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Introduction

It must be regarded as a peculiarity that the African Charter on Human and Peoples' Rights (the Charter) makes no specific mention of prisoners' rights and that prisoners' rights have to be inferred from the overall reading of the Charter and in particular Articles 4-6.¹ The reasons for this lie in the history of the drafting of the Charter and the political context at the time² and will not be the focus of the discussion here. Other regional instruments such as the American Convention on Human Rights, are more specific and states that "All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person".³ In respect of the Charter it must therefore be concluded that prisoners' rights are weakly defined and much room is left for interpretation.

There also does not exist in respect of Africa an instrument such as the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR) or the European Prison Rules⁴ that would operationalise normative law in a manner that is appropriate to the African context. An attempt in this regard was made in 2002 when the Conference of Eastern, Southern and Central African Heads of Correctional Services (CESCA) drafted an African Charter on Prisoners' Rights. However, this charter appears not to have assumed any further status subsequently⁵ although it was planned that it would be adopted by the African Commission on Human and Peoples' Rights (the Commission).⁶

In view of both of these shortcomings other possibilities need to be explored to give greater clarity to, and promote and protect prisoners' rights under the African human rights system. The mandate of the Commission, set out in Article 45 of the Charter, enables it to undertake a broad range of activities to promote and protect human and people's rights, which includes prisoners' rights. Article 45 reads: "The functions of the Commission shall be:

1. *To promote human and peoples' rights and in particular:*

a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments.

b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.

c) cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

2. *Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.*

3. *Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU.*

4. *Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government."*

Based on the powers of the Commission articulated in Article 45, three possible measures to improve the reporting on and monitoring of prisoners' rights are explored in this article: (1) more precise guidance in respect of state reporting; (2) guidance notes on prisoners rights from the Commission and (3) missions to state parties by the Special Rapporteur on Prisons and Conditions of Detention in Africa (the Special Rapporteur).

More precise guidance in respect of state reporting

Article 62 of the Charter requires that state parties submit to the Commission every two years "a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter." In order to guide and structure these reports, the Commission adopted in 1989 the "Guidelines for National Periodic Reports under the African Charter".⁷ The 1989 Guidelines were, however, regarded as "too lengthy and complicated making compliance a matter of impossibility".⁸ The 1989 Guidelines also do not provide any specific guidance to states on how to report on the situation of prisoners, save for general guidelines to states in respect of reporting on the realisation of civil and political rights.⁹ With this criticism levelled at it, it is therefore not surprising that the Commission adopted, less than ten years later, the 1998 "Guidelines for National Periodic Reports under the African Charter".¹⁰ The 1998 Guidelines have effectively rendered the old Guidelines redundant.¹¹ ¹²If the old Guidelines were criticised for being too lengthy and detailed, the opposite can be said of the 1998 Guidelines. The 1998 Guidelines have even been called 'vacuous'.¹³ The new Guidelines barely fill a page and are of such a broad and general nature that the original intention of a universal format¹⁴ that would enable consistency and facilitate monitoring over time would be all but impossible. The 1998 Guidelines do not specifically mention prisoners or any other persons deprived of their liberty and merely require that states report on how the state party is implementing civil and political rights.¹⁵ The 1998 Guidelines also require states to report on specific groups (women, children and the disabled) but again do not list prisoners or other persons deprived of their liberty as a vulnerable group.¹⁶

The overall impression is thus that even if it is accepted that the Charter is not precise in articulating prisoners' rights, the 1989 and 1998 Guidelines have also not assisted in providing states with clearer guidance on how to report on the realisation of prisoners' rights and conditions of detention in a particular country. The fundamental purpose of Initial and Periodic Reports submitted under Article 62 is to provide the Commission with an accurate description of the measures taken by states to implement the rights protected under the Charter, which would also include the challenges that the state party may encounter. It is this description, submitted through the periodic reports, which should guide the dialogue between the Commission and the state party. However, if the periodic report is of such a general and vague nature, it is less than likely that the Commission will be able to engage in meaningful and constructive dialogue with the state party.

By way of example, three periodic reports were considered by the Commission during its 45th Ordinary Session in May 2009 and serve to illustrate the point. The report by Uganda made no mention of prisoners or conditions of detention.¹⁷ The reports by Benin¹⁸ and Mauritius¹⁹ provided some information on prisoners' rights, but each focused on different aspects. The Benin report noted the visiting of prisons by the Department of Human Rights; overcrowding; the construction of new prisons; training of paralegals; and the provisioning of prison clinics with the necessary means to provide first aid. The Mauritian report noted the legal framework for the visitation of prisons and other places of detention by the National Human Rights Commission; the investigation of deaths in custody; and the use of mandatory minimum sentences.

If the aim of state reporting is to facilitate substantive dialogue between state parties and the Commission on the realisation of rights, and prisoners' rights and conditions of detention in particular, the periodic reports should enable this. For this to happen it will be necessary for the Commission to provide states with clear and precise guidelines on what should be reported on.

In this regard the Commission should be guided by its resolutions and declarations, with specific reference to the Resolution on Prisons in Africa (1995);²⁰ Robben Island Guidelines (2002)²¹ and the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa (2003)

(the Ouagadougou Declaration).²² The 1995 Resolution is clear on what the Commission regarded as the key areas for prison reform: "Concerned that the conditions of prisons and prisoners in many African countries are afflicted by severe inadequacies including high congestion, poor physical health and sanitary conditions; inadequate recreational, vocational and rehabilitation programmes, restricted contact with the outside world, large percentages of persons awaiting trial, among others". The Robben Island Guidelines focus on measures aimed at the prohibition and prevention of torture and other ill treatment and thus forms a critical component of protecting prisoners' rights and Guidelines 33 to 44 focus specifically on improving conditions of detention. In an important development, the Ouagadougou Declaration not only identified the key problem areas, but also included a plan of action under the following headings:

- ? reducing the prison population;
- ? making African prison more self-sufficient;
- ? promoting the reintegration of offenders into society;
- ? applying the rule of law in prison administration;
- ? encouraging best practice;
- ? promoting an African Charter on Prisoners' Rights; and
- ? looking towards the United Nations Charter on the Basic Rights of Prisoners.

While the Ouagadougou Declaration is not as comprehensive as some may want, it will nonetheless provide a legitimate and sensible structure for state reporting in respect of prisons and prison reform. Moreover, of the seven items listed above, it is in fact only the first five that would directly fall within the mandate of state parties, as the promotion of an African Charter on Prisoners' Rights and an UN-driven Charter on the Basic Rights of Prisoners would more appropriately reside with the Commission. The Ouagadougou Declaration can furthermore be complimented by the Robben Island Guidelines (33 - 44).

A particular challenge in respect of state reporting is the frequency. There are few states compliant with the two-year reporting requirement.²³ If, however, all 53 state parties were to submit all their reports on time, the Commission would have to deal with at least 13 periodic reports in every session. Based on recent history, this is clearly not possible. In the last four sessions of the Commission, it dealt with between one (44th Session) and three (42nd, 43rd and 45th Sessions) periodic reports. The two-year reporting requirement is clearly not achievable by state parties and, even if it was, the Commission would not have the capacity to deal with such a volume of reports. A four-year reporting cycle or even a five-year reporting cycle, similar to what the UN treaty monitoring bodies use,²⁴ would be more achievable and more closely match the capacity of the Commission. Changing this will require the amendment of Article 62 of the Charter.

Guidance notes on prisoners rights

The African Charter on Prisoners' Rights, as drafted by CESCA in 2002, was an important step in building consensus around the promotion and protection of prisoners' rights in Africa, but more specifically, around standards that are appropriate to the African context and, importantly, also accepted by African states. It is therefore unfortunate that that process had lost momentum. It is also uncertain to what extent civil society was involved in the drafting of that Charter. It will thus be necessary to restart the process around an African Charter on Prisoners' Rights. The drafting process of such a charter will need to be inclusive and comprehensive in order to produce a charter that will be regarded as legitimate and achievable. Inevitably, this will be a time consuming process, but some measures can be taken to build consensus around key issues that would form the foundation for a charter.

One such measure would be the drafting of guidance notes by the Commission through its Special Rapporteur on Prisons and Conditions of Detention in Africa (the Special Rapporteur) in respect of key issues regarding conditions of detention, safe custody, health care and overcrowding. Guidance notes on a range of issues have been developed by the International Centre for Prison Studies²⁵ and it is proposed that similar guidance notes for the African context will make a valuable contribution to promote and protect prisoners' rights by advancing a common understanding of the issues. The aim of a guidance note would be to provide practical guidance to prison managers and their staff on the operationalisation of rights protected under the Charter. While the Commission has expressed its concern about a number of issues and the Ouagadougou Declaration and recommends a number of steps to be taken, there is little from the Commission to guide the day-to-day management of prisons. Guidance notes should place particular emphasis on practical issues as many of the existing instruments, such as the UN Standard

Minimum Rules for the Treatment of Prisoners which were adopted in 1955, are formulated in an abstract manner or have become dated and lost their initial impetus. Guidelines and ultimately standards for African prisons should clearly spell out achievable minimum requirements for prisons and conditions of detention as a first step towards an African Charter on Prisoners' Rights.

Given that many African states have limited resources, there is a need to re-think our approach to standard setting in such an environment. While standards applicable to developed countries may seem attractive, they may also not be achievable in the foreseeable future. There is thus the need to investigate and develop a set of standards that are both appropriate and attainable in the African context. While such standards may initially be rather modest in order to be attainable, these should be adjusted incrementally over time. In developing such a set of standards, guidance notes can contribute by defining the problem accurately, recording proven solutions from Africa and, based on these, articulate standards aimed at the operationalising normative law. Clear standards will facilitate successful monitoring and reporting when these are known to officials and applied in a transparent manner. Guidance notes are therefore useful in promoting a common understanding of particular problems and develop consensus in addressing them.

Missions by the Special Rapporteur

The Special Rapporteur has the mandate to, amongst others, "examine the state of the prisons and conditions of detention in Africa and make recommendations with a view to improving them" and may undertake missions to state parties for this purpose.²⁶ Since the first Special Rapporteur was appointed in 1996 (Commissioner Victor Dankwa), a number of missions to state parties have been undertaken and reports on these visits have been made available.²⁷ While the reports on these visits share a number of common features, it is also evident that they are not consistent in the issues they cover. One criticism is that the reports focus too much on the material, as opposed to the legal, conditions of detention.²⁸ Even in respect of material conditions, the categories of information collected are not consistent across different states.

In view of this it is proposed that the Special Rapporteur develops a standardised report format focussing on a number of core variables. This will facilitate inter-state comparisons as well as comparisons over time to enable monitoring. It is furthermore proposed that these core variables reflect at least the issues raised in the Ouagadougou Declaration and the Robben Island Guidelines so that reports by the Special Rapporteur link up with the periodic reports by state parties as proposed above. It will, however, be necessary to unpack these in greater detail to ensure that valid and reliable observations are made.

Conclusion

State reporting to the Commission, as well as to the UN treaty monitoring bodies, has often been criticised for not being adequate to force states to comply with their treaty obligations, but the reporting is rather intended to oversee compliance and is not a form of an enforcement mechanism.²⁹ It is against this background that Evans, Ige and Murray observe: "To be sure, the potency of a reporting system as catalyst for change and as a point of pressure upon States should not be underrated but the essence of the process lies in the State presenting its record of compliance to the monitoring body and receiving the benefit of external scrutiny."³⁰

In the above it was argued that the scope and substance of this "record of compliance" in respect of prisoners' rights is lacking. There is limited guidance from the Commission on what states should report on and consequently, the reports fall short in providing an accurate description of the level of compliance. Furthermore, in the African human rights system insofar as it pertains to prisoners' rights, it is uncertain what "compliance" is. Compliance must ultimately be a measurable notion, based on verifiable evidence against a known, objective, systematic and constant set of standards or indicators. Compliance cannot be measured against an unknown, opaque or moving standard. It is in this endeavour, to define compliance in respect of prisoners' rights and conditions of detention, that the Commission should play a leading role as it has the sole authority³¹ to interpret the Charter.

Endnote

1. Article 4: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. Article 5: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. Article 6: Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.
2. Nmeielle, VOO (2001) *The African human rights system- its laws, practices, and institutions* (2001) Hague: Martinus Nijhoff Publishers. See also Igweta R (2008) *The African Commission On Human and Peoples' Rights and the Promotion and Protection of Prisoners' Rights: An Analysis*, Unpublished LLM Thesis, University of the Western Cape.
3. Article 5(2) American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).
4. Council of Europe-Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the Europe Prison Rules. 5. Dissel A (2008) 'Rehabilitation and reintegration in African prisons' in Sarkin J (ed) *Human Rights in African Prisons*, Cape Town: HSRC Press, p. 160
6. Article 6 of the The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, http://www.achpr.org/english/declarations/declaration_ouagadougou_en.html Accessed 19 November 2009.
7. Fifth Session held in Benghazi, Libya, 3-14 April 1989.
8. Viljoen F (2007) *International Human Rights Law in Africa*. Oxford: Oxford University Press. p. 372.
9. See "General Guidelines regarding the form and contents of reports from states on civil and political rights" in Guidelines for National Periodic Reports under the African Charter. Reprinted in Heyns C (ed) 2004) *Human Rights Law in Africa - Vol 1*. Leiden: Marthinus Nijhof Publishers, pp. 508 - 509.
10. 23rd Session held in Banjul, the Gambia, 20-29 April 1998.
11. Heyns C (ed) 2004) *Human Rights Law in Africa - Vol 1*. Leiden: Marthinus Nijhof Publishers, pp. 507.
12. A third set of guidelines known as the 'Dankwa document' also exists, but it has never been adopted by the Commission and are thus not dealt with here [Viljoen F (2007) *International Human Rights Law in Africa*. Oxford: Oxford University Press. p. 372].
13. Evans, M. Ige, T. and Murray R (2002) 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in Evans M and Murray M (eds) *The African Charter on Human and Peoples' Rights - The System in practice 1986 - 2000*, Cambridge: Cambridge University Press, p.45
14. The 1989 Guidelines described it as follows: "The purpose of these guidelines is to ensure that the reports are made in a uniform manner, reduce the need for the Commission requesting additional information and for it to obtain a clearer picture of the situation in each state regarding the implementation of the rights, fundamental freedoms and duties of the Charter." (para I(2))
15. *Guidelines for National Periodic Reports under the African Charter* (1998) Guideline 4(a).
16. *Guidelines for National Periodic Reports under the African Charter* (1998) Guideline 5.
17. Republic of Uganda (2008) *Report by the Government of the Republic of Uganda to the African Commission on Human and Peoples' Rights*, Presented at the 44th Ordinary Session, Abuja, Nigeria.
18. Republic of Benin (2008) *Periodic report of the Republic of Benin on the implementation of the rights and freedoms enshrined in the African Charter on Human and Peoples' Rights*, Ministry of Justice and Human Rights.
19. Republic of Mauritius (2008) *2nd, 3rd, 4th, and 5th Combined Report under the African Charter on Human and Peoples' Rights*
20. Adopted at the 17th Ordinary Session of the African Commission on Human and Peoples' Rights, Lomé, Togo, ACHPR/Res.19 (XVII) 95.
21. Adopted at the 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, ACHPR/Res.61 (XXXII) 02
22. Adopted at the 34th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, ACHPR/Res.64 (XXXIV) 03.
23. Please see *Status On Submission of State Initial/Periodic Reports to the African Commission* at http://www.achpr.org/english/_info/statereport_considered_en.html Accessed 24 November 2009
24. Article 19 of the Convention against Torture requires a periodic report every four years and Article 44

of the Convention on the Rights of the Child requires a report every five years.

25. The Guidance Notes developed by the International Centre for Prison Studies can be downloaded at

<http://www.kcl.ac.uk/depsta/law/research/icps/downloads.php> Accessed 24 November 2009

26. Mandate of the Special Rapporteur on Prisons and Conditions of Detention In Africa

http://www.achpr.org/english/_info/prison_mand..html

27. Evans M and Murray M 'The Special Rapporteur in the African System' in Evans M and Murray M (eds) *The African Charter on Human and Peoples' Rights - The System in practice 1986 - 2000*, Cambridge: Cambridge University Press, p.290-291.

28. Viljoen F (2007) *International Human Rights Law in Africa*. Oxford: Oxford University Press. p. 372.

29. Evans, M. Ige, T. and Murray R (2002) 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in Evans M and Murray M (eds) *The African Charter on Human and Peoples' Rights - The System in practice 1986 - 2000*, Cambridge: Cambridge University Press, p.36.

30. Evans, M. Ige, T. and Murray R (2002) 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in Evans M and Murray M (eds) *The African Charter on Human and Peoples' Rights - The System in practice 1986 - 2000*, Cambridge: Cambridge University Press, p.36.

31. Article 45(3)
