

An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights

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Summary

While the right to freedom from torture is one of the few non-derogable rights, it is also one of the rights commonly violated in Africa. The right to freedom from torture is protected under article 5 of the African Charter. This article looks at the measures the African Commission has put in place to protect the right to freedom from torture in the last 20 years that the African Charter has been in force. The definition of torture is given, the principle of jus cogens is discussed, and the general situation of torture in Africa is reviewed. The article also discusses the human rights instruments in Africa and how they protect the right to freedom from torture. In particular, the African Charter and the African Charter on the Rights and Welfare of the Child are discussed and emphasis is put on the mechanisms in those treaties and how such mechanisms have been used to protect the right to freedom from torture. On the role of the African Commission and how it has used its mechanisms to protect the right to freedom from torture, the article looks at how torture has been dealt with in the seminars and workshops organised by the African Commission, how the African Commission has laid down rules and co-operated with other African and international institutions to protect the right to freedom from torture, and how it has protected the right to freedom from torture through individual communications. The role of the Special Rapporteur on Prisons and Conditions of Detention in

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Africa in protecting the right to freedom from torture and the Robben Island Guidelines are also discussed in detail. The author recommends that Africa should adopt a torture-specific treaty, as has been the case in the European and Inter-American systems of human rights if the right to freedom from torture is to be protected effectively.

1 Introduction

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

In this article, existing mechanisms to combat torture in Africa are covered, and the way in which the African Commission on Human and Peoples' Rights (African Commission) has addressed the issue of the right to freedom from torture is discussed. This discussion is based on the Tenth to Eighteenth Activity Reports of the African Commission. This is because they are readily available on the African Commission website, except for the Seventeenth Annual Activity Report which was obtained from the website of the University of Minnesota. The Robben Island Guidelines are analysed, and it is recommended that the mechanisms in place designed to combat torture in Africa are not effective and that there is a need for a torture-specific treaty.

2 Definition of torture

The exact meaning of the term 'torture' is still debated in the academic world.¹ However, it is beyond the scope of this article to explore in

¹ See A Cullen 'Defining torture in international law: A critique of the concept employed by the European Court of Human Rights' (2003) 34 *California Western International Law Journal* 29, where he calls for a need for a less definitive and broader view of the concept of torture; E Gross 'Legal aspects of tackling terrorism: The balance of the right of a democracy to defend itself and the protection of human rights' (2001) 6 *UCLA Journal of International Law and Foreign Affairs* 89 94, who argues that there is no clear definition of torture. His argument is based on the fact that in *Republic of Ireland v The United Kingdom*, judges at the European Court of Human Rights did not agree on the exact meaning of the term 'torture'.

detail those debates. The author here relies on the definition of torture in the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (article 1).² Torture is defined as

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

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

The basic principles of international law which states are not allowed to contract out of are known as *jus cogens*.³ The concept of *jus cogens* is founded 'upon an acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in the domestic legal orders'.⁴ Some examples of *jus cogens* have been given, particularly during the discussions by the International Law Commission on the topic, and they include unlawful use of force, piracy, slave trading⁵ and, recently, torture.⁶

For a rule to qualify as *jus cogens*, in the light of article 53 of the Vienna Convention on the Law of Treaties (Vienna Convention), a two-stage approach is involved.⁷ The first is the establishment of the proposition as a rule of general international law and, second, the acceptance of that rule as a peremptory norm by the international community of states as a whole.⁸ The fact that torture is a *jus cogens*

² Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987.

³ See arts 53, 64 & 71 of the 1969 Vienna Convention on the Law of Treaties.

⁴ MN Shaw *International law* (1997) 97.

⁵ As above.

⁶ HJ Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 77. The authors argue that, at present, very few rules pass the test of *jus cogens* and that torture is one of them.

⁷ n 3 above.

⁸ n 4 above. In *Siderman de Blake v Republic of Argentina* 965 F 2d 699 (9th Cir 1992), where the Sidermans sued the government of Argentina in a United States court for, *inter alia*, torture, the Ninth Circuit Court of Appeals rightly observed, in para 717, '[t]hat states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens . . . under international law, any state that engages in official torture violates *jus cogens*.' See also MJ Leavy 'Discrediting human rights abuse as an "Act of State": A case study on the repression of the Falun Gong in China and commentary on international human rights law in US Courts' (2004) 35 *Rutgers Law Journal* 749 780.

has practical consequences for the community of states in general and for African states in particular. The House of Lords, in *Ex Parte Pinochet Ugarte* [2000], observed that 'the *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture whenever it is committed'.⁹ The only correct interpretation that can be given to the above observation is that every state has a duty to punish the crime of torture for so long as the perpetrators are within the jurisdiction of that state. It does not matter whether the offence was committed within that state or in another state. It also does not matter whether the crime was committed against the nationals of that particular state or not.¹⁰

State immunity¹¹ is not a defence in cases where torture has been alleged. According to *Jones v Saudi Arabia*,¹² victims of Saudi Arabia torture could claim compensation in the United Kingdom despite Saudi Arabia's claim of state immunity. It has been rightly stated that the prohibition against torture prevails over state immunity because of the normative characteristics of that prohibition, not because the rules on state immunity should or should not allow this.¹³ It is also vital to note that former heads of state cannot claim immunity from prosecution for the crime of torture.¹⁴

Though state practice, international humanitarian law, international law and human rights law all consider the prohibition against torture as *jus cogens*, there is an unpopular view that torture should be permissible in some situations. Dershowitz, while reviewing current instances where

⁹ *Ex Parte Pinochet Ugarte (NO 3)* [2000] 1 AC 147 198 (HL 1999); see also DM Amann 'Abu Ghraib' (2005) 153 *University of Pennsylvania Law Review* 125.

¹⁰ J Bacchus 'The garden' (2005) 28 *Fordham International Law Journal* 308 332.

¹¹ It is a principle of international law to the effect that states are equal sovereigns and that domestic courts in a given state have no jurisdiction in cases where a foreign state is the respondent. For a detailed discussion of this subject, see Shaw (n 4 above) 491-540. The Special Court for Sierra Leone held that 'the principle of state immunity derives from the equality of sovereign states'. See *Prosecutor v Charles G Taylor*, SCSL-2003-01-I-AR72 (E) para 51.

¹² *Jones v Saudi Arabia* [2005] UKHRR 57, cited in C Miéville 'Anxiety and the sidekick state: British international law after Iraq' (2005) 46 *Harvard International Law Journal* 441, where the author argues that this decision was 'constructed from a complete lattice of international law, European human rights law, British human rights law, and the prohibition of torture as *jus cogens*' and that the case vividly illustrates the slippery boundaries between these various elements; see 451. See also *Siderman de Blake v Republic of Argentina* (n 8 above).

¹³ A Orakhelashvili 'Restrictive interpretation of human rights treaties on the recent jurisprudence of the European Court of Human Rights' (2003) 14 *European Journal of International Law* 529 562.

¹⁴ Lord Browne-Wilkinson observed that the fact that torture is an offence of universal character, the fact that the international community is obliged to outlaw and punish it and that it is committed by government officials indicate that ex-heads of states are not immune from jurisdiction when they are being accused of torture. He said that continued immunity contradicts the Torture Convention. See F Sullivan 'A separation of powers perspective on Pinochet' (2004) 14 *Indiana International and Comparative Law Review* 409 499.

the United States has used torture, argues that 'of course it would be best if we didn't use torture at all, but if the United States is going to continue to torture people, we need to make torture legal and accountable'.¹⁵ It is submitted that the fact that a state violates its obligations under international law does not mean that other states should follow suit. The argument that torture should be legalised because countries like the United States of America have disregarded their international law obligations does not hold water.¹⁶

Bagaric and Clarke have argued that 'torture is morally defensible, not just pragmatically desirable'.¹⁷ Their unpopular view is based on 'the harm minimisation rationale', which is based on a hypothetical case of a terrorist leader having instigated the planting of a bomb, which is about to explode, on an aircraft. The police arrest him and he refuses to reveal the details of the aircraft on which the bomb was planted. It is argued by them that torture is morally defensible in such circumstances to get information and prevent the loss hundreds of lives. The authors themselves realise that their argument is 'hypothetical' and that it 'is not . . . one that has occurred in the real world'.¹⁸

4 The situation of torture in Africa

The situation of torture in Africa is succinctly summarised as follows:¹⁹

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

Though 'African states still relish and cherish the use of torture as [an] instrument of state policy',²⁰ it is beyond the scope of this paper to discuss the situation of torture in every African country. However, a cursory perusal of the Activity Reports of the African Commission (as discussed in detail below), and conclusions and recommendations

¹⁵ As quoted in J Silver 'Why America's top liberal lawyer wants to legalise torture?' *Scotsman* 22 May 2004. It is quoted again in M Bagaric & J Clarke 'Not enough torture in the world? The circumstances in which torture is morally justifiable' (2005) 39 *University of San Francisco Law Review* 581 582.

¹⁶ Prof A Dershowitz has been criticised; see SF Kreimer 'Too close to the rack and the screw: Constitutional constraints on torture in the war on terror' (2003) 6 *University of Pennsylvania Journal of Constitutional Law* 278 278-325.

¹⁷ See Bagaric & Clarke (n 15 above).

¹⁸ n 17 above, 583.

¹⁹ Statement made at an international seminar 'African cultures and the fight against torture' which was held from 29 July 2005 to 1 August 2005 at Dakar, Senegal http://ww2.fiacat.org/en/article.php3?id_article=41 (accessed 31 July 2006).

²⁰ NJ Udombana 'Can the leopard change its spots? The African Union treaty and human rights' (2002) 17 *American University International Law Review* 1177 1225.

made by the Committee against Torture (Committee) on the reports of some African countries, indicate that torture is a serious problem in Africa. For instance, the Committee has expressed its 'wide concern' at 'the widespread evidence of torture of detainees by law enforcement agencies' in Egypt;²¹ the Committee expressed its 'concern over the increase in the number of allegations of torture' in Morocco;²² 'torture seemed to be a very widespread practice in Cameroon' and the Committee, still referring to Cameroon, was 'troubled by the sharp contradictions between consistent allegations of serious violations of the Convention and the information provided by the state'.²³ After examining Uganda's report, the Committee was concerned about the continued allegations of torture in a widespread manner by the state's security forces and agencies together with the apparent impunity enjoyed by the perpetrators.²⁴

5 The African human rights instruments and torture

Two African regional human rights treaties that deal with torture, the African Charter on Human and Peoples' Rights (African Charter)²⁵ and the African Charter on the Rights and Welfare of the Child (African Children's Charter) are now discussed.²⁶

5.1 The African Charter on Human and Peoples' Rights

The right to freedom from torture is protected under article 5 of the African Charter, which provides that

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

The African Charter has been ratified by all the 53 states in Africa²⁷ and,

²¹ CAT/C/CR/29/4 (para 5 (b)) 23 December 2002.

²² CAT/C/CR/31/2 (para 5(d)) 5 February 2004.

²³ CAT/C/CR/31/6 (para 4) 5 February 2004.

²⁴ CAT/C/CR/34/UGA (para 6(c)) 21 May 2005. See also the Committee's conclusions on the following reports: Egypt, A/54/44, paras.197-216 (para 206); Libyan Arab Jamahiriya, A/54/44, paras 176-189 (para 182 (b)); Cameroon, A/56/44, paras 60-66 (para 65); Tunisia, A/54/44, paras.88-105 (para 99); and Zambia, CAT/C/XXVII/Concl.4 (para 5).

²⁵ Also known as the Banjul Charter, adopted on 27 June 1981 and entered into force on 21 October 1986.

²⁶ Entered into force 29 November 1999.

²⁷ See <http://www.africa-union.org/home/Welcome.htm> (accessed 2 September 2005).

unlike the other instruments,²⁸ article 5 of the African Charter is not only limited to the right to freedom from torture, inhuman or degrading treatment or punishment, but it also covers 'respect of the dignity inherent in a human being'. This is important because torture aims at breaking down the individual to the level of losing their human dignity, and the right to freedom from torture is inseparable from the guarantee of human dignity.

Another unique feature about the African Charter is that it puts torture in the same category as slavery and slave trade, and categorises them as 'forms of exploitation and degradation'. It may be argued that, by so doing, it expressly enacts that torture has acquired the status of *jus cogens*²⁹ as is the case with slavery and slave trade.

5.2 The African Charter on the Rights and Welfare of the Child

The African Children's Charter, which has been ratified by 38 of the 53 African states,³⁰ also prohibits torture, specifically with regard to children. It requires state parties to take 'specific legislative, administrative, social and educational measures to protect the child from all forms of torture'.³¹ Measures to ensure that this article is made effective are introduced, and they include:

[e]ffective procedures for the establishment of special monitoring units to provide necessary support for the child as well as other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child abuse and neglect.

²⁸ See eg the Convention against Torture (n 2 above); the International Covenant on Civil and Political Rights (adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A(XXI) of 16 December 1966 and entered into force on 23 March 1976 in accordance with art 49 (see art 7)); the Convention on the Rights of the Child (adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990 (see art 37(a)); the American Convention on Human Rights (signed at the Inter-American Specialised Conference on Human Rights, San Jose?, Costa Rica, 22 November 1969 and entered into force on 18 July 1978 (art 5(2)); and the European Convention on Human Rights (signed by the state members of the Council of Europe at Rome on 4 November 1950 and entered into force on 3 September 1963 and, as amended by Protocol 11, on 1 November 1998 (see art 3)). According to arts 60 and 61 of the African Charter, the Commission may rely on these instruments when interpreting the Charter.

²⁹ It has been rightly argued that 'the prohibition of slavery and torture is *jus cogens*, prevailing over all other forms of international law'; see A Smith 'Child labour: The Pakistan effort to end a scourge upon humanity — is it enough?' (2005) 6 *San Diego International Law Journal* 461 493.

³⁰ States that have not yet ratified this treaty are Central African Republic, Congo, Côte d'Ivoire, Congo, Djibouti, Congo, Gabon, Guinea Bissau, Liberia, Mauritania, Sahrawi Arab Democratic Republic, Somalia, São Tomé and Príncipe, Sudan, Swaziland, Tunisia and Zambia. See <http://www.africa-union.org/home/Welcome.htm> (accessed 31 July 2006).

³¹ Art 16(1).

State parties are also required to ensure that 'no child who is detained or imprisoned or otherwise deprived of his or her liberty is subjected to torture, inhuman or degrading treatment or punishment'.³²

Unlike the Inter-American and the European systems of human rights, the African human rights system expressly extends the right to freedom from torture to children. This could be attributed to the fact that in many African countries, children still suffer maltreatment at the hands of public entities and private individuals. In some African countries, children are detained in the same cells as adults³³ and are at times subjected to torture when prison or police authorities want to extract confessions from them with regard to some of the offences they are alleged to have committed. Their protection against torture is therefore of utmost importance, especially in cases where they have been deprived of their liberty.

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

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

6.1 The African Commission on Human and Peoples' Rights

The African Commission is established under article 30 of the African Charter with the mandate of promoting human and peoples' rights³⁴ by collecting documents, undertaking studies and research on African problems in the field of human and peoples' rights, organising seminars, symposia and conferences, disseminating information, encouraging national and local institutions concerned with human and peoples'

³² Art 17(2)(a).

³³ In some instances prison authorities 'inflate' children's ages and detain them with adults.

³⁴ Art 45. The Committee on the Rights and Welfare of the Child that is established under art 32 of the African Children's Charter has the same mandate as the African Commission. See art 42. Like the African Commission, it has the jurisdiction to entertain individual communications (art 44) and to examine reports from state parties on the efforts taken to comply with the provisions of that treaty (art 43). However, it does not have jurisdiction to entertain inter-state communications. Its jurisprudence has not yet been developed and therefore it will not be necessary to discuss it in detail here.

rights, and, where necessary, giving its views or making recommendations to governments.

6.1.1 Seminars and conferences

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

However, it can safely be stated that the African Commission has not been very effective in this regard. According to the Activity Reports of the African Commission, very few seminars or conferences dealing with torture have been organised, and the same applies to those at which the African Commission has been represented.³⁵ This could be

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

attributed to factors such as the lack of sufficient funding³⁶ and also that there are many duties³⁷ and rights in the African Charter that the African Commission, consisting of 11 commissioners³⁸ (who do not work on a full-time basis) has to oversee. In its Eighteenth Activity Report (28 June to 2 July 2005),³⁹ the African Commission specifically mentions the prohibition and prevention of torture as some of the activities that the commissioners carried out during the period under review and it makes torture part of its promotional activities (see paragraph 21). This has, however, been at the expense of having torture feature in the seminars and conferences organised by the African Commission.⁴⁰

6.1.2 Laying down rules and co-operating with African and international institutions

The African Commission is empowered to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation and also to co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.⁴¹

In an attempt to fulfil these two duties with regard to the right to freedom from torture, the African Commission, together with the Association for the Prevention of Torture,⁴² drafted and later adopted the Robben Island Guidelines (RIG), which are discussed below, and has ensured their distribution in some African countries.⁴³ It is assumed

³⁶ The Commission has acknowledged that it lacks sufficient funding from the African Union to carry out its activities (see para 63 of the Seventeenth Annual Activity Report 2003-2004). It was not until the intervention of APT that the Commission started concentrating on torture. Like other activities of the African Commission, it is the NGOs who influence the activities of Special Rapporteurs. See M Evans & R Murray 'The Special Rapporteurs in the African system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2004) 289. In the Eighteenth Activity Report (28 June to 2 July 2005), EX CL/199(VII), the African Commission reports that its 'work . . . was compromised due to lack of funding', and that the 'Commission was unable to carry out several promotion missions to member states' (see para 58).

³⁷ Arts 27-29.

³⁸ Art 31.

³⁹ See n 36 above.

⁴⁰ Paras 38-41 of the report that covers the conferences and seminars that were organised by the African Commission indicate that in none of the seminars or conferences did torture feature on the agenda.

⁴¹ Arts 45(1)(b) & (c).

⁴² It is a Geneva-based human rights NGO.

⁴³ Commissioner Angela Melo distributed the RIG and the resolution leading to their adoption to the Ministries of Foreign Affairs, Justice and Interior, Parliaments and women NGOs in lusophone countries. See Sixteenth Annual Activity Report (2002-2003) para 20.

that African governments will base their legislation relative to torture on the RIG.⁴⁴ The African Commission has liaised with certain institutions, especially prison authorities, in some European countries in an effort to gain an insight on how, among other rights, torture can be prevented in places of detention,⁴⁵ and also with various human rights institutions in Africa.⁴⁶ It has granted observer status to many non-governmental organisations (NGOs) that deal with torture.⁴⁷

6.1.3 Inter-state and individual communications

The African Commission has the mandate to entertain both inter-state⁴⁸ and individual communications.⁴⁹ As is the case in the Inter-American and European systems of human rights, the inter-state procedure is rarely resorted to by African states, notwithstanding the fact that some countries grossly violate the provisions of the African Charter.⁵⁰ Traditionally, African states have tended to emphasise the principle of non-interference, which originates in the Charter of OAU⁵¹ and

⁴⁴ The African Commission has recommended that the government of Zimbabwe study and implement the RIG after allegations of torture were made during its fact-finding mission to Zimbabwe (see Executive Summary of the Report of the Fact-Finding Mission to Zimbabwe 24-28 June 2002) Annex II, Seventeenth Annual Activity Report 2003-2004. However, it should be noted that in the same report, the government of Zimbabwe discredited the findings of the fact-finding mission on a number of grounds, among others that the Commission did not carry out enough research to verify whether the alleged stories of torture had not been fabricated (see Comments by the Government of Zimbabwe on the Report of the Fact-Finding Mission in the Seventeenth Annual Activity Report).

⁴⁵ The Special Rapporteur on Prisons and Conditions of Detention in Africa 'informed the Commission that he [Prof EVO Dankwa] had visited various prisons in Paris, France'; see Thirteenth Annual Activity Report (para 27); and 'As part of her [Commissioner Chirwa's] and to be able to study the practices of developed countries, the Special Rapporteur also visited one prison in Glasgow, UK on 9th April 2002' (Fifteenth Annual Activity Report (para 30)).

⁴⁶ C Heyns (ed) *Human rights law in Africa* (2004) 611. The African Commission has to date granted affiliation status to 15 national human rights institutions; see Seventeenth Annual Activity Report (para 56).

⁴⁷ n 46 above, 604-610. For a detailed discussion of the role of NGOs in the African human rights system, see A Motala, 'Non-governmental organisations in the African system' in Evans & Murray (n 36 above) 246-279.

⁴⁸ Arts 47-54.

⁴⁹ Arts 55-59.

⁵⁰ Countries like the Sudan that have violated human rights in Darfur should have been taken to the Commission by some African states. 'It is only recently that the Commission was seized for the first time with an inter-state communication [Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*] worthy of the name.' See F Ouguergouz *The African Charter on Human and Peoples' Rights. A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 571.

⁵¹ Art III(2) of the Charter of the OAU, adopted in Addis Ababa, Ethiopia, on 25 May 1963, entered into force on 13 September 1963; replaced in 2001 by the Constitutive Act of the African Union. See O Umozurike 'The complaint procedure of the African Commission on Human and Peoples' Rights' in G Alfredsson *et al* (eds) *International human rights monitoring mechanisms. Essays in honour of Jakob Th Möller* (2001) 707.

which was recently re-introduced by the Constitutive Act of the African Union (AU).⁵² The African Commission therefore has no true practice in this respect,⁵³ and consequently it is not going to be a subject of detailed discussion. However, it is important to note that the inter-state complaint procedure has been rightly criticised, in light of the Inter-American and European procedures, as 'too state-centric' with the African Commission appearing to settle 'inter-state disputes rather than serving as a watchdog of human rights transgressions'.⁵⁴

However, many individual communications have been filed, by both individuals and NGOs, to the African Commission alleging the violation of the right to freedom from torture. These communications indicate the extent to which the right to freedom from torture is violated in Africa, the brutality of the methods used,⁵⁵ the misunderstanding of the meaning of torture by the complainants,⁵⁶ and the failure by the African Commission to define torture. (To date, the African Commission has not defined what torture is, though it has in numerous communications held that the right to freedom from torture has been violated.)⁵⁷ They also indicate the unfortunate instance where the Commission allowed the state to amicably settle with the victims a communication that alleged torture.⁵⁸

⁵² Accepted in Lomé, Togo, on 11 July 2000, and entered into force on 26 May 2001; CAB/LEG/23 15.

⁵³ Ouguergouz (n 50 above) 572.

⁵⁴ O Ojo & A Sesay 'The OAU and human rights: Prospects for the 1980s and beyond' (1986) 8 *Human Rights Quarterly* 89, quoted in J Pehman *International human rights law. A practical approach* (2003) 255.

⁵⁵ In *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998), International Pen alleged that Ken Saro-Wiwa was kept in leg irons and handcuffs and subjected to beatings and held in cells which were airless (para 80). In *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), it was alleged that many villagers were arrested and tortured. A method of torture called 'jaguar' was used where the victim's wrists are tied to his feet, he is then suspended from a bar and thus kept upside down, some times over a fire and he is beaten on the soles of the feet. Other forms of torture involved beating the victim, burning them with cigarette stubs or with a hot metal. As for women, they were just raped (para 20). Other methods included electric shock to the genital organs, as well as burns all over the bodies (para 22). Detainees at J'Reida military camp were allegedly undressed, had their hands tied behind their backs, were sprayed with cold water and beaten with iron bars (para 23).

⁵⁶ In *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), the complaints alleged the detaining of persons incommunicado and preventing them from seeing their relatives amounted to torture (para 56) and this was rightly rejected by the Commission.

⁵⁷ The African Commission has not attempted to define the meaning of the term torture. In *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000), the Commission relied on standards laid down in the case of *Ireland v The United Kingdom* (para 41).

⁵⁸ In *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* (2000) AHRLR 80 (ACHPR 2000), which alleged that torture had been committed against members of the Afar ethnic group and indicated that 26 people had been tortured (para 1), the Commission opted for an amicable settlement because the government had requested so.

These communications also indicate the standard of proof of torture,⁵⁹ and an instance where the African Commission declared as inadmissible a communication which clearly alleged torture on the ground that it was couched in an insulting and disparaging language.⁶⁰ Though the African Charter gives the Commission discretion to declare a communication inadmissible when it has been phrased in insulting and disparaging language,⁶¹ it is argued that the Commission in this case should have looked at the substance of the communication and not the form.⁶² It could be argued that not very many lawyers, victims of human rights abuses and human rights activists know about the procedural technicalities involved at the African Commission level⁶³ and the Commission should always give them the benefit of doubt in cases like this. The protection of human rights should take precedence over technical legal issues which may be beyond the understanding and appreciation of non-experts in the African human rights system.

6.1.4 Absence of a Special Rapporteur and torture

The African Charter does not provide for the institution of Special Rapporteurs. However, having seen how effective Special Rapporteurs have been under the United Nations (UN) system, the African Commission has started to appoint Special Rapporteurs in order to strengthen its promotional and protectional roles of human and peoples' rights.⁶⁴ The Commission has appointed five Special Rapporteurs on the following thematic issues: Extra-Judicial Executions, Prisons and Conditions of Detention, Women's Rights, Human Rights Defenders in Africa and

⁵⁹ The Commission has always required medical evidence to back up the allegations of torture for it to find a violation. In *Rights International v Nigeria* (2000) AHRLR 254 (ACHPR 1999), the communication (para 7) included medical evidence that the victim, Mr Charles B Wiwa, had been tortured and the Commission admitted it and found a violation. However, in *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000), which alleged that Mr Ayodele Ameen had been tortured by the Nigerian security officials, and where no medical evidence was adduced to substantiate the allegations, the Commission did not find a violation of art 5 (para 16).

⁶⁰ *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997), the communication which alleged that between 1984 and 1989 at least 46 prisoners were tortured was declared inadmissible because, among other things, it referred to the ruling regime as a 'regime of torturers'.

⁶¹ Art 56(3).

⁶² 'In principle, it appears diversionary to reject a communication because of the quality of the phraseology.' See Umozurike (n 51 above) 709.

⁶³ This is probably because the Commission has not created much awareness about its procedural aspects in many parts of Africa. It is rightly suggested that 'apparently, this problem is universal. African NGOs, like their Inter-American counterparts, have great difficulties in trying to use the African systems when seeking to vindicate the rights of the victims.' See M Hansungule 'Protection of human rights under the Inter-American system: An outsider's reflection' in Alfredsson (n 51 above) 689.

⁶⁴ M Evans & R Murray 'The Special Rapporteurs in the African system' in Evans & Murray (n 36 above) 280.

Refugees and Internally Displaced Persons in Africa.⁶⁵ It is vital to note that the Special Rapporteur on Extra-Judicial Executions had difficulties in carrying out his work and he consequently resigned and the office was closed.⁶⁶ Some authors rightly concluded that 'this has been largely a wasted opportunity and a matter of some considerable embarrassment for the reputation of the African human rights system in general and the African Commission in particular'.⁶⁷

The Special Rapporteur on Prisons and Conditions of Detention in Africa is mandated, among other things, to examine the situation of prisons and prison conditions in Africa and to ensure the protection of persons in detention or in prisons.⁶⁸ The mandate of the Special Rapporteur is based on many human rights treaties, declarations and codes of conduct, including CAT and the African Charter. The Special Rapporteur has generally been regarded as successful.⁶⁹

Nevertheless, it can be safely argued that this institution has not been effective in preventing torture in Africa. This can be attributed to two factors. One is that the Special Rapporteur has many issues to focus on during these visits to prisons or places of detention. Therefore there is not enough time to concentrate on investigating allegations of torture. Any investigation of torture would need at least the involvement of a physician and a psychologist to verify whether the allegations correspond with the medical examination or a psychological assessment.⁷⁰

The second factor is that the Special Rapporteur does not have

⁶⁵ The nomination of the last two is reported in the Seventeenth Annual Activity Report 2003-2004 (para 34). They are Commissioner Bahame Tom Mukirya Nyanduga (Special Rapporteur on Refugees and Internally Displaced Persons in Africa) and Commissioner Jainaba Johm (Special Rapporteur on Human Rights Defenders in Africa).

⁶⁶ See Twelfth Annual Activity Report (para 25) and Fourteenth Annual Activity Report (para 20).

⁶⁷ Evans & Murray (n 64 above) 289.

⁶⁸ Mandate of the SRP http://www.achpr.org/english/_info/index_prison_en.html (accessed 15 September 2005).

⁶⁹ Evans & Murray (n 64 above) 292. See also Ouguergouz (n 50 above) 498-501. The SRP has carried out a number of prison visits to various African countries. The SRP has been to Zimbabwe (Tenth Annual Activity Report Annex VII); Madagascar, Mali and Mozambique (Eleventh Annual Activity Report paras 30-31); Cameroon, Kenya, Uganda and Zimbabwe (once again) (Twelfth Annual Activity Report paras 26-27); Benin, The Gambia and Mali (once again) (Thirteenth Annual Activity Report para 26); Mozambique (once again) (Fourteenth Annual Activity Report para 22); Malawi, Namibia, and Uganda (once again) (Fifteenth Annual Activity Report para 30); Benin (once again) and Cameroon (once again) (Sixteenth Annual Activity Report para 25); and Ethiopia and Malawi (once again) (Seventeenth Annual Activity Report para 28).

⁷⁰ The European Committee for the Prevention of Torture, eg, ensures that medics and psychologists form part of the teams that visit places of detention. See R Morgan & MD Evans (eds) *Protecting prisoners. The standards of the European Committee for the Prevention of Torture in context* (1999) 13.

enough time⁷¹ and resources (both financial and human)⁷² to visit all places of detention and prisons in all African countries (let alone in one country) every year. Consequently, visits of the Special Rapporteur are limited to a few countries for a very short period of time, and, needless to say, to a few prisons or places of detention in the capital cities or major towns. The issue of human resources is a vital one, especially when it comes to investigating and documenting allegations of torture. The Special Rapporteur or any member on the team should be able to spend enough time in a place of detention, talk to the prisoner or detainee in a language both understand, and be able to verify the allegations of torture by carrying out a medical examination on the alleged victim.

It is unfortunate that the future of the Special Rapporteur is uncertain. This is due to the fact that in 2003, Penal Reform International, a Paris-based NGO and the backbone of the Special Rapporteur, withdrew its financial support⁷³ and the activities of the Special Rapporteur were gravely affected.⁷⁴ In the Eighteenth Activity Report, it is reported that the Special Rapporteur, Dr Vera Mlangazuwa Chirwa, conducted missions in only two countries during the period under review; that is, in Kenya and South Africa.⁷⁵ What is also of note about those two missions is that the Special Rapporteur did not highlight whether there were any allegations of torture in the prisons that she visited. Therefore, the discussion whether it is an effective way of preventing torture in Africa is of no practical importance unless the financial situation changes positively, enabling the office of Special Rapporteur to effectively investigate and document allegations of torture in prisons.

7 The Robben Island Guidelines

7.1 A brief introduction to the Robben Island Guidelines

There is no academic work as yet done on the RIG and therefore this

⁷¹ On his first visit, the SRP spent 10 days in Zimbabwe. See Ouguergouz (n 50 above) 498. The SRP was in Malawi from 17 to 26 June 2001, in Namibia from 17 to 28 September 2001, and in Uganda from 11 to 23 March 2002 (Fifteenth Annual Activity Report para 30); in Cameroon from 1 to 14 September 2002, in Benin from 23 January to 5 February 2003 (Sixteenth Annual Activity Report para 25); and in Ethiopia from 15 to 29 March 2004 (Seventeenth Annual Activity Report para 28). This clearly shows that there is not much time available for the SRP to spend in a given country.

⁷² The SRP has always depended on the funding provided by an NGO called Penal Reform International and, as will be discussed later, when it withdrew its funding, the activities of the SRP came to a standstill.

⁷³ The official reason for the withdrawal of financial support is not given in the Seventeenth Annual Activity Report.

⁷⁴ Paras 27-28 Seventeenth Annual Activity Report.

⁷⁵ Para 24 Eighteenth Annual Activity Report.

section will be based on the *travaux préparatoires*⁷⁶ and the text of the RIG. Two factors spring immediately to the mind as to why no commentary has appeared: One is that the RIG is a relatively new development (barely three years old) and secondly, few writers write about torture in Africa.⁷⁷

7.2 The history of the Robben Island Guidelines

Realising that there was a need to develop a torture-specific instrument in Africa, and that the prevention of torture is a multidimensional issue, the Association for the Prevention of Torture (APT) made an oral presentation at the 29th session of the African Commission in Tripoli, Libya, and informed the Commission that it was to organise 'a workshop that would reflect on measures and concrete strategies and that it would draw up the draft of a plan of action [for the prevention of torture in Africa]'.⁷⁸ In the same presentation, APT proposed the objectives of the workshop,⁷⁹ the number of participants⁸⁰ as well as the date⁸¹ and venue of the workshop.⁸²

⁷⁶ The author was able to acquire this by fax and e-mail from the APT. The following documents were acquired and are available on file with the author: a copy of the letter dated 16 January 2001 in which the African Commission gave APT the go-ahead to organise the workshop; a copy of the introductory paper containing proposals for the plan of action for the prevention of torture in Africa that was presented and discussed at the workshop in Cape Town and Robben Island, South Africa; a copy of the letter dated 6 August 2001 in which the African Commission notified APT that Commissioner Andrew Chigovera had been designated to work with the APT in preparing the workshop; and a copy of the letter dated 1 November 2002 in which the African Commission informed APT that a resolution has been passed at the 32nd ordinary session that adopted the RIG.

⁷⁷ Some developments in Africa attract the attention of writers before they are even implemented. This was the case, eg, with the International Criminal Tribunal for Rwanda and also with the Special Court for Sierra Leone.

⁷⁸ See oral presentation by APT <http://www.apr.ch/africa/oralaf29.htm> (accessed 31 July 2006).

⁷⁹ It had 'the goal of drafting a plan of action for the prevention of torture and ill-treatment in Africa'.

⁸⁰ It proposed 15, including the Chairperson of the Commission, three members of the Commission, the Secretary of the Commission, a representative of the General Assembly of the OAU (as it then was), as well as other international experts, notably a representative of the International Committee of the Red Cross, the UN Committee Against Torture, the Inter-American Human Rights Commission and the European Committee for the Prevention of Torture. However, the workshop was not able to attract all the anticipated experts. Notably absent were experts from the UN Committee on Torture, the European Committee for the Prevention of Torture and the Inter-American Commission on Human Rights. It did, however, attract participants from relevant human rights bodies. See list of participants at the Workshop on the Prevention of Torture and Ill-treatment in Africa Cape Town and Robben Island 12-14 February 2002 <http://www.apr.ch/Africa/rig/Robben%20Island%20Participants.pdf> (accessed 14 September 2005).

⁸¹ It proposed 12-14 December 2001.

⁸² It proposed Johannesburg, South Africa.

The African Commission, in a letter dated 16 January 2001,⁸³ informed APT that it was 'in agreement with [the] proposal [for APT] to hold a workshop' and urged APT to follow up on the matter. After that, APT drafted an introductory paper,⁸⁴ which would later form the basis of the discussion and also of the RIG. The paper proposed that the plan of action should include legal, control and training and empowerment measures for the prevention of torture.⁸⁵ It also indicated that around 20 African and international experts would be invited to the workshop,⁸⁶ and that the venue of the workshop would be at Robben Island, South Africa⁸⁷ from 12 to 14 February 2002. The reason for holding the workshop at Robben Island was given:⁸⁸

Robben Island has been chosen for the final day⁸⁹ of the workshop and as a focus of the closing ceremony, because it is a place which has come to symbolise the fight against repression. To finalise the 'Robben Island Plan of Action' for the prevention of torture and ill-treatment and to hold a closing ceremony there, would have a powerful and symbolic impact.

The African Commission⁹⁰ notified APT that Commissioner Andrew Chigovera had been designated to work in collaboration with APT to organise the workshop. The workshop took place as indicated and the Robben Island Statement was adopted on 14 February 2002 recommending, among other things, that the African Commission adopts 'a resolution endorsing the Robben Island Guidelines'.⁹¹ At its 32nd ordinary session,⁹² the African Commission adopted the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.⁹³ In a letter dated 1 November 2002,⁹⁴ the African Commission informed APT that a resolution had been passed on the Robben Island Guidelines.

7.3 The Robben Island Guidelines and its approach to torture

The RIG approaches the question of torture in three ways: prohibition, prevention, and responding to the needs of victims. Each way enumer-

⁸³ ACHPR/ORG/MIS available on file with the author.

⁸⁴ Available on file with the author.

⁸⁵ Para II(a).

⁸⁶ Hence increasing the number from 15; see para II(b).

⁸⁷ Changing it from Johannesburg; see para II(c).

⁸⁸ As above.

⁸⁹ The paper states that '[f]or practical and logistical reasons the first two days of the workshop will be held in Cape Town, where better conference and accommodation facilities are located. The final day of the workshop will be held on Robben Island.'

⁹⁰ ACHPR/OBS/164, available on file with the author.

⁹¹ Robben Island Statement <http://www.apt.ch/africa/rig/Robben%20Island%20Statement.pdf> (accessed 14 September 2005).

⁹² Held in Banjul, The Gambia, from 17 to 23 October 2002.

⁹³ See Annex VI to the Sixteenth Annual Activity Report.

⁹⁴ ACHPR/SEM/3, available on file with the author.

ates in detail the measures that should be taken in that regard. It is beyond the scope of this paper to reproduce the RIG, but that notwithstanding, an attempt will be made to briefly tackle what is required under each approach.

7.3.1 Prohibition of torture

African states are required to take six measures to prohibit torture: the ratification of regional and international instruments;⁹⁵ the promotion and support of co-operation with international mechanisms (including the African Commission, UN human rights treaty bodies and the UN Special Rapporteur on Torture);⁹⁶ criminalisation of torture;⁹⁷ and non-refoulement (no one is to be expelled or extradited to a country where he or she is at the risk of being subjected to torture).⁹⁸ The RIG also requires states to combat impunity for both nationals and non-nationals who commit acts of torture;⁹⁹ and to establish complaints and investigation procedures to which all persons can bring their allegations of torture.¹⁰⁰

7.3.2 Prevention of torture

States are required to establish basic procedural safeguards for those deprived of their liberty (the rights to an independent medical examination and of access to a lawyer);¹⁰¹ to establish safeguards during the pre-trial process (this includes prohibiting the use of incommunicado detention and ensuring that comprehensive written records of all interrogations are kept, including the identity of all persons present during the interrogation);¹⁰² to take steps to ensure that conditions of detention comply with international standards;¹⁰³ to establish mechanisms of oversight (this includes ensuring the independence of the judiciary, of the national human rights bodies with the mandate to carry out visits to places of detention, to encourage and facilitate visits by NGOs to places of detention, and to support the adoption of the Optional Protocol to CAT to create an international visiting mechanism with the mandate to visit all places of detention);¹⁰⁴ states are also required to train and empower (among others) law enforcement officers so that they refrain from using

⁹⁵ Part IA (1 a-d).

⁹⁶ Part IB (2-3).

⁹⁷ Part IC (4-14).

⁹⁸ Part ID (15).

⁹⁹ Part IE (16 a-e).

¹⁰⁰ Part IF (17-19).

¹⁰¹ Part IIA (20 a-d).

¹⁰² Part IIB (21-32).

¹⁰³ Part IIC (33-37). In particular, they should comply with the UN Standard Minimum Rules for the Treatment of Prisoners, UN ECOSOC Res 663 C (XXIV) 31 July 1957 as amended by UN ECOSOC Res 2076 (LXII), 13 May 1977.

¹⁰⁴ Part IID (38-44).

torture;¹⁰⁵ and, finally, to educate and empower civil society so that they disseminate information relating to the prohibition of torture.¹⁰⁶

7.3.3 Responding to the needs of victims

States are required to ensure that all victims of torture and their dependants are offered appropriate medical care, have access to appropriate social and medical rehabilitation, and are provided with appropriate levels of compensation and support. In addition, families and communities which have been affected by the torture and ill-treatment of one of its members can also be considered torture victims.¹⁰⁷

8 Conclusion

The above discussion covered torture in Africa and the African human rights instruments to address it. It was largely based on the Activity Reports of the African Commission because it is not possible to find many books written about torture in Africa, apart from the reports by human rights organisations such as Amnesty International and Human Rights Watch.

Much as the RIG derives its provisions substantially from CAT, it leaves a lot to be desired. In the first place, it is not binding on states, as it is a mere declaration and not a treaty. Its enforcement mechanism is very weak. A follow-up committee was established, but it has only five members with the mandate to organise, with the support of interested partners, seminars to disseminate the RIG, to develop and propose to the African Commission strategies to promote and implement the RIG at national and regional levels, to promote and facilitate the implementation of the RIG within member states, and to draft a progress report to the African Commission at each session.¹⁰⁸ This is clearly too much work for only five individuals.

The RIG does not give the follow-up committee 'real power', such as by authorising it to visit places of detention, nor do members of the follow-up committee enjoy any immunity¹⁰⁹ when carrying out their work. This means that there is a need to establish a committee that has the same powers and privileges as that in the European system. This can only be achieved by having that committee established by a treaty and not a declaration, and therefore it is argued that there is a need for Africa to adopt a treaty on torture.

¹⁰⁵ Part IID (45-46).

¹⁰⁶ Part IIE (47-48).

¹⁰⁷ Part III (49-50 a-c). This part attempts to draw a distinction between primary and secondary victims to torture.

¹⁰⁸ See Resolution on the RIG adopted by the African Commission at its 32nd ordinary session, 17-23 October 2002, Banjul, The Gambia (para 3).

¹⁰⁹ Members of the European Committee for the Prevention of Torture enjoy immunity when carrying out their activities. See art 16 of the European Convention on Torture.