵⁰ The colonial powers built prisons at garrisons and administrative outposts that were established across the continent supported by comprehensive legislation from the home states giving wide powers to particularly the British colonisers.⁵¹ Countries like Kenya, Uganda, Ghana and Nigeria had prisons built rapidly to accommodate the large number of prisoners resulting from active resistance to colonialism.⁵²

Between 1900 and 1935, imprisonment and prisons in Africa were significantly similar to what they were 100 years before in England and America retaining the use of archaic forms of punishment such as flogging.⁵³ The colonial powers were running two prison systems, one at home and another in the colonies. The reforms that were being made at home were not being transferred to the colonies that they occupied. As the struggle for independence continued over the first half of the twentieth century, the colonial masters increased the use of imprisonment and in some cases resorting to the use of emergency camps for confinement.⁵⁴ It is against this background that prisons in Africa continue to operate only in highly bureaucratic states, such as South Africa, which have succeeded in maintaining the prison system at the heart of the judicial system.⁵⁵

⁴⁹ Pete (n 48 above) 43.

⁵⁰ As above 45.

⁵¹ F Bernault 'The politics of enclosure in colonial and post colonial Africa' in Bernault (n 28 above) 13.

⁵² As above, according to Bernault, the colonial powers wanted free labour for their agricultural and public works projects and prisoners were the source of such labour.

⁵³ As above 3.

⁵⁴ As above 12.

⁵⁵ As above 39.

2.4 Functions of prisons

The functions of prisons fit within two broad theories; utilitarian and retributive.⁵⁶ The utilitarian theory seeks to punish the offender for the general welfare of society, thus incapacitation is supposed to deter the offender, minimize the rate of crime and rehabilitate him for his own good. The retributive theory regards the offender's wrongdoing as deserving of a punishment whose amount should be proportionate to the extent of wrongdoing. Based on these theories, prisons are perceived as having multiple and sometimes conflicting purposes that may range from custody, coercion and correction to prevention, deterrence and reform.⁵⁷ Foucault notes that penal imprisonment covers the deprivation of liberty so that the person pays his debt not only to the victim but also the society by transforming that person into a law abiding citizen.⁵⁸ Muntingh concurs observing that;

[p]risons must house people in a humane manner but simultaneously appeal to the punitive nature of prisons – order and security must be maintained while providing an effective deterrent, and appease political opinion.⁵⁹

Rule 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR) states that;

[t]he purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure that upon his return to society, the offender is not only willing but able to lead a law-abiding and self-supporting life.

Article 10 of the International Covenant on Civil and Political Rights (ICCPR), provides that,

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

⁵⁶ CL Ten *Crime, guilt and punishment: A philosophical introduction* (1987) 4-5.

⁵⁷ G Hawkins 'The prison' in Killinger et al (n 44 above) 1; K Frimpong 'Botswana' and TMD Pereira 'Brazil' in D van Zyl Smit & F Dünkel (eds) *Imprisonment today and tomorrow: International perspectives on prisoners rights and prison conditions* (2001) 82 and 223.

⁵⁸ Foucault (n 29 above) 232-233.

⁵⁹ Muntingh (n 2 above) 5.

- (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

The Human Rights Committee when interpreting article 10 of the (ICCPR)⁶⁰ stated that ‘no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner.’⁶¹ Article 17(3) of the African Charter on the Rights and the Welfare of the Child (ACRWC) provides that,

[t]he essential aim of treatment of every child during the trial and also if found guilty of the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

What emerges from the various schools of thought is that a central feature of the prison is control over the individual in order to achieve the purpose of imprisonment. A prison system controls every aspect of the prisoners’ life starting from what time the prisoner wakes up, what and how they eat, what activities they engage in, the clothes that they wear and who they can interact with. Whatever purpose imprisonment intends to achieve, control is a necessary tool in facilitating it.

Imprisonment achieves incapacitation because it isolates the individual from free society where the person cannot directly offend the community.⁶² The prison experience serves a deterrent function because the person should have learnt his or her lesson and in future is expected to prevent the person from offending again.⁶³ Deprivation of liberty serves both the functions of punishment and retribution because taking away a person’s liberty is a punishment. In addition, the victim is perceived to receive justice by having the offender serve the punishment. The reformative function is based on the realisation that imprisonment often is for a limited time period and that the person must return to society. As such, the offender must by the time of their release see the error of their ways and live in accordance with accepted norms.⁶⁴ Since that

⁶⁰ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976.

⁶¹ General Comment no. 21, para 10.

⁶² Hawkins (n 57 above) 5; R Johnson *Hard time: Understanding and reforming the prison* (1996) 15.

⁶³ LS Branham & S Krantz *Sentencing, corrections and prisoners’ rights* (1994) 3, see EL Glaeser ‘An overview of crime and punishment’ (1999) 20 Washington: World Bank. Mimeographed, 1999, J Galtung ‘The social functions of a prison’ (1958) 6 (2) *Social Problems* 127-140.

⁶⁴ N Morris *The future of imprisonment* (1974) 16; CHS Jayewardene and DJN Jayasuriya *The management of correctional institutions* (1981) 21.

individual must live in a community, the reintegration function helps him to return to the society that he had wronged and take their appropriate place as a law abiding citizen.⁶⁵

It could be argued that the functions that prisons are supposed to serve have not been achieved compounded by problems in the prison system. Due to chronic overcrowding (discussed in detail below), there have been attempts to introduce frameworks which deal with non-custodial sentencing. These include the Kampala Declaration on Prison Conditions in Africa (1996), the Kadoma Declaration on Community Service Orders (1997) and the Ouagadougou Declaration on Accelerating Penal and Prison Reform (2002). A discussion on non-custodial sentencing is outside the scope of this study.⁶⁶

2.5 The evolution of prisoners' rights

Prisoners' rights is a term used to describe a penal or policy regime that respects the prisoner's inherent dignity as a person and recognises that he does not surrender the law's protection on being imprisoned.⁶⁷ In ninth-century Europe, it was argued that the standard of life for prisoners should not be better than that of free labourers outside; the notion of less eligibility as propounded by Herman Mannheim.⁶⁸ The prison was intended to cause the prisoner much suffering so as to repay the harm that had been caused to the victim.⁶⁹ In some cases, it was argued that prisons were humane in that they sacrificed a few people to save others by deterring would be criminals.⁷⁰ Since prisons initially were run for a profit and later considered a place where criminals should be securely confined away from law abiding society, there was ample opportunity for ill-treating prisoners and maximising profits.

The development of prisoners' rights in medieval England was the result of two issues; delays before the trial leading to the development of the Habeas Corpus Act of 1679 and the imprisonment of small debtors that plunged them further into debt requiring legislative

⁶⁵ EL Rubin 'The inevitability of rehabilitation' (2001) 19 *Law and Inequality Journal* 345.

⁶⁶ L Muntingh 'Alternative sentencing in Africa' in Sarkin (n 1 above) 178-203.

⁶⁷ G Zellick 'The case for prisoner's rights' in JC Freeman *Prisons past and future* (1978) 105.

⁶⁸ Garland (n 30 above) 11; Jeremy Bentham refers to this idea as the rule of severity and argues that when a person's liberty is taken away, it deprives them of daily comforts and therefore serves the principle of less eligibility.

⁶⁹ Johnson (n 62 above) 15. He notes that the first known prison that was built in 64BC was built under the sewers of Rome with the sole purpose of punishing the prisoners who were kept in the cages.

⁷⁰ As above 29.

intervention in the first half of the eighteenth century.⁷¹ From 1773, when John Howard was appointed High Sheriff of Bedfordshire, he got involved in reforms in Bedford prison, his local prison and documented this in a book, *The state of the prison* published in 1777.⁷² He inspired other reformers who improved the conditions of prisoners.⁷³

In America, the Quakers, a religious group, who were appalled by the cruelty of torture and execution as modes of punishment in the prisons at the time and the fact that death meant finality, came up with the idea of the penitentiary, a place of separation, where criminals could think upon their evil deeds and repent.⁷⁴ This set the stage for the states of Philadelphia and New York to open prisons based on the Quakers model that condemned brutalisation of the prisoner and focused on ending capital and corporal punishments and led to the adoption of the law of 5 April 1790.⁷⁵ The actions of John Howard and the Quakers were the first steps in the protection of prisoners' rights.

In the 18th, 19th and early 20th centuries, attempts at obtaining judicial protection of prisoners' rights yielded mixed results in various jurisdictions. In *R v Higgins*, a gaoler and warder were charged with the murder of a prisoner who had died as a result of unhealthy conditions and this was held to be a breach of the trust which the law reposed in them.⁷⁶ In contrast, in *Ruffin v Commonwealth*, the court observed that prisoners had no rights; any rights they once had were forfeited while they were incarcerated as part of the price that they had to pay.⁷⁷ The court stated that the only rights that the prisoner had were those that the law in its humanity accorded him.⁷⁸ Less than fifty years later in South Africa, in *Whittaker and Morant v Roos and Bateman*, the court held that prisoners 'were entitled to all their personal rights and personal dignity which

⁷¹ Treverton-Jones (n 36 above) 2.

⁷² E Stockdale 'John Howard and Bedford Prison' in JC Freeman (n 67 above) 15-24.

⁷³ Sir George Paul in Gloucestershire who introduced visits by the governor, warders, doctor and chaplain, Elizabeth Fry who was involved in Newgate prison for 30 years from 1816.

⁷⁴ TO Murton 'Prison Management: The past, the present and the possible future' in ME Wolfgang *Prisons: Present and possible* (1979) 5; M Meskell 'An American resolution: the history of prisons in the United States from 1777 to 1877' Stanford Law School (1999).

⁷⁵ Morris (n 64 above) 4.

⁷⁶ (1730) 17 State Tr 309; 2 Stra 883.

⁷⁷ Supreme Court of Virginia, 62 Va. 790; 1871 Va. LEXIS 89; 21 Gratt. 790.

⁷⁸ Branham & Krantz (n 63 above) 128.

were not taken away by law, or necessarily inconsistent with the circumstances in which they had been placed.⁷⁹ In 1943, an English court held in *Arbon v Anderson*, that prison rules did not confer rights on prisoners that could be enforced by court action.⁸⁰ Eight years later, in *Stroud v. Swope*⁸¹ a federal circuit judge in America asserted: '[w]e think it well settled that it is not the function of the courts to superintend the treatment and discipline of persons in penitentiaries...' These mixed findings of various courts did not clarify the judicial protection of prisoners' rights.

After the Second World War (WW2) and with the formation of the United Nations Organisation (UN), human rights were codified in the Universal Declaration of Human Rights (UDHR).⁸² This led to the specific protection of the right to liberty and protection of rights upon the deprivation of liberty.⁸³ Soon thereafter, minimum standards to which prisoners should be treated were adopted - the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR).⁸⁴ Other applicable UN standards include, the Code of Conduct for Law Enforcement Officials⁸⁵, the Principles of Medical Ethics relevant to the role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment⁸⁶ and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁸⁷

Other instruments such as the ICCPR⁸⁸ which deal with general human rights, also protect prisoners' rights. While drafting article 10 of ICCPR, it was argued that a person should not be regarded as unworthy simply because he has been convicted of an offence but he may be

⁷⁹ 1912 AD 92.

⁸⁰ [1943] KB 252; [1943] All ER 154.

⁸¹ 187 F. 2d. 850, 9th Circuit, 1951.

⁸² GA res. 172 A (III), 10 December 1948.

⁸³ Art 3, UDHR; see also LA Rehof 'Article 3' in G Alfredsson and A Eide (eds) *The Universal Declaration of Human Rights* (1999) 89; GM Sykes 'The pains of imprisonment' in GG Killinger et al (n 42 above) 110.

⁸⁴ Adopted August 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

⁸⁵ Adopted by the General Assembly on 17 December 1979, GA res. 34/169.

⁸⁶ Adopted by the General Assembly on 18 December 1982, GA res. 37/194.

⁸⁷ Adopted by the General Assembly on 9 December 1988, GA res. 43/173.

⁸⁸ See art 3.

subjected to special handling because he is not in the same situation as a free person.⁸⁹ A person is sent to prison as a punishment by taking away his freedom, not for any additional punishment.⁹⁰ The Human Rights Committee has stated that ‘treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule’.⁹¹ The law therefore should accord the person procedures and facilities for ensuring that his or her treatment is at all times just, fair and humane. Whatever happened elsewhere, prisoners’ rights found a less than receptive audience in Africa.

Finally, there are several special categories of prisoners whose rights need to be protected in addition to generalised protection of prisoners’ rights because they are particularly vulnerable. These include prisoners with disabilities, mentally challenged, juvenile, pregnant and nursing mothers as well as children accompanying their mothers to prison. These particular vulnerable groups are however outside the scope of this study.

2.6 Overview of the human rights situation in African prisons

Prisons in African states have been plagued with many problems accentuated by state specific social, political, historical and economic factors. Among the common problems are, overcrowding, antiquated buildings, corruption, lack of separate facilities for various categories of prisoners and poor governance resulting in human rights violations.⁹² These can be classified either as systemic problems or issues resultant from systemic problems. There are several sources that provide an analysis of the systemic and other problems in prisons resulting in human rights violations.⁹³

⁸⁹ N Jayawickrama *The judicial application of human rights law: National, regional and international jurisprudence* (2002) 427. The drafters opined that the person is entitled to respect for his physical and moral dignity, to material conditions and treatment befitting that dignity, sympathy and kindness; UN Document A/4045, section 49.

⁹⁰ Johnson (n 62 above) 10; see D van Zyl Smit ‘Humanising Imprisonment: A European Project?’ (2006) 12 *European Journal of Criminal Policy* 107–120.

⁹¹ Para 4, Human Rights Committee, General Comment 21 (1992).

⁹² J Sarkin ‘An overview of human rights in prisons worldwide’ in Sarkin (n 1 above) 13.

⁹³ Most recently Sarkin (n 1 above).

Overcrowding of prisons has been singled out as the primary problem of African prison systems and consequently resulting in human rights violations.⁹⁴ Overcrowding increases the spread of communicable diseases, makes the attainment of hygiene and sanitation standards difficult and violates the dignity of people due to the inhumane conditions that they are subjected to. This is compounded by poor infrastructure that has not expanded to accommodate the growing numbers of prisoners. Research has shown that in 64 percent of the African states, the prison population increased between 2002 and 2006.⁹⁵ Of the 36 states on which information is available, 20 have occupancy rates of 140 per cent and higher.⁹⁶

One direct result of overcrowding is poor prison conditions. In Benin, for example, the prison conditions are so deplorable as a result of overcrowding yet the government officials admit they are helpless about it.⁹⁷ The problem of overcrowding can be attributed to a weak democratic state that is not accountable to its citizens as is the case in the Democratic Republic of the Congo (DRC), where there have reportedly been 26 deaths since January 2008 due to inadequacy of food for the large number of prisoners.⁹⁸ In Uganda, the Daily Monitor, a leading newspaper reported that ‘an estimated 34,000 prisoners countrywide would starve to death if the government failed to mobilise just over US\$9 million to feed them’.⁹⁹ In Cote D’Ivoire prisoners die of nutrient deficiencies.¹⁰⁰ A report by a Committee in Kenya to investigate the prison

⁹⁴ V Dankwa ‘Overcrowding in African Prisons’ in Sarkin (n 1 above) 83, also see generally; ‘Prison overcrowding’ http://hrw.org/reports/2006/guinea0806/5.htm#_Toc143135720 (accessed 19 August 2008).

⁹⁵ R Wamsley ‘World Prison Population, Seventh Edition’ <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf> (accessed 4 September 2008).

⁹⁶ International Centre for Prison Studies (n 1 above).

⁹⁷ ‘Benin: Prison conditions violate human rights’ 30 July 2008, <http://www.irinnews.org/Report.aspx?ReportId=79523> (accessed 4 September 2008), also see ‘Cruel prison condition damage Malawi human rights record’ 5 November 2007 Nyasa Times available on http://www.africanpath.com/p_blogEntry.cfm?blogEntryID=2581 (accessed 4 September 2008).

⁹⁸ ‘DRC: Prisoners dying of hunger in Kasai Oriental’ <http://www.irinnews.org/report.aspx?ReportID=79375> (accessed 19 August 2008).

⁹⁹ ‘Uganda: Over 30,000 prisoners at risk of starving to death’ 29 July 2008, http://www.monitor.co.ug/artman/publish/news/34_000_prisoners_face_starvation_68975.shtml (accessed 31 October 2008)

¹⁰⁰ ‘COTE D’IVOIRE: Malnutrition concerns in country’s prisons’ 2 September 2008, <http://www.irinnews.org/Report.aspx?ReportId=80115> (accessed 5 September 2008).

conditions highlighted the deplorable state of affairs not only for prisoners but for staff who work in the prisons.¹⁰¹

Health and sanitation facilities in most prisons leave a lot to be desired. Nutrition is often inadequate leading to deaths and exposing prisoners to avoidable health problems. Luzira prison in Uganda was built to hold 600 people and holds more than six times that number leading to rapid infection with tuberculosis resulting in approximately 200 deaths per year.¹⁰² At a conference in 1999, a doctor who had visited the prisons in Malawi stated:

[prisoners] share the available space with rats, bats, cockroaches, flies, mosquitoes and many other visible and invisible things. Very many of them dreadfully pathogenic. These prisons have overflowing toilets and septic tanks, broken showers, smashed windows, and dirty kitchens. The cells are packed with inmates who sleep head to toes and who sweat like pigs in the hot season This more or less completes the picture...¹⁰³

HIV and AIDS are key challenges to African prisons with international data showing that HIV prevalence among prisoners is between two to fifty times higher than that of the general adult population.¹⁰⁴ According to the United Nations Office on Drugs and Crime (UNODC), the systemic problems such as overcrowding increase the chances for sexual violence and which are partly responsible for the spread of HIV in prisons and cause an increase in opportunistic infections such as TB.¹⁰⁵ HIV and AIDS are not just health concerns but a social one as prisoners return to the communities from which they have come and there are no steps to arrest the spread of infections in prison.

A recent feature of the law enforcement landscape in Africa is the idea of renditions as part of the fight against terrorism. African prisons have been responsible for holding prisoners on transit to

¹⁰¹ Report of the high level committee on the prisons crisis in Kenya, July 2008, on file with author.

¹⁰² 'Uganda: Overcrowded prisons heighten TB risk' <http://www.plusnews.org/Report.aspx?ReportId=79104>; 'Crowded prisons undermine rehabilitation' http://www.int.iol.co.za/index.php?set_id=1&click_id=3045&art_id=vn20080614085837868C533533 (accessed 19 August 2008).

¹⁰³ PRI 'The causes of poor prisoner health' 2 (2007) *Prison Reform Briefing Newsletter* 6.

¹⁰⁴ UNODC 'HIV and prisons in Sub-Saharan Africa' <http://www.unodc.org/unodc/en/frontpage/hiv-and-prisons-in-sub-saharan-africa.html> (accessed 20 September 2008).

¹⁰⁵ UNODC 'HIV and Prisons in sub-Saharan Africa: Opportunities for Action' in <http://www.unodc.org/unodc/en/frontpage/hiv-and-prisons-in-sub-saharan-africa.html> (accessed 31 October 2008).

other destinations and in the process using torture to obtain information from them.¹⁰⁶ In many of the cases, diplomatic assurances are used to guarantee that the prisoner will not be tortured although it is well known that this is ignored by the receiving states.¹⁰⁷ This has added to the already existing phenomena of torture that is widely used in many prisons across the continent including in Egypt, Uganda, Cameroon and Morocco.¹⁰⁸

These are just some of the problems that characterise prisons on the continent. The SMR are clear about prisoners' rights and the dignity of the person is at the heart of this protection. Some states like South Africa, have taken steps towards the specific protection of prisoners' rights and have consequently strengthened judicial protection at the domestic level.¹⁰⁹ Continentally, more needs to be done to ensure that there is protection of prisoners' rights and reacting to problems.

2.7 Conclusion

African states have supported imprisonment as one of the punishments in the criminal justice system but the primary responsibility for the protection of prisoners' rights lies with the state. The state holds prisoners on behalf of the people but has to ensure that they are treated humanely within those facilities and that the reason for their incarceration is achieved legitimately. States also ratify human rights instruments for the protection of their citizens and have the responsibility to adhere to these legally enforceable instruments. The present situation of prisons, as outlined in this chapter, can be improved if legal frameworks are adhered to by the states parties. The next chapter outlines the legal framework for the promotion and protection of prisoners' rights under the African system.

¹⁰⁶ Amnesty International 'Amnesty International report 2008, State of human rights in the world' (2008) 27 .

¹⁰⁷ Redress 'Terrorism, counter-terrorism and torture: International law in the fight against terrorism' (2004) 32.

¹⁰⁸ JD Mujuzi 'An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights (2006) 6 *African Human Rights Law Journal* 427-428.

¹⁰⁹ See generally Muntingh (n 2 above).

CHAPTER THREE

NORMATIVE FRAMEWORK: THE AFRICAN HUMAN RIGHTS SYSTEM AND PRISONERS' RIGHTS

3.1 Introduction

Regional human rights systems play an important role in facilitating international human rights protection.¹¹⁰ The protection of human rights must be within a legal system that articulates what the rights are, what institutions are responsible and the applicable procedures for enforceability; in other words, it must have constitutional and functional components. A 'system' is defined as a set of connected things or parts; an organised body of material or immaterial things.¹¹¹ A system is functional when there is an organisational structure that facilitates the working as an integrated whole.¹¹² This chapter looks at the legal framework for the protection of prisoners' rights within the African system.

3.2 Overview of the African Human Rights System

The term 'African system' describes the architecture of norms and institutions comprised in the core pan-continental human rights treaties adopted under the auspices of the Organisation of African Unity (OAU) and its successor, the African Union (AU).¹¹³ The normative framework at the regional level includes the Constitutive Act of the AU,¹¹⁴ the Charter, the ACRWC, and the African Women's Protocol. Other instruments include those relating to corruption, mercenaries,

¹¹⁰ C Heyns et al 'A schematic comparison of regional human rights systems' (2003) 3 *African Human Rights Law Journal* 76.

¹¹¹ RE Allen (ed) *The Concise Oxford Dictionary* (1990).

¹¹² See AD Hall & RE Fagen *Definition of system in system thinking-* volume 1 (2003) 63 cited in W Wicomb 'The complexity of identity: the Afrikaner in a changing South Africa' Unpublished MA dissertation, Stellenbosch University (2008) 53, also see D Juma 'Access to the African Court on Human and Peoples' Rights: a case of the poacher turned gamekeeper' (2007) 2 *Essex Human Rights Review* 7.

¹¹³ CA Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 226.

¹¹⁴ OAU Doc. CAB/LEG/23.15 (July 11, 2000) (entered into force May 26, 2001)

refugees, conservation of nature and combating terrorism.¹¹⁵ These, however, fall outside the scope of this study. The institutions include the AU, the Commission, the African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).¹¹⁶

3.2.1 The African Charter on Human and Peoples' Rights (1981)

The Charter is the central document of the African system and recognises individual rights as well as human and peoples' rights, socio-economic rights in addition to civil and political rights.¹¹⁷ The Charter was adopted at a time of increased scrutiny of states for their human rights practices and the ascendancy of human rights as a legitimate subject in the international discourse.¹¹⁸ Initially, the OAU adhered to a strict interpretation of the principle of non-interference, even at the expense of the rights and the lives of the citizens of member states.¹¹⁹ With the establishment of the Commission, there has been a greater interest in individual rights and the Commission's jurisprudence in interpreting human and peoples' rights has grown.¹²⁰

The Charter makes no specific reference to 'prisoners' rights' but these rights can be implied from reading the instrument, in particular, the right to 'respect the dignity inherent in a human being'.¹²¹ An important question is why the Charter failed to address issues of prisoners' rights when they had already been well established in the international human rights discourse. The OAU was created at a time when the emphasis was on self-determination and the struggle

¹¹⁵ For full texts; C Heyns & M Killander, *Compendium of key human rights instruments of the African Union* (2007).

¹¹⁶ See VOO Nmehielle *The African human rights system- its laws, practices, and institutions* (2001); GW Mugwanya *Human rights in Africa- enhancing human rights through the African regional human rights systems* (2003); & Evans & Murray (n 23 above); Viljoen (n 24 above); R Murray *Human rights in Africa: From the OAU to the African Union* (2004).

¹¹⁷ Odinkalu (n 113 above) 230; R Murray *The African Commission on Human and Peoples' Rights* (2000) 11.

¹¹⁸ M Mutua, 'The African human rights system: A critical evaluation', <http://hdr.undp.org/en/reports/global/hdr2000/papers/mutua.pdf> (accessed 12 September 2008).

¹¹⁹ EA Ankumah *The African Commission on Human and Peoples' Rights. Practice and procedures* (1996) 24; G Naldi 'Future trends in human rights in Africa: the increased role of the OAU' in Evans and Murray (n 23 above) 1-5; GM Wachira and A Ayinla, 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 469.

¹²⁰ Viljoen (n 24 above) 415.

¹²¹ As above 132.

against racial discrimination in response to the ravages of colonialism.¹²² Consequently, the mandate of the drafters of the Charter was limited to:

‘draw up an instrument based on African legal philosophy, which is responsive to African needs – African needs in the sense of incorporating African traditional values and civilisation, which should inspire and characterise the reflection and conception of African human rights.’¹²³

Given the history of prisons discussed in Chapter Two, it is submitted that prisoners’ rights could not have been explicitly included in the Charter as prisons did not represent African traditional values and to include prisoners’ rights would be to endorse the colonial system. However, many Africans suffered under prisons and by the 1850’s were a well established feature in Southern Africa.

In 1995, the Commission adopted a Resolution on Prisons in Africa, which confirmed that the rights in the Charter extended to all categories of persons including prisoners, detainees and all persons deprived of their liberty.¹²⁴ The resolution urged states to include in the reports submitted to the Commission, under article 62 of the Charter, information on human rights affecting the human rights of prisoners. How the Commission has addressed issues related to prisoners’ rights will be discussed in Chapter four.

3.2.2 The African Charter on the Rights and Welfare of the Child (1990)

The ACRWC was adopted soon after the UN Convention on the Rights of the Child (CRC)¹²⁵ and the reason for its adoption was the need to deal with specific issues of interest and importance to children in Africa.¹²⁶ It provides for the rights and duties of the African child and the obligations of the member states in the promotion and protection of these rights.¹²⁷ The ACRWC makes specific reference to children within the context of administration of justice by providing that the

¹²² Nmehielle (n 116 above) 75.

¹²³ As above 83.

¹²⁴ ACHPR /Res.19(XVII)95.

¹²⁵ GA Res. 44/25, adopted on 29 November 1989 and entered into force on 2 September 1990

¹²⁶ LG Muthoga ‘Introducing the African Charter on the Rights and Welfare of the African Child and the Convention on the Rights of the Child (1992) cited in Viljoen (n 24 above) 262; M Gose *The African Charter on the Rights and the Welfare of the Child* (2002), J Sloth-Nielsen & BD Mezmur ‘Surveying the research landscape to promote children’s legal rights in an African’ (2007) 7 *African Human Rights Law Journal*, T Kaime ‘The Convention on the Rights of the Child and the cultural legitimacy of children’s rights in Africa: Some reflections’ (2005) 5 *African Human Rights Law Journal* 221 – 238.

¹²⁷ See A Lloyd ‘A theoretical analysis of the reality of children’s rights in Africa: an introduction to the African Charter on the Rights and Welfare of the Child’ (2002) 2 *African Human Rights Law Journal* 11-32.

rights of children who are in prison shall be protected by separating them from adults and ensuring that they are not subjected to torture, inhuman or degrading treatment or punishment.¹²⁸ Article 17 provides that the purpose of imprisonment of a child is reformation and re-integration back into family as well as social rehabilitation.

The responsibility for monitoring the implementation of the ACRWC is with the African Children's Committee whose functions largely duplicate those of the Commission.¹²⁹ The Committee is mandated to receive and consider periodic state reports¹³⁰ and consider communications alleging violations of the ACRWC.¹³¹ By May 2008, the Committee had not examined any state report despite receiving the initial reports of Egypt, Mauritius, Rwanda, Kenya and Nigeria between November 2006 and August 2007. Similarly, while two communications have been lodged with it by May 2008, they had not been considered¹³²

The ACRWC is an important instrument for the protection of children in prison but the Committee is yet to be seen as enforcing the provisions for the benefit of children. The Commission can draw inspiration from the ACRWC under articles 60 and 61 of the Charter.

3.2.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

Despite the wide ratification of the International Bill of Rights¹³³ and the Convention on the Elimination of All Forms of Discrimination (CEDAW)¹³⁴, gender-based discrimination remained

¹²⁸ Art 17.

¹²⁹ Art 32.

¹³⁰ Art 43.

¹³¹ Art 44.

¹³² J Biegon 'Strides to celebrate, stifes to overcome: recent developments in the African human rights system, July 2007-July 2008' *SUR International Journal* forthcoming December 2008.

¹³³ UDHR arts 2 and 7; ICCPR arts 2(1), 3, 26; International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) 993 UNTS 3 arts. 2(2), 3.

¹³⁴ Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) 1249 UNTS 13.

rampant in Africa and there was thus a need to adopt a Protocol to address the issue.¹³⁵ In relation to women in prison, article 24(b) provides for the special protection of ‘women in distress’. It provides that:

[t]he state parties undertake to:

(b) ensure the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity.

This provision is problematic starting with the isolation of ‘women in distress’ because it lumps many different categories of women with diverse needs and places an obligation on state parties to take some undefined action. In addition, the reference to ‘which is suitable to their condition’ is too general therefore making compliance difficult. The vagueness of the provision, despite its reference to women in prison, makes it difficult to implement. The Protocol fails to specifically recognise that the needs of women prisoners are different from those of male prisoners and must be addressed as such.¹³⁶

3.2.4 African Youth Charter (2006)

The Africa Youth Charter was adopted on 2 July 2006 but two years later in July 2008 had only six ratifications and is yet to come into force as it requires 15 ratifications.¹³⁷ Article 18 makes reference to young persons in detention and the kind of treatment that they should receive. Article 18(d) highlights the purpose of imprisonment as reformation, social rehabilitation and re-integration into family life which is similar to article 17 (3) of the ACRWC. Although the Youth Charter is yet to come into force, article 14 of the Vienna Convention on the Law of Treaties of 1969 provides that when states sign and ratify an instrument, it signifies their intention to be bound by and adhere to the obligations arising from the instrument. The Youth Charter therefore provides an additional basis on which the states parties can act to protect prisoners’ rights.

¹³⁵ F Banda ‘Blazing a trail: the African protocol on women’s rights comes into force’ (2006) 1 *Journal of African Law*, 50.

¹³⁶ See, L Vetten ‘The imprisonment of women in Africa’ in Sarkin (n 1 above) 134-154; M Bastick ‘Women in Prison: A commentary on the Standard Minimum Rules for the Treatment of Offenders’ (2005) 3, www.unodc.org/documents/justice-and-prison-reform/women-and-imprisonment.pdf - (accessed 12 September 2008)

¹³⁷ <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (accessed 11 September 2008).

3.3 Soft Law

Standards, principles and declarations are categorised as soft law and represent the general intent of the parties. They are usually not legally binding but are of persuasive value. Soft law may in some cases evolve into customary law if it meets the minimum requirements of settled practice (*usus*) and the acceptance of an obligation to be bound (*opinio juris sive necessitates*).¹³⁸ In the African system, this may be drafted by the Commission or may emanate from a conference in relation to a specific issue. The Commission has adopted several resolutions that directly affect prisoners' rights discussed below.

3.3.1 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)

The right to a fair trial is a fundamental human right, more so for those who are deprived of their liberty or are facing the prospect of deprivation of their liberty.¹³⁹ In order to address several aspects that were missing in the Charter such as the right to public hearings, interpretation, protection against self incrimination and double jeopardy,¹⁴⁰ the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa¹⁴¹ were formulated.¹⁴² They provide for the right to humane treatment of persons in detention¹⁴³ and the supervision of places of detention by an external monitoring body.¹⁴⁴ These Principles present a guiding structure through which the rights contained in the Charter can be realised practically. Further, the protection of the right to a fair trial is the first step in protecting prisoners' rights as judicial interventions can take place at any point during the trial if the accused is in custody and are legally binding on the detaining authorities.

¹³⁸ J Dugard *International law: A South African perspective* (2005) 29-38.

¹³⁹ See generally; T van de Walt & S de la Harpe 'The right to pre-trial silence as part of the right to a free and fair trial: An overview' (2005) 5 *African Human Rights Law Journal* 70-88.

¹⁴⁰ C Heyns 'Civil and political rights in the African Charter in Evans and Murray (23 above) 155.

¹⁴¹ Accessible on http://www.achpr.org/english/declarations/Guidelines_Trial_en.html (accessed 12 September 2008).

¹⁴² Aimed at buttressing arts 5, 6, 7 and 26 of the African Charter.

¹⁴³ Part M para 7.

¹⁴⁴ Part M para 8.

3.3.2 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa – Robben Island Guidelines (2002)

Africa registers the highest incidence of torture and ill-treatment in the world with documented acts of torture, extra-judicial executions and arbitrary arrests committed in 32 countries.¹⁴⁵ The Robben Island Guidelines¹⁴⁶ were developed to provide a torture-specific instrument to address the prevalent problem of torture in Africa.¹⁴⁷ The Robben Island Guidelines are structured to deal with torture in three ways.¹⁴⁸ First, states are required to prohibit torture by ratifying existing legal instruments and using domestic legislation to criminalise torture.¹⁴⁹ Second, states should prevent torture by putting in place safeguards that prevent torture from happening especially during the different stages of criminal procedure where torture is likely to be used.¹⁵⁰ Education and awareness raising are emphasised as a way of preventing torture. Third, in case torture happens, the Robben Island Guidelines provide for how to respond to the needs of victims.¹⁵¹ The follow-up mechanism that was adopted has a focus mainly on the dissemination of the Robben Island Guidelines. The practical implementation of Robben Island Guidelines is discussed in Chapter Four below.

¹⁴⁵ Amnesty International Report 2007, <http://report2007.amnesty.org/eng/Homepage> (accessed 21 October 2008)

¹⁴⁶ Adopted by the Commission at the 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia.

¹⁴⁷ JB Niyizurugezo & P Lessene *Robben Island Guidelines for the prohibition and prevention of torture: Practical guide for implementation* (2008) 5.

¹⁴⁸ For a detailed analysis see; APT, Robben Island Guidelines – Introduction. <http://www.apr.ch/content/view/144/156/lang,en/> (accessed 11 September 2008); also see, JD Mujuzi ‘Safeguarding the right to freedom from torture in Africa: The Robben Island Guidelines, Unpublished LLM dissertation, University of Pretoria (2005) 53-57.

¹⁴⁹ Part I (paras 1-19).

¹⁵⁰ Part II (paras 20-48).

¹⁵¹ Part III (paras 49-50).

3.3.3 The Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa (2002)

The Ouagadougou Declaration¹⁵² was the result of the second Pan-African Conference on Prison and Penal Reform held in Burkina Faso in 2002. The conference discussed the key challenges to implementing prison reform with specific reference made to the large number of prisoners and weak prison governance. However, the Ouagadougou Declaration uses non-specific language in formulating the guidelines that may be difficult to implement. Its most important feature is the recognition that states alone cannot bring about reforms in prisons - that there needs to be partnerships with various stakeholders.¹⁵³ Overall, it provides useful direction for states that intend to bring about reforms into their prison systems through its proposals.

3.4 Conclusion

This chapter has highlighted what the legal framework in the African system for the promotion and protection of prisoners' rights is. The current framework fails to adequately enumerate prisoners' rights leaving them mostly to be read into generalised human rights instruments. Without a sound legal framework, the protection of rights is more difficult starting with the problem of identifying the rights and enforcing them. An African Charter on Prisoners' Rights drafted by the Central, Eastern and Southern Heads of Correctional Services (CESCA) in 2002 represented the first real effort at providing a comprehensive legal framework for the protection of prisoners' rights but this is yet to be tabled to the UN's African member states as had been agreed during the drafting.¹⁵⁴ The soft law that the Commission has developed to date has not specifically elaborated on prisoners' rights in the Charter, and thus further compounding the problem of not clearly defining prisoners' rights.

¹⁵² Adopted by Resolution ACHPR /Res.64(XXXIV)03.

¹⁵³ Para 1 recognises that the problems arising in prisons must be addressed by all the criminal justice agencies and through concerted strategies.

¹⁵⁴ A Dissel 'Rehabilitation and reintegration in African Prisons' in Sarkin (n 1 above) 160.

CHAPTER FOUR

PROMOTION AND PROTECTION OF PRISONERS' RIGHTS: AN ANALYSIS OF THE INTERVENTIONS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

4.1 Introduction

This chapter assesses how the mandate of the Commission has been used in relation to the promotion and protection of prisoners' rights. It describes the relationships between the various activities of the Commission and investigates how they link up as part of an overall strategy for the protection of prisoners' rights. The analysis is based on a review of annual activity reports of the Commission, state reports and promotion and fact-finding mission reports published from October 1996 to May 2008. One year that is significant for prisoners' rights in Africa is 1996, as this is when the SRP was appointed.¹⁵⁵

4.2 Understanding the mandate of the Commission

4.2.1 Promotion

The purposes of the Commission are to promote and protect human and peoples' rights, to interpret the provisions of the Charter and to perform any other tasks assigned to it by the Assembly of Heads of State and Government (AHSG).¹⁵⁶ The promotional mandate¹⁵⁷ includes the collection of documents, undertaking studies and research, holding of seminars, symposia and conferences, as well collaboration with national and international institutions that deal with human rights, together with the formulation of rules and principles to solve legal problems.¹⁵⁸

¹⁵⁵All activity reports for the Commission since 1996 are the African Commission's website http://www.achpr.org/english/_info/index_activity_en.html.

¹⁵⁶ Art 45 of the African Charter; for detailed discussion see, Viljoen (n 24 above) 317; Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 14.

¹⁵⁷ Arts 45(1)(a), (b) and (c).

¹⁵⁸ UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 70; Nmehielle (n 116 above) 176.

State reporting is the backbone of the promotional activities of the Commission.¹⁵⁹ Under article 62 of the Charter, states parties report on the extent of the implementation of the rights and freedoms, as well as how duties have been carried out.¹⁶⁰ The 1998 Guidelines for National Periodic Reports require states to report on various issues, including civil and political rights as well as steps taken to protect specific groups such as ‘other oppressed and/or disadvantaged groups.’¹⁶¹ Although prisoners are not specifically identified as a group by the guidelines, they are a disadvantaged and vulnerable group in need of protection as discussed in Chapter Two above. Non-governmental organisations participate in state reporting through shadow reporting to provide alternate or additional information from what is presented by the state.¹⁶² Upon submission of state reports, the Commission engages the state party in a discussion based on the report submitted, information collected from shadow reports or country visits and a questionnaire prepared by the secretariat.¹⁶³ These questions are not sent in advance to the state party to prepare responses thus diluting the quality of constructive dialogue as the state parties are not always adequately prepared to answer the questions. Thematic Special Rapporteurs ask questions specifically related to their portfolios thus providing the opportunity to the SRP to engage the state party on prisoners’ rights and conditions of detention. The Commission issues concluding observations that are transmitted to the state party and may require comments to be issued by the state party within a fixed time frame.¹⁶⁴

The special mechanisms to promote the work of the Commission are Special Rapporteurs (SRs) and Working Groups (WGs). SRs have a formal and detailed mandate adopted by the Commission as the basis for their work.¹⁶⁵ The following SRs have been appointed by the Commission: Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions in Africa

¹⁵⁹ Murray (n 156 above) 16.

¹⁶⁰ M Evans et al ‘The reporting mechanism of the African Charter on Human and Peoples’ Rights’ in Evans & Murray (n 23 above) 40.

¹⁶¹ Reprinted in C Heyns *Human Rights law in Africa*, 2004 569; see Viljoen (n 24 above) 368-391.

¹⁶² Nmehielle (n 116 above) 309-319; Viljoen (n 24 above) 406-412.

¹⁶³ Viljoen (n 24 above) 376.

¹⁶⁴ Rule 86(1) of the Rules of Procedure, reprinted in Heyns and Killander (n 115 above) 148-170.

¹⁶⁵ Viljoen (n 24 above) 400.

(1994);¹⁶⁶ Special Rapporteur on Prisons and Conditions of Detention in Africa (1996);¹⁶⁷ Special Rapporteur on the Rights of Women in Africa (1999);¹⁶⁸ Special Rapporteur on Freedom of Expression in Africa (2001);¹⁶⁹ Special Rapporteur on Human Rights Defenders in Africa (2004);¹⁷⁰ and the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced persons in Africa (2005).¹⁷¹ Nearly all the mandates of the SRs can be interpreted to include some or all prisoners' rights but only the SRP has the specific and direct mandate in this regard.¹⁷² WGs, on the other hand, are *ad hoc* in nature and are constituted to conduct research on emerging issues or issues related to the Commission's work. They are more exploratory in nature, comprising Commissioners and individual experts.¹⁷³ For this study, the most relevant WG is the one that developed the Robben Island Guidelines and was converted into a follow-up committee to promote the contents of the Guidelines after the completion of its mandate.¹⁷⁴

The Commission also organises workshops, conferences and seminars to disseminate information on the Charter and on a variety of human rights topics. At most sessions, the Commission adopts a list of issues that it would like to pursue through seminars and conferences.¹⁷⁵ The Commission may collaborate with other stakeholders to organise the workshops, sometimes resulting in the adoption of frameworks that elaborate and supplement the provisions of the Charter.¹⁷⁶ In the last four ordinary sessions, the Commission has not

¹⁶⁶ Eighth annual activity report of the Commission, reprinted in R Murray & M Evans *Documents of the African Commission on Human and Peoples Rights* (2001) 509

¹⁶⁷ Tenth annual activity report.

¹⁶⁸ Eleventh annual activity report.

¹⁶⁹ Fifteenth annual activity report.

¹⁷⁰ Seventeenth annual activity report.

¹⁷¹ Eighteenth annual activity report.

¹⁷² Viljoen (n 3 above) 127-135.

¹⁷³ Rule 28 of the Rules of Procedure.

¹⁷⁴ As above; also see Section 3.3.2 of the Robben Island Guidelines.

¹⁷⁵ See for example paragraph 30, Final communiqué of the Commission at the forty-second ordinary session http://www.achpr.org/english/communiqués/communique42_en.html (accessed 15 October 2008).

¹⁷⁶ Viljoen (n 24 above) 405.

scheduled prisoners' rights and conditions of detention as one of the issues to be discussed in workshops and seminars.¹⁷⁷

Another mechanism of the Commission is thematic or country-specific resolutions that play a similar role to General Comments issued by UN treaty bodies. They elaborate the rights contained in the Charter or address human rights issues emanating from a state even where no complaints that have been received but gross human rights violations are known to be taking place.¹⁷⁸

Inputs by NGOs are a crucial component of the Commission's work, providing not only information on state reporting, but also bringing to its attention human rights violations arising on the continent.¹⁷⁹ Rules 75 and 76 of the Commission's Rules of Procedure provide for observer and consultative status that NGOs may have with the Commission. By July 2008, over 380 NGOs had been granted observer status by the Commission.¹⁸⁰ It is now an established practice that NGOs have a forum immediately prior to the ordinary sessions of the Commission and this forum may produce proposals and resolutions tabled before the Commission.¹⁸¹

At the domestic level, NHRIs are acknowledged as valuable in contributing towards the promotion and protection of human rights despite the criticism that they receive by virtue of being quasi-government institutions and that they may deflect attention from state actions.¹⁸² NHRIs have in the last few years become a feature of the African system starting with the Togolese National Human Rights Commission, which was established in June 1987. Over half the states in Africa have NHRIs.¹⁸³ The Commission grants affiliate status to NHRIs, which is a

¹⁷⁷ See http://www.achpr.org/english/_info/past_en.html (accessed 23 October 2008). The communiqués of the sessions prior to the 40th session are not active on the Commission's website thus the status could not be established.

¹⁷⁸ Viljoen (n 24 above) 402, for a list of the resolutions of the Commission, see http://www.achpr.org/english/_info/index_resolutions_en.html (accessed 13 October 2008)

¹⁷⁹ Nmehielle (n 116) 311.

¹⁸⁰ Twenty-fourth annual activity report.

¹⁸¹ See for example; NGO Forum: 3 – 5 May, 2008 organised by the African Centre for Democracy and Human Rights Studies (ACDHRS) in report above.

¹⁸² C Idike 'Deflectionism or activism? The Kenya National Commission on Human Rights in focus (2004) 1 *Essex Human Rights Review* 41

¹⁸³ B. Burdekin, 'Human Rights Commissions' in Hossain, Kamal et al., (eds), *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World* (2000) 801 in Idike above 41.

special observer status similar to the one issued to NGOs and they thus have audience before the Commission and can be consulted on human rights issues.¹⁸⁴

4.2.2 Protection

The protective mandate consists of individual and inter-state complaints to the Commission as well as on-site protective and fact finding missions.¹⁸⁵ The consideration of individual complaints (communications) is one of the leading procedures applied in holding states to account for their obligations under the Charter.¹⁸⁶ Communications are submitted in accordance with article 55 while article 56 provides the conditions that it must meet if it is to be considered by the Commission.¹⁸⁷ After the case is admitted, the Commission considers the merits and may hear oral evidence and call witnesses where it deems it necessary.¹⁸⁸ The decision of the Commission remains confidential until the AHSG decide otherwise.¹⁸⁹

When there are allegations of widespread and systemic human rights violations, the Commission may undertake on-site protective or fact-finding missions to assist it in making decisions on the communications before it.¹⁹⁰ There has been little enthusiasm for this approach and even where such missions have been carried out, the link with the communications has not always been clear.¹⁹¹ In this study, a distinction is made between evidence collection for purposes of considering communications done orally at the ordinary sessions and on-site missions where the Commission visits various locations to collect information. Fact-finding missions provide the

¹⁸⁴ Resolution on granting affiliate status to national human rights institutions, http://www.achpr.org/english/_info/affiliate_en.html (accessed 14 September 2008); see also; *Protectors or Pretenders: Government Human Rights Commissions in Africa: Regional initiatives* <http://www.hrw.org/reports/2001/africa/overview/initiative.html> (accessed 14 October 2008)

¹⁸⁵ Viljoen (n 24 above) 319.

¹⁸⁶ Umzurike (n 158 above) 75; Viljoen (n 24 above) 319.

¹⁸⁷ See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

¹⁸⁸ Viljoen (n 24 above) 340.

¹⁸⁹ Art 59(1).

¹⁹⁰ Art 46 of the African Charter; also see T Mutangi 'Fact-finding missions or omissions? A critical analysis of the African Commission on Human and Peoples' Rights' (2006) 12 *East African Journal of Peace and Human Rights* 1.

¹⁹¹ Viljoen (note 24 above) 363-364.

Commission with an opportunity to visit prisons with the view of investigating received complaints and make informed decisions.¹⁹²

The Commission is also required to consider inter-state communications under article 49 of the Charter if a state party has good reason to believe that another state has violated the provisions of the Charter. The communication is considered only if local remedies are exhausted where they exist and all means to achieve an amicable solution have failed. The matter is concluded after the Commission has received oral and written submissions, considered them and made recommendations.¹⁹³ The Commission has to date concluded only one inter-state communication namely, *DR Congo / Burundi, Rwanda and Uganda*¹⁹⁴ which dealt with issues emanating from a complaint of armed aggression and therefore falls outside this study.

4.3 The Commission in action: interactions on prisoners' rights

4.3.1 State reporting

When a state is compiling its initial or periodic report, it is expected that its various government departments contribute to the report in order to provide a comprehensive, accurate and up-to-date report on the enforcement of the Charter.¹⁹⁵ Initial reports are submitted two years after the state party ratifies the Charter and periodic reports every two years thereafter.¹⁹⁶ The initial report should provide background information on the country and to its laws as a starting point for future dialogue.¹⁹⁷ The practice at the Commission, however, is that most states provide the same background information in the periodic reports that they submit in the initial report. At the Commission's ordinary sessions approximately two to four reports are considered. Out of all the state parties, only nine states have presented all their reports while twelve states have not presented any reports at all.¹⁹⁸ The rest of the state parties have presented one or more state

¹⁹² See, 'R Murray 'Evidence and fact-finding by the African Commission' in Evans and Murray (n23 above) 100-136.

¹⁹³ Arts 49-54.

¹⁹⁴ (2004) AHRLR 19 (ACHPR) 2003.

¹⁹⁵ Viljoen (n 24 above) 371.

¹⁹⁶ Art 62 of the Charter.

¹⁹⁷ Viljoen (n 24 above) 370.

¹⁹⁸ African Commission (n 180 above) 72.

reports and owe other reports. This study assesses the reports of Algeria,¹⁹⁹ Benin,²⁰⁰ DRC,²⁰¹ Nigeria,²⁰² Rwanda,²⁰³ Sudan,²⁰⁴ Tanzania,²⁰⁵ Tunisia,²⁰⁶ Uganda²⁰⁷ and Zambia²⁰⁸ representing 30 per cent of state reports submitted.²⁰⁹

At its 42nd ordinary session, the Commission examined the periodic reports of Rwanda, Tunisia and Algeria while at the 43rd ordinary session, those of Sudan and Tanzania were examined. This study considered the following factors; (i) policy and legislative reforms, (ii) conditions of detention (iii) monitoring mechanisms and (iv) torture. None of the reports make any mention of an overall strategy for prison reform and the link with prisoners' rights. Some reports such as that of Kenya²¹⁰ do not even mention prison or prisoners.²¹¹

The reports of Algeria,²¹² DRC,²¹³ Rwanda,²¹⁴ Tanzania,²¹⁵ Tunisia,²¹⁶ Uganda,²¹⁷ and Nigeria²¹⁸ detail the reforms to make legislation compliant with the Charter and to address specific needs

¹⁹⁹ Algeria, third and fourth periodic reports, August 2006.

²⁰⁰ Benin, consolidated report for 2000-2008.

²⁰¹ DRC eighth, ninth and tenth periodic reports, June 2007

²⁰² Nigeria second consolidated periodic report, 1990 – 2004

²⁰³ Rwanda eighth periodic report, March 2007

²⁰⁴ Sudan third periodic report, May 2006

²⁰⁵ Tanzania second, third, fourth, fifth, sixth, seventh, eighth and ninth periodic reports, 2006

²⁰⁶ Tunisia, fourth, fifth, sixth, seventh, eighth and ninth periodic reports, 2006

²⁰⁷ Uganda consolidated report, 2006

²⁰⁸ Zambia initial state report, 2006

²⁰⁹ The period of the study was August – October 2008.
http://www.achpr.org/english/_info/statereport_considered_en.html (last accessed 24 October 2008). Some of the links on the website are inactive and do not have the reports. See also the Centre for Human Rights, University of Pretoria http://www.chr.up.ac.za/hr_docs/themes/theme02.html (accessed 24 October 2008).

²¹⁰ Initial report of Kenya, May 2007

²¹¹ JD Mujuzi 'The role of civil society in protecting and promoting prisoners' rights before the African Commission on Human and Peoples' Rights' (2005) 5(3) *International Journal of Civil Society Law* 26.

²¹² Algeria (n 199 above) 12.

²¹³ DRC (n 201 above) Para 69-82.

of prisoners. None of the reports however elaborate on the progress made in the implementation of the provisions. Factors such as the resources necessary to support the implementation are not addressed in any of the reports. Of the ten reports examined, the seven discussed above are undertaking legislative reform aimed at compliance. One of the anticipated challenges that none of the states have addressed in their reports is the effective implementation of the legislation.

The reports of Benin,²¹⁹ Nigeria²²⁰ and Tanzania²²¹ make reference to the conditions of detention but fail to delve into the specific well-known problems and the measures taken to address the challenges other than broad legislative reform. Tanzania, for example, states that it is taking steps to the best of its financial ability to implement the recommendations of the Commission for Human Rights and Good Governance.²²² The recommendations are, however, not stated nor the progress towards implementation. In the case of Sudan, the conditions of detention can be implied from the section referring to ‘the measures taken to address the poor conditions of detainees.’²²³ It seems that Sudan recognised that the prison conditions were below the standards envisaged in the Charter and thus the proposed corrective steps. The proposed measures include the creation of a monitoring mechanism to assess prisoners’ rights.²²⁴ The Zimbabwe²²⁵ reports highlights the conditions in which women are detained and refers to steps

²¹⁴ Rwanda (n 203 above) 30-31.

²¹⁵ Tanzania (n 205 above) 10.

²¹⁶ Tunisia (n 206 above) 12.

²¹⁷ Uganda (n 207 above) 67-72.

²¹⁸ Nigeria (n 202 above) 50.

²¹⁹ Benin (n 200 above) 26.

²²⁰ Nigeria (n 202 above) 47-49.

²²¹ Tanzania (n 205 above) 10.

²²² As above 10.

²²³ Sudan (n 204 above) paras 106 – 117.

²²⁴ Sudan (n 204 above) paras 106-138.

²²⁵ Zimbabwe seventh, eighth, ninth and tenth reports, 2006.

being taken to reduce overcrowding in the prisons but fails to address the well know problems that the prison system is facing.²²⁶

All the states have a monitoring mechanism through the Human Rights Commission or Justice Ministry save for Algeria and DRC that do not specifically mention them. The mandate of the monitoring mechanisms includes visiting places of detention, talking to prisoners and making recommendations to the states parties on how to improve the conditions in prisons. Other than Tanzania, which refers to some action being taken by its monitoring body, there are no references to action taken by states.²²⁷

With regards to torture, all the state reports other than Tanzania and Zambia have legislation outlawing torture. Benin acknowledges the lacuna in the implementation of torture legislation and states that steps are being taken to put in place a mechanism for the prevention of torture.²²⁸ None of the reports link torture and the protection of prisoners' rights. Sudan isolates two cases in relation to torture and in the first case, the victim received compensation from the state and in the second case, the state's secret agents who were charged with torturing a person to death received the death sentence.²²⁹ Although the action in dealing with the torturers should be applauded, it is argued that the sentence itself was inappropriate and amounted to torture or cruel punishment.²³⁰

Ethiopia remains one of the state parties that are yet to submit an initial or periodic report to the Commission on the enforcement of the Charter.²³¹ However, while submitting a response to the Commission's report on Ethiopia's human rights situation, the state party made lengthy references to the conditions in prisons and cited from the report of the SRP to defend the conditions in its prisons.²³²

²²⁶ Mujuzi (n 211 above) 26.

²²⁷ Tanzania (n 205 above) 10.

²²⁸ Benin (n 200 above) 26.

²²⁹ Sudan (n 203 above) paras 121 & 122.

²³⁰ L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) 97-147.

²³¹ http://www.achpr.org/english/_info/statereport_considered_en.html (accessed 13 October 2008).

²³² Submissions by Ethiopia concerning the sixteenth activity report of the African Commission in the twentieth activity report 68.

There is no doubt that state reporting is one of the strongest mechanisms for engaging a state on its obligations towards prisoners. States should be required to provide sufficient information in this regard so that the Commission can assess progress over time towards the realisation of prisoners' rights.

4.3.2 Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP)

Within the African system the SRP has primary responsibility for prisoners' rights and addressing prison conditions. The mandate of the SRP includes visiting prisons and making recommendations with a view to improving prison conditions, advocating for prisoners' rights and providing support to the Commission with regard to communications if called upon to do so.²³³

Since 1996, there have been visits to 14 countries and over 200 places of detention with repeat visits to Mozambique and Mali.²³⁴ Several factors are considered when selecting the countries to be visited, namely geographical representation, main languages of the AU, size of the country, mainland and island countries, language competence of the SRP, the likelihood of cooperation by the government and NGOs, as well as the travel difficulties in the country.²³⁵ Other factors may include the presence of political prisoners, vulnerable categories (such as women with children and prisoners on death row) overcrowding and whether the state is a party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or not.²³⁶

With regards to the methods of work, one challenge is the broad mandate of the SRP which includes investigative and preventive functions, as well as some punitive and standard setting elements.²³⁷ Because the mandate does not have specific standards, the methodology applied when conducting visits ends up with a reflection of what was observed rather than a measure of

²³³ Tenth Annual activity report (n 167 above).

²³⁴ Viljoen (n 24 above) 137, visit to Kenya not include on the list – see 18th activity report 2004/2005

²³⁵ Tenth Annual Activity Report (n 167 above), annex VII

²³⁶ Viljoen (n 3 above) 137.

²³⁷ R Murray "The African Commission's approach to prisons' in Sarkin (n 1 above) 207.

compliance with a set of identifiable standards.²³⁸ In contrast, the role of the European Committee for the Prevention of Torture (ECPT) is more comprehensive, resulting in collection of precise data that is measured against set standards from which it can approach and influence governments.²³⁹ Murray notes that the SRP reports do not clearly indicate the standards against which the prisons are being measured resulting in vague references like ‘international standards’ being used.²⁴⁰ In one case, the SRP called for the conditions to be ‘as good as possible’ and in another instance stated that prisoners should only be detained for a ‘maximum of a few hours’.²⁴¹ As a result, the recommendations that are made by the SRP are unclear and lead to uncertainty as to what exactly compliance means. There are instances where there is compliance by state parties of the recommendations of the Commission as was the case by Benin after the SRP’s visit.²⁴²

A further challenge is the dual mandate of the SRP as a monitoring mechanism for the promotion of prisoners’ rights and as a Commissioner serving a quasi-judicial function. Hearing individual communications may lead to the condemnation of the acts of state parties that fail to fulfil their obligations under the Charter. The SRP is supposed to facilitate constructive dialogue with state parties and also serve the function of issuing decisions that may find them in breach of their obligations. Further confusion follows later when follow-up visits are made to establish the enforcement of the decisions taken.²⁴³ Given that there are no stringent standards forming the basis for the SRP’s visits, it is of concern how the personal views of the SRP fit within the discussions during the consideration of a communication. In contrast, in the European system, the ECPT and European Court of Human Rights (ECtHR) are separate institutions and the ECtHR has a choice of how and when it can use the findings of the CPT.²⁴⁴ Viljoen is of the view that the SRP’s experience and expertise has been drawn upon in most of the communications brought in relation to prisoners’ rights before the Commission.²⁴⁵ For example, Commissioner

²³⁸ As above 208.

²³⁹ As above 207; also see <http://cpt.coe.int/en/about.htm>.

²⁴⁰ As above 207.

²⁴¹ As above 207.

²⁴² Fourteenth annual activity report, para 21.

²⁴³ Murray (n 237 above) 209.

²⁴⁴ As above 210.

²⁴⁵ Viljoen (n 3 above) 147.

Dankwa was the SRP when most communications from Nigeria were brought and since he was the rapporteur for most of those cases, his views as SRP found their way into the decisions drafted.²⁴⁶

Since July 2005, there has been no visit to any state party by the SRP due to lack of funding. The SRP has since then undertaken low cost activities, such as meetings with various government officials and other stakeholders to discuss issues pertaining to conditions of detention.²⁴⁷ The SRP's impact has been significantly weakened due to the inactivity. A further limitation is that the periodic state reports also raise few issues related to prisons and due to lack of visits, the SRP has not actively engaged state parties on the issue.

4.3.3 Promotional visits

Promotional visits are important in securing engagement with state parties through non-confrontational and non-investigative visits that facilitate constructive dialogue on the rights protected by the Charter.²⁴⁸ Promotional visits engage senior government officials on various aspects of the Charter, including prisoners' rights. For this study, mission reports to several states were analysed to investigate the extent to which the Commissioners created awareness in relation to prisoners' rights and conditions of detention. The states considered are: Botswana,²⁴⁹ Burkina Faso,²⁵⁰ Burundi,²⁵¹ Guinea Bissau²⁵² Lesotho,²⁵³ Mali,²⁵⁴ Mauritius,²⁵⁵ Rwanda,²⁵⁶

²⁴⁶ As above 147.

²⁴⁷ Twenty-fourth Annual Activity Report (n 180 above).

²⁴⁸ Viljoen (n 24 above) 401.

²⁴⁹ Botswana, 14 – 18 February 2005.

²⁵⁰ Burkina Faso, 26 – 30 March 2007.

²⁵¹ Burundi, 1 – 11 February 2004.

²⁵² Guinea Bissau, 15 – 22 March 2005.

²⁵³ Lesotho, 3 – 7 April 2006.

²⁵⁴ Mali, 9 – 18 April 2004.

²⁵⁵ Mauritius, August 2006.

²⁵⁶ Rwanda, 26 January – 2 February 2004.

Swaziland,²⁵⁷ and Seychelles²⁵⁸. As part of promotional visits, discussions are held with the Minister of Justice or Minister responsible for prisons and in many instances, the specific conditions of detention are discussed unlike during state reporting. In the promotional visit to Lesotho, the Justice Minister stated that steps were being taken to implement the recommendations that were given by the Ombudsman who is responsible for monitoring conditions of detention. There was, however, little discussion on the progress towards implementing those recommendations.²⁵⁹ In Burkina Faso, the Justice Minister acknowledged that there was overcrowding in the prisons and that the priority was to ensure food self-sufficiency.²⁶⁰

Commissioners were able to engage with civil society organisations in Burundi, Rwanda and Swaziland to gather information on the situation in the prisons. Commissioners visited several prisons in Lesotho²⁶¹, Mali²⁶², Swaziland²⁶³, Botswana²⁶⁴ and Seychelles²⁶⁵ at the request or on invitation from the government. In Guinea Bissau, the visit was to a prison that had been renovated and unoccupied and could therefore not establish the conditions of detention.²⁶⁶

Since the Commission has not approved standards to assess prisons, the recommendations of Commissioners are vague and difficult to implement, as is the case with the SRP. In Burundi, for example, the recommendation was that the state party 'should take adequate measures to improve the living conditions in the detention centres to guarantee respect for human rights'.²⁶⁷ It could be argued that one of the reasons why states parties do not implement the recommendations is that there are no standards in place and recommendations are vague. In

²⁵⁷ Swaziland, 21-25 August 2006.

²⁵⁸ Seychelles, July 2004.

²⁵⁹ Lesotho (n 253 above) 10.

²⁶⁰ Burkina Faso (n 250 above) 13.

²⁶¹ Lesotho (n 253 above) 32.

²⁶² Mali (n 254 above) 18.

²⁶³ Swaziland (n 257 above) 23.

²⁶⁴ Botswana (n 249 above) 38.

²⁶⁵ Seychelles (n 258 above) 29.

²⁶⁶ Guinea Bissau (n 252 above) 17.

²⁶⁷ Burundi (n 251 above) 24.

some cases, the Commissioners visit the prisons but make no recommendations, as was the case with Seychelles.²⁶⁸ Failure to make recommendations or making vague recommendations does little to improve the situation of prisoners.

4.3.4 Resolutions

The Commission has adopted several resolutions in relation to prisoners' rights and conditions of detention. The Resolution on Prisons in Africa recognised that conditions in African prisons do not conform to the provisions of the Charter and the UNSMR, and urged states to report on prisoners' rights in their periodic reports. At the thirty-fourth session, the Commission adopted the Ouagadougou Declaration and Plan of Action on Accelerating Penal and Prison Reform in Africa.²⁶⁹ Through this resolution, the Commission committed itself to penal reform to ensure that the rights of persons deprived of their liberty were promoted and protected.²⁷⁰ The Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa resulted in the adoption of the Robben Island Guidelines to assist African states to meet their international obligations with regard to the prohibition of torture and cruel, inhuman or degrading treatment or punishment.²⁷¹ In the twenty-fourth annual activity report, the follow-up committee on the Robben Island Guidelines reported that three countries had been identified for the pilot implementation.²⁷² At the time of writing the states and the specific activities to be undertaken were yet to be disclosed.

²⁶⁸ Seychelles (n 258 above).

²⁶⁹ Seventeenth Annual Activity Report (n 170 above) para 52.

²⁷⁰ Murray (n 237 above) 214.

²⁷¹ http://www.achpr.org/english/declarations/declaration_robbenislands_en.html (accessed 13 October 2008).

²⁷² Para 90.

4.3.5 Conferences and Seminars

As already noted, the Commission organises workshops, conferences and seminars to disseminate information on the Charter on a variety of topics. This function is performed with other stakeholders sometimes resulting in the adoption of frameworks that elaborate and supplement the provisions of the Charter.²⁷³ Several examples exist of this in relation to prisoners' rights as was the case in relation to the Robben Island Guidelines that were developed in collaboration with the Association for the Prevention of Torture (APT). The Commission holds workshops at the start of ordinary sessions in collaboration with NGOs to discuss thematic issues.²⁷⁴ In addition, Commissioners participate in various conferences and seminars as participants or present papers therefore conduct the promotion of the Charter at these meetings.²⁷⁵

4.3.6 Relationship between the Commission and NGOs

NGOs have been engaged in the wide dissemination of the Charter, thus facilitating the dissemination of information on issues of prisoners' rights, monitoring conditions of detention, as well as bringing individual communications on behalf of victims of human rights violations.²⁷⁶ NGOs with observer status are entitled to address the Commission and have over the years become one of the most tangible constituencies of the Commission.²⁷⁷ NGOs bring new perspectives to the Commission's work through shadow reports, interactions with the SRP and other Commissioners on fact-finding and promotional missions and are useful sources of information in relation to prisoners' rights.²⁷⁸ A significant contribution has also been made with regard to communications on behalf of prisoners by NGOs and this will be discussed in the next section. NGOs are required to submit activity reports at least once every two years to inform the

²⁷³ Viljoen (n 24 above) 405.

²⁷⁴ Twenty-Fourth Annual Activity Report (n 181 above).

²⁷⁵ As above, paras 71-191.

²⁷⁶ Mujuzi (n 211 above) 18-28.

²⁷⁷ Viljoen (n 24 above) 407.

²⁷⁸ http://www.achpr.org/english/_info/directory_ngo_en.html#m.

Commission of the interventions made in respect of human rights.²⁷⁹ This enables the Commission to track the interventions of NGOs and to confirm that the relationship continues to be mutually beneficial. However, only a third of NGOs submit activity reports thus undermining the crucial relationship with the Commission.²⁸⁰

4.3.7 Relationship between the Commission and National Human Rights Institutions

Many NHRIs have different interventions in prisons in domestic jurisdictions and provide information to the Commission in this regard.²⁸¹ The impact of NHRIs on the Commission is yet to be fully realised as their affiliate status is not well defined and there has been decreasing participation at the Commission's sessions.²⁸² Most of the Commission's annual activity reports only state that a number of NHRIs participated in the ordinary sessions of the Commission and that a representative made a statement on the general human rights situation on behalf of the other NHRIs. This remains one of the most under-developed relationships and some NHRIs have urged the Commission to adopt standards for engagement with NHRIs. This is yet to be considered by the Commission.²⁸³

4.4 Protection

The protective mandate of the Commission includes individual and inter-state communications as well as on-site investigative and fact-finding missions. Inter-state communications are outside the scope of this study given the fact that there has only been one communication that has been concluded and it did not address issues related to prisoners' rights.²⁸⁴

²⁷⁹ ACHPR /Res.30(XXIV)98: Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission (1998)

²⁸⁰ Nmehielle (n 116 above) 315.

²⁸¹ W Kaguongo 'Prisoners rights: The role of national human rights institutions in Africa' unpublished LLM dissertation, University of Pretoria, 2003 36-45.

²⁸² Viljoen (n 24 above) 413.

²⁸³ Para 61, twenty-fourth annual activity report of the Commission.

²⁸⁴ n 193 above.

4.4.1 Individual communications

Individual communications form the bulk of the work in the protection mandate with states being called upon to react to allegations that they had violated human rights. Several communications have been received focussing on conditions of detention and prisoners' rights, with the majority of the cases coming from Nigeria, Mauritania and Sudan.²⁸⁵ The Commission, in the years immediately following the appointment of the SRP, received many communications on the conditions of detention but these have subsequently declined. The Commission's decisions have made it clear that governments have an obligation towards prisoners in the protection of their rights.²⁸⁶

Prior to the appointment of the SRP, several communications had been concluded with regard to conditions of imprisonment such as the *Orton and Vera Chirwa* case where the commission stated that:

The conditions of overcrowding and acts of beating and torture that took place in prisons in Malawi contravened this article (article 5 of the Charter). Aspects of the treatment of prisoners such as excessive solitary confinement, shackling within a cell, extremely poor quality food and denial of access to adequate medical care, were also in contravention of this article.²⁸⁷

In 1996, two communications were considered with regards to conditions of detention. In the first, the Commission rightly held that the conditions of detention in which children, women and the aged were held in Rwanda violated their physical and psychological integrity and constituted a violation of article 5.²⁸⁸ The other, was not admitted for use of insulting language and failure to point to specific violations.²⁸⁹ The Commission failed to ask the complainants to expunge the offensive words and consider the case on the merits.²⁹⁰

²⁸⁵ Viljoen (n 3 above) 147.

²⁸⁶ Mujuzi (n 211 above) 21.

²⁸⁷ Communications 64/92, 68/92 and 78/92 *Krischna Achuthan (on behalf of Aleke Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi* in seventh annual activity report.

²⁸⁸ Communications 27/89, 46/91, 49/91, 99/93 *Organisation Mondiale Contre La Torture and Association Internationale des juristes Democrates, Commission Internationale des Juristes (C.I.J), Union Inter africaine des Droits de l'Homme/Rwanda* in tenth annual activity report.

²⁸⁹ Communication 65/92 *Ligue Camerounaise des Droits de l'Homme/ Cameroon* in tenth annual activity report.

²⁹⁰ For a critique of this approach 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) 709 where he argued that 'In principle, it appears diversionary to reject a communication because of the quality of the phraseology'.

The Commission has also found violations in two cases against Nigeria in relation to health stating that

to deny a detainee access to doctors while his health is deteriorating is a violation of article 16 and that the responsibility of the government is heightened in cases where an individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the actions of the authorities.²⁹¹

In these cases, the Commission emphasised that the rights of the individual do not cease because they have been deprived of liberty.

NGOs play a crucial role in bringing communications on behalf of prisoners. Between 1999 and 2000, thirteen communications were concluded in relation to prisoners' rights and conditions of detention and these were all brought by NGOs on behalf of people in detention.²⁹² The Commission found that acts such as being deprived of the right to see one's family may constitute inhuman treatment, deprivation of light, insufficient food and lack of access to medicine or medical care also constitute violations of the Charter. The cases against Sudan addressing the situation between 1989 and 1993 were consolidated and the state party did not refute claims of torture and violation of fair trial rights of people in detention leading to findings of violations of articles 5 and 7 of the Charter.²⁹³ The Mauritania cases also were consolidated and heard together and the Commission found other violations in addition to the finding that the conditions of the prisons violated article 5 of the Charter.²⁹⁴ When the Commission made recommendations after the findings, it addressed issues relating to discrimination and slavery but made no specific recommendations with regard to the conditions of detention.

²⁹¹ 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 Organisation/Nigeria and Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project/ Nigeria* in twelfth annual activity report.

²⁹² Communications 143/95, 150/96 *Constitutional Rights Project and Civil Liberties Organisation / Nigeria*, 148/96 *Constitutional Rights Project / Nigeria*, 151/96 *Civil Liberties Organisation / Nigeria*, 153/96 *Constitutional Rights Project / Nigeria*, 206/97 *Centre for Free Speech/Nigeria*, 201/97 *Egyptian Organisation for Human Rights / Egypt*, 48/90 *Amnesty International / Sudan*, 50/91 *Comité Loosli Bachelard / Sudan*, 52/91 *Lawyers Committee for Human Rights / Sudan*, 89/93 *Association of Members of the Episcopal Conference of East Africa / Sudan*, 54/91 *Malawi African Association / Mauritania*, No 61/91 *Amnesty International / Mauritania*, 98/93 *Ms. Sarr Diop, Union Inter africaine des Droits de l'Homme and RADDHO / Mauritania*, 164/97 and 196/97 *Collectif des Veuves et Ayants-droit / Mauritania*, 210/98 *Association Mauritanienne des Droits de l'Homme / Mauritania* in thirteenth annual activity report.

²⁹³ Paras 56 and 66.

²⁹⁴ Paras 116-118.

Since the twenty-eight session, less than ten communications²⁹⁵ have been considered in relation to conditions of detention with the most recent being concluded at the forty-third ordinary session.²⁹⁶ When a violation is found, the Commission lists the articles violated by the state party concerned and the remedial measures to be adopted by that state.²⁹⁷ These remedies are referred to by the Commission as recommendations and are reasoned not to be legally binding, although states are required to report on the progress towards implementation.²⁹⁸ Unfortunately, most of these recommendations are ignored by the states parties as they are non-binding.²⁹⁹ The provisions of the Charter are greatly undermined if the Commission's decisions cannot be enforced.

The African Court on Human and Peoples' Rights will complement the protective mandate of the Commission.³⁰⁰ The Court will deliver legally authoritative and conclusive decisions.³⁰¹ This will not automatically translate into state compliance but states will no longer use the non-binding nature of the decisions as the reason for their non-compliance.³⁰² There may be difficulty with individuals engaging the Court because states parties must make a declaration to accept that NGOs and individuals can have direct access to the Court and so far only Burkina Faso has made this declaration.³⁰³ Given the fact that the African Court is expected to develop African human rights jurisprudence this may be severely affected if only the Commission and states parties can approach the Court.

²⁹⁵ Fourteenth to twenty-fourth annual activity reports.

²⁹⁶ Communication 292/04, *Institute for Human Rights and Development in Africa / Angola* twenty-fourth annual activity report.

²⁹⁷ F Viljoen and L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 (1) *The American Journal of International Law* 3.

²⁹⁸ L Louw, 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' Unpublished PhD thesis, University of Pretoria, 2005 99.

²⁹⁹ Wachira and Ayinla (n 119 above) 465.

³⁰⁰ Established by the Protocol to the African Charter on the establishment of an African Court on Human and Peoples' Rights and came into force in 2004.

³⁰¹ Articles 28, 30 of the Protocol.

³⁰² Wachira and Ayinla (n 119 above) 488.

³⁰³ Viljoen (n 24 above) 422.

4.2 Fact-finding missions

The Commission has undertaken fact-finding missions to Togo, Sudan, Senegal, Nigeria and Mauritania. The only mission report available on the Commission's website is to Sudan, while the Zimbabwe report only contains an executive summary and the state's response.³⁰⁴ From the information available, the Commission does not seem to have a clear set of guidelines for visits and thus leading to questions about its independence, impartiality and the reliability of the information.³⁰⁵ The response from the government of Zimbabwe raised the question of the procedure applied and describes some of the reports as allegations and being unfounded.³⁰⁶ Murray argues that the Commission has not been able to effectively link its fact-finding missions to the communications it receives, thus questioning the utility of such visits.³⁰⁷ The Commission, after sending fact-finding missions to Mauritania and Sudan stated in the communications that they were promotional missions which were also used to understand the country situations and were not intended to collect information in relation to specific communications.³⁰⁸ This contradicts the Commission's own objectives of sending the missions to those countries in the first place.

The government of Zimbabwe, in response to the issue of detention conditions and the specific statement that 'conditions are horrible', suggested that they were in compliance with UN Standard Minimum Rules for the Treatment of Offenders.³⁰⁹ The Commission had no response to this as there are no standards being applied while visiting those prisons.

4.5 Conclusion

This chapter highlighted how the Commission has utilised its mandate in enforcing the Charter provisions in relation to prisoners' rights. All the mechanisms highlighted present a challenge with the applicable standards not clearly defined and publicised to enable all stakeholders to

³⁰⁴ http://www.achpr.org/english/_info/reports_en.html (accessed 15 October 2008).

³⁰⁵ R Murray 'Evidence and fact-finding by the African Commission' in Evans and Murray (n 23 above) 108.

³⁰⁶ Executive summary of the fact-finding mission to Zimbabwe 24th – 28th June 2002 22, http://www.achpr.org/english/_info/reports_en.html (accessed 15 October 2008).

³⁰⁷ As above.

³⁰⁸ Thirteenth annual activity report, Mauritania communication, para 87; Sudan communication; para 46.

³⁰⁹ Zimbabwe report (n 225 above) 30.

engage on an equal footing. The second issue is the enforcement of the findings and recommendations of the Commission. Wachira and Ayinla rightly summarise the reasons contributing to the difficulty in enforcing the Commission's recommendations as:

[t]he lack of political will on the part of state parties, a lack of good governance, outdated concepts of sovereignty, a lack of an institutionalised follow-up mechanism for ensuring the implementation of its recommendations, weak powers of investigation and enforcement and the non-binding character of the Commission's recommendations.³¹⁰

The next chapter will draw conclusions from the analysis provided in this chapter and provide recommendations in relation to the protection of prisoners' rights in Africa.

³¹⁰ Wachira and Ayinla (n 119 above) 471.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Writing about the African continent in generalised terms has been dismissed as a ‘foolish pastime’ because Africa is a vast continent with a long and complex history.³¹¹ Despite this, there are common factors that unite the continent, including one human rights system. African prisons developed mostly during and after the colonial period but have not evolved to serve the main functions for which prisons are designed, particularly reformation and rehabilitation.³¹² In fact, given the overall situation, prisons have failed to provide the requisite support to the justice system to ensure its effectiveness.

People deprived of their liberty are entitled to human rights except for those legally taken away by virtue of the imprisonment and to facilitate their detention. This must be done humanely and dignity should be the cornerstone of treatment of prisoners. The Commission is a critical stakeholder in promoting and protecting human rights in Africa and prisoners form a special category of persons whose rights must be protected and promoted. The legal framework for the African system in relation to prisoners’ rights is not well drafted and is difficult to implement presenting a challenge to the protection of prisoners’ rights. The responsibility for the humane treatment of prisoners and conditions of detention should not be left only to states to decide the standards without clear direction from the Commission. So far, states have failed in the duty to ensure adequate protection of prisoners’ rights leading to the present state of African prisons. Other actors, such as NGOs and NHRIs, have played an important role in holding states to account for their obligations under the African system.

In order to promote and protect human rights, there must be clearly stipulated standards that facilitate an effective interaction between the stakeholders and the African system for the protection of people deprived of their liberty. Without these standards, there are no benchmarks to ensure the improvement of African prisons. At present, the standards have to be implied or

³¹¹ Pete (n 48 above) 40.

³¹² Rule 58 UNSMR.

found in several different instruments and soft law without building on an agreed upon strategy towards the protection of prisoners' rights.

The Commission has made several interventions in relation to prisoners' rights and conditions of detention but they are not strategic and are poorly documented. This is mainly due to the fact that there are no comprehensive standards that should be applied when assessing prison conditions leading to limited information on the actual progress towards improvement. The designated mechanism for dealing with prisoners' rights is the SPR, but there has not been proper coordination between the mechanisms of the Commission to ensure that all mechanisms contribute towards the common cause of protecting prisoners' rights. Despite these challenges, there has been constructive dialogue between the Commission and state parties, especially using promotion visits and the SRP. This, however, needs to translate in compliance by state parties with the recommendations of the Commission so as to improve the overall situation of African prisons.

5.2 Recommendations

- i) The Commission must develop an overall strategy for intervention to address the specific problems of African prisons. This strategy must address the present challenges and provide a roadmap for where African prisons want to go to in an ideal situation.
- ii) The Commission should develop clear standards for the protection of prisoners' rights in Africa as a crucial first step in the promotion and protection of prisoners' rights. Having comprehensive standards will provide a goal towards which states must work and provide a framework for effective monitoring by the Commission and other stakeholders such as NGOs and NHRIs.
- iii) Consistent monitoring of the implementation of rights against the standards will enable compliance with their obligations. This should emphasise follow-up strategies that involve, amongst others, collecting information while not in the country using domestic institutions such as NGOs and NHRIs.
- iv) There should be sufficient resource allocation for promotion and protection of prisoners' rights. The SRP has not been able to fulfil the mandate in the last few years due to lack of funding as a result of withdrawal of donor support. Consequently, this

has hampered the effective implementation of the existing mandate. With a clearer mandate of comprehensive standards, there should be sufficient resources allocated to ensure that the mandate is effectively carried out to ensure the promotion and protection of prisoners' rights.

- v) The Commission should engage the AU so as to ensure that there is compliance by states parties with the recommendations that it makes otherwise if the recommendations are not complied with, the commission will fail in the execution of its mandate.

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