Litigating Torture and Ill-treatment in East Africa
A Manual for Practitioners

November 2016

Photo on front and back cover:

Prison lock, © Floris van Halm, 20 July 2011

Lock on a door in former prison Fort Ussher, Ussher Town, Accra, Ghana

REDRESS

Ending Torture, Seeking Justice for Survivors

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Introduction

Torture is an abhorrent crime that is absolutely prohibited under any circumstance. It has the special status of *jus cogens*, which is a 'peremptory norm' of general international law. Rules of *jus cogens* cannot be contradicted by treaty law or by other rules of international law.

Torture cannot be justified even if there is an emergency or a terrorist or other threat facing a country. The absolute prohibition of torture operates irrespective of the particular circumstances at play or the attributes of the perpetrators or the victims. Members of the military, the security services, the police or any other public authority cannot torture a suspect under any circumstances; their role as public officials does not give them a license to abuse the rights of any person. Non-citizens, migrants, terror suspects, convicted criminals, persons suspected to have vital information about planned crimes, protesters, opposition leaders benefit like any other person or group of persons from the right not to be subjected to torture or other prohibited ill-treatment. Under international law, there are no recognised defences to torture, such as necessity or superior orders. An order from a superior officer or a public authority may not be invoked as a justification for torture.

This prominent status notwithstanding, torture continues to be practised widely all over the world, including in East Africa, the focus region of this manual. While no State openly admits to practising torture, it is used nonetheless in a range of circumstances and contexts. In East Africa, torture was a

routine practice during colonisation, most infamously used by the colonial British government to fight the Mau Mau uprising in Kenya in the 1950s and was widely used in Belgium's colonisation of Congo. Today, States practice torture during conflict and in counterterrorism operations, as a means to obtain confessions, as a form of corruption or simply as a tool of control, intimidation and oppression. Its use is frequently arbitrary. Anyone can become a victim of torture, with marginalised people being particularly exposed.

Torture leaves permanent scars on victims and most will struggle for the rest of their lives with the consequences of the harm inflicted upon them. Beyond inflicting irreparable harm on the individual victim, torture affects communities and society as a whole. It is the antithesis of the rule of law and where it is allowed to fester, a range of other associated human rights abuses also tend to be present.

This underscores why taking active steps to combat torture is so important. Five countries belonging to the East African Community: Burundi, Kenya, Rwanda, South Sudan and Uganda (all except Tanzania), have signed up to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) which prohibits torture and ill-treatment and provides victims with a right to a remedy. All countries except for South Sudan have ratified the International Covenant on Civil and Political Rights as well as the African Charter.

All six countries have introduced domestic legislation to various degrees to implement their obligations under these treaties, creating opportunities for litigation at domestic as well as regional and international levels. The fight against torture requires measures of prevention, prohibition,

rehabilitation and other forms of reparation. Supporting victims with legal claims is an important aspect of these measures and vital to hold States to account and to uphold the rule of law, making clear that torture is never acceptable. Litigation can contribute to deterrence, a change of law and practice, while at the same time it can help ensure that victims obtain redress for the harm inflicted upon them.

This manual focuses on the six countries belonging to the East African Community as torture and ill-treatment is still routinely practiced in different contexts in those countries. The governments in the region have started to take steps to address torture, including for instance through the introduction of specific anti-torture legislation. In the region, a vibrant and active civil society exists that advocates for an end to torture and for accountability and justice for victims. Lawyers are using existing avenues to litigate on behalf of victims. This manual seeks to build on those efforts and to assist those working to fight torture and to support victims through litigation. It is furthermore based on REDRESS' extensive experience in assisting victims to obtain justice, including in East Africa, as well as the long-standing expertise of the Independent Medico-Legal Unit (IMLU) in providing rehabilitation and legal support to victims of torture in Kenya.

Part I of this manual provides an introduction to the methods to document torture and ill-treatment to support litigation efforts, with a specific emphasis on medical documentation.

Part II outlines domestic litigation avenues. The six countries examined for this manual offer a range of avenues for victims of torture and ill-treatment to obtain redress and to hold perpetrators to account; though some work more effectively

than others. This includes criminal and civil proceedings as well as constitutional actions. The manual examines those different avenues, drawing on the existing legal frameworks in place as well as best practices of lawyers and others consulted in the course of the research for this manual.

Part III examines regional and international litigation avenues. All too often, States fail to give effect to victims' rights, and fail to hold those responsible to account in their own domestic legal system. Regional and international avenues therefore can provide a "port of last resort" for victims seeking to obtain justice.

This manual was researched and written by REDRESS. A range of legal interns with REDRESS provided extensive research assistance, including Mariana Campos D'Arcadia, Laura Notess, Hélène Saadoun, Sneha Shrestha, Laura Lazaro Cabrera and Lina Philipp. It also benefitted from discussions among Kenyan lawyers in the framework of trainings organised by IMLU and REDRESS. James Lin from the International Rehabilitation Council for Torture Victims provided valuable input into earlier versions of the manual. We would also like to acknowledge and thank practitioners and human rights activists who assisted with in-depth research into the practice of litigating torture at the national level including Janvier Bigirimana, Charles William and Ladislaus Kiiza Rwakafuuzi.

We are grateful to the European Union for providing financial support for this publication.

Part I: Investigation and documentation of torture

This Part provides an introduction to documentation. It sets out the key purposes for documenting torture and sets out the main international and regional standard-setting texts that have been developed to aid with documentation. It also explains some of the key challenges that may arise when carrying out documentation and how these may be addressed.

When an allegation of torture is made it is necessary to assemble evidence of the facts surrounding the allegation so that further action can be taken – usually involving a combination of measures linked to human rights advocacy, support to victims, and follow up of the legal case through the criminal justice process, civil courts, national human rights commission, and/or at the international level. This collection of evidence, or parts of it, may be done by the individual victim, the police, the individual's lawyer, a prosecutor or judge, prison authorities, medical professionals, a non-governmental organisation or a national investigatory body, such as a national human rights commission.

Documentation of a case involves recording the individual's version of events and collating other forms of evidence which may support it. In reality, documentation of a case is often done by a number of individuals, though it may be directed or collected by one – such as the individual's lawyer, the police or an investigative body. Medical professionals may

provide documentation either through the medical records they produce for a patient they are treating, or through more formal medico-legal examination and documentation (such as through the use of a Medico-Legal form, or the production of an expert report). This documentation should then be taken into account in an investigation into the allegation and may be used in subsequent legal proceedings.

I.1 Why document torture?

There are three main reasons to document torture:

1. **To understand whether torture is happening, why it is happening and to have a clearer evidential basis to determine what additional steps should be taken to address the problem.** Concrete information about torture practices is crucial for national authorities with the responsibility to ensure that torture doesn't happen, to respond effectively. It is also crucial for human rights organisations as part of a wider strategy of human rights advocacy: having a clear understanding of torture practices and who might be responsible will greatly assist advocates to follow up with the competent local authorities, so that effective action can be taken to address the problem.

   Documentation can help to provide an evidential basis to show patterns of torture. The types of patterns that might emerge might include a pattern of torture against particular marginalised or discriminated against groups such as minority ethnic or religious groups, human rights defenders or political activists and sexual minorities. Or,

it may reveal a pattern about the practice of a particular form of torture – such as rape in detention; use of electric shocks; psychological tactics; forms of sensory deprivation; humiliating and degrading treatment; mutilation of body parts during conflict. There might also be a pattern linked to where torture is most prevalent: torture may be linked to a particular police station or military contingent, or be practiced most frequently in a certain region of a country.

Documentation can also be used to assess whether the practice of torture is increasing or decreasing in a particular location. This will be important to determine whether prevention measures such as training or detention safeguards are working, or whether additional safeguards need to be put in place.

Evidence-based advocacy is important for law reform and reform of policies and institutions at the domestic level. It is also important at the regional and international levels, such as when reporting to African Commission and United Nations bodies including treaty bodies or special procedures. It is also important for media campaigns, to increase public awareness of the issue.

2. **To ensure that victims receive appropriate medical or psychological care or other needed services, and to prevent further violations against them**. Torture may cause physical injuries such as broken bones and wounds that heal slowly and can leave physical scars. Or, it may not leave any physical trace; torture can be purely psychological, for instance through the use of death threats, mock executions, solitary confinement or incommunicado detention. Irrespective of the form used,

torture usually leads to severe psychological harm and survivors of torture frequently experience difficulties to get to sleep, they suffer from nightmares, difficulties with memory and concentration, persistent feelings of fear and anxiety, depression and/ or an inability to enjoy any aspect of life. Sometimes these symptoms meet the diagnostic criteria for post-traumatic stress disorder (PTSD) and/ or major depression. These are common responses to the trauma suffered.

Documentation of survivors' physical and psychological condition may help to signpost them to specialist service providers so they can obtain much needed support.

Documentation may also reveal whether there are any particular risks the victim faces of being exposed to further violence, so that protection measures can be put in place to minimise and ideally eliminate those risks, or to have the individual moved from the place where torture or other ill-treatment is being carried out to a safer environment.

Documentation of torture may assist a victim with an asylum claim on the basis that evidence of past torture may impact on future risks of ill-treatment. It may also help to prevent other types of violations from occurring. For example, documenting torture may reveal that a victim signed a forced confession. It may be possible for a lawyer to seek to have that confession excluded from any legal proceedings.

3. **To ensure civil and criminal accountability.** International law requires States to investigate allegations of torture and to punish those responsible. It also requires States to

enable victims of acts of torture to pursue remedies that are accessible and effective, and to afford full reparation for the harm suffered (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition). Documenting torture will help to put pressure on the competent authorities to open an official investigation capable of identifying the perpetrators. Sufficient evidence will be necessary for a criminal prosecution and conviction, which further underscores the importance of documentation. Torture evidence is also vital to pursue civil claims for damages, including compensation for the individual victim, at both the domestic and international or regional level.

An understanding of what documentation exists in a given case will also help lawyers to identify whether the evidence is sufficient to sustain a claim of torture (or whether further evidence should be sought).

I.2 International & regional framework for documentation

In 1999, a range of medical, legal and human rights experts drafted the '***Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (Istanbul Protocol)*** precisely with a view to support the investigation and documentation of torture and ill-treatment by national authorities, lawyers, psychologists, doctors and other

stakeholders.[1] The Istanbul Protocol provides a comprehensive framework for the assessment of torture and ill-treatment and for investigating such allegations and reporting findings to the judiciary or other investigative bodies. Since its finalisation, the Istanbul Protocol has been endorsed by the United Nations as well as regional human rights mechanisms, including for instance the African Commission.[2] It is a manual designed to ensure that a State's obligation to investigate, prosecute and redress torture is translated into reality by making investigations and documentations of torture effective.

The Istanbul Protocol is complemented by a number of other instruments designed to render investigations more effective. The ***International Protocol on the Documentation and Investigation of Sexual Violence in Conflict (Sexual Violence Documentation Protocol)*** for instance sets out best practice standards for documenting and investigating sexual violence in conflict zones. It is aimed at supporting accountability efforts through ensuring that the strongest possible evidence is collected and survivors receive proper support.[3] The ***Manual on the Effective Prevention and***

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[1] Office of the UN High Commissioner for Human Rights, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2004, at http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf.

[2] *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman OR Degrading Treatment or Punishment in Africa (Robben Island Guidelines)*, The African Commission on Human and Peoples' Rights, meeting at its 32nd ordinary session, held in Banjul, The Gambia, from 17th to 23rd October 2002, para. 19.

[3] *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict- Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law*, First Edition, June 2014, at

Investigation of Extra-Legal, Arbitrary And Summary Executions of 1991 (Minnesota Protocol) can also assist in the litigation of cases of torture and ill-treatment, including for instance where a victim has died as a result of the treatment inflicted.[4]

At the regional level, the African Commission adopted the ***Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa (Robben Island Guidelines)*** which provide that investigations "into all allegations of torture or ill-treatment shall be… "guided by the UN Manual on the Effective Investigation and Documentation of Torture and Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)."[5] The African Commission has furthermore announced that it is in the process of adopting Guidelines on Combating Sexual Violence and Its Consequences. According to the Commission, these Guidelines will also address the need for accountability of perpetrators, and could therefore be a useful tool for litigators seeking accountability of perpetrators and justice for victims.[6]

Amongst the key principles highlighted in these regional and international principles for investigations to be effective:

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf.

[4] *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, 1991, at http://www.ohchr.org/Documents/Issues/Executions/UNManual2015/Annex1_The_UN_Manual.pdf.

[5] Robben Island Guidelines, para. 19.

[6] African Commission, Press Release: The African Commission on Human and Peoples' Rights (ACHPR) is developing Guidelines to combat the scourge of sexual violence in Africa, 15 September 2016, at http://www.achpr.org/press/2016/09/d316/.

- States must establish and support ***effective and accessible complaints mechanisms*** which are independent from detention and enforcement authorities and which are empowered to receive, investigate and take appropriate action on allegations of torture, cruel, inhuman or degrading treatment or punishment.

- Investigators must be ***competent, impartial and independent*** of suspected perpetrators and the national authority for which the investigators work.

- Methods used to carry out investigations should meet the ***highest professional standards*** and findings shall be made *public.*

- Investigators should be ***obliged to obtain all information necessary to the inquiry*** and should effectively question witnesses.

- Torture victims, their lawyer and other interested parties should have ***access to hearings and any information*** relevant to the investigation and must be ***entitled to present evidence*** and allowed to submit written questions.

- ***Do no harm***: Engaging individuals, their families and communities in order to investigate and document incidents must be done in a way that maximises the access to justice for survivors, and minimises as much as possible any negative impact the documentation process may have upon them.

- Victims of torture, cruel, inhuman and degrading treatment or punishment, witnesses, those conducting the investigation, other human rights defenders and families must be ***protected from violence, threats of violence or any other form of intimidation or reprisal*** that may arise pursuant to the report or investigation.

- Detainees should have the ***right to obtain an alternate medical evaluation*** by a qualified health professional and this alternate evaluation should be accepted as admissible evidence by national courts.

- States should ***establish, support and strengthen independent national institutions such as human rights commissions, ombudspersons and commissions of parliamentarians, with the mandate to conduct visits to all places of detention*** and to generally address the issue of the prevention of torture, cruel, inhuman and degrading treatment or punishment, guided by the UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights. Equally, States should encourage and facilitate ***visits by NGOs to places of detention***.

I.3 Key documentation challenges and how these can be addressed

The investigation of torture and cruel, inhuman or degrading treatment ('ill-treatment') can pose specific challenges to national authorities, in particular, where the authorities in

charge have not received any training on how to document the crime with a view to collect relevant evidence. A lawyer in Tanzania for instance highlighted that this was a particular challenge in Tanzania, where investigators "are not well trained on torture cases" resulting in "very poor investigations." In addition, in many instances, States are reluctant to initiate such investigations. This makes the role of lawyers and other stakeholders seeking to support victims in their quest for accountability and reparation ever more important. Lawyers can document what happened to their clients. Such documentation can trigger investigations, support on-going investigations or be used to highlight authorities' failure to adequately investigate and support litigation efforts at national, regional and international levels.

Preliminary issues:

- **Getting informed consent: It is vital for any interviewer to obtain informed consent from the victim or witness.** All survivors and witnesses must understand the purpose of the data collection and how information collected may be used as well as any potential risks associated with same. They must give their informed consent to be interviewed and examined, to be photographed, to have their information recorded, to be referred to any support services, and to have their information and contact details shared with third parties: "Obtaining informed consent before documenting testimonial information ensures that the survivor/witness maintains full control and power over her/his own experiences, and that s/he is a knowledgeable and willing participant in the justice process. Not obtaining informed consent violates the rights of the survivor/witness, disrespecting her/him, and

causing her/him harm. The results of an interview conducted without securing proper and informed consent may also not be accepted in certain legal proceedings, on the grounds that the information was provided under some kind of duress or coercion, or based upon misleading assurances."[7]

Not every victim will want to pursue a legal case. To do so may be draining, time consuming or not in the victim's personal interest. Some victims may fear for their safety or that of their families, or may simply wish to move on from the experience. This must be respected.

- **Ensure measures of confidentiality are in place:** Where will interviews take place? How will the data collected be stored? Are there risks that the data (whether stored physically and/or in electronic form) may be stolen? The precise measures to be taken to preserve confidentiality will depend on the local context and the perceived risks. It is common good practice for interviews to take place in private spaces outside of public view and for any data collected to be stored securely, and for names and other personal details to be stored separately from factual information.

- **Empathy:** Lawyers interviewed for the development of this manual emphasised that victims had suffered psychologically and needed to be listened to with empathy and patience.

[7] *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict- Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law*, (n 3) p 45.

- **Avoid leading questions:** Leading questions can lead to a skewed version of the events and can undermine later prosecutions, if it can be successfully argued that victims were coached.

I.4 Proving torture

Lawyers receiving a potential client who says that he or she has been subjected to violence by or with the acquiescence of State officials will need to know what type of documentation is needed so as to determine whether the matter concerns torture or not, whether something can be done and if so, what that might be, and whether to file a case for torture or ill-treatment.

When considering what type of evidence is required to demonstrate that torture has indeed taken place, it is important to focus on finding proof which corresponds to the elements of the definition of torture.

The main elements to prove torture as defined by UNCAT, and generally followed by other human rights treaties such as the International Covenant on Civil and Political Rights and the African Charter are set out below, together with the typical evidence used to prove those elements.[8] It must be stressed, however that it is not the responsibility of the victim to prove every element of their case. Once a credible

[8] REDRESS interview with Ugandan lawyer, 16 September 2016; with private practitioner in Tanzania, 15 September 2016; REDRESS and IMLU workshop with Kenyan lawyers, 26 July 2016; see further Istanbul Protocol (n 1), paras. 88-102, 106.

allegation has been made, it is the responsibility of the State to pursue investigations:

'S**evere pain or suffering, whether physical or mental'**

'Severe pain or suffering, whether physical or mental' has been understood to require a certain threshold of intensity. However, the threshold need not be 'extreme'. The characterisation of the severity of harm is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. The African Commission on Human and Peoples' Rights' *Abdel Hadi Radi* case concerned conduct "ranging from severe beating with whips and sticks, doing the *Arannabb Nut* (rabbit jump), heavy beating with water hoses on all parts of their bodies, death threats, forcing them to kneel with their feet facing backwards in order to be beaten on their feet and asked to jump up immediately after, as well as other forms of ill-treatment,"[9] which resulted in serious physical injuries and psychological trauma. The Commission found that "this treatment and the surrounding circumstances were of such a serious and cruel nature that it attained the threshold of severity as to amount to torture."[10]

In Uganda, the PPTA 2012 includes a list of exemplary acts that are considered to constitute torture as they inflict severe pain and suffering, such as for instance systematic

[9] African Commission, *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, Communication No. 368/09, 5 November 2013, para. 71.
[10] Ibid, para. 73.

beatings and electric shock treatment. The anti-torture bill pending in Kenya similarly includes such a list. However, it is important in any case, to analyse the act in question in view of the context in which it was committed and the impact this act has had on the victim. It is impossible to exhaustively list all of the different forms of torture and there continue to be new forms of treatment dreamt up by perpetrators which could amount to torture.

Lawyers arguing that a specific act resulted in such severe pain and suffering that it amounted to torture should seek to inquire with the victim (and witnesses, where available) not only about the methods used to inflict pain and suffering, but also about the duration of the treatment and concretely, what the victim felt or experienced as a result. Medico-legal reports can be used to demonstrate the physical or mental effects on the victim. The latter may be complemented by demonstrating the effects linked to the sex, age and state of health of the victim.

The types of evidence that are usually used to prove the severity of pain or suffering include:

- A statement from the victim which explains, not only what transpired but any particular personal circumstances of the victim (age, religion, particular vulnerabilities, past experiences) which might have increased the severity of the impact of the experience on the victims' physical or psychological well-being. The Istanbul Protocol provides important guidance on how to interview victims of torture and ill-treatment, as does the Sexual Violence Documentation Protocol.

- A medical and/or psychological report describing the victim's symptoms. Medical and psychological expert evidence can be crucial to support claims of torture and ill-treatment. In Uganda, such evidence is used in particular because of its corroborative value.[11] Kenyan lawyers similarly highlighted that such reports are important also to complement State medical reports which frequently are insufficient.[12] These reports are important to prove the degree of harm, however they will not always be possible to obtain, because of lack of access to independent doctors, prohibitive costs for procuring a report or otherwise. The absence of a medical or psychological report does not prove that torture did not happen. Where independent medical evidence cannot be obtained, detailed statements and oral evidence by the victim and eye witnesses (if any) can also help to prove harm.[13]
- Medical reports prepared by State authorities including post-mortem reports (where applicable) will also be useful and lawyers should be able to apply to a court to receive these if they are not immediately made available.
- Physical evidence (soiled clothes; weapons/instruments used to inflict the treatment).
- Photographs, videos.
- Other expert evidence, such as evidence as to calculation of loss.

[11] REDRESS interview with Ugandan lawyer, 16 September 2016.
[12] REDRESS and IMLU workshop with Kenyan lawyers, 26 July 2016
[13] Ibid.

Intention

Article 1(1) of UNCAT specifies that for an act to constitute torture, it must have been intentionally inflicted. Relevant domestic definitions of torture in Kenya, Uganda, Burundi and Rwanda, require that for an act to constitute torture it must have been committed with intent. As such, the crime of torture cannot be met through negligence.[14] Some courts have implied the intention requirement, holding that the deliberate infliction of severe pain and suffering was the only outcome consistent with the facts. In *Kunarac*, the ICTY Appeal Chamber held that it is "important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims."[15] Courts have also eased the burden of proving intentionality, holding that the State bears the primary responsibility of disproving torture, once a credible allegation is made. Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under the prohibition.[16]

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[14] Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN Doc. A/HRC/13/39/Add.5, 5 February 2010, para. 34.

[15] ICTY, *Prosecutor v. Kunarac et al.*, Appeals Chamber Judgment, 12 June 2002, para. 235.

[16] ECtHR, *Selmouni v. France* (Grand Chamber), Judgment, 28 July 1999, para. 87. See also, ECtHR, *Aksoy v Turkey*, Judgment, 18 December 1996.

In proving intent, lawyers do not need to show that a perpetrator intended to cause serious pain or suffering: it is enough to show that the severe pain and suffering is the natural and most obvious consequence of the conduct.[17] In a case against Burundi submitted to the UN Committee Against Torture, the State had acknowledged that police officers had lashed with belts and kicked the victim. However, according to the State, they had not done so with intent, but rather "on the spur of the moment and out of ignorance of the law."[18] The Committee disagreed, finding that the treatment inflicted was intentional, "since it occurred while he [the Victim] was in the hands of agents of the State party, and was of such severity that the victim lost consciousness and that his injuries have had last consequences which affect him to this day. Furthermore, the abuse to which he was subjected was in all likelihood intended to punish him for an act that he was thought to have committed."[19]

The types of evidence that are usually used to prove the intention to produce severe pain or suffering and that the State is responsible include:

- Contextual or similar fact evidence to show that the treatment to which the victim was subjected is treatment which is well-recognised to result in severe pain or suffering. This could be gleaned from medical or psychological research studies into the effects of certain types of treatments on other detainees; the use of experts who have studied the phenomenon of torture in

[17] UN Committee Against Torture, *E.N. represented by Track Impunity Always (TRIAL) v Burundi*, Communication No.578/2013, 2 February 2016, para. 7.3 .
[18] Ibid, para. 4.4.
[19] Ibid, para. 7.3.

other contexts and can apply their general knowledge to the facts of the case.

- Evidence of the physical and psychological health of the victim prior to the detention or alleged incident of torture. This could be in the form of medical reports from doctors who treated the individual prior to the events, or statements from trusted persons in the community who know the victim well and can attest to the victim's prior good health. This may be further substantiated by correspondence with official bodies requesting an official explanation as to what transpired while the victim was in detention, which is unanswered or insufficiently explained.

Specific purpose

There is a requirement for torture to be inflicted for a specific purpose. The nature of the purpose, as set out in the UNCAT definition, has been interpreted broadly and non-exhaustively and is understood to include self-incrimination, intimidation of the population, humiliation and discrimination as among the relevant qualifying purposes. Sometimes the prohibited purpose has been implied. The suggestion that the rape by a person wielding power or authority took place for simple private gratification purposes has not been accepted; the involvement of a person of authority can be inherently coercive.[20]

The types of evidence that are usually used to demonstrate a specific purpose include:

[20] ICTY, *Prosecutor v. Delalić et al.,* Trial Chamber Judgment, 16 November 1998, para. 495.

- The victim's witness statement, which may refer to particular questions being asked or the forcible taking of a confession.
- The wider context of the crime, whether a situation of conflict, the repression of a community or particular groups within it. This can be demonstrated through news reports, broader human rights documentation of patterns of discrimination or violence towards particular groups in society, and evidence that the victim is, or is perceived to be, part of such a group (for instance by United Nations, regional institutions such as the African Commission, nongovernmental organisations).
- Statistical evidence, for example to demonstrate discriminatory practices.

Involvement of a public official

Under human rights law, torture must take place by or at the instigation of or consent or acquiescence of public officials. In certain circumstances this has been understood to extend to persons holding de facto power as public officials, in the absence of any de jure government control. In *Elmi v. Australia*, the UN Committee Against Torture determined that, in the exceptional circumstance where State authority was wholly lacking (Somalia had no central government at the time); acts by groups exercising quasi-governmental authority could fall within the definition.[21]

[21] UN Committee Against Torture, *Elmi v Australia*, Communication No. 120/1998, UN Doc. CAT/C/22/D/120/1998, 14 May 1999, para. 6.5.

In contrast, international humanitarian law does not limit the notion of torture to acts committed by State officials, or at their instigation, or with their consent or acquiescence. At the International criminal tribunal for the former Yugoslavia, the *Kunarac* Trial Chamber determined that the "characteristic trait of the offence. . . is to be found in the nature of the act committed rather than in the status of the person who committed it."[22] Consequently, "the presence of a State official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law."[23] The Appeals Chamber affirmed this reasoning.[24] The ICTR jurisprudence[25] and the provisions of the ICC Statute[26] largely reflect this ICTY jurisprudence.

The types of evidence that are usually used to demonstrate the involvement of a public official include:

- Detention records, which demonstrate that the victim was in an official place of detention at the time of the events.
- The victim's witness statement, in which the victim should be asked to note whether they saw any public officials, their police or military unit, official uniforms or vehicles, the location – a detention centre or military barracks, etc.

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[22] ICTY, *Prosecutor v. Kunarac et al.*, Trial Chamber Judgment, 22 February 2001, para. 495.
[23] Ibid, para. 496.
[24] ICTY, *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgment 12 June 2002, para. 148.
[25] ICTR, *Prosecutor v. Semanza*, Trial Chamber, Judgment 15 May 2003, paras. 342-343.
[26] Arts. 7(1)(f) (Crimes against Humanity) and 8(2)(c)(i) and (ii) (War Crimes).

- Diagrams, maps, drawings of the scene of the alleged torture.
- Similar fact evidence or wider torture trends involving public officials, in which others who suffered similarly have been able to identify the presence of public officials.
- Official records, such as caution statements, custody records or personnel records.

- **State responsibility to exercise due diligence:** The obligation to prevent torture has been interpreted as a positive requirement that States exercise due diligence and thereby protect persons within their jurisdiction from acts causing severe pain or suffering. In *Dzemajl et al. v. the Federal Republic of Yugoslavia*, the police, though present at the scene, failed to intervene to prevent the destruction of a Roma settlement. The UN Committee Against Torture determined that this failure to act amounted to acquiescence in the acts, which were understood to amount to cruel, inhuman or degrading treatment.[27] In the *El Masri* case, the ECtHR Grand Chamber determined that a State is obliged to take measures to ensure that individuals within its jurisdiction are not tortured, and must take measures to prevent a risk of ill treatment about which it knew or should have known.[28] The obligation on States to exercise due diligence is an obligation of means and not necessarily one of result. Thus, the evidence to support such a

[27] UN Committee Against Torture, *Hajrizi Dzemajl et al. v. Federal Republic of Yugoslavia*, Communication No. 161/2000, UN Doc CAT/C/29/D/161/2000, 21 November 2002, para. 9.2.
[28] ECtHR, *El-Masri v. The Former Yugoslav Republic Of Macedonia* (Grand Chamber), Judgment, App. No. 39630/09, 13 December 2012, paras. 218-221.

contention would focus on demonstrating that there were steps the State could have reasonably taken to prevent the torture from happening, but did not do so.

Lawful sanctions

Article 1(1) UNCAT stipulates that torture: "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." However, the fact that a sanction is considered lawful under national law does not necessarily engage the exception. Forms of corporal punishment,[29] such as lashes, whipping or flogging have been held to violate the prohibition.[30]

I.5 The need for strong, credible and reliable evidence

The Istanbul Protocol provides particular guidance on the different types of evidence, including on taking statements from victims and witnesses, collecting and presenting medical and psychological evidence, and the collection of physical evidence. The Sexual Violence Documentation Protocol and Minnesota Protocol provide further guidance on documentation in particular circumstances.

[29] UN Human Rights Committee, General Comment No. 20 (30 Sept. 1992) para. 5.
[30] African Commission, *Curtis Francis Doebbler v. Republic of Sudan,* Communication No. 236/2000, 15-19 May 2003, para. 42.

A number of factors will affect the strength of documentation and its ability to be used by lawyers in legal proceedings. Documentation will be strongest if it is:

- **From a reliable and identifiable source**: if the source and circumstances of collection cannot be identified and proved, evidence is likely to be of no use in court.
- **Detailed**: generally, the more detailed the documentation is, the better.
- **Internally consistent**: human memories are not fool proof- particularly after a traumatic event, and so it is almost inevitable that there will be inconsistencies in an individual's account. However, the extent to which other evidence corroborates or contradicts the account in general will impact the chances of success in any legal proceedings.
- **Collected as soon as possible**: the earlier information is collected, the stronger it is likely to be- for example it is more likely that any physical injuries will still be identifiable. However, this should not dissuade collection of evidence much later if necessary; in such cases, medical and psychological evidence can be particularly useful.

I.6 Medical documentation in the East Africa Region

In Kenya, Tanzania and Uganda, victims of torture (and ill-treatment) seeking an investigation into the crimes committed, need to obtain an official medical examination

form to document the injuries inflicted upon them. In all three countries, victims need to request the medical form from the police station. Official medical practitioners (for instance police surgeons in Uganda) will then examine the victim and complete the relevant form, which might be used by the police in its investigation, and can be submitted to the court as expert evidence. The doctors completing the form will usually be requested to testify in court and can be cross-examined.

This can be a challenging process for victims and their legal representatives for a number of reasons. The police are responsible for providing the relevant form to victims and/or their legal representatives. However, victims have in the past experienced challenges in even obtaining the form, with police officers in Kenya for instance having refused to provide it to victims. Victims may also be afraid to request the form from the police in particular in cases where the police was responsible for the torture or ill-treatment.[31] In such cases, lawyers will have to formally request the form, or get a court order for the police to provide the form to victims. In Tanzania, victims in remote areas may not have access to police stations and therefore cannot obtain a form. In addition, not all police stations have a form.[32]

In none of the three countries are the forms designed to specifically document the consequences of torture and ill-treatment, but rather to document any type of physical injury sustained by the complainant. As a result, the official medical forms are insufficient to document the full spectrum

[31] REDRESS and IMLU Workshop with Kenyan lawyers, 26 July 2016.
[32] Interview with Tanzanian lawyer, 15 September 2016.

of harm, in particular psychological harm, suffered. In addition, doctors required to examine the victim and complete the relevant form, have usually not received relevant training in documenting torture. The UN Committee Against Torture for instance has recommended that Kenya ensure that all medical personnel are trained on the use of the Istanbul Protocol and take measures to ensure that standards therein are applied in practice, though there is no evidence that Kenya heeded that recommendation.[33] The Committee has similarly inquired about the application and training of Burundian physicians on the Istanbul Protocol as part of their professional education. Burundian officials have admitted that the specialised and technical training for medical professionals is insufficient.[34]

Other obstacles encountered by victims specifically in regards to medical documentation include for instance police officers in Kenya requesting a bribe to issue the relevant form, and failing to produce the form when victims refuse to pay.[35] Doctors are at times reluctant to complete the required medical form because by doing so, they become witnesses in court.[36] As a result, doctors have in the past required victims

[33] UN Committee against Torture, "Concluding Observations on the Second Periodic Report of Kenya", Adopted by the Committee at its fiftieth session (6 to 31 May 2013), UN Doc CAT/C/KEN/CO/2, 19 June 2013, para. 24.
[34] UN Committee Against Torture, "Reponse du Burundi a la Liste de Points", UN Doc CAT/C/BDI/Q/2Add.2, 19 November 2014, para. 42; see also, UN Committee Against Torture, "Liste de Points concernant le Deuxieme Rapport Periodique du Burundi", UN Doc CAT/C/BDI/Q/2/Add.1, 6 June 2014, para. 22.
[35] Kenya Forum, 'Being Raped in Kenya; Reluctant Doctors, Insensitive Policing and Crooked Courts', 2 January 2014, available at: http://www.kenyaforum.net/2014/01/02/being-raped-in-kenya-reluctant-doctors-insensitive-policing-and-crooked-courts/.
[36] REDRESS and IMLU workshop with Kenyan lawyers, 26 July 2016; interview with national NGO in Tanzania.

to pay an amount ranging from Kshs 500.00 to 1,500.00 (approximately $5 -$15 USD) so that the form can be filled. The doctors/medical officers insist that this amount will facilitate their transport to the courts once they are called upon to give evidence since neither the Ministry of Health nor the court pays their transport costs.[37] This makes progress in a case contingent on a victim's ability to pay.

Neither Rwandan nor Burundian law require victims of torture or ill-treatment to obtain any official medical report when submitting a complaint to the authorities, though expert medical reports are admissible as evidence in both countries.[38] In Rwanda, lawyers interviewed highlighted that while such evidence would be admissible, it is unclear whether medical services exist that are able to adequately document all the consequences suffered by the victim, in particular psychological harm.[39] DNA evidence is not readily available in any of the jurisdictions.

Legal and formal medical institutions in South Sudan were weak both prior to and immediately following independence, with very little capacity. This has been significantly aggravated by the ongoing conflict which has affected all institutions in the country.

- **What to do about insufficient official medical documentation?**

    - Obtain an independent medico-legal examination as soon as possible to supplement the official forms.

[37] REDRESS and IMLU workshop with Kenyan lawyers, 26 July 2016.
[38] See, e.g., articles 182-184 of the Penal Code of Burundi.
[39] REDRESS interviews with practitioners in Rwanda, September 2016.

This is possible in each country examined; such evidence should be treated as expert evidence.

- The treatment of third party reports versus official State authored reports may differ depending on the country. In Uganda, for instance, medical evidence regarded as 'opinion evidence' is not binding on the courts. Both the P3F and a medical report prepared by the anti-torture rehabilitation NGO ACTV will be considered as opinion evidence under s. 43 of the Evidence Act. Relevance is assessed by the ability of the reports and/or the form to corroborate the allegations.[40] In Tanzania, both State issued and external reports will be accorded the same weight, and both experts (government expert filling in the official form and private medical expert preparing the medico-legal report) can be subject to cross-examination to assist the court in weighing the evidence.
- It is also important that all medical evidence is supplemented by other evidence so as to corroborate the allegations, such as witness testimonies, detention records, photographic evidence etc.

NGOs providing medico-legal documentation and support in the region:

- Solidarity Action for Peace, Great Lakes (Burundi)
- Independent Medico-Legal Unit (Kenya)
- Centre Against Torture (Kenya)

[40] See also, *Uganda v. Hassan Hussein*, High Court Criminal Session Case no. 1 of 2010.

- Mwatikho Torture Survivors' Organization (Kenya)
- Arama (Rwanda)
- Medical Association of Tanzania (Tanzania)
- African Centre for Treatment and Rehabilitation of Torture Victims (Uganda)

In addition, there are a range of humanitarian organisations providing medical and related support in the region, in refugee camps and targeting vulnerable populations.

Part II: Litigating torture at the domestic level

II.1 Introduction

This Part analyses the avenues for litigating torture and ill-treatment cases at the domestic level, and explains some of the main challenges and advantages related to domestic litigation. Depending on the legal system, complaints about torture and ill-treatment might be pursued as criminal, civil or constitutional complaints before relevant courts. Other avenues may include filing a case with a national human rights commission, and pursuing disciplinary proceedings.

The justice processes in each of the six countries differ, yet certain commonalities exist: Rwanda and Burundi follow the civil law tradition which provides victims with useful avenues to initiate criminal complaints before the courts and if the accused person is found guilty, to pursue reparation claims at the close of the criminal procedure. In contrast, Kenya, Tanzania and Uganda apply the common law, which traditionally affords less direct avenues for victims to pursue justice through criminal proceedings, though constitutional remedies and public interest litigation more broadly tend to be more advanced. Many of the countries have experienced extreme forms of violence including wide scale sexual violence, mutilations and other inhuman treatment in the context of armed conflict and organised violence, and in

which torture was, and in some cases continues to be, a key feature of the conflict.

South Sudan, as the newest country has a weak legal framework and legal institutions and affords very limited prospects for domestic justice in the short-term, whereas its internal conflict is raging and reports of torture and other inhuman treatment remain widespread. The political crisis in Burundi since April 2015 has significantly worsened the human rights situation in the country and the number of torture allegations has significantly increased.[41]

II.2 Criminal proceedings

Article 1 of UNCAT defines torture 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

[41] See, African Commission on Human and Peoples' Rights, 'Report of the Delegation of the African Commission on Human and Peoples' Rights on its Fact-Finding Mission to Burundi', 7 - 13 December 2015, at: www.achpr.org/files/news/2016/05/d218/achpr_report_fact_finding_eng.pdf.

not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Accordingly, lawyers arguing that a specific act constituted torture under international law must prove the four constituting elements of the crime: 1) severe pain or suffering inflicted with 2) intent; 3) for a specific purpose; 4) by a public official. This is set out in the section on documentation, above.

At the domestic level, however, some countries in the sub-region have used definitions which diverge from the UNCAT definition set out above, or have not specifically criminalised torture.

Burundi:	Article 204 of the Penal Code provides a definition of torture which mirrors the UNCAT definition. The definition was adopted as part of a legislative reform introduced in 2009.[42] The penalties for torture and ill-treatment (which is not defined) range from ten years to a life sentence depending on the circumstances (Articles 205-207). Torture is also criminalised when committed as part of a widespread attack against the civilian population as a crime against humanity (Articles 196(6) and 197(5) Burundi Penal Code) and when committed during an armed conflict as a war crime (Articles 198(1)(b) and 198(3)(a)).
Uganda:	The 2012 Prevention and Prohibition of Torture Act (PPTA 2012) criminalises torture and ill-treatment (Articles 2 and 7 respectively). The definition of torture is wider than the definition of torture in Article 1 UNCAT, as it specifies that torture may be committed by private actors as well as public actors.[43] The Act refers to: "a public official or other person acting in an official or private capacity." Penalties are proscribed and range from fifteen years to life imprisonment.[44] According to the Ugandan Human Rights

[42] Penal Code, Loi no. 1/05, 5 April 2009, Introducing the Reforms to the Penal Code.
[43] PPTA 2012, article 2 (1).
[44] Ibid, art 4-5.

	Commission, this is important to capture torture perpetrated by non-State actors: 'Mob justice' can be torturous, cruel and inhuman. Certain types of family violence are acts that can inflict severe pain and suffering as a form of punishment or a way of obtaining information.[45]
Rwanda:	Rwanda has criminalised torture. Article 176 of the Rwandan Penal Code (2012) provides that: "For the purposes of this Organic Law, torture means any act by which severe pain or suffering, whether physical or mental, inhuman, cruel or degrading, are intentionally inflicted on a person for such purposes as obtaining from him/her or a third person, especially information or a confession, punishing him/her of an act he/she or a third person committed or is suspected of having committed, or intimidating him/her or coercing him/her or a third person or for any other reason based on discrimination of any kind. However, pain arising from the execution of penalties imposed by a competent Court is not characterised as torture." Similar to the Ugandan legislation, Article 176 of the Rwandan penal code in principle applies to any person. However, it does not make any reference to public officials in particular, which is the overriding rationale for a torture definition. Article 177 sets out the penalties for torture. The final part of that article notes that torture carried out by public officials results in the maximum proscribed penalty: "If the offences under Paragraphs one and 2 of this Article are committed by a Judicial Police Officer or a Prosecutor or any other security service officer or civil servant, the offender shall be liable to the provided maximum penalty."
Tanzania:	Tanzania is the only country in the region not to have ratified UNCAT. In Tanzania, while torture is prohibited in the Constitution, it is not considered a crime in the Criminal Code.[46] The UN Human Rights Committee has also noted with concern, in respect of some acts which may give rise to States' obligations to prohibit torture and ill-treatment, that domestic violence and spousal rape are not specifically criminalised and corporal punishment of children is

[45] *Fred Tumuramye v Gerald Bwete & Ors,* UHRC Complaint 264 of1999; UHRC, *Interpretive Guide to the Prevention & Prohibition of Torture Act*, p. 13, http://www.apt.ch/content/files_res/uhrc-interpretive-guide.pdf.

[46] However, the Law of the Child Act prohibits "torture, or other cruel, inhuman punishment or degrading treatment" (section 13), http://www.mcdgc.go.tz/data/Law_of_the_Child_Act_2009.pdf.

	lawful as a sentence of the courts, as well as a form of discipline in schools, alternative care institutions and the home.[47] As one of the outcomes of Tanzania's most recent Universal Periodic Review, the Government had agreed to consider the possibility and intensify efforts to ratify UNCAT.[48]
Kenya:	Kenya does not have a comprehensive criminal law prohibiting torture: torture is defined and criminalised under the National Police Service Act of 2011 and the National Intelligence Service Act of 2012. The definitions provided under the two acts mirror the definition of torture under UNCAT.[49] Torture is similarly an offence under Section 20 of the Chief's Act[50] and the Children's Act.[51] As torture is not a specific offence under Kenya's penal code, other officials as well as persons acting in official capacity not falling within the above categories, including for instance officers of the Kenya Wildlife Service, Kenya Forest Guards, Kenya Defence Forces, Kenya Prisons Service and law enforcement officers attached to County Governments, cannot be held criminally responsible for torture. A comprehensive Anti-Torture Bill is currently before Parliament for adoption.
South Sudan:	South Sudan acceded to the UNCAT on 30 April 2015. There is no definition of torture in South Sudan's penal code.

In the absence of a uniform approach with regard to criminal proceedings, this section will identify common lessons for those jurisdictions in which torture is a crime, and will look at possible other avenues where it is not.

[47] Concluding observations on the initial to third reports of the United Republic of Tanzania, adopted by the Committee at its forty-ninth session (12–30 November 2012), E/C.12/TZA/CO/1-3, 13 December 2012, paras. 13, 14.
[48] Report of the Working Group on the Universal Periodic Review, United Republic of Tanzania, A/HRC/33/12, 14 July 2016, paras. 134.1 – 134.4.
[49] Kenya, National Police Service Act of 2011, s.2; National Intelligence Service Act of 2012, s. 51.
[50] Kenya, Chiefs' Act, as amended, Act No. 10 of 1997, s 20.
[51] Kenya, Children's Act No. 8 of 2001, s 20.

II.2.1 Where torture and ill-treatment have not been criminalised

In Tanzania and South Sudan, torture and ill-treatment have not been criminalised as a separate offence. In those countries, acts which would amount to torture would need to be investigated and prosecuted as an included offence, such as assault, assault causing bodily harm, offences against the physical integrity of the person and/or abuse of authority. For example, in Tanzania, there are instances in which police officers have been prosecuted and convicted of murder and manslaughter for wrongful custodial deaths of criminal suspects. However these are not equivalent crimes; there is special stigma to prosecuting a crime as torture which may not be present if the acts are prosecuted as included offences.

In both Tanzania and South Sudan, the States' human rights obligations to investigate and prosecute torture cases remain, even though the governments of those countries have chosen not to incorporate a torture definition into the respective criminal codes - yet.

What will happen if Tanzania or South Sudan were to introduce a crime of torture onto the statute books? Would it be possible to prosecute torture cases that happened before the act came into force, or will it only be possible to prosecute future torture cases? Normally it will not be possible to prosecute a person for a crime unless that crime is an official crime recognised in the statute books of the country, at the time the crime took place. This is the principle of legal certainty (***Nulla poena sine lege***) - one cannot be punished for doing something that is not prohibited by law. It

is an important fair trial principle recognised in all legal systems. But, torture is a crime which exists as a matter of general international law and in applicable treaties. Its incorporation into domestic law would not result in the creation of a new criminal offense but in the establishment of national mechanisms to prosecute and punish acts that were already prohibited as a matter of general international law and/or treaty law.

Article 15 of the ICCPR, ratified by Tanzania for example, allows the trial and punishment of just this sort of case. It provides:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

This same principle has been incorporated into Article 11 of the Universal Declaration of Human Rights (UDHR) (1948): "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time

when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

If acts which amount to torture are prosecuted as lessor or subsidiary offences what types of arguments can be made by lawyers representing victims? Lawyers for victims may be able to argue that a State has not complied with its human rights obligation to investigate and prosecute torture, which derives from its obligations under treaties and under general international law; it does not depend on whether the State has chosen to criminalise torture. Thus, it may be that the State is violating its international human rights obligations when it does not have a statute capable of prosecuting torture. Note however that these arguments can be made to encourage a State to reform its laws. These arguments will not result in an individual being prosecuted for torture in the absence of a statutory provision which criminalises torture; that would breach the defendant's right to a fair trial.

Under the same principle, a State may breach its human rights obligations:

- **if the competent authorities prosecute and convict an individual for a lessor included offence (when clearly, according to the facts, torture would have taken place)**; this may violate the obligation to investigate and prosecute torture. The UN Committee Against Torture has consistently held that torture as defined in the Convention Against Torture should be a separate offence "distinct from common assault or other crimes".[52] This

[52] CAT (2008), 'General Comment No. 2', CAT/C/GC/2, para. 11.

obligation continues through to prosecution: the Committee has stressed that "it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present".[53] The Committee Against Torture has stressed that, by criminalising and prosecuting torture in this way States "will directly advance the Convention's overarching aim of preventing torture and ill-treatment" including by "alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture", emphasising "the need for appropriate punishment that takes into account the gravity of the offence", enhancing "the ability of responsible officials to track the specific crime of torture" and "enabl[ing] and empower[ing] the public to monitor and, when required, to challenge State action as well as State inaction that violates the Convention".[54]

- **if the competent authorities sentence the convicted person to a non-custodial sentence or a very short period of imprisonment which may correspond to the lessor included offence under domestic law but is inappropriate for the acts which took place, which would amount to torture if torture had been criminalised**. In this respect, it is important that a penalty is sufficient in view of the fundamental breach of human rights in torture cases. If a penalty is overly low, it could not be said to have a deterrent effect nor could it be perceived as fair by the victim. The sentence needs to be in proportion to the seriousness of the act; when this

[53] Ibid para. 10.
[54] Ibid, para.11.

deterrent effect is not present, the criminal justice system does not comply with its role as a vehicle to prevent torture.[55]

- **decides not to investigate or prosecute the acts in question, because an overly short limitation period (applicable to the included offence) has expired**. Under international law, acts of torture should not be subjected to overly short statutes of limitation;[56] many bodies have recognised that there should be no limitation at all for torture.[57] In the sub-region, torture prosecutions have been subjected to differing rules on prescription. For example in Burundi, offences of torture prescribe after 20 - 30 years whereas in Rwanda there is a 10 year limitation period. In Uganda and Kenya, torture is not time barred, as it does not fall under the limited category of offences that are time barred. In most countries, torture which is part of the underlying offense of crimes against humanity and war crimes are not subject to statutes of limitation.

- **decides to give an amnesty or to recognise an immunity for the suspect**. Under international law, amnesties and immunities do not apply to torture prosecutions as they contradict the obligation to

[55] See, e.g., *Zontul v. Greece*, ECtHR, application no. 12294/07, 17 January 2012.
[56] UN General Assembly (2005), 'Basic Principles on Remedy and Reparation', UN G.A. Res 60/147, arts 6, 7.
[57] See, eg. CAT (2007), 'Concluding Observations: Denmark', CAT/C/DNK/CO/5, 16 July 2007 at para. 11; CAT (2010), 'Concluding Observations: Jordan', CAT/C/JOR/CO/2, 25 May 2010 at para. 9; CAT (2011), 'Concluding Observations: Bulgaria', CAT/C/BGR/CO/4-5, 14 December 2011 at para. 8; CAT (2012), 'Concluding Observations: Armenia', CAT/C/ARM/CO/3, 6 July 2012, para. 10.

> investigate and prosecute, which is a fundamental obligation under the Torture Convention and other treaties outlawing torture.

Thus, even if the competent authorities may decide to prosecute for a lesser offence, this does not make the human rights framework relating to the prohibition of torture inapplicable; to the contrary, that framework applies to all acts which may properly amount to torture, regardless of how they are characterised in relation to a particular prosecution.

II.2.2 When the authorities decide not to charge torture

Sometimes, even where there is a definition of torture in domestic law, the competent authorities may nonetheless choose to prosecute the impugned acts as a lesser offence. This practise has been noted in respect of Kenya. The UN Committee Against Torture, as part of its concluding observations on Kenya's periodic report to the Committee, noted that:

> The Committee is concerned by the delegation's statement that while the provisions of the Convention are incorporated into the national legal system as enforceable rights, in practice, law enforcement officers, who have committed acts of torture, are not charged with the offence of torture, but rather with other offences such as murder, assault and rape (art. 4).
>
> The State party should ensure that, in the presence of evidence of acts of torture, public officials should be prosecuted for the

crime of torture, in accordance with the definition contained in article 1 of the Convention.[58]

There can be several reasons why acts that amount to torture are not prosecuted as torture:

- the definition of torture is overly narrow, or only applies to a narrow category of persons. For instance, if the law only recognises physical forms of severe pain or suffering as capable of amounting to torture (even though the UNCAT provides that suffering may be physical or mental or both). For this reason, the Committee Against Torture has consistently criticised States that criminalise and/or prosecute acts of torture and other ill-treatment without taking into account the cumulative effect of physical and mental pain and suffering.[59]

- the definition of torture is perfectly adequate, but is interpreted narrowly by the prosecutors who are bringing the charges or by the judges who are interpreting the law. This may simply be a misinterpretation. In some cases, however, it may result from certain discriminations operating in society which

[58] Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013), CAT/C/KEN/CO/2, 19 June 2013, para. 7.

[59] See, e.g., CAT (2010), 'Concluding Observation: Moldova', CAT/C/MDA/CO/2, 29 March 2010 at para. 19 ("amend the code of criminal procedure to … clarify that the individual and cumulative physical and mental impact of treatment or punishment should be considered". See also CAT (2006), 'Concluding Observations: United States of America', CAT/C/USA/CO/2, 25 July 2006 at para.13; CAT (2007), 'Concluding Observations: Japan', CAT/C/JPN/CO/1, 3 August 2007 at para. 10; CAT (2008), 'Concluding Observations: Estonia', CAT/C/EST/CO/4, 19 February 2008 at para. 8; CAT (2012), 'Concluding Observations: Gabon', CAT/C/GAB/CO/1, 17 January 2013, para. 7.

may lead to certain acts not being understood to be as serious or harmful as others. In some countries, acts of rape, including rape with an object, may not be interpreted as torture because of these discriminatory reasons.

- The police, prosecutors and judges may simply not be familiar with the provisions, particularly if they have only recently been adopted. This is one of the reasons that has been put forward in **Uganda** for the under-use of the PPTA. There have been very few cases brought under the Act and no reported convictions resulting from the Act as of September 2016.[60]

- Following the beating of journalist Andrew Lwanga by a senior police officer, only assault charges were brought.[61] Similarly, in the *Tumuhiirwe* case, it was reported that the DPP might have been unfamiliar with the torture law as compared to assault charges.[62] It is not always comparatively insignificant changes that have been lodged; in Uganda, murder convictions have been brought against perpetrators of torture where the torture amounted to death: four police officers were convicted of murder under Section 188 and 189 of the

[60] Roundtable Discussion on the Prevention and Prohibition of Torture: Good Practices and Challenges in Uganda, African Commission on Human and Peoples' Rights, 18 December 2014, p 4 http://www.achpr.org/files/special-mechanisms/cpta/good_practices_and_challenges_kampala_dec_2014.pdf; Sulaiman Kakaire, *A tale of Uganda's forgotten laws*, The Observer, 31 December 2014.

[61] *Court Adjourns a Journalist's Assault Case against a Senior Police Officer,* Human Rights Network for Journalists- Uganda, 18 February 2015.

[62] 'Torture Maid' Prosecution Exposes Loopholes in Uganda's Justice System, Daily Monitor, 21 December 2014.

Penal Code where they tortured a detainee who subsequently died of his injuries.[63] In another case, where government officials participated in the kidnapping and execution of suspected guerrillas, a conviction of kidnapping with intent to murder was issued.[64]

- There may be a lack of will to apply the offence, because of the stigma associated with torture, because there is a heavy penalty associated with torture cases or simply because the prosecutions are perceived as difficult or time-consuming to pursue. For example, in Uganda the DPP is handling a significant backlog of cases, and some of the persons REDRESS interviewed have questioned whether the institution has sufficient political will to push for torture convictions. There are also concerns with the investigative capacities of police, and the need for recruitment of medical doctors and police surgeons and resources for better investigative equipment.[65]

II.2.3 Criminal complaints

International law clearly recognises the right of victims to complain about torture and to have the complaint investigated.[66] A range of international and regional instruments exist that provide further guidance on measures

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[63] *Uganda v. Siza & 3 Ors*, Criminal Case No. 52 of 2012. *See also Uganda v. No 2418 P.C. Mugenyi*, Criminal Case No. 173 of 1993.
[64] *Rwakasisi, Wanyama v. Uganda,* Criminal Appeal No. 8 of 1988.
[65] Implementation of the Prevention and Prohibition of Torture Act 2012, Outcome document, available at http://www.apt.ch/content/files/region/africa/Roadmap%20for%20the%20effective%20implementation%20of%20the%20Anti-torture%20Act.pdf.
[66] See for instance Article 13 of the UNCAT.

States should take to guarantee the right to complain in law and in practice.[67] The right to complain and the corresponding duty to investigate complaints of torture is also standard jurisprudence of the African Commission in regards to alleged violations of Article 5 of the African Charter.[68]

In assessing whether domestic authorities comply with their obligations, lawyers and others seeking justice on behalf of victims may resort to international standards as to what constitutes a prompt, impartial and effective investigation. Where authorities fail to adhere to those standards, this may provide the basis for a judicial review of a decision to discontinue an investigation, or, where such a decision is final, for the submission of a complaint to regional or international human rights mechanisms. It is therefore important to bear these standards in mind throughout when devising a litigation strategy. Where the lawyer is aware of a lack of adequate investigations it would furthermore be important to document relevant evidence in line with the Istanbul Protocol. Such evidence could be used to strengthen ongoing investigations and prosecutions, trigger investigations, or be used to substantiate complaints submitted to regional or international human rights mechanisms.

The obligation to investigate exists where authorities have information that torture has been committed, even in the

[67] See for instance, African Commission, *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa* (Robben Island Guidelines), Section F, May 2003.
[68] See for instance African Commission, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, para. 100.

absence of a complaint. The Committee Against Torture for instance considered that "the authorities have the obligation to proceed to an investigation ex officio, wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed and whatever the origin of the suspicion."[69] According to the African Commission, "whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion."[70] However, our research suggests that in the vast majority of cases authorities do not initiate so-called *proprio motu* investigations in any of the six countries, notwithstanding the existence of information about torture. As a result, a criminal investigation usually depends on victims (and/ or their legal representatives) to submit a complaint to relevant authorities.[71]

In the six countries reviewed, the absence of statistical evidence of the number of complaints filed, investigations and prosecutions initiated and convictions for acts amounting to torture and ill-treatment makes it difficult to adequately assess compliance with those international standards in practice. The lack of practice also makes it difficult to identify concrete lessons learned as to how best to initiate a criminal investigation into complaints of allegations. However, while several avenues exist within the respective legal frameworks of all six countries, it appears

[69] CAT, *Blanco Abad v Spain*, Communication No. 59/1996, 14 May 1998, para. 8.2.
[70] *Article 19 v Eritrea* , Application no 275/03, 30 May 2007, para. 72.
[71] Interview with Ugandan lawyer, 16 September 2016; interviews with Burundian lawyer, August/September 2016. Complaints can be filed in Uganda under section 12(1)(3) and (4) of the PPTA 2012. See also, Article 22 of Rwandan Code of Criminal Procedure.

that some have a better prospect for initial investigations to be opened than others.

Complaints processes should have the following characteristics:

- **Anyone with information about a crime should be able to complain, not only the victim**. There may be many reasons why a victim may not wish to file a complaint – they may be afraid of repercussions, they may fear further torture. A doctor or prison monitor should be able to file a complaint directly, if they see a detainee with symptoms consistent with torture. Similarly, it should be possible (and indeed encouraged) for public officials to inform the competent authorities when they see other officials partaking in criminal behaviour such as torture.

- **The police or other body receiving the complaint should be able to process the complaint without it being on a specific form or following any kind of procedure**. A complaint should not have to be formal. Not all victims will be able to write a complaint on a particular form; they may not have access to the form. Sometimes, the requirement of forms invites corruption – victims may need to pay officials to receive a form. There should be no requirement for victims to append evidence – such as a medico-legal report – to a complaint. They should be able to submit evidence should they wish, and should they have access to such information. However this should not be a requirement. It should be the authorities' responsibility to investigate all credible complaints; it is not the responsibility of the victim to pursue all evidential leads when the authorities will be better

placed to collate the evidence. In a civil claim in Uganda, the High Court held that while medical evidence can help to prove the gravity of an assault, "it is not a requirement of the law that every allegation of assault must be proved by medical evidence."[72] Medical evidence is helpful, but not necessary. In practice however, a heavy burden can be placed on victims to cause an investigation to be initiated.[73] In South Sudan, in legal provisions which were transferred over from Sudan with independence, a criminal case concerning a public servant can only be investigated with the authorisation of that public servant's superior officer.[74]

- **Authorities need to ensure that victims and witnesses are protected against ill-treatment and intimidation.[75]** The obligation to protect victims and witnesses is an integral part of an effective investigation, as reflected in the Istanbul Protocol: "Alleged victims of torture or ill-treatment, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in torture or ill-treatment shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families,

[72] *Kainamura & 2 Ors v. Attorney General & 2 Ors*, Civil Suit No. 961 of 1994.
[73] Coalition on Violence Against Women, FIDA Uganda, Independent Medico-Legal Unit, Kenyan Section of the International Commission of Jurists, Kituo Cha Sheria, Physicians for Human Rights, REDRESS, TRIAL, 'Submission to the Secretariat of the International Conference on the Great Lakes Region (ICGLR) on the Implementation of the Kampala Declaration in Member States', 25 November 2015, pp. 2-5.
[74] South Sudan Code of Criminal Procedure Act, 10 February 2009, Art 43.
[75] See Article 13 UNCAT.

as well as those conducting the investigation."[76] The absence of effective protection systems in law and practice across the region has been highlighted as a "major problem impeding accountability."[77]

- **It should be possible to file the complaint at any time**. As the crime of torture should not normally prescribe, there should not be a requirement that a complaint be filed within a short period of time (e.g., within 15, 30 or 60 days of the incident). There are many reasons why a victim cannot file a complaint straight away. The victim may be in detention, he or she may be far away from the location of the complaints body. He or she may also suffer psychological trauma or physical injuries which may prevent him or her from taking steps in relation to the case in a quick way. In some cases, victims may have fled the country because of their fear of further abuses, which may also complicate the filing of speedy complaints.

- **The complaints process should be prompt, accessible, available and appropriate**. There should not be barriers put in the way of victims to prevent them from filing complaints, such as fees to file a complaint, forcing victims in remote areas to file a complaint in the capital city, or in a location far removed from where they live. The complaints processes must be safe and secure, and cater to victims' needs for privacy and dignity. In Burundi, for example in the case of Michel Nurweze (alias

[76] Istanbul Protocol, para. 80.
[77] REDRESS, *Torture in the Middle East and North Africa Region: The Law and Practice*, August 2013, p. 43.

Rwembe), a police officer accused of murdering Léandre Bukuru and torturing Philbert Kimararungu and Zacharie Ngenzebuhoro, the matter was postponed several times because two police officers that were supposed to testify as prosecution witnesses were re-deployed to other locations, and other witnesses reported that they were threatened, though no protective measures were ever put in place.[78] Fear of reprisals prevents victims and families from coming forward. Complainants are entitled to be kept informed about the progress and outcome of an investigation.

- **Complaints processes – both the body that receives the complaint and how it is handled, should be sufficiently independent and impartial**. This means that the bodies that receive and follow up complaints should be independent in the chain of command from those who are accused of the acts amounting to torture or ill-treatment. For instance, in Kenya, the Independent Police Oversight Authority (IPOA) can investigate allegations of torture by the police.[79] Upon receipt of a complaint, the IPOA can request information or reports regarding the complaint from the appropriate Government department or agency or any other body within a specified period; or initiate an inquiry as it considers necessary.[80] If the Prosecution services have initiated a criminal investigation for the same case, the IPOA may suspend its investigation until the conclusion

[78] Meeting with ACAT Burundi.
[79] Section 24(1), Independent Policing Oversight Authority Act (No. 35 of 2011).
[80] IPOA Act, ibid, Section 25.

of the former;[81] or if disciplinary proceedings have been instituted, the IPOA has the discretion to decide whether to abide by the outcome of the proceedings and adopt the findings and recommendations of those proceedings.[82] After the investigation, the IPOA can recommend the prosecution of that member to the Director of Public Prosecutions.[83] If the inquiry, in the IPOA's opinion, discloses negligence in the performance of duty by a member of the Service, it can recommend that disciplinary action be taken against such member.[84] Importantly, the IPOA can "apply to the court for the enforcement of any of its recommendations […]"[85] In Uganda, criminal complaints should be made to the relevant magistrate who has jurisdiction to try or inquire into the alleged offence, and can be submitted by the victim and anyone who has "reasonable and probable cause" to believe torture has been committed, including lawyers and other representatives or associates of victims.[86] Following the submission of the complaint, the magistrate must then consult with the local authority of the area in which the complaint arose unless the complaint was already supported by a letter from the local authority.[87] The magistrate, after ensuring that the complaint is not prima facie frivolous or vexatious, shall then draw up a formal charge.[88] This procedure was designed to provide an alternative to complaints

[81] Ibid, Section 24(5).
[82] Ibid, Section 24(6).
[83] Ibid, Section 7(a)(ix) and (x).
[84] Ibid, Section 29.
[85] Ibid, Section 29(2).
[86] PPTA 2012, Section 12(3).
[87] Ibid, Section 12(5).
[88] Ibid, Section 12(4)-(6).

submitted to police and is considered as a more independent means of bringing a charge where police may be reluctant to investigate.

- **Investigations must be effective and thorough**, meaning that they must be capable of ascertaining the facts and establishing the identity of any alleged perpetrators.[89] According to the African Commission, effectiveness of the investigation is closely linked to its independence: "[T]his means not only a lack of hierarchical or institutional connection but also a practical independence."[90] In assessing the effectiveness of an investigation, the Commission therefore examines, *inter alia*, the legal framework in place and its ability to ensure accountability of officials[91] and whether the investigation targets those responsible, including, where appropriate, high ranking officials.[92] Where violations continue being committed, the Commission has found that this demonstrates a "weakness in the judicial system and lack of effectiveness to guarantee effective investigations and suppression of the said violations."[93] Premature closure of investigations because, for instance, victims could not identify their attackers, will also be taken into account when assessing the effectiveness of an investigation.[94]

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[89] European Court of Human Rights, *Assenov et al v Bulgaria*, Application No.90/1997/874/1086, 28 October 1998, para. 77.
[90] African Commission, Sudan Human Rights Organisation & Centre on Housing Rigths and Evictions (COHRE) v Sudan, Communications 279/03-296/05, (Sudan COHRE Case), para. 150.
[91] Ibid, para. 153.
[92] Ibid, para. 152.
[93] Ibid, para. 153.
[94] Ibid, para. 151.

- **As long as the complaint is not frivolous or vexatious,[95] it should be fully investigated**. Allegations must be investigated promptly and fully. This is to ensure that vital evidence is not lost, and also to ensure that justice is swift. Serving public officials accused of torture or ill-treatment should be suspended pending the outcome of the investigation.

In countries with a civil law tradition like Burundi and Rwanda, formal complaints need to be filed with the judicial police (*Officier de police judiciaire*) who will prepare the case file and transmit it to the Prosecutor's office, or in Burundi, a complaint can also be filed directly with the Prosecutor's office. The Prosecutor will decide whether to take up the case or not.

II.2.4 What if authorities do not adequately investigate or discontinue the investigation?

Victims have a fundamental right to know what happens with an investigation and if a decision is taken for any reason to close an investigation or to end a prosecution. According to the African Commission, where the authorities fail to inform about the closure of an investigation, this may render an investigation ineffective: "[T]he Commission considers that the failure to inform the victim about the investigation and the decision to dismiss her case prejudiced her because she was left in a state of limbo without knowing what further

[95] IPOA Act, Section 24(8).

steps to take. This in effect renders any available remedies ineffective."[96]

In some of the countries under review such as Uganda, Kenya and Tanzania, it is possible for a private prosecution to be initiated with leave of the court, however this can be taken over by the Department of Public Prosecutions and they can discontinue it. In Burundi it is similarly possible for a victim to initiate an action directly before the court (*citation directe*)[97] to become the principal complainant in the case (and not only the civil party). Private prosecutions are difficult in that the victims bear the burden to prove the entirety of the crime (which can be a major challenge in torture cases involving public officials) and bear the costs for bringing witnesses. Other challenges identified include significant delays and intimidation of witnesses and victims, in combination with a non-existent framework for protection.[98]

However, there are instances in which private prosecutions have been fruitful. Criminal proceedings are currently ongoing in Uganda, where several lawyers initiated a private prosecution under the PPTA 2012 against eight senior police officials. The complainants allege that the police officials are responsible for the torture of members and supporters of the political opposition on 13 and 14 July 2016. In response to the complaint, a Magistrate Court on 26 July 2016 summoned the eight suspects to appear and answer to the

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[96] *Safia Ishaq Mohammed (represented by REDRESS and the African Centre for Justice and Peace Studies) v Sudan*, Communication 443/2013, para. 58 (admissibility decision).

[97] Section 135 of the Burundian Code of Criminal Procedure. However there are no known cases in Burundi in which this has successfully led to a torture prosecution.

[98] Interview with Ugandan lawyer, 16 September 2016.

charges. In August 2016, the DPP took over the prosecution in the case in line with Section 13 (1) PPTA 2012 and Article 120 (5) of the Constitution. However, the lawyers filing the initial private prosecution negotiated with the DPP to stay involved in the investigations, holding a "watching brief."[99] At the time of writing, the case was pending determination by the Constitutional Court as to the propriety of the charges.[100]

II.2.5 The inadmissibility of torture evidence

As enshrined under Article 15 of UNCAT, confessions and other evidence obtained by torture are inadmissible in legal proceedings, except against a person accused of such treatment as evidence that the statement was made. The exclusion of evidence obtained by torture is an important aspect of States' obligations to prevent torture. It counteracts one of the main enumerated purposes of torture – to elicit a confession. The rationale for the exclusionary rule stems from a combination of factors: i) the unreliability of evidence obtained as a result of torture (ii) the outrage to civilised values caused and represented by torture (iii) the public policy objective of removing any incentive to undertake torture anywhere in the world (iv) the need to ensure protection of the fundamental rights of the party against whose interest the evidence is tendered (and in particular those rights relating to due process and fairness) and (v) the need to preserve the integrity of the judicial process.

[99] REDRESS interview with Ugandan lawyer, 15 September 2016; see also UTN News, 'DPP finally takes over Kayihura torture case'.
[100] REDRESS interview with Ugandan lawyer, 15 September 2016.

The exclusionary rule is also reflected in the African Commission's Fair Trial Principles, which call on prosecutors to refuse any evidence they know or believe to have been obtained through unlawful means, including torture and ill-treatment. The burden of proof should be on the prosecution to "prove beyond reasonable doubt that a confession was not obtained under any kind of duress."[101]

All of the six countries have a general provision in which coerced or involuntary confessions or statements are not admitted. The **South Sudan** Code of Criminal Procedure underscores that "[n]o Magistrate shall record any such confession, unless after questioning the person making it, he or she is satisfied that it is made voluntarily."[102] The **Ugandan** Torture Prevention Act not only provides for the exclusion of evidence obtained by torture[103] but also makes the use of such evidence to prosecute a person (other than the torturer) a criminal offence.[104] The Evidence Acts of **Kenya** and **Uganda** do not specify who has the burden of proving voluntariness. The ambiguous language provides for the exclusion of a confession if "it appears to the court" that it was made through inducement, threat or inappropriate promise.[105] **Rwandan** law specifies that confessions obtained by torture are inadmissible as does the **Burundi** Code of Criminal Procedure, which also outlaws other evidence obtained through the torture.[106]

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[101] See for instance, UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 2012, A/HRC/19/61, 1 March 2012, Add.3, para. 89.
[102] South Sudan Code of Criminal Procedure Act, 10 February 2009, Art 61(3).
[103] Prevention and Prohibition of Torture Act, Uganda, s. 14.
[104] Ibid, s 15.
[105] Kenyan Evidence Act, s. 26; Uganda Evidence Act, s 24.
[106] Loi n°1/10 du 3 avril 2013 portant révision du code de procédure pénale, Art 52.

The **Tanzanian** provision is more ambiguous. Article 169 of the Tanzanian Criminal Procedure Act specifies that if it is suggested that evidence was obtained in contravention of, or in consequence of a contravention of, or of a failure to comply with a provision of this Act or any other law, … "the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person."[107]

In the case of *Prosecution v. Mujawamariya*, the Rwandan Supreme Court reversed a guilty verdict imposed by the High Court in a poisoning case, on the basis that the convicted persons' admission of guilt was illegally extorted contrary to the article 6 of Law N°15/2004 of 12 June 2004 regulating evidence and its production which prohibits torture against the parties to extort from them statements they would not willingly give.[108]

II.3 Civil claims

Torture can cause significant harms to victims and it has been recognised that torture survivors have a cause of action against those that wronged them. In Kenya, the Victim Protection Act establishes that a victim has the right to compensation from the offender, which includes, *inter alia*,

[107] Tanzania Criminal Procedure Act, Ch 20, Art 169 (1).
[108] *Prosecution v. Mujawamariya et al*, Rwanda Supreme Court, Case No RPA0198/CS, 12 September 2014.

reparation for personal injury and the "costs of any medical or psychological treatment".[109] In most other countries without specialist victims' legislation, a civil claim for damages (usually resulting in monetary compensation only) can be brought to the courts.

Victims in Rwanda and Burundi can become civil parties in proceedings lodged by the Prosecutor, which is the usual route. In Burundi, the *Code d'Organisation et de la Competence Judiciaires* establishes that the aggrieved party can seek reparations for damages alongside criminal proceedings and before the same court.[110] In this way, the alleged victim may become part of the proceedings as a *partie civile* any time after the commencement of the jurisdictional stage of the lawsuit (with the proceedings under the oversight of the *Tribunal*) and until the closing of the oral arguments, through a statement lodged with the registry or at the hearings[111] or before the judge during the instruction stage.[112] It is important to note that medical evidence has been understood as crucial to sustain a claim of damages in Burundi. The Court of Appeals of Ngozi held that physicians needed to demonstrate the definitive "level of disability" suffered by the victim.[113] In this case, the Court deemed that the medical report was unclear and contradictory ("level of definitive partial disability") and declared that the awarding of reparation would be

[109] Sections 23(1) and (2) and 26(1)(b), Kenya Victim Protection Act (2014), 4 November 2015.
[110] Article 108, Code d'Organisation et de la Competence Judiciaires.
[111] Article 163, Burundi Code of Criminal Procedure.
[112] Ibid, Article 163.
[113] Ndabarushimana Ferdinand *v* M.P., Court of Appeals of Ngozi, (RPA 616), 15 February 2007.

dependent on the demonstration by the physician of "the level of suffering or definitive disability".[114]

The advantages of bringing a civil claim as part of criminal proceedings is that the judge hearing the criminal matter will also be called upon to decide reparations, and will be well acquainted with the facts of the case. However, the criminal court has the power to decide on its own motion or upon request of either party, to separate the civil and criminal actions, whenever the former is likely to delay the proceedings.[115] But, the civil remedy is dependent on the outcome of a criminal investigation and judgment. In *Minani Jean v the State of Burundi*, the Burundi Supreme Court decided that, because the State did not proceed with an investigation on the allegations of torture, the victim could not file a civil lawsuit seeking damages.[116]

The Burundi Code of Criminal Procedure provides that victims of torture perpetrated by a State official in the exercise of his functions have a right to integral reparation from the State.[117] If an award of damages is made against the State, it can counter-sue the State agent responsible for the commission of torture, his co-perpetrators and the accomplices.[118] Victims in Rwanda and Burundi can also take up any civil matters after the end of the criminal prosecution

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[114] Ibid; Full text can be found in Recueil Analytique de Decisions, Arrets et Jugements surle Traitment de la Torture, les Traitements Inhumains, Cruels et dregradants au Burundi (2000-2008), Ministère de la Justice, Republique du Burundi, pp 67-68.
[115] Article 13(1) of the Rwanda Code of Criminal Procedure.
[116] *Minani Jean v the State of Burundi*, Supreme Court of Burundi, (RAA 372), 23 March 2001.
[117] Article 289, Burundi Code of Criminal Procedure.
[118] Ibid, Article 290.

process. In Rwanda, victims will need to pay court fees in order to participate which may depend on the court and the amount of reparations being sought.

In Kenya, Uganda[119] and Tanzania (which do not have a civil party system in criminal trials), the only route is to bring a separate civil claim before the courts, which can be done in all of the countries surveyed. A claim would be brought against the individual perpetrator. If that perpetrator is a State official, he or she can be sued in a private capacity if the conduct in question exceeded the scope of his or her duties.[120] To the extent that a State entity is said to be responsible, the claim can be brought also against the State under principles of vicarious liability, whereby it may be vicariously liable in the case of damages caused by the action of its servants or agents, or as a result of any breach of duties owed to its servants or agents.[121] For example, the Ugandan High Court has said that where a plaintiff was tortured while in the "absolute control, custody and on the premises of Kabale Police Station," and no evidence was shown that the torture was not carried out by the police or outside the scope of police employment, the Attorney General was held to be vicariously responsible for the police torture.[122]

There are usually specific notification requirements when bringing such a claim against the Government. For example, prior to filing a complaint seeking reparations against the government of Kenya, the complainant must notify in writing

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[119] *See, e.g., John Ogil v. Attorney General*, Civil Suit No. 94 of 2004.
[120] *Twagira v. Attorney General & Anor*, High Court Civil Suit No. 836 of 2006.
[121] Section 4(1), Kenya Government Proceedings Act (Chapter 40); Section 3 of the Uganda Government Proceedings Act, 1959.
[122] *Magezi Raphael v. Attorney General*, Civil Suit No. 977 of 2000.

the Attorney-General, and then initiate the proceedings within thirty days of that notice.[123] A similar procedure is in place in Uganda, where the office of the Attorney General must be notified 45 days in advance of any claim being filed,[124] or 90 days in the case of Tanzania, to the Government Minister, Department or officer concerned, with a copy of the claim sent to the Attorney-General.[125]

Statutes of limitation for civil claims can be quite short. In Tanzania, a claim must be brought within three years of the incident,[126] whereas in Kenya, there is a one year limitation period.[127] In Uganda, tort actions against the Government or a local authority have a two year limitation period.[128] In civil law jurisdictions, when civil claims are brought as part of criminal proceedings, the limitation period is lengthened. For instance in Rwanda, a civil action arising from a criminal offence prescribes after five years from the commission of the crime.[129] However, if the prescriptive period of a civil action expires before that of the criminal action, the civil action will be subject to the same prescriptive period as the criminal action.[130] For misdemeanors, there is a three year limitation period for the criminal action and once that expires, a civil action can no longer be brought before the

[123] Sections 13 and 14(1), Kenya Government Proceedings Act (Chapter 40).
[124] Section 2(1) of the Uganda Civil Procedure and Limitation (Miscellaneous Provisions) Act; *Rwakasoro and 5 ors v. the Attorney General*, HCB 40 of 1982.
[125] Article 6(2) of the Tanzania Government Proceedings (Amendment) Act, 1994.
[126] Schedule, Section3, Part I of the Tanzania Law of Limitation Act, 1971.
[127] S.3(1), Kenya Public Authorities Limitation Act (Chapter 39).
[128] Section 3 of the Uganda Civil Procedure and Limitation (Miscellaneous Provisions) Act, 1969.
[129] Article 15(1) of the Rwanda Code of Criminal Procedure.
[130] Ibid, Section 1 and 2 of Article 15.

criminal court. If an action was already underway at the time of expiry, the Court can continue to hear the civil action.[131]

After the initial stage, the claimant may put forward evidence either by way of documentation, witnesses or oral allegations made by the parties under oath (or some combination of same). The burden of proof is on the claimant, who must prove at court the facts which are alleged,[132] on a balance of probabilities.[133] However, the burden of proof may shift once the plaintiff has established certain facts, such as injuries received during detention, which the Government then has the burden of explaining.[134]

The commission of torture may be a factor in determining whether exemplary or punitive damages[135] should be awarded. Ugandan courts have held that exemplary damages should be awarded where "an agent of Government acts oppressively, arbitrarily or unconstitutionally and in utter disregard of the rights of the plaintiff."[136] The High Court held that where soldiers assaulted a civilian, and kept him in dehumanising and military detention conditions, they had acted arbitrarily and in complete disregard for his constitutional rights. Accordingly, the High Court awarded

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[131] Ibid, Article 16.
[132] Section 107, Evidence Act of Kenya (Chapter 80).
[133] See, for instance, Kenya: *Noah Kibet Sigilai v Attorney General* [2014] eKLR, para. 14; Uganda: *Magezi Raphael v. Attorney General*, Civil Suit No. 977 of 2000.
[134] *Damulira Abubaker et al. v. Attorney General*, Complaint UHRC 900/2000 of 2000; Article 115 of the Tanzania Evidence Act, R.E. 2007.
[135] See Uganda: *Esso Standard v Semu Amanu Opio*, Civil Appeal No. 3/93 (Supreme Court) where the Court held that: "The notion arose that a further sum in damages could be meted out by way of punishment, or by making an example of the defendant's conduct. Hence this extra sum may be called punitive or exemplary damages."
[136] *William Abura v. Attorney General*, Civil Suit No. 56 of 2001.

exemplary damages.[137] In contrast, in another case, the High Court did not find the conduct of police towards the plaintiff to be sufficiently oppressive and arbitrary to justify an award of exemplary damages, even though the court did find that the plaintiff had been tortured. Thus while torture or inhuman treatment may be a factor in awarding exemplary damages, the presence of torture is not determinative.[138]

In Tanzania, enforcement of court awards tends to be a big problem, as there is no compensation fund to aid with impecunious debtors. Claims made against the State are executed through the State treasurer however there have been no successful cases to date. This appears to be the case with the other countries surveyed. In Burundi, lawyers consulted indicated that the judgments that they were aware of had not been enforced. Some judgment creditors have tried to enforce their awards against the State by seizing the jurisdiction of the administrative court.[139]

II.4 Constitutional claims

Constitutions in the countries surveyed include a prohibition of torture and/or ill-treatment.

Burundi:	Article 25 of the Constitution of Burundi recognises that no one shall be submitted to torture, or to cruel, inhuman or degrading penalties or treatments.

[137] Ibid.
[138] *Magezi Raphael v. Attorney General*, Civil Suit No. 977 of 2000.
[139] After the UN Working Group on Arbitrary Detention issued a decision against Burundi for the prolonged arbitrary detention of Me François NYAMOYA, this lawyer has sought to sue Burundi for reparations.

Kenya:	Article 25(a) of the Kenyan Constitution recognises freedom from torture and cruel, inhuman or degrading treatment or punishment. Article 29 recognises the right of every person not to be subjected to torture in any manner, whether physical or psychological, subjected to corporal punishment or treated or punished in a cruel, inhuman or degrading manner.
Rwanda:	Article 14 of the Rwandan Constitution provides that no one shall be subjected to torture or physical abuse, or cruel, inhuman or degrading treatment. Article 136 makes clear that a declaration of a state of siege or state of emergency cannot under any circumstances violate the right to life and physical integrity of the person.
South Sudan	The Transitional Constitution of the Republic of South Sudan, 2011 provides in Article 18 that "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." According to Article 188(a), the President cannot derogate from the prohibition against torture, even in a state of emergency.
Tanzania	Article 13(6)(e) of the Constitution of Tanzania affirms that no person shall be subjected to torture or inhuman or degrading punishment or treatment. The Tanzanian Constitution provides that the right is derogable and capable of limitation.[140] The Zanzibar Constitution, unlike the Tanzanian Constitution, expressly provides that the limitations otherwise allowed on the exercise of rights and freedoms do not apply to the right not to be tortured.[141]
Uganda	Articles 24 of the Ugandan Constitution recognises that no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment, and 44(a) that this does cannot be derogated from.

Under most constitutions operating in the sub-region, it is possible for victims of torture to bring a fundamental rights claim to the appropriate court. In South Sudan, for instance,

[140] Article 30 (2) of the Constitution of Tanzania.
[141] Article 24(1) (a-b) of the Constitution of Zanzibar.

this would be the Supreme Court, which has original jurisdiction to decide on disputes that arise under the Constitution at the instance of individuals, juridical entities or governments.[142] In Kenya,[143] Tanzania[144] and Uganda[145] it is possible to bring complaints to the High Court for the infringement of constitutional and fundamental rights and obtain redress. In Burundi, a person can petition the Constitutional Court regarding issues of constitutionality of laws or regulations,[146] which can result in such legislation being overturned, though no other forms of redress are available. Similarly, the Supreme Court of Rwanda can hear petitions on the constitutionality of laws and decrees,[147] however, there is no possibility for a victim of torture and/or ill-treatment to bring a constitutional complaint related to the treatment suffered in order to obtain civil redress.

Some courts in the sub-region have a long experience of adjudicating fundamental rights cases, particularly in Uganda and Kenya.

In Kenya, the aggrieved party, another person acting on their behalf, a person acting as a member of, or in the interest of, a group or class of persons, a person acting in the public interest or an association acting in the interest of one or

[142] South Sudan Interim Constitution, Art 128(2)(c).
[143] Article 23(1) of the Kenyan Constitution.
[144] Article 4 of the Basic Rights and Duties Enforcement Act, 1995.
[145] Section 50, Constitution of Uganda.
[146] Article 230(2) of the Burundi Constitution; Article 10, Law no 1/18 Regulating the Organisation and Functioning of the Constitutional Court and the Applicable Procedure before the Court, 19 December 2002.
[147] Section 3 of Article 145 of the Rwanda Constitution.

more of its members,[148] can lodge a constitutional complaint. The High Court can also accept "an oral application, a letter or other informal documentation."[149] In Uganda there are similarly broad rules of standing; standing to bring a claim is afforded to "any person or organization," which is not limited only to victims, but rather is available to anyone who desires to bring an action related to another person or group's rights.[150] Such claims are brought in Uganda under Article 50 as a civil action before any competent court at the magistrate court level. In Tanzania, Article 30(3) of the Constitution creates a mechanism by which individuals may institute proceedings for redress where a basic right has been, is being, or is likely to be violated.[151] The High Court has original jurisdiction over such suits.[152] Alternatively, complaints can be brought under Article 26(2) of the Constitution, which creates a right of every person to "take legal action to ensure the protection of this Constitution and the laws of the land," although this provision does not create the express right to redress embodied in Article 30(3). The Zanzibar Constitution also prohibits torture and allows for a constitutional remedy through proceedings instituted in the High Court.[153]

The standing of human rights organisations or other juridical persons to bring claims under Article 30(3) is a complicated question. On the one hand, the High Court at Dar es Salaam,

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[148] Article 22(2) Kenya Constitution and Rule 4(2), The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 28 June 2013, Kenya Gazette Supplement No. 95.
[149] Rule 10(4), the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.
[150] Section 50 Uganda Constitution.
[151] Article 30(3) of the Tanzania Constitution.
[152] Ibid, Article 30(4).
[153] Article 13(3), 24(2) of the Constitution of Zanzibar.

in Miscellaneous Civil Cause No. 77 of 2005, found that suits need not be brought by a natural person under Article 30(3), and accordingly found that human rights nongovernmental organisations had standing to challenge the constitutionality of certain sections of the Elections Act.[154] This reflects a principle espoused in an earlier High Court decision that "in matters of public interest litigation this Court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the manner."[155] However, a more recent decision by the High Court has called this into question, particularly in relation to torture. The case resulted from a statement made by then Prime Minister Mizengo Pinda, who in response to clashes between police and the public and alleged beatings by soldiers, suggested that those who had been beaten deserved it and suggested that police should continue to beat such persons.[156] Human rights organisations subsequently brought a suit challenging the lawfulness of the statement and arguing it violated, among other rights, article 13 of the Constitution.[157] The Court found that the relevant standing was provided by Article 26(2) of the Constitution, rather than Article 30(3). This was a key distinction, because unlike Article 30(3), article 26(2) is subject to parliamentary immunity rules protecting statements made during parliamentary proceedings.[158] The lack of standing under Article 30(3) accordingly presented a

[154] Legal and Human Rights Centre & Ors v Attorney General, Miscellaneous Civil Case No. 77 of 2005.
[155] *Mtikila v. Attorney General*, Civil Case No. 5 of 1993.
[156] *Legal and Human Rights Centre v. Pinda*, Miscellaneous Civil Cause No. 24 of 2013; Peter Nyanje, *Instigators of chaos deserve a thorough beating, says Pinda*, The Citizen, 20 June 2013.
[157] *Legal and Human Rights Centre v. Pinda*, Miscellaneous Civil Cause No. 24 of 2013, 6 June 2014.
[158] Ibid.

procedural barrier to the continuance of the lawsuit. The Court's rationale for finding that the human rights organisations did not have standing under Article 30(3) was that, because non-natural persons could not suffer physical or mental injuries, such as those caused by torture, they could not bring a claim for redress of those injuries.[159] This finding does not seem consistent with the earlier cases described above, which had emphasised that juridical persons have standing to assert claims in the public interest. It remains to be seen if the Court of Appeals will address this, as the case is reportedly being appealed.[160]

The High Court of Kenya has held that there is no limitation period for seeking redress for violation of the fundamental rights and freedoms of the individual under the Constitution.[161] Similarly, in Uganda there is no statute of limitation to bring a constitutional complaint. Compensation may be obtained for past wrongs, but an injunction may also be issued to prevent future harm.[162]

Constitutional claims have dealt with a range of anti-torture issues in the countries surveyed.

- Award of damages for violation of constitutionally protected right not to be subjected to torture. For example, in Uganda in 2002, Gulu Central Prison was attacked by UPDF soldiers, who removed 20 prisoners to the Gulu Military Barracks, where they were repeatedly tortured. The Gulu

[159] Ibid.
[160] Karama Kenyunko, TLS, LHRC to appeal against ruling in Premier Pinda case, IPP Media, 3 July 2014.
[161] *Wachira Weheire v Attorney General* [2010] eKLR, 8 April 2010, p. 10.
[162] *See, e.g., Mukasa and Another v. Attorney-General* Misc. Cause No. 24 of 2006.

High Court subsequently awarded monetary compensation to each of the prisoners for violating among other things, their right not to be subjected to torture.[163] In a later case, two journalists who were beaten and kicked, had their cameras taken away, and had dogs set upon them by police, were awarded damages.[164] In a third high-profile case, a woman who underwent forced undressing and sexual harassment by police was also awarded monetary compensation.[165]

The Nyayo Torture House case[166] concerned a number of plaintiffs who were arrested individually, taken to a police station and thereafter to the Nyayo House Basement, where each was held incommunicado in a completely dark cell, subjected to interrogation, and various acts of torture, inhuman and degrading treatments. After being held for a number of days, most of the plaintiffs were charged in court, several with treason offences, others with some minor offences. In making its award, the court notes: "Therefore, this court in exercise of its jurisdiction under Section 84 of the Constitution to provide redress for violation of fundamental rights and freedoms, has the powers to award damages to an individual whose fundamental rights and freedoms have been violated. However, it may not be possible to value or measure in monetary terms what an individual has undergone through violation of his fundamental rights. An award of damages merely serves to

[163] *Ronald Reagan Okumu & Ors v. Attorney-General*, Miscellaneous Application No. 63 of 2002 (cited in *Francis Tumwekwasize & Ors v. Attorney-General*, UGHC 36 of 2010.
[164] *Francis Tumwekwasize & Ors v. Attorney-General*, UGHC 36 of 2010.
[165] *Mukasa & Anor v. Attorney-General*, Miscellaneous Cause No. 24 of 2008.
[166] *Harun Thungu Wakaba v Attorney General* [2010] eKLR, 21 July 2010.

vindicate and restore his dignity and also send a clear message to the Executive that it will be held responsible for acts of impunity committed by its servants or agents. I find that in this case, it will be appropriate to make a global award in respect of the violations, taking into account the element of punitive damages."[167]

- Consideration of the constitutionality of the death penalty. In *Mbushuu alias Dominic Mnyaroji & Another v. Republic,*[168] the Tanzania Court of Appeal determined that the death penalty was constitutionally permissible, because although the death penalty contained "elements of torture" and constituted "inhuman, cruel, and degrading punishment" in violation of Article 13(6)(e) of the Constitution, it was permissible under the limitations clause of Article 30(2) because it had a legitimate purpose and was reasonably necessary.[169]

II.5 Human rights commissions

Human rights commissions are governmental institutions that have the mandate to investigate allegations concerning human rights violations and to issue recommendations and/or orders to rectify the situation of violation. Most of the countries surveyed have active human rights commissions or related bodies which can visit persons deprived of their

[167] Ibid, para. 48.
[168] Criminal Appeal No. 142 of 1994.
[169] *Mbushuu alias Dominic Mnyaroje and Another v. Republic*, Criminal Appeal No. 142 of 1994.

liberty and consider allegations concerning torture and ill-treatment.

Burundi:	The *Commission Nationale Independante des Droits de l'Homme* can receive complaints and investigate cases of human rights violations, make recommendations and as necessary, refer these cases to the competent authorities to be prosecuted. It also monitors places of detention.
Kenya:	The Kenya National Commission on Human Rights which succeeded the previous Commission established in 2002, has a mandate to, *inter alia*, promote the respect, protection and observance of human rights, as well as to receive and investigate complaints related to violations and provide redress when appropriate.[170]
Rwanda:	The National Commission for Human Rights receives, examines and investigates complaints from individuals about human rights violations. It also carries out visits and inspections to places of detention. Also, it can conduct mediation and conciliation between the claimant and the other party and request the relevant State organs to restore the rights of the victim or to bring to justice alleged perpetrators. The Commission has the power to file legal proceedings in civil, commercial, labor and administrative matters on grounds of human rights violations provided by the Constitution.
South Sudan:	The South Sudan Human Rights Commission has a constitutional mandate. Its functions include: to promote human rights; monitor and report on the situation of human rights in the country; investigate alleged human rights violations and abuses, initiate, oversee and implement programmes intended to promote and protect human rights and give key recommendations or advice to the government including advice on governance issues.
Tanzania:	The Commission for Human Rights and Good Governance (CHRAGG), established under Part VI of the Constitution of Tanzania and the Commission for Human Rights and Good

[170] Section 8, The Kenya National Commission on Human Rights Act (Act no. 14 of 2011).

	Governance Act, 2001 is a body primarily tasked to receive complaints in relation to human rights violations, to inquire and investigate matters pertaining to human rights abuse, including torture. CHRAGG's powers extend to Zanzibar.
Uganda	The Uganda Human Rights Commission was established by Article 51 of the Ugandan Constitution. The Commission can investigate human rights violations, order the release of a detained or restricted person, the payment of compensation or any other legal remedy or redress.

The degree of independence of these bodies and freedom to pursue sensitive cases is variable. Most use a variety of dispute resolution techniques such as conciliation, mediation or negotiation. Most commissions have the power to request information and to issue summonses,[171] however often recommendations and/or orders, including for the release of persons from detention, referral for prosecution or the payment of compensation are disregarded.

II.6 Disciplinary and oversight mechanisms

Some of the countries surveyed have put in place additional disciplinary and oversight bodies to oversee the conduct of specific State institutions.

For example, in Kenya, any complaint against the Police has to be submitted to the Internal Affairs Unit of the Police Service which has the mandate, among other things, to

[171] Section 52, The Kenya National Commission on Human Rights Act (Act no. 14 of 2011).

receive and investigate complaints against the police.[172] The Unit investigates misconduct and hears complaints on its own initiative or when put forward by members of the Police Service or members of the public, at the direction of a senior officer, of the Inspector-General or at the request of the Independent Police Oversight Authority (IPOA).[173] The IPOA can also take over the investigations when there is reason to believe the investigations are inordinately delayed or manifestly unreasonable.[174] It is also possible for an individual to lodge a complaint directly with the IPOA.[175] The Unit can recommend to the Inspector General the interdiction or suspension of an officer, the administration of a severe reprimand or a reprimand to control or influence the pay, allowances or conditions of service of an officer or any other lawful action.[176] Disciplinary penalties for police officers can range from, *inter alia*, a reprimand or a suspension, to dismissal from service or the payment of a fine.[177] Additionally, police officers who have committed an offence which amounts to a criminal offence are liable to criminal prosecution as provided by the law.[178]

Members of the Kenyan intelligence service may be disciplined which may range from, *inter alia*, dismissal from Service to the payment of fines.[179] Any person deprived of liberty who alleges that his or her rights have been violated

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[172] Section 87, National Police Service Act, 2011.
[173] Ibid, Section 87.
[174] Ibid, Section 87(5).
[175] "Complaints", Webpage of the Independent Policing Oversight Authority: http://www.ipoa.go.ke/complaints/how-to-complain.html.
[176] Section 87(6) National Police Service Act, 2011.
[177] Ibid, Section 89.
[178] Ibid, Section 88.
[179] Section 23, National Intelligence Service Act.

may also lodge a complaint to the administrative officer in charge of the facility where this person is detained.[180] Additionally, a grave allegation of misconduct by a police officer which amounts to a breach of the code of ethics may be filed with the Independent Ethics and Anti-Corruption Commission (EACC).[181]

In Uganda, the Police Act, Section 70, entitles the public to make written complaints regarding police misconduct to a senior police officer.[182] This complaint process is handled by the Professional Standards Unit (PSU), which was established under the authority of the Inspector General of Police.[183] The PSU handles the investigatory process once a complaint has been made. It then makes a recommendation to either the Inspector General of Police or the relevant supervising officer to initiate disciplinary proceedings.[184] These proceedings, outlined in the Police Act, depend on the rank of the officer in question, but in general will result in a hearing by a disciplinary court. The Police Act requires that a police disciplinary court is established at every police unit, which may impose any penalty except dismissal, and may recommend dismissal to the police authority or police council.[185] However, this is an internal mechanism, so members of the public do not have access. Nonetheless, in at least one well-publicised case, the police disciplinary court acted to dismiss four officers who had been filmed beating a

[180] Section 29(1), The Persons Deprived of Liberty Bill (2014).
[181] Sections 11 and 13, Ethics and Anti-Corruption Act (no. 22 of 2011).
[182] Section 70 of the Police Act, 1994.
[183] *IGP Introduces Unit to Tackle Corruption and Police Misconduct,* Uganda Radio Network, 30 December 2006.
[184] Commonwealth Human Rights Initiative & Human Rights Network- Uganda, *A Force for Good?,* p. 76.
[185] Section 52 of the Police Act, 1994.

former Mukwano Ltd. employee.[186] In practice cases are only referred with approval of the Head of the Legal and Human Rights Directorate.[187] This may be why, while the PSU does refer cases for criminal proceedings in addition to internal disciplinary measures, this is an infrequent occurrence: in particular, it has not referred any cases related to torture to the criminal process since the anti-torture act was passed in 2012.[188] There have been concerns that the PSU has become an internal administrative replacement for proper independent criminal prosecutions of serious cases of police misconduct.[189] There is a significant backlog in the handling of complaints: a 2014 report noted that since 2007, out of 361 complaints of torture or assault, 237 cases had been completed but 124 (just over a third) remained under inquiry.[190]

In Tanzania, prison officers may only use what force is "reasonably necessary" to make prisoners obey lawful orders or to maintain discipline.[191] However, the Prisons Act does not specifically note that torture or ill-treatment of prisoners is a disciplinary offense. To the contrary, some forms of punishment, such as corporal punishment or dietary restrictions, sanction certain forms of prisoner ill-treatment. Some procedural guarantees are in place before prisoners are subject to punishment: prisoners are supposed to be given an opportunity to hear any charge against them and

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[186] *Four Officers Dismissed*, Uganda Police Force, 3 December 2013.
[187] Commonwealth Human Rights Initiative & Human Rights Network- Uganda, *A Force for Good?,* p. 77.
[188] JLOS, *Annual Performance 2013-2014,* p. 122.
[189] Commonwealth Human Rights Initiative & Human Rights Network- Uganda, *A Force for Good?,* p. 85.
[190] JLOS, *Annual Performance 2013-2014,* p. 122.
[191] Article 13(1) of the Prisons Act, 1967.

have an opportunity to make a defense before being punished for a prison offence.[192] Similarly, medical examinations should be conducted before corporal punishments or punishment diets are imposed.[193] Prisoners have the right to complain to visiting justices (ministers, judges, and selected other officials),[194] who may visit certain prisons at their discretion[195] and enter recommendations or observations in a book kept at the prison, whose contents are reported to the Commissioner.[196] Otherwise, however, no formal complaint mechanism is present which provides a regular complaint procedure or requires a response from authorities. Despite this, internal disciplinary measures have been previously taken against prison officials who are found to have perpetrated acts of torture.[197]

The Police Force and Auxiliary Services Act provides slightly more detailed procedures regarding internal police discipline, outlining a process for police discipline and providing for an Inspector-General with investigatory and disciplinary powers.[198] The Act also provides that a police officer who "offers or uses unwarrantable personal violence to or ill-treats any person in his custody," has committed an offense against discipline.[199] However, independent investigations of police misconduct are an ongoing challenge. In one instance, after the death of a detainee who was reportedly beaten by

[192] Ibid, Article 37.
[193] Ibid, Article 38.
[194] Ibid, Article 100.
[195] Ibid, Article 100(6).
[196] Ibid, Article 100(8).
[197] *See, e.g.,* Faustine Kapama, *Police Officer being Probed over Inmate's Torture*, Tanzania Daily News, 24 November 2014
[198] Article 54 of the Police Act, R.E. 1995.
[199] Ibid, Article 50(1)(r).

police officers, the Police Force Dar es Salaam Special Zone convened an investigatory team which produced a report on the case. However, the team was criticised for lacking independence, since it was comprised solely of police officers.[200]

Several commissions of inquiry or special investigations have been convened following high-profile crimes or human rights violations, including instances of torture. These generally serve an investigatory or fact-finding purpose, and while they may present a more independent mechanism in some instances, it is not clear that they have generally resulted in accountability or prosecutions for those responsible for torture and other abuses. This is evidenced by the various responses to the 2012 killing of journalist Daudi Mwangosi, who was allegedly beaten and killed by anti-riot police while reporting on opposition protests. Following his death, police announced that a joint police-military commission of inquiry had been formed to investigate the death.[201] This was criticised for not being independent, given that police were investigating police misconduct, and a probe was also opened by the Minister of Home Affairs. The Minister's report found that police had used excessive force, but did not comment on the cause of death because the case was pending in a court of law.[202] Similarly, following serious reports of abuses committed during Operation Tokomeza, an aggressive anti-poaching operation in 2013, both a parliamentary probe and a judicial commission of inquiry

[200] Legal and Human Rights Centre, Tanzania Human Rights Report 2014 at 26-27.
[201] Fumbuka Ng'wanakilala, Tanzanian journalist killed reporting police-opposition clash, Reuters, 4 September 2012.
[202] *Mwangosi's Death Probe Report Out*, Tanzania Daily News, 10 October 2012.

were established.[203] The campaign had resulted in acts of murder, rape, torture, ill-treatment, and destruction of private property. Despite the two separate investigations, including confirmations of human rights violations by the parliamentary probe, the officers involved have not been held accountable or faced charges.[204] Such cases have led to concerns over Commissions of Inquiry being a distraction rather than a furtherance of justice for torture victims.[205] Some human rights activists have emphasised that the proper investigatory authority where torture or misconduct results in death should instead be the coroner.[206] Under the Inquests Act, following a death of a person in official custody, the Coroner shall hold an inquest into the cause of death "as soon as practicable."[207]

Article 243 of the Burundian Constitution establishes that the national Parliament, through Parliamentary commissions, has the mandate to oversee the work of the Corps of Defence and Security[208] which include the Army, the Police and the Intelligence Services.[209] The Constitution also provides for the creation of a national Ombudsman.[210] The Ombudsman has the mission of receiving complaints of and investigating violations of human rights committed by public officials; making recommendations to public authorities; mediating

[203] Team embarks on probing anti-poaching operation in northern and central regions, IPP Media, 25 December 2014.
[204] Legal and Human Rights Centre, Operesheni Tokomeza Ujangili Report 2014, 29
[205] *Tanzanians beg for answers on commissions of inquiry*, The Citizen, 4 August 2013.
[206] Legal and Human Rights Centre, Tanzania Human Rights Report 2014, 26-27.
[207] Article 15(2) of the Inquest Act, 1980.
[208] Article 243, Constitution of Burundi.
[209] Ibid, Article 245.
[210] Ibid, Articles 237 – 239.

between citizens and the public administration; carrying out and executing special tasks of reconciliation under the request of the President of the Republic and acting as an observer in relation to the public administration.[211] If the Ombudsman determines that a situation constitutes a grave crime or a disciplinary offence, it can refer the matter to the Public Prosecutor or the competent administrative authority, respectively.[212] If the complaint has merit, the Ombudsman tries to reconcile the positions of the complainant and the administration and makes recommendations to this effect;[213] it can also recommend the modification of laws and regulations[214] and advise on legal reforms.[215]

In Rwanda, when a member of the Rwanda National Police (RNP) incurs in misconduct which gives rise to disciplinary and criminal proceedings, the two are dealt with separately.[216] The disciplinary regulations are set by the Minister in charge of the Police.[217]

The Office of the Ombudsman is an independent institution with administrative and financial autonomy.[218] Among its main functions, the Office receives and examines complaints from individuals and associations in connection with the acts of civil servants, State organs and private institutions and it

[211] Article 6, Loi no. 1/04 of 24 January 2013 Revising Loi no. 1/03 of 25 January 2010 Regulating the Organisation and Functioning of the Ombudsman.
[212] Ibid, Article 14.
[213] Ibid, Article 16(1).
[214] Ibid, Article 16(2).
[215] Ibid, Article 16(3).
[216] Article 63 of the Presidential Order No. 30/01 of 09/07/2012 on specific statute for police personnel.
[217] Ibid, Article 66.
[218] Article 3 of the Law no. 76/2013 of 11/09/2013 determining the mission, powers, organisation and functioning of the Office of the Ombudsman.

mobilises such civil servants and institutions to resolve those complaints if founded.[219] The Office can carry out investigations, request for disciplinary sanctions to be imposed against an official who acted unjustly towards a person and to determine what is to be done for the victims to find redress.[220] Furthermore, the Ombudsman and the Deputy Ombudsmen have the power to resort to the judicial police to investigate the activities under their responsibilities.[221]

In some of the countries under review, members of the military who are accused of torture or other ill-treatment may be subject to a court martial in accordance with domestic military law, and/or disciplinary measures if they are accused of torture or ill-treatment.

[219] Ibid, Article 4(3).
[220] Ibid, Article 10 .
[221] Ibid, Article 11.

Part III: Regional and international human rights systems

III.1 Introduction

There are a number of regional and international human rights mechanisms that can be used to access justice for victims of torture and ill-treatment from the countries surveyed. Each of these mechanisms has their strengths and weaknesses and are explained below.

III.2 Sub-regional human rights system

III.2.1 The East African Court of Justice

The East African Court of Justice (EACJ) is a regional court that has been created to resolve disputes involving the East African Community and its Member States. Each of the countries under analysis is subject to the jurisdiction of the EACJ. The EACJ was established under Article 9 of the Treaty for the Establishment of the East African Community (EAC

Treaty)[222] and is one of the organs of the East African Community. It became operational on 30 November 2001.

Jurisdiction

As per Articles 27 and 30 of the EAC Treaty, the Court has jurisdiction over the interpretation and application of the EAC Treaty, including "such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction."[223] A Draft Protocol to Operationalise the Extended Jurisdiction of the EACJ has been drafted in May 2005 but has not yet been approved. However, the absence of an explicit human rights jurisdiction does not mean that lawyers representing victims of torture cannot approach the EACJ: the EACJ can consider human rights cases if they fall within its overall jurisdictional framework.[224]

The EACJ allows individuals to bring reference proceedings to challenge the legality of the acts of EAC Member States or Community institutions.[225] However, the EACJ limits access to individuals who are resident in the sub-region. The ability of individuals to bring reference proceedings is predicated on them being able to demonstrate a sufficient direct and personal connection to the act in question. Cases fall within

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[222] Treaty for the Establishment of the East African Community (EAC Treaty), adopted on 30 November 1999, entered into force on 7 July 2000, amended on 14 December 2006 and 20 August 2007, at http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf.

[223] Ibid, Article 27.

[224] EACJ, *James Katabazi and 21 Others v Secretary General of the EAC and others*, Case 01/2007, 1 November 2007.

[225] EAC Treaty, Article 30.

the temporal jurisdiction of the EACJ if they occurred after the EAC Treaty entered into force for the State against whom the complaint is submitted.

Procedure for submitting a complaint to the EACJ

The EACJ includes a First Instance and an Appeals Division. To submit a complaint to the EACJ, the lawyer should lodge "a statement of reference" with the Court which should include:

- the name, designation, address and where applicable residence of the applicant;
- the name, designation, address and where applicable residence of the respondent;
- the subject-matter of the reference and a summary of the points of law on which the application is based;
- where appropriate, the nature of any evidence offered in support;
- the relief sought by the applicant;
- where the reference seeks the annulment of an Act, regulation, directive, decision or action, the application shall be accompanied by documentary evidence of the same.[226]

The Respondent State should file its reply to the 'statement of reference' within 45 days of being served, after which the applicant has 45 days to file a reply. The Respondent State then has another 45 days to file its response if it decides to

[226] See Rule 24 (2) of the Rules of Procedure of the East African Court, at http://eacj.org/wp-content/uploads/2013/09/EAC-Rules-of-Procedure-2013.pdf.

do do.[227] The Court will then determine a date for an oral hearing of the case, at which both parties can call and examine witnesses.

Admissibility

There is no obligation to exhaust local remedies before going to the EACJ, which can make it easier for potential litigants to approach the Court. However, at the same time the EACJ has interpreted the period in which claims can be filed very narrowly. There is a **two month period** (from the moment in which the applicant learned of the violation) in which an applicant can bring a case to the EACJ. In a case concerning widespread torture and killings that the applicants allege the **Kenyan** government knew about but did nothing to investigate, the Court refused to extend its inordinately short limitation periods, even though the facts arguably constituted continuing human rights violations.[228]

Merits

Complaints submitted to the EACJ must allege a violation of the EAC Treaty. Human rights complaints, including torture and ill-treatment, fall within Article 7(2) of the Treaty, which, according to the Court, requires the Court to assess whether a State party's acts has violated the principles of good governance, which include democracy, the rule of law, social

[227] Ibid, Rule 30.
[228] EACJ, *Independent Medical Legal Unit v the Attorney General of the Republic of Kenya and 4 Others*, Appeal 01/2011, 15 March 2012; *Attorney General of Uganda and Attorney General of Kenya v. Omar Awadh and Six Others*, Appeal 02/2012, 15 April 2013.

justice and the maintenance of universally accepted standards of human rights.

When filing a submission on the merits of the case, it is therefore important to demonstrate how the alleged violations relate to the EAC Treaty. The EACJ will also take into account human rights instruments, in particular the African Charter, jurisprudence of the African Commission and the African Court as well as declaratory instruments such as the African Commission's Fair Trial and Legal Assistance Guidelines. Lawyers should therefore include these regional standards in their submission to the Court.

The following examples of the EACJ's jurisprudence illustrate how it will assess human rights violations in the context of Article 7(2) of the Treaty.

Jurisprudence

The EACJ has decided a number of cases concerning the rights of detainees. For example, in a case brought by Plaxeda Rugumba against **Rwanda**, the applicant's brother was allegedly arrested and detained without trial and held incommunicado for a period of six months during which time his family had no news about his whereabouts. The EACJ determined that this was a violation of the fundamental and operational principles of the East African Community which demands that Partner States shall be bound by principles of inter alia, good governance and the rule of Law.[229] In a case

[229] *Plaxeda Rugumba v. Secretary General of the EAC and Attorney General of Rwanda*, Case 08/2010, 1 December 2011, para. 44. The decision was confirmed on appeal, Appellate Division, 01/2012, June 2012.

concerning sixteen **Ugandan** prisoners who had been detained and charged with treason, they were granted bail by the High Court but the security personnel refused to allow them to leave the building. The EACJ determined that the failure to comply with the Court's bail order violated the principle of the rule of law and consequently contravened the Treaty.[230]

Amicus curiae interventions Article 40 of the EAC Treaty and Rule 36 of the Court's 2013 Rules of Procedure provide for the possibility for the Court to receive amicus curiae (friend of the court) interventions. An application for leave to intervene as an amicus curiae shall contain:

- a description of the parties;
- the name and address of the intervener;
- a description of the claim or reference;
- the order in respect of which the intervener or amicus curiae is applying for leave to intervene;
- a statement of the intervener's or amicus curiae's interest in the result of the case.

The Court will allow applications for leave to intervene "if the Application is justified", taking into account the Applicant's interest in the case and whether an intervention would prejudice any Party to the proceeding. The Court will assess

[230] EACJ, *James Katabazi & 21 Others v Secretary General of EAC & Another*, Case 01/2007, 20 November 2007, p 23.

the independence of the Applicant, considering for instance the Articles of Association of an NGO seeking to intervene.[231]

Amicus curiae interventions can be of great value as they provide the Court with an opportunity to hear additional arguments on points of law that are of wider importance than the concerns of the parties in the particular case. This is particularly true in human rights cases which raise issues that are of major public importance.

Appeals

Article 35A of the EAC Treaty provides that an appeal of a First Instance Division Judgment is possible on:

- points of law;
- grounds of lack of jurisdiction; or
- procedural irregularity.

Article 35A distinguishes the EACJ from other regional mechanisms, such as the African Commisison and African Court (see further below), which do not provide for the possibility of an appeal. In a case which concerned the disappearance, torture and execution of about 3,000 Kenyans from the Mt Elgon district in **Kenya** between 2006-2008, the applicants claimed that the Kenyan Government did not take measures to prevent the events or to investigate

[231] See for instance EACJ, *Avocats Sans Frontieres v Mbugua Mureithi Wa Nyambura and others*, Application No. 2 of 2013, 28 August 2013, at http://eacj.huriweb.org/wp-content/uploads/2013/08/APPLICATION-NO.2-OF-2013.pdf.

and punish the persons responsible. The EACJ determined at the first instance that it was able to hear the case.[232] On appeal the EACJ determined that the matter was time-barred, because it was not brought within the required two month period,[233] even though the applicant had known about the alleged violations at least 1.5 years before the application was filed.

Remedies

The EACJ's jurisprudence in human rights related cases to date demonstrates a very narrow interpretration of its mandate to award remedies. The Court has considered that it has no authoritiy to order a State found in violation of the Treaty to e.g. amend its legislation[234] or to provide compensation to victims.[235] Instead, the Court issues a declaratory order confirming that a violation has occurred.[236]

However, this should not prevent lawyers representing

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[232] EACJ, *Independent Medical Unit v. Attorney General of Kenya & 4 ORS*, Case 03/2010. 29 June 2011.

[233] EACJ, *Attorney General of Kenya v. Independent Medical Legal Unit*, EACJ Appellate Division, Appeal 01/2011, 15 March 2012. An application for review was subsequently denied, *Independent Medico Legal Unit v. Attorney General of Kenya*, EACJ Appellate Division, Appeal 02/2012, 1 March 2013.

[234] See e.g., EACJ, *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, Case 07/2013, 18 May 2015.

[235] EACJ, *James Katabazi & 21 Others v Secretary General of EAC & Another*, Case 01/2007, 20 November 2007.

[236] Ibid; see also EACJ, *Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda*, Case 05/2011, 17 May 2013. The Court found that Uganda's conduct amounted to illegal denial of entry; unlawful detention, removal and return of the Applicant in violation of the EAC Treaty. The Court did not, however, make a finding on any remedy.

victims before the Court to set out in detail the remedies they are requesting and how those remedies would serve to repair the harm suffered. Such submissions could usefully set out relevant regional and international standards on reparations so as to underline the concerned State's obligations in that regard.[237]

III.3 Regional human rights system

III.3.1 The African Commission on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (the African Charter) is the regional human rights treaty for Africa. Kenya, Burundi, Rwanda, Tanzania and Uganda all have ratified the African Charter. South Sudan has not ratified yet. The Charter established the African Commission on Human and People's Rights (African Commission). The African Commission is the main and most accessible human rights mechanism in Africa. It is a quasi-judicial body that is charged with monitoring the implementation of the African Charter. It is entrusted to protect human and peoples' rights under the conditions laid down in the Charter as well as promote human and peoples' rights. It also has the task of interpreting the Charter on Human and Peoples' Rights.

[237] See for instance REDRESS, Reaching for Justice – The Right to Reparation in the African Human Rights System, October 2013 (REDRESS, Reaching for Justice), pp. 8-17, at http://www.redress.org/downloads/publications/1310reaching-for-justicefinal.pdf.

Article 5 of the African Charter provides for the right to dignity and prohibits "all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment."

Jurisdiction

As part of its protective mandate, the African Commission has a quasi-judicial function to examine 'Communications' (i.e. complaints) from victims and/or their representative(s) alleging violations of the African Charter by a State party to the Charter. Its protective mandate allows the Commission "to make findings on violations or otherwise, with a view to safeguarding the enjoyment of human and peoples' rights and fundamental freedoms and providing redress for breaches thereof."[238]

Anyone alleging a violation of the African Charter by one of the State parties to the Charter can file a complaint with the Commission. The Commission takes a wide approach as to who can file a complaint before it. The Commission has emphasised that complainants do not themselves need to be victims or members of a victim's family to raise an allegation of a human rights violation. In particular, the Commission has explained that in cases where victims themselves are unable to file a complaint: "[I]t has adopted an *actio popularis* approach where the author of a communication need not know or have any relationship with the victim. This is to enable poor victims of human rights violations on the

[238] African Commission, Resolution 97: *Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties*, 29 November 2006.

continent to receive assistance from NGOs and individuals far removed from their locality."[239]

Procedure for filing a complaint

Complaints can be addressed to the Chairperson of the Commission through the Secretary by any natural or legal person.[240] The complaint must comply with **Rule 93 (2)** of the Commission's Rules of Procedure and contain, amongst other things: an account of the act or situation complained of, specifying the place, date, and nature of the alleged violations; the name of the victim, if he or she is not the complainant; the State(s) alleged to be responsible for the violation of the African Charter and any steps taken to exhaust domestic remedies. Furthermore, in order for a Communication to be taken up by the Commission, the Communication must be signed, it must be against a State party to the African Charter, and it must reveal, at least on a preliminary basis, a violation of one of the rights guaranteed in the Charter.

Any complaint that does not include all of the above information will be rejected, and the Commission will usually request the complainant to provide further detail on the missing information. While it is not necessary for the initial complaint to argue in detail the admissibility and merits or to provide an exhaustive account of the evidence in support, it is important that the complaint makes out a '***prima facie***'

[239] African Commission, *Article 19 v Eritrea* , Application no 275/03, 30 May 2007, para. 65; *The Social and Economic Rights Action Center and the Centre for Economic and Social Rights v Nigeria*, Communication 155/96, 27 October 2001, para. 49.
[240] African Commission, Rule 93 (1) Rules of Procedure.

violation of the Charter. According to the Commission, the term 'prima facie means "on the face of it"; "so far as can be judged from the first disclosure"; "a fact presumed to be true unless disproved by some evidence to the contrary". So, *prima facie* is a decision or conclusion that could be reached from preliminary observation of an issue or a case without deeply scrutinising or investigating into its validity or soundness.[241]

Once the Commission decides to take up the matter (**to be seized**), the author of the Communication will be informed. At this stage, the Commission will then also inform the State concerned.

If there are concerns as to the safety of the victim(s) of the alleged violations, the complainant can request the Commission to keep the **victim's identity anonymous** in all public documentation of the case.[242]

The procedure before the Commission can take a long time and delays in the consideration of complaints are not uncommon. These can be the result of the parties' failure to respond to the Commission as well as the Commission's

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[241] African Commission, *Samuel T. Muzerengwa & 110 Others v Zimbabwe*, Communication 306/05, 1 March 2011, para. 55.

[242] See for instance complaint filed with the African Commission by REDRESS and Synergie pour l'assistance judiciaire aux victimes de violation des droits humains au Nord Kivu (SAJ) in *S.A. v DRC*, requesting the Commission in light of the sensitive nature of the alleged violation (including rape), that "the Applicant wishes her identity to be withheld from the public by referring to her as S.A. and through the redaction of her name, address and any other information which might identify her from any publicly available document, including the present communication," para. 2, at http://www.redress.org/downloads/engcommunication-sa-v-drc20-nov-2014.pdf.

limited resources to examine communications in a more speedy manner. It is important for complainants to ensure that the Commission has up-to-date contact details so as to receive relevant correspondence. Where the Commission has sought unsuccessfully to contact complainants, it has struck out communications for lack of diligent prosecution. As the secretariat of the Commission often does not have the capacity to inform complainants about their respective complaints, complainants should follow up with the secretariat in writing after each Extra-Ordinary and Ordinary Session to inquire whether any steps have been taken in their case. These follow-up letters can be sent to the Executive Secretary of the Commission at au-banjul@africa-union.org and africancommission@yahoo.com.

Provisional Measures

If there is a chance that there will be irreparable harm to the victim, the Commission can at any time once the case is seized, adopt provisional measures, before taking a full decision in the case. It can do so on its own initiative or on the initiative of a party to the case. Complainants seeking provisional measures will need to demonstrate to the Commission the urgency of the measure required and how the harm risked to be suffered will be irreparable. In *Egyptian Initiative for Personal Rights & Interights v Egypt*, the Complainants requested provisional measures in order to put on hold a scheduled execution of a death sentence until the case before the Commission was considered.[243] A death

[243] African Commission, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Communication 334/06, para. 30.

sentence is an example of risk of irreparable harm. Other examples include cases of serious or massive violations; cases where the complainant was forcibly removed from his country of origin and wanted to return pending the outcome of the communication; cases where the complainants were prevented from voting in a national general election.

Admissibility

The Commission will then consider whether the communication is **admissible**. In accordance with Article 56 of the African Charter, a case will only be admissible if:

- the names of the author of the communication are provided;

- the communication relates to a specific violation of an article in the Charter;

- there is jurisdiction over the respondent State – the respondent State has ratified the African Charter (in the East Africa region this is all States except for South Sudan) and the allegations relate to incidents which took place after ratification (or which are violations which 'continued' to be perpetrated after the entry into force of the Charter;

- The Communication cannot be written "in disparaging or insulting language directed against the State concerned and its institutions or to the AU"

- The Communication cannot be "based exclusively on news disseminated through the mass media". Additional

types of evidence should be used such as witness statements, medical reports, reports of intergovernmental bodies, etc.

- The Communication must demonstrate that local remedies were exhausted before approaching the Commission, UNLESS, it is obvious that the remedies were unduly prolonged, or that they were not truly available (accessible without impediment), effective (with a reasonable prospect of success) and sufficient (capable of redressing the violation).

- The Communication must be submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter. Usually the Commission interprets this as meaning that the Communication must be made within six months, unless there are compelling reasons for a delay.

- The Commission must not have been settled by another international claims mechanism with a similar mandate.

The Commission will ask the author of the communication to present arguments about why the case is admissible, and the State will be given the opportunity to respond. The author will then have a short time to comment on the State's response. The Commission can hold a hearing on the matter, on request on of the parties or at its own initiative.[244] The

[244] African Commission, Rule 99 (1), Rules of Procedure.

Commission can also decide to call in independent experts or witnesses.[245]

Merits

Once a Communication is deemed admissible, the Commission sets a period of sixty days in which the complainant can file his observations on the **merits** of the case.[246] The Respondent State then has two months to respond to the complainant's submission. The complainant will have one month to reply to the State's submission. Also, the Commission can, either on its own initiative or at the request of one of the parties, try to help reach an **amicable settlement** between the parties.[247]

Usually the Commission will consider the merits on the basis of filings made, but it is open to the Commission to hold a hearing and/or to carry out fact-finding. In 2004 upon invitation from the Government of Sudan, the Commission carried out a fact-finding mission in the context of allegations concerning the serious and massive human rights violations committed in Darfur. The fact-finding mission was not carried out specifically in the context of a communication pending before the Commission. However, the Commission did refer to the findings of its mission in the case of *Sudan human rights organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* ('the Darfur case'), specifically to interviews it had conducted during the mission with women internally displaced persons who alleged, *inter alia*, that they were

[245] Ibid, Rule 100 (1).
[246] Ibid, Rule 108 (1).
[247] Ibid, Rule 109 (1); see, e.g. African Commission, *Association pour la défense des droits de l'Homme et des libertés v. Djibouti*, Communication 133/94, 11 May 2000.

raped and that their complaints were not investigated.[248] The Commission, based on a range of documents submitted by the complainants in support of such allegations, then found a violation of Article 5 as the State had not diligently protected its civilian population in Darfur and as it failed to provide remedies to the victims. The Commission may have come to the same conclusion without having carried out the fact-finding mission. However, by being in Darfur and speaking to authorities, NGOs and victims involved, the Commission was able to form its own impression of the situation, and, importantly, of the situation and needs of some of the victims. This may have contributed to the Commission's relatively far-reaching recommendations on reparation.[249]

Once it has received the parties' submissions and/or carried out a fact finding mission, it will adopt a decision on the merits of the Communication.[250] Where the Respondent State fails to respond in time, the Commission usually grants an extension to submit observations. Should the Respondent State not make any observations, the Commission will take a decision on the merits of the case on the basis of the information before it.

Jurisprudence on torture and ill-treatment

The African Commission has dealt with numerous cases involving allegations of torture. In *International PEN,*

[248] African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communications 279/03 and 296/05 ('Darfur case'), para .151.
[249] Ibid.
[250] African Commission, Rule 110 (1), Rules of Procedure.

Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria,[251] the victim had been severely beaten during his detention and was furthermore denied access to a lawyer or medical care. He was sentenced to death alongside other people and later executed. In deciding that there had been a violation of Article 5 of the Charter, the Commission determined that "[A]rticle 5 prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience".[252] In a later case, the Commission underscored can be "a tool for discriminatory treatment of persons or groups" … and can have a purpose "to control populations by destroying individuals, their leaders and frightening entire communities."[253]

The Commission has also recognised that "when a person is injured in detention or while under the control of security forces, there is a strong presumption that the person was subjected to torture or ill-treatment".[254] When such circumstances occur, it is up to the Respondent State to prove that the allegations of torture are unfounded.[255]

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[251] African Commission, *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*, Communications 137-94- 139/94- 154/96-167/97, 31 October 1998.
[252] Ibid, para. 79.
[253] African Commission, *Darfur Case*, para. 156.
[254] African Commission, *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Communication 334/06, 3 March 2011, para. 168.
[255] Ibid, para. 169.

Complaints to the African Commission should set out in detail how the acts complained of constitute torture and/ or ill-treatment under Article 5 of the African Charter. As violations of Article 5 are rarely committed in isolation, violations of other Charter articles could be similarly alleged (such as Article 6 if the torture or ill-treatment occurred during detention; Article 7 if evidence obtained under torture was used in a subsequent trial; Articles 9, 10 and 11 if the treatment was inflicted in response to an exercise of an individual's right to freedom of expression, association or assembly). It is important to know the jurisprudence of the African Commission (and African Court) in this respect.

The Institute for Human Rights and Democracy in Africa maintains the 'Caselaw Analyser', a database of African human rights mechanisms which can be a very helpful tool to research jurisprudence when drafting a complaint. The Caselaw analayser is available at http://caselaw.ihrda.org/. In addition to the jurisprudence of African human rights mechanisms, complainants should also be aware of the Commission's many declaratory instruments which help set out the Commission's understanding and interpretation of specific State obligations under the Charter. The Commission's Robben Island Guidelines, Fair Trial and Legal Assistance Guidelines and Guidelins on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) and Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, are particularly important in the context of alleged violations of

Article 5.[256] The Commission will also take into consideration other sources of human rights law, including UN treaties (such as UNCAT) and declaratory instruments (such as the Istanbul Protocol, General Comments of UN Mechanisms etc).[257]

Remedies

While its Rules of Procedure do not expressly provide the African Commission with a mandate to award reparation where it finds a violation of the Charter, the African Commission for instance has made clear that:

> "[I]ts role consists precisely in pronouncing on allegations of violations of the human rights protected by the Charter of which it is seized in conformity with the relevant provisions of that instrument. It is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries…..cannot shield that country from fulfilling its international obligations under the Charter."[258]

If the Commission finds a violation, it usually recommends that the State party afford reparations to the victim, which might include compensation, restitution of rights or other types of measures.

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[256] For an overview of relevant instruments see, http://www.achpr.org/instruments/.

[257] See Articles 60 and 61 of the African Charter.

[258] African Commission, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*, Communications 54/91-61/91-96/93-98/93-164/97_196/97-210/98, para. 83.

It is important for litigants to actively consider reparations in their claims before the Commission in order that they can demonstrate how the author has suffered and put forward arguments as to why reparations should be recommended and in what form.[259]

Implementation

Article 112 specifies the follow-up of the recommendations of the Commission. The Commission usually asks the State Party concerned to submit information on any measure it has taken on the matter within 180 days from the date it received the decision[260] and the Rapporteur for the Communication will monitor the measures taken.[261] If it finds that a State has not complied with its recommendations, the Commission may decide to convene a hearing on implementation, request the State concerned to develop an implementation plan[262] or refer the case to the African Court for non-implementation, provided that the State concerned has ratified the Protocol establishing the African Court.

Implementation of decisions is one of the biggest challenges litigants face before the African Commission. It is important to consider implementation at the outset of a case, and to bear in mind and explain to the client(s) that African

[259] REDRESS, *Reaching for Justice* (n 237).
[260] African Commission, Rule 112 (3) Rules of Procedure.
[261] Ibid, Rule 112 (5).
[262] See for instance African Commission, Resolution 257 Calling on the Republic of Kenya to Implement the Endorois Decision, adopted at its 54th Ordinary Session, held in Banjul, The Gambia, from 22 October to 5 November 2013, at http://www.achpr.org/sessions/54th/resolutions/257/.

Commission decisions are not *stricto senso* binding, which will impact on the capacity of the Commission to press for implementation. Litigants may wish to file 'follow-up' submissions to the Commission specifically on implementation, request implementation hearings and engage the State domestically on implementation, including through national human rights institutions.[263]

III.3.2 The African Court on Human and Peoples' Rights

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights entered into force on 25 January 2004, establishing the African Court on Human and Peoples' Rights (African Court). The African Court officially started to operate in November 2006. A judgment of the African Court is final and binding on the parties. Of the countries reviewed in this manual, Burundi, Kenya, Rwanda, Tanzania and Uganda have all ratified the Protocol.

Jurisdiction

The jurisdiction of the African Court covers all cases and disputes that are submitted to it concerning the interpretation and application of the African Charter, the Protocol and any other relevant human rights instrument ratified by the concerned States. This is expressed into two types of jurisdiction: contentious and advisory. In accordance

[263] The Network of African National Human Rights Institutions is developing guidelines for monitoring the implementation of decisions of the African Commission by National Human Rights Institutions, see Network of African National Human Rights Institutions (NANHRI), Annual Report 2015, p.12, at http://www.nanhri.org/wp-content/uploads/2016/07/Annual-Report_2015-1.pdf.

with Article 5 of the Protocol and Rule 33 of the Rules of Procedure, the African Commission, a State party to the Protocol, African intergovernmental organisations and non-governmental organisations with observer status before the African Commission, and individuals from States which have made the Declaration accepting the jurisdiction of the African Court, can bring a matter to the attention of the Court.

Countries must recognise the competence of the African Court to receive cases from non-governmental organisations or individuals, by making a Declaration under Article 34(6) of the Protocol. Until now, only eight of the thirty States Parties that have ratified the Protocol have made such a Declaration: Burkina Faso, Cote d'Ivoire, Ghana, Mali, Malawi, Rwanda, Tanzania and recently also Benin. Where no such Declaration is made, a complaint filed by an individual or NGO will be inadmissible. Thus, within the countries under analysis in this report, only **Rwanda** and **Tanzania** have submitted such a Declaration. Following the submission of several cases against Rwanda by individuals and non-governmental organisations, Rwanda withdrew its declaration in March 2016. On 5 September 2016, the Court decided that Rwanda's withdrawal was effective and that a notice period of one year should be applied as to when the declaration ceases to be binding on Rwanda. According to the Court, individuals and others therefore have **until 1 March 2017 to file a complaint against Rwanda** before the Court. Thereafter, cases against Rwanda can only be initiated by the African Commission and other institutions in line with Article 5 of the Protocol and Rule 33 of the Court's rules of

procedure. Pending cases submitted to the Court under Rule 34 ((6) are not affected by the withdrawal.[264]

Procedure

With the exception of Tanzania, the only way to engage the African Court in regards to the other countries of the East African Community (except South Sudan) will be through the African Commission. According to Rule 118 of the Commission's Rules, the Commission will bring cases to the Court if:

- the African Commission has taken a decision with respect to a communication and considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the time limit;
- it has made a request for provisional measures against a State party, and considers that the State has not complied with the provisional measures requested;
- a situation constituting one of serious or massive violations of human rights has come to its attention; or
- it deems it necessary to do so at any stage of a communication.

[264] African Court, *Ingabire Victoire Umuhoza v Republic of Rwanda*, Application No 003/2014, Ruling on Jurisdiction, 5 September 2016.

Admissibility

In order for an application to be admissible before the Court, Rule 40 of the Rules of Court specifies criteria that are by and large the same as the criteria used by the African Commission to determine whether Communications are admissible.

The Application must:

- disclose the identity of the Applicant;

- comply with the Constitutive Act of the Union and the Charter;

- not contain any disparaging or insulting language;

- not be based exclusively on news disseminated through the mass media;

- be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

- be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and

- not raise any matter or issues previously settled by the parties in another international forum.

In a matter concerning the killing of an investigative journalist and his colleagues in Burkina Faso and the failure

to carry out diligent investigations into the deaths (Zongo case),[265] on the issue of the exhaustion of domestic remedies, the applicants had not used all possible remedies in Burkina Faso; while they did pursue legal remedies they did not appeal the final ruling to the cassation court as they believed it would not be effective or timeous to do so.[266] The African Court determined that an appeal to the Cour de Cassation is not a waste of time and can in certain circumstances lead to a change or change the substance of a decision; it is therefore an effective remedy which should have been exhausted.[267] However, in finding the case admissible it determined that the procedure was unduly prolonged and would have been further prolonged if the matter had been brought to the Cour de Cassation.[268]

Provisional Measures

Similar to the African Commission, it is possible for the Court to adopt provisional measures in accordance with Rule 51 of the Rules of the Court. The Court has done so in a case referred to the Court by the Commission concerning Libya, requesting Libya to "immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the

[265] African Court, *Late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabé Human and Peoples' Rights Movement v. Burkina Faso,* Application no 013/2011, 28 March 2014.
[266] Ibid, paras. 56, 62.
[267] Ibid, para. 70.
[268] Ibid, para. 106.

Charter or of other international human rights instruments to which it is a party."[269]

Merits

The African Court has yet to decide on a case involving an alleged violation of Article 5 of the African Charter. It has, however, rendered a number of judgments regarding other violations that complainants to the African Court should take into account when drafting their submissions.[270] The Court can receive written and oral evidence, and may decide to hold an enquiry to obtain further evidence.[271]

Amicus curiae interventions

The Court's Rules provide that it may accept amicus curiae interventions from "any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task."[272]

Remedies

The Court issues binding judgments and has an express mandate to award reparation, with Article 27 (1) of the Protocol providing that:

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[269] *African Court, African Commission on Human and Peoples' Rights v. Great Socialist Peoples' Libyan Arab Jamahiriya* (Provisional Measures), 004/11, 25 March 2011.
[270] The Court's jurisprudence can be found at http://caselaw.ihrda.org/.
[271] See Article 26, African Court Protocol.
[272] Rules of Court, Rule 45 (1); see for example *Lohe Issa Konaté v Burkina Faso*, Application No.004/2013; *African Commission on Human and Peoples' Rights v The Great Socialist Libyan Peoples' Arab Jamahiriya*, Application No. 004/11.

> If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

The Court has confirmed in its jurisprudence that where a violation of an "international obligation" results in harm, there is an obligation to provide adequate reparation. In the *Zongo* case, the Court found in favour of the claimants. It held separate hearings on reparation following which it ordered the Respondent State to inter alia, pay a determined amount of compensation to the families, publish a summary of the judgment in French in the Official Gazette of Burkina Faso and in a widely read newspaper and to keep the summary on the website of the Respondent State for one year. It also ordered Burkina Faso to reopen investigations into the murders with a view to apprehend, prosecute and bring to justice the perpetrators.[273] In another Burkina Faso case which concerned a journalist who had been convicted of defamation for having published an article about counterfeit bank notes, and was sentenced to a prison term, the Court found that his rights had been violated, and ordered *inter alia*, the Respondent State to: expunge from the Applicant's judicial records, all the criminal convictions pronounced against him; to compensate the Applicant for loss of income and for moral damages. It also ordered Burkina Faso to publish a summary of the judgment in French in the Official Gazette of Burkina Faso and in a widely read newspaper and

[273] African Court, *Late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabé Human and Peoples' Rights Movement v. Burkina Faso,* Application no 013/2011, (Judgment on Reparations) 5 June 2015.

to keep the summary on the website of the Respondent State for one year.[274]

The Court's practice to date suggests that it will award different types of reparation going beyond compensation, depending on the circumstances of the case. Where it finds a violation, complainants can make a submission on reparation, which should set out in detail the reparation sought and provide evidence on how it is linked to redress the harm suffered as a result of the violation.[275]

Implementation

Article 29 (2) of the Court's Protocol provides that the Council of Ministers of the African Union (AU) shall be notified of the judgment and shall monitor its execution on behalf of the Assembly of the AU. Article 30 provides further that "[T]he States parties to the present protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."

[274] *Lohe Issa Konate v. Burkina Faso,* Application No. 004/2013, (Judgment on Reparations) 3 June 2016.
[275] See further African Court, Rules of Court, Rule 34 (5).

III.4 International human rights system

There are a range of mechanisms that are available at the international level to draw attention to torture practices in a particular country and/or to assess a particular case of torture or ill-treatment. These are summarised below with examples of how they relate to countries in the East Africa region.

III.4.1 Individual Complaints Procedures

Individual complaints may be brought to a number of treaty bodies, if the State in question has accepted the possibility for individual complaints to be brought against it. For example, **Burundi** has accepted the jurisdiction of the **UN Committee Against Torture** to receive individual complaints. In a case decided in February 2016 concerning the torture of a bus driver by police, the Committee determined that the acts in question amounted to torture. It urged Burundi to bring all those responsible for the torture to justice; grant the complainant appropriate redress, including compensation for the material and psychological harm suffered, measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition and to take all necessary measures to prevent any threats or acts of violence to which the complainant or

his family might be exposed, in particular as a result of having lodged the complaint.[276]

Rwanda, Tanzania and **South Sudan** have accepted the competence of the **Committee on the Elimination of All Forms of Discrimination against Women** to receive individual complaints submitted to it under Article 7 (3) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The Committee is an important avenue for complainants alleging for instance gender-based violence in violation of the State Parties' obligations under the Convention.[277] It has rendered a number of significant decisions, ranging from domestic violence cases[278] to States' failure to respond to sexual violence.[279] In case brought by two widows against **Tanzania** claiming that Tanzania's provisions on customary law governing inheritance had violated Tanzania's obligations under the Convention, the Committee considered that Tanzania had violated its obligations under the Convention by "condoning legal restraints (for women) on inheritance and property rights."[280] The Committee ordered Tanzania to

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[276] UN Committee Against Torture, *E.N. v. Burundi*, Communication No. 578/2013, UN Doc CAT/C/56/D/578/2013, 2 February 2016, para. 9.

[277] See further, REDRESS, Litigation Strategies for Sexual Violence in Africa, September 2012, pp. 42-45, at http://www.redress.org/downloads/publications/VAW%20Manual%2027%20Aug%202012%20UPDATED.pdf.

[278] See for example, CEDAW Committee, *A.T. v Hungary*, Communication No.2/2003, 26 January 2005; *Goekce v Austria*, Communication No.5/2005, 6 August 2007.

[279] See for example, CEDAW Committee, *Vertido v The Philippines*, Communication No.18/2008, 1 September 2010.

[280] CEDAW Committee, *E.S. and S.C (represented by the Women's Legal Aid Centre and the International Women's Human Rights Clinic) v Tanzania*, Communication No. 48/2013, 2 March 2015.

"grant the authors appropriate reparation and adequate compensation" and, inter alia, to "Ensure access to effective remedies by guaranteeing that courts will refrain from resorting to excessive formalism and/or unreasonable and undue delays."[281]

In order for an individual complaint to be **admissible** before UN Treaty Mechanisms, very similar criteria are used to those in place before the African Commission and African Court: a complainant must exhaust domestic remedies, the complaint must be brought within a reasonable time, and it must not have been considered by another international (or regional) settlement procedure. Specifically in the context of complaints submitted to CEDAW, it is important for admissibility purposes that complaints submitted at the domestic level explicitly highlighted grounds of discrimination.[282]

The **United Nations Working Group on Arbitrary Detention (UNWGAD)** has issued a number of findings relating to persons arbitrarily detained in **Burundi**, **Rwanda** and **Tanzania**. **A person from any country can bring a matter to the attention of the Working Group**, and the UNWGAD's competence to consider complaints does not depend on acceptance by States. It can respond urgently in cases of persons who remain in detention and require urgent attention and has a detailed individual complaints procedure which can assess an individual case in great detail. The Working Group has dealt with issues such as access to

[281] Ibid, paras. 9 (a) and (b) (iii).
[282] See e.g. CEDAW, *Kayhan v Turkey*, Communication No.8/2005, 27 January 2006.

medical care, access to a lawyer, and has often called for individuals to be released from detention and to receive compensation.

Similarly, cases of enforced disappearances can be submitted to the **UN Working Group on Enforced or Involuntary Disappearances** (UNWGEID) irrespective of whether a State has recognised the UNWGEID's competence to consider cases. The UNWGEID considers urgent appeals and general allegations which it transmits to the government concerned, requesting the government to carry out investigations and to inform UNWGEID about the results. As with UNWGAD, it is not necessary to exhaust domestic remedies before submitting a case to the group. The UNWGEID has developed a brief guide on "How to use the WGEID" and a Form for submitting a communication on a victim of an enforced disappearance.[283] In its 2016 Annual Report, the UNWGEID noted in respect of the countries reviewed that 72 cases of alleged enforced disappearance were outstanding in regards to **Kenya**, 54 in regards to **Burundi**, 26 in regards to **Rwanda**, 22 in regards to **Uganda**, and two each regarding **South Sudan** and **Tanzania**. The Working Group noted specifically regarding **Burundi** that it is "concerned about the ongoing situation of violence and instability in Burundi which may facilitate the occurrence of enforced disappearances."[284]

[283] See UNWGEID, Form to submit a communication on an alleged enforced or involuntary disappearance, at http://www.ohchr.org/Documents/Issues/Disappearances/Communication_form_E.doc.

[284] Report of the UNWGEID, 28 July 2016, A/HRC/33/51, para. 85.

The UNWGAD and UNWGEID cannot issue binding decisions, yet they are important mechanisms to raise urgent cases, in particular in situations where domestic avenues have failed or do not offer a prospect of prompt relief. As neither mechanism requires exhaustion of domestic remedies and does not depend on acceptance by States, they are easily accessible. These cases are important as they draw attention to the plight of individuals in detention / forcibly disappeared which can help to remove or reduce the torture risk.

III.4.2 The work of Special Rapporteurs

When the human rights situation in a particular country is particularly problematic, the UN Human Rights Council may appoint a country-specific rapporteur to enquire into the situation. Rapporteurs with thematic mandates may also inquire into particular problem areas. For example, in 2015, the Special Rapporteur on the situation of human rights defenders carried out a mission to Burundi,[285] and in 2016, the Special Rapporteur on the human rights of internally displaced persons carried out inquiries in relation to the situation in South Sudan.[286]

III.4.3 State reporting procedures

States are required to report periodically to treaty bodies about the extent to which they have complied with the treaties they ratified. Civil society and others will have an

[285] HRC, Report of the Special Rapporteur on the situation of human rights defenders on his mission to Burundi, A/HRC/31/55/Add.2, 20 December 2015.
[286] HRC, Report of the Special Rapporteur on the human rights of internally displaced persons - Mission to South Sudan, A/HRC/26/33/Add.3, 16 June 2016.

opportunity to present information to the treaty body to provide their own understanding of how the State has complied with its obligations.[287] The Committee then uses the information it has received from the State and others, as well as any further information it has at its disposal, to discuss the matter with the State concerned and to issue concluding observations. Recently, the UN **Committee Against Torture** issued its **Concluding Observations on Burundi**, in which it noted with concern inter alia, the discrepancy about the number of torture cases between what the State had reported and other information available to the Committee and called on the State to urgently take all possible steps to remedy the situation.[288] In consequence, the Government of Burundi prepared a detailed response.[289] While this dialogue does not have a binding consequence for the State in relation to any particular torture case, it acts as a form of suasion for governments and is an important complement to other approaches. **The UN Human Rights Committee issued Concluding Observations against Burundi** in 2014, in which it encouraged Burundi to take a variety of measures to prevent and address torture, including by establishing an independent mechanism for investigating complaints of torture or ill-treatment at the hands of

[287] See, for example, *Rapport alternative de la société civile à l'attention du Comité Contre la Torture sur la situation au Burundi*, 58ème session, 25 juillet – 12 août 2016, Juillet 2016.

[288] Concluding observations of the Committee on the special report of Burundi requested under article 19 (1) *in fine* of the Convention, CAT/C/BDI/CO/2/Add.1, 9 September 2016.

[289] *Renseignements reçus du Burundi au sujet de la suite donnée aux observations finales*, CAT/C/BDI/CO/2/Add.2, 30 October 2016.

members of police or security forces or the intelligence services and facilitate the filing of complaints by the victim.[290] In other Concluding Observations, the Committee Against Torture has recommended, for example that **Kenya** "repeal, as a matter of urgency, the one-year limitation for tort claims against government officials",[291] that **Rwanda** "provides for appropriate penalties for acts of torture, including the infliction of mental pain or suffering,"[292] and that **Uganda** "abolish the use of 'ungazetted' or unauthorised places of detention or 'safe houses'," and "Strengthen the Uganda Human Rights Commission and ensure that its decisions are fully implemented, in particular concerning awards of compensation to victims of torture and prosecution of perpetrators."[293]

All States that are part of the UN system participate in the **Universal Periodic Review** process, in which a State's human rights record is scrutinised by other States. For example in its last review, **Tanzania** agreed to "intensify efforts to ratify the Convention against Torture."[294] **Rwanda** agreed to "establish

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[290] Concluding observations on the second periodic report of Burundi, CCPR/C/BDI/CO/2, 21 November 2014, para. 14.

[291] Concluding observations on the second periodic report of Kenya, adopted by the Committee at its fiftieth session (6 to 31 May 2013), CAT/C/KEN/CO/2, 19 June 2013, para.23(a).

[292] Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee against Torture, CAT/C/RWA/CO/ 1, 26 June 2012, para. 7.

[293] Consideration of reports submitted by States parties under article 19 of the Convention, Conclusions and recommendations of the Committee against Torture (Uganda), CAT/C/CR/34/UGA, 21 June 2005, para. 10 (i) and (k)

[294] Human Rights Council, Report of the Working Group on the Universal Periodic Review: United Republic of Tanzania, A/HRC/33/12, 14 July 2016, para. 134.1

swiftly a robust national preventive mechanism in accordance with the Optional Protocol to the Convention against Torture."[295]

The State reporting mechanism can be an important complement to litigation at domestic, regional and international levels. It affords complainants and/ or their representatives and non-governmental organisations supporting them the possibility to raise specific issues of concern pertaining to e.g. a particular case, the absence of relevant legislation or general lack of accountability and reparation for torture and ill-treatment in the country concerned.

III.4.4 Commissions of Inquiry and other special procedures

When a human rights situation in a particular country is particular grave, the UN Human Rights Council may adopt a special resolution, as it has done recently in relation to Burundi.[296] It may also decide to establish a particular inquiry process or monitoring mission as it has recently done for South Sudan.[297]

[295] Human Rights Council, Report of the Working Group on the Universal Periodic Review: Rwanda, A/HRC/31/8, 18 December 2015, para. 133.6

[296] Human Rights Council, Situation of Human Rights in Burundi, A/HRC/RES/33/24, 5 October 2016

[297] Human Rights Council, Resolution 31/20 on the Situation of human rights in South Sudan, 23 March 2016

Annex: Excerpt, submission on admissibility in S.A. v. DRC, Afr Comm 502/14, 1 June 2015

SUBMISSON ON ADMISSIBILITY

1. The Communication satisfies all admissibility criteria stipulated in Article 56 of the African Charter.

Identification of authors, African Charter Article 56(1)

2. As required under Article 56(1) of the African Charter, the Communication identifies the authors representing the Applicant as REDRESS and SAJ. It also identifies the Applicant but requests the protection of her identity towards the public.

Compatibility with African Charter, African Charter Article 56(2)

3. Article 56(2) of the African Charter requires communications to be compatible with the Charter of the Organization of African Unity or with the African Charter. According to the jurisprudence of the Commission, communications must show a *prima facie* violation of the African Charter; be directed against a State Party; be based on events occurred during the

applicability of the African Charter and on the territory of the respective State Party.[298]

4. The Communication fulfils all of these criteria. The Communication was submitted against the Respondent State which ratified the Charter on 20 July 1987. The Communication sets out facts which evidence that serious violations of rights protected by the African Charter[299] and the Maputo Protocol[300] were committed on and after XXXXX on the territory of the Respondent State.

5. The Applicant is aware that the Maputo Protocol was deposited on 9 February 2009[301], a few months prior to the judgment issued on XXXX. However, the Applicant makes the argument that the temporal applicability of the Maputo Protocol stems from the continued failure of the Respondent State to pay the court-ordered compensation. The Commission has made it clear that "violations that occurred prior to the entry into force of the Charter, in respect of a State Party, shall be deemed to be within the jurisdiction *rationae temporis* of the Commission, if they continue, after the entry into force of the Charter",[302] for example, in relation to cases of enforced disappearance,[303] and denial of nationality.[304]

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[298] African Commission, *Dabalorivhuwa Patriotic Front v. the Republic of South Africa*, Comm. No. 335/06, para. 72.
[299] Articles 2, 5, 7, 14 of the African Charter.
[300] Articles 2, 4, 8, 11, 25 of the Maputo Protocol.
[301] Instrument of ratification deposited with the Chairperson of the Commission of the African Union on 9 February 2009.
[302] Adopted at the Commission's 55th Ordinary Session held from 28 April to 12 May 2014 in Luanda, Angola, available at http://www.achpr.org/sessions/55th/resolutions/284.
[303] African Commission, *JE ZItha & PJL Zitha v. Mozambique*, Comm. No. 361/08, para. 84.
[304] African Commission, *John K Modise v. Botswana*, Comm. No. 97/93.

6. Other international human rights bodies have ruled that the failure to provide redress and reparation constitute a continuing violation. In *Gerasimov v. Kazakhstan* the alleged torture occurred before the state party's ratification, but the UN Committee Against Torture stated that its "failure to fulfil its obligations to investigate the complainant's allegations and to provide him with redress continued after the State Party recognized the Committee's competence under article 22 of the Convention" and considered that it was not precluded *rationae temporis* from considering the complaint in its entirety.[305] The European Court of Human Rights (ECHR) has also established that the failure to pay a reparation award made by the state's courts against it "creates a continuing situation".[306]

7. In the current case, the Respondent State has not yet paid the court-awarded compensation of XXXXX USD to the Applicant despite the fact that a number of procedural steps have been taken to try to enforce the judgment since XXXXX, including the notification of the judgment to the State by the Registrar on XXXXX, and a letter on behalf of the Applicant to the Provincial Governor of XXXXX on XXXX.[307] The failure to provide reparation to the Applicant therefore continued after the adoption of the Maputo Protocol in February 2009. In such a situation, the Commission has the jurisdiction to consider all of the alleged violations whose effects continue.

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[305] UN Committee Against Torture, *Gerasimov v. Kazakhstan*, Comm. No. 433/2001, 25 July 2012, para. 11.2.

[306] See e.g. ECHR, *Driza v. Albania* (2011), App. No. 10810/05, 15 March 2011, para. 60; ECHR, *Marini v Albania* (2007), App. No. 3738/02, 18 December 2007, para. 95, ECHR 2007-XIV (extracts).

[307] See Exhibit D (Notification Order of the Registrar of the Operational Military Tribunal XXXX in Case No. XXXXX, XXXXX) and Exhibit E (Letter addressed to Excellency XXXX, Governor of XXXXX, XXXXX) to the Communication.

8. In addition, the Maputo Protocol enshrines *specific* continuing obligations which have not been complied with in this case in Article 4(2)(f), Article 2, and Article 8.

No insulting language, African Charter Article 56(3)

9. The Communication is written in a respectful language and thus satisfies the requirement in Article 56(3) of the African Charter which prohibits disparaging or insulting language.

Not exclusively based on mass media reports, African Charter Article 56(4)

10. In line with Article 56(4) of the African Charter, the Communication is not based exclusively on mass media reports. The Communication references reports issued by non-governmental organisations and the United Nations, and annexes the Applicant's statement, the letter addressed to the Provincial Governor of XXXX by the Applicant, the official judgment of the OMT of XXXX and the notification order issued by the Registrar of the OMT.

Exhaustion of domestic remedies, African Charter Article 56(5)

11. According to Article 56(5) of the African Charter, communications are only admissible if they "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged." This submission supplements the arguments on this point initially set out in the Communication,[308] and should be read in conjunction with paragraphs 33 to 43 of the Communication setting out the Respondent State's legal framework for the enforcement of compensation awards.

[308] See Communication, paras. 51-59.

12. The Applicant has exhausted domestic remedies by obtaining and notifying a judgment awarding compensation to her (see section V.1. below). Apart from that, domestic remedies to enforce the judgment are unavailable, ineffective and insufficient (see section V.2. below).

The Applicant has exhausted local remedies

13. The Applicant constituted herself as a Civil Party in the criminal proceedings against XXXXX and obtained a judgment awarding compensation to her against XXXXX and the Respondent State.[309] This judgment was notified to the Respondent State.[310] Through her participation in the trial and the notification of the judgment, the Applicant has exhausted local remedies for the crimes committed against her by an agent of the Respondent State. She is under no obligation to take any further steps on the domestic level before filing a complaint to the Commission because the Respondent State is made aware of its responsibility and has an obligation to implement the compensation order made by its courts.

14. This was clearly established by the Commission in the case of *Bissangou v. Congo*[311] where the state's non-enforcement of a judgment delivered in favour of an individual lawyer was considered. The state party argued that domestic remedies had not been exhausted because the complainant should have appealed against a Minister's decision not to pay the compensation, and because the complainant had not

[309] See Exhibit B to the Communication (Judgment of the Operational Military Tribunal XXXX in Case XXXX, XXXXX).
[310] See Exhibit D to the Communication (Notification Order of the Registrar of the Operational Military Tribunal XXXX in Case No. XXXX, XXXXX).
[311] African Commission, *Bissangou v. Congo*, Comm. No. 253/02.

undertaken proceedings for seizure against the state under the Administrative Procedure Code. The Commission did not accept these arguments, finding that "it is unreasonable to require from a citizen who has won the case of a payable debt against the State at the end of a legal proceedings to institute procedures of seizure against it".[312] The complainant had notified the state party of the judgment, and as such, the Commission held that he had "exhausted all local remedies in endeavouring to assert his right to compensation for the prejudice suffered".[313]

15. This is consistent with the jurisprudence of the European Court of Human Rights which has dealt with multiple cases of non-enforcement of judgments against the state. As that European Court of Human Rights reiterated in the case of *Burdov*:

> *A person who has obtained a judgment against the State may not be expected to bring separate enforcement proceedings (see Metaxas v. Greece, no. 8415/02, § 19, 27 May 2004). In such cases, the defendant State authority must be duly notified of the judgment and is thus well placed to take all necessary initiatives to comply with it or to transmit it to another competent State authority responsible for execution.*
>
> *[...]The Court thus considers that the burden to ensure compliance with a judgment against the State lies primarily with the State authorities starting from the date on which the judgment becomes binding and enforceable.*[314]

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[312] *Ibid*., para. 59.
[313] *Ibid*., para. 57.
[314] ECHR, *Burdov v. Russia (No. 2)* (2011), App. No. 33509/04, 15 January 2009, paras. 68-70; see also ECHR, *Beshiri v. Albania* (2006), App. no. 7352/03, 22 August

16. In accordance with this jurisprudence, the judgment issued by the OMT of XXXXX and notified to the Respondent State by its Registrar was the final local remedy which the Applicant had to exhaust before seizing the Commission.

17. The European Court of Human Rights has acknowledged that the states can require individuals to complete a number of procedural steps in order to enforce a judgment against the state:

> *A successful litigant may be required to undertake certain procedural steps in order to recover the judgment debt, be it during a voluntary execution of a judgment by the State or during its enforcement by compulsory means (see Shvedov v. Russia, no. 69306/01, § 29–37, 20 October 2005). Accordingly, it is not unreasonable that the authorities request the applicant to produce additional documents, such as bank details, to allow or speed up the execution of a judgment (see, mutatis mutandis, Kosmidis and Kosmidou v. Greece, no. 32141/04, § 24, 8 November 2007). The requirement of the creditor's cooperation must not, however, go beyond what is strictly necessary and, in any event, does not relieve the authorities of their obligation under the European Convention on Human Rights to take timely action*

2006, para. 54 ("In particular, as to the Government's argument relating to the applicants' failure to initiate enforcement proceedings, the Court reiterates that a person who has obtained an enforceable judgment against the State as a result of successful litigation cannot be required to resort to enforcement proceedings in order to have it executed (see *Cocchiarella v. Italy* [GC], no. 64886/01, § 89, ECTHR 2006; *Metaxas v. Greece*, no. 8415/02, § 19, 27 May 2004; *Koltsov v. Russia*, no. 41304/02, § 16, 24 February 2005; and *Petrushko v. Russia*, no. 36494/02, § 18, 24 February 2005).").

> *of their own motion, on the basis of the information available to them, with a view to honouring the judgment against the State (see Akashev, cited above, § 22).*[315]

18. In the current case, the procedural steps required go far beyond the absolute necessary and can even create insurmountable obstacles for individuals seeking enforcement of compensation awards. Therefore, the Applicant is allowed to resort to regional mechanisms once she has completed the basic procedural steps.

19. The Applicant has complied with the strictly necessary procedural steps to trigger the payment of the court-ordered compensation award and even gone beyond that. Following receipt of the judgment, the Provincial Governor is required to send a signed copy to the Ministry of Justice in Kinshasa. The Provincial Governor has not acted in accordance with the enforcement procedure. This is despite the Applicant diligently pursuing her entitlement to payment, as described in paragraphs 18 and 21 of the Communication. The Applicant repeatedly approached the Registrar of the OMT to demand payment[316] and sent a letter to the Provincial Governor of XXXXXX on XXXXX[317] in which she reiterated her right to entitlement under international law.[318] To date, the Applicant has not received a response. No further steps to pursue the payment of the compensation award can reasonably be expected of the Applicant.

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[315] ECHR, *Burdov v. Russia (No. 2)* (2011), App. No. 33509/04, 15 January 2009, para. 70.

[316] See Communication, para. 18.

[317] See Exhibit E to the Communication (Letter addressed to Excellency XXXXX, Governor of XXXX, XXXXX).

[318] See Communication, para. 21, and Exhibit E to the Communication (Letter addressed to Excellency XXXXX, Governor of XXXX, XXXXX).

Local remedies to enforce the judgment are unavailable, ineffective and insufficient

20. Under the Respondent State's legal system, there are no available, effective and sufficient local remedies which would enable the Applicant to enforce the judgment and receive the payment awarded to her because the procedure for enforcing the judgment is administrative and discretionary in nature (see V.2.1. below), there are no judicial remedies available (see V.2.2. below), and the Respondent State failed to act despite ample notice of the Applicant's claim (see V.2.3. below).

Enforcement procedure is administrative and discretionary

21. In accordance with the legal framework and practice of the Respondent State, any person who obtained a judgment awarding compensation against the state has to complete the following procedural steps:[319]

    (1) The victim must obtain a copy of the judgment from the Court's Registrar or the Public Ministry against the payment of a fee.[320]
    (2) According to Article 129 of the Code of Criminal Procedure and an Inter-ministerial Act dated 15 April 2013,[321] the victim has to pay "proportional fees" of 3% of

[319] See procedure described in Physicians for Human Rights, *Barriers to Justice: Implementing Reparations for Sexual Violence in the DRC*, May 2013, p.28; and FIDH, *DRC Victims of Sexual Violence Rarely Obtain Justice and Never Receive Reparation*, August 2013, available at http://www.fidh.org/IMG/pdf/rapport_rdc_.pdf, p.60f.
[320] On the amount of fees see Article 126(13) Code of Criminal Procedure and Inter-ministerial Act No. 002/CAB/MIN/J&DH/2013 and No. 785/CAB/MIN/FINANCES/2013 of 15 April 2013.
[321] Inter-ministerial Act No. 002/CAB/MIN/J&DH/2013 and No. 785/CAB/MIN/FINANCES/2013 of 15 April 2013.

the amount awarded. Article 117 of the Code of Criminal Procedure requires the payment to be made to the Registrar within 8 days of the final judgment, i.e. before the compensation is paid to the Civil Party. Alternatively, s/he can apply for a certificate of indigence from the Ministry of Social Affairs to prove their inability to bear the costs. For this purpose, the victim is required to travel to the provincial division of the Ministry of Social Affairs or another competent local authority for a personal interview followed by investigations on the financial status if necessary.[322] However, it has been reported that in practice, victims are often still required to pay the fee, even after being declared indigent.[323]

(3) Upon the victim's request and payment of an additional notification fee,[324] the Court's Registrar will notify the provincial governor about the judgment and the payment order and will furnish him or her with a copy of the judgment.

(4) The copy of the judgment must be signed by the provincial governor and delivered to the Ministry of Justice in Kinshasa.

(5) The Enforcement Office at the Ministry of Justice must include the requested amount in the next budget. This inclusion must be approved by the Director of Litigation or the Secretary General of the Ministry of Justice and by the

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[322] Avocats Sans Frontières, *Etude sur l'aide légale en République démocratique du Congo*, January 2014, p. 59.

[323] International Center for Transitional Justice, *Judgment Denied: The Failure to Fulfill Court-Ordered Reparations for Victims of Serious Crimes in the Democratic Republic of the Congo*, May 2012, available at http://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Reparations-2012-ENG.pdf, p. 3.

[324] On the amount of fees see Inter-ministerial Act No. 002/CAB/MIN/J&DH/2013 and No. 785/CAB/MIN/FINANCES/2013 of 15 April 2013.

Minister of Justice. However, they can suspend enforcement without giving any justification.
(6) The amount awarded must be transferred to the Ministry of Finance which makes the payment according to the expenditure plan.
(7) The victim must present all documents to the presiding judge who dispenses the amount.

22. These enforcement procedures are not of a judicial nature, rather they are administrative, and presided over exclusively by executive bodies, including the Court's Registry which informs the relevant parties on the judgment through the notification process, the Ministry of Social Affairs which decides whether an applicant qualifies as indigent, the Provincial Governor who must sign and deliver the award to the Ministry of Justice, the Enforcement Office at the Ministry of Justice which must include the award amount in the next budget, the Director of Litigation or Secretary General at the Ministry of Justice who must approve the budget change, and the Ministry of Finance which makes the payment according to the budget. None of these bodies are judicial in nature, nor do they carry out judicial functions with regard to the enforcement process. The Respondent State's courts are only involved during the issuance of the judgment itself, whereas the execution thereof is a purely administrative matter to be dealt with by the Provincial Governor of XXXX and the respective ministries.

23. Such *de facto* procedures, over which administrative and executive bodies have exclusive authority, do not constitute 'local remedies' under Article 56(5). The Commission has consistently interpreted the 'local remedies' requirement of Article 56(5) to refer exclusively to remedies of a judicial

nature and not to encompass administrative or executive remedies.[325] Additionally, it is established in the jurisprudence of the Commission that the remedies required to be exhausted must not be discretionary.[326] In *Interights et al. v. Mauritania*, the Commission stated that

> […] *the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.*[327]

24. Furthermore, the success of the enforcement procedures is at the absolute discretion of the Respondent State's executive bodies. For example, the Ministry of Social Affairs has discretion over whether the applicant receives indigent status and the Ministry of Justice can suspend enforcement without giving any justification. Therefore, the enforcement procedure as described above does not qualify as a local remedy under Article 56(5) and the Applicant had no obligation to complete all the steps before filing a complaint to the Commission.

Judicial local remedies for enforcement are unavailable and insufficient

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[325] African Commission, *Kenneth Good v. Republic of Botswana*, Comm. No. 313/05, para. 88; African Commission, *Ilesanmi v. Nigeria*, Comm. No. 268/03, para. 42; African Commission, *Priscilla Njeri Echaria v. Kenya*, Comm. No. 375/09, para. 53.

[326] African Commission, *Kenneth Good v. Republic of Botswana*, Comm. No. 313/05, para. 88.

[327] African Commission, *Interights, the Institute for Human Rights and Development in Africa, and the Association mauritanienne des droits de l'Homme v. Mauritania*, Comm. No. 242/01, para. 27.

25. The Commission has found that only sufficient, effective and available local remedies need to be exhausted.[328] A remedy is available if it can be pursued without impediment, it is effective when there is a prospect of success and it is sufficient when it is capable of redressing the complaint.[329] In the current case, other local remedies to enforce a court-ordered compensation award, aside from the administrative and discretionary enforcement procedure described above, are not available, ineffective or insufficient.

26. Under the legal system of the Respondent State, enforcement of judgments against the state through compulsory means is prohibited.[330] Thus, the Applicant cannot seize domestic courts to obtain the payment by, for example, an order to seize state property, rendering this kind of local remedy unavailable.
27. Under Article 162 of the Constitution of the Democratic Republic of the Congo (2005), individuals may complain to the Constitutional Court claiming the unconstitutionality of a legislative or regulatory act. Despite the constitutional complaint being a judicial remedy and therefore prima facie within the purview of a local remedy, it cannot be considered to be sufficient in redressing the violation.

28. The Applicant is seeking payment from the Respondent State of court-ordered compensation. Even if the Applicant had obtained a decision from the Constitutional Court, such a decision would merely have confirmed the requirement that

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[328] *African Commission,* Sir Dawda K. Jawara v. The Gambia*, Comm. No. 147/95-149/96, para. 31.*
[329] *Ibid.*, para. 32.
[330] REDRESS, Submission to the Committee on the Elimination of Discrimination against Women for Consideration of the Combined 6th and 7th Report of the Democratic Republic of the Congo, available at http://www.redress.org/downloads/publications/REDRESS%20Final%20DRAFT%20Submission%20to%20CEDAW%20on%20DRC%2020%20June%202013.pdf, para. 22.

the Respondent State pay the compensation. The Applicant would then face the same challenges with enforcement that she has faced thus far in respect of the final court judgment obtained, which necessitated the present Communication to the Commission. Therefore, even if the Applicant had overcome the practical hurdles to bring a case before the Constitutional Court, the Applicant would be in no better position to obtain the payment of the award. The Commission employed similar reasoning in *Bissangou v. Congo:*

> *Even a ruling by the Supreme Court […] would have given the Complainant the power to demand the execution of his judgment without however providing him with any means to enforce this ruling.*[331]

The Respondent State failed to act despite ample notice

29. The rationale for the requirement to exhaust local remedies is based on the notion that State Parties should be given the opportunity to remedy a violation through domestic means.[332] Where a state has had ample notice of a violation and has been given time to remedy the situation but has failed to do so, the Commission has previously determined that local remedies are either not available or not effective or sufficient to redress the violations alleged.[333]

30. The Respondent State has been aware of its obligation to pay compensation to the Applicant for almost XXXXX years. The Respondent State's own courts issued the order for compensation on XXXXX which put the Respondent State on

[331] African Commission, *Antonie Bissangou v. Congo,* Comm. No. 253/02, para. 61.
[332] African Commission, *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, Comm. No. 368/09, para. 44.
[333] African Commission, *Article 19 v. Eritrea*, Comm. No. 275/03, para. 77.

notice of its obligations. The latest possible date on which the Respondent State could claim to be notified of the judgment, and therefore its obligation to make payment to the Applicant, was XXXXX, the date on which the Registrar of the OMT of XXXX notified the Provincial Governor of XXXXX of the obligation to pay the damages awarded to the Applicant.[334] The Respondent State was thus aware of the violation and the redress sought by the Applicant and had the opportunity to grant the Applicant the compensation to which she is entitled but has failed to do so and failed to respond to the Applicant's claims for her entitlement in any manner.

Reasonable time period requirement, African Charter Article 56(6)

31. Article 56(6) of the African Charter stipulates that communications must be submitted within "a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter." As the African Charter does not stipulate what constitutes a reasonable time period, the Commission treats each case according to its own merits under consideration of the context and characteristics.[335]

32. This submission complements the points raised in the Communication, namely that the reasonable time period requirement is not applicable in this case (see VI.1. below), and that that even if it was applicable, the Communication was filed within the required time limit (see VI.2. below).

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[334] See Exhibit D to the Communication (Registrar of the Operational Military Tribunal XXXX, Notification Order in Case No. XXXX, XXXX).

[335] African Commission, *Luke Munyandu Tembani and Benjamin John Freeth v. Angola and Thirteen Others*, Comm. No. 409/12, para. 106.

The reasonable time period requirement is not applicable in this case

33. According to the plain text of the first limb of Article 56(6) of the African Charter, the reasonable time period starts when local remedies are exhausted. As set out above, the Applicant exhausted the local remedies by obtaining the judgment on XXXX and its notification on XXXXX. However, in light of the specific violation raised by the Applicant in the Communication, the Applicant argues that this limb of the provision of Article 56(6) is not applicable and, as a result, there was no reasonable time period for the submission of the Communication.

34. The rationale for the requirement to submit a communication within a reasonable time period after the exhaustion of local remedies as provided in the first limb of Article 56(6) is to prevent challenges to domestic decisions long after they have been delivered, in the interests of legal stability and certainty. However, when a final judgment has been delivered by domestic courts, and the onus is on the State to provide compensation awarded to repair a serious violation of human rights, a continuing situation arises. In such cases of a continued violation, the European Court of Human Rights has held that an analogous six-month time limit for bringing complaints under the European Convention on Human Rights has no application to a failure to enforce domestic judgments.[336]

35. This exception is in line with the rationale of the first limb of Article 56(6). After a judgment is issued and notified, claimants

[336] See e.g. ECHR, *Driza v. Albania* (2011), App. No. 10810/05, 15 March 2011, para. 60; and ECHR, *Marini v. Albania* (2007), App. No. 3738/02, 18 December 2007, para. 95, ECHR 2007-XIV (extracts).

are in a stage of uncertainty about whether the judgment will be enforced by the state. At that stage, the question of whether or not the state will comply with its obligation and pay the compensation is not yet settled. Therefore, the first limb of Article 56(6) is ill-suited to deal with cases of continued violation by non-enforcement of judgments.

36. Where the first limb of Article 56(6) is not applicable, the second limb of Article 56(6) which stipulates that the reasonable time period starts "from the date the Commission is seized with the matter" needs to be assessed. On the meaning of seizure as used in the second limb of Article 56(6), the Commission has stated that:

> *In this regard, the Commission notes that while the term "seized" or "seizure" has acquired a technical meaning in its Communications handling procedure, meaning "the decision by the Commission to consider a Communication" [See Article 55(1)&(2) of the Charter. See also Comm. 65/92 - Ligue Camerounaise des Droit de l'Homme vs. Cameroon (1997) ACHPR, para 10.], this technical meaning of seizure is clearly not what is contemplated under the second limb of Article 56(6). This is because, for a seizure to technically occur, the Communication must have first been submitted to the Commission, while on the other hand Article 56(6) contemplates that a Communication must be submitted "after" and within a timeline "from the date the Commission is seized with the matter".*
>
> *In the Commission's view, the jurisdiction of the Commission began in relation to the facts of the present Communication on the date on which the*

alleged cause of action under the African Charter arose.[337]

37. In cases of continued violations such as the current case, the "alleged cause of action under the African Charter" arises afresh every day as long as the violation is on-going, in other words with each day the Respondent State fails to pay the court-ordered compensation to the Applicant. Consequently, the reasonable time period would start anew every day until the payment is made. This effectively means that the Applicant can submit a communication to the Commission without obeying a time limit.

The Communication was submitted within a reasonable time period

38. Even if the Applicant was bound by a time limit for her complaint to the Commission, such a time period could only have started when she was aware and certain that the Respondent State would not fulfil its obligation and pay the court-awarded compensation. It was only in XXXXX that the Applicant realised with certainty that, despite all efforts, she would not obtain the court-awarded compensation, and the Communication was therefore filed within a reasonable time limit.
39. Where local remedies are considered unavailable, ineffective or insufficient, the Commission has ruled that the reasonable time period begins with the claimant's notice of the unwillingness of the state party to remedy the alleged violation.[338] This is the logical consequence of a situation

[337] African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Comm. No. 409/12, para. 108-109.
[338] African Commission, *Tsatsu Tsikata v. Ghana,* Comm. No. 322/06, para. 37.

where the claimant is uncertain whether the state will eventually remedy the alleged violation. Once this uncertainty is resolved, the claimant must file the communication within a reasonable time period.

40. In the current case, as set out above there are no available, effective and sufficient local remedies which the Applicant can resort to. Such a situation calls for the reasonable time period, if applicable, to only start when the Applicant was aware and certain that the Respondent State would not enforce the judgment. In addition, the Applicant is facing a continued violation which should be treated in the same manner as unavailable, ineffective or insufficient local remedies because the Applicant finds herself in a similar situation of uncertainty. As long as the violation continues and is not remedied, the Applicant needs time to ascertain whether or not the Respondent State eventually will pay the court-ordered compensation. Thus, the Applicant cannot be expected to act before she has certainty about the Respondent State's intentions.

41. Under this premise, the Applicant has filed the Communication within a reasonable time period from the moment she became aware and certain of the unwillingness of the Respondent State to comply with the judgment. Upon the granting of compensation in the judgment on XXXX, the Applicant made several attempts to contact the court's Registrar for payment. The judgment was notified to the Executive by the Registrar of the OMT of XXXX on XXXXXX after the Applicant, with the support of the authors, was able to secure the necessary means to pay for the notification fees. Having seen no progress by the Respondent State, the Applicant demanded payment of the compensation by letter dated XXXX and the Respondent

State confirmed its receipt of this letter on XXXXX.[339] In this letter, the Applicant set a time limit of one month for actions to be taken by the Respondent State which expired on XXXXX. Only after the Applicant received no payment or even a response to her letter, despite acknowledgement by the Respondent State that it had received her requests, did she realize that despite all the efforts the Respondent State would not comply with the judgment and it is from this date that any reasonable time period, if it applied, would have to be judged.

42. The Commission acknowledged receipt of the Communication on 5 December 2015, approximately XXXXX months after the Applicant became fully aware of the unwillingness of the Respondent State to provide the court-ordered compensation. This lapse of time can be considered reasonable in light of the necessary preparations for a complaint to the Commission.

No submission to other bodies, African Charter Article 56(7)

43. The Communication has not been submitted to any other procedure of investigation or settlement in accordance with Article 56(7) of the African Charter.

REQUEST

44. In light of the foregoing, the Applicant and the Authors request the African Commission to find this Communication admissible and proceed to the decision on the merits.

[339] See Exhibit E to the Communication (Letter addressed to Excellency XXXXX, Governor of XXXX, XXXXX).

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