



ACHPR
African Commission on
Human & Peoples' Rights

Human Rights our
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***REPORT ON ARTICLE 5 OF
THE AFRICAN CHARTER'S
JURISPRUDENCE***

by

***COMMITTEE FOR THE PREVENTION
OF TORTURE IN AFRICA***



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With the technical support of Center for Reproductive Rights (research completed with the support of a pro bono team at Dentons)

Table of contents

I.	Acknowledgments.	4
II.	Summary	4
III.	Introduction	4
IV.	Decisions of the African Commission on Human and Peoples' Rights (The "Commission")	5
a)	Burden of proof	5
b)	Substance of Article 5	5
c)	Specific acts falling under Article 5	6
d)	Summaries of the Commission's decisions on Article 5	7
	Arbitrary Arrest and Detention	7
	Death Sentence / Penalty	12
	Violations resulting from warfare and military Operations.	14
	Violations against Vulnerable Persons and Groups	15
	Physical Assault & Police Misconduct	16
	Citizenship, Nationality & Related Rights	18
	Detention & Treatment in Prisons	19
	Trafficking in Persons and Modern Slavery	19
	Extra Judicial Killings and Enforced Disappearances	19
	Child Marriage	20
V.	Other Relevant Regional, Sub-Regional and National Bodies	21
I.	Jurisprudence of the African Court on Human and Peoples' Rights (the "Court")	21
a)	Burden of proof	21
b)	Substance of Article 5	22
c)	Specific acts falling under Article 5	22
d)	Summaries of the Court's decisions on Article 5	23
II.	Economic Community of West African States Court of Justice ("Court of Justice")	29
a)	Burden of proof	29
b)	Substance of Article 5	30
c)	Summaries of the Court of Justice's Decisions on Article 5	30
III.	Application of Art. 5 of the Charter in National Level Jurisprudence	34
IV.	Recommendations	36
a)	Clarification on the meaning of ' <i>prima facie</i> ' evidence	36
b)	Potential outreach to expand Article 5 jurisprudence.....	37
c)	Accounting for the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	38

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II. Summary

1. This report reviews how Article 5 of the African Charter on Human and Peoples' Rights, which prohibits torture cruel, inhuman, or degrading treatment, has been interpreted and applied by the African Commission on Human and Peoples' Rights. Its main objectives are to assess whether the African Commission has applied a broad or narrow interpretation to what acts constitute a violation of Article 5 and to determine whether there are any trends in its interpretation which may be hindering or enhancing its application. The report further provides a comparative analysis of the jurisprudence of the African Court on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, and the Economic Community of West African States Court of Justice. This comparative analysis identifies and assesses the differences in interpretation and application of the prohibition of torture in Africa among these human rights bodies. The report discusses some national jurisprudence where violations of Article 5 have been claimed as examples of the implication of the regional and sub-regional level decisions at the national level. It concludes with some recommendations including the need to clarify the meaning of '*prima facie*' evidence given its different application by the aforementioned mechanisms, undertake potential outreach to expand the range of cases and jurisprudence on Article 5 violations, and account for the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa by addressing Article 5 violations that occur in the context of women's access to reproductive healthcare services.

III. Introduction

2. Article 5 of the African Charter on Human and Peoples' Rights (the "Charter") reads:
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.
3. This report reviews how Article 5 has been interpreted and applied by the African Commission on Human and Peoples' Rights, and other relevant regional and subregional human rights bodies such as the African Court on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, and the Economic Community of West African States Court of Justice. The report also analyses select national level jurisprudence from Kenya that are examples of the practical application and implication of the regional decisions by and on various national courts such as the High Court and the Court of Appeal.
4. The purpose of the review is to determine the following:
 - i. If the African Commission has applied a broad or narrow interpretation to what acts constitute a violation of this provision.
 - ii. The extent to which other relevant national, regional, and subregional human rights bodies have applied a broad or narrow interpretation to the provision.
 - iii. If there are any trends in the interpretation of Article 5 which are hindering or enhancing its application; and
 - iv. In light of the above, if any recommendations could be made on how the interpretation or application of Article 5 could be modified to ensure that acts that could constitute a breach of Article 5 are being adequately addressed.
5. This report is organised as follows:

- **Section 1** introduces the objectives of the report.
- **Section 2** reviews the communications of the African Commission on Human and Peoples' Rights regarding allegations of a breach of Article 5;
- **Section 3** reviews the jurisprudence and work of other relevant regional and subregional human rights bodies that have interpreted Article 5; and
- **Section 4** provides recommendations for the African Commission's furtherance of Article 5 in the light of the findings in the previous sections.

IV. Decisions of the African Commission on Human and Peoples' Rights (The "Commission")

6. The Commission has heard several cases through its complaint's procedure alleging a breach of Article 5. These cases have covered a broader range of circumstances than the cases before the African Court on Human and Peoples' Rights (the Court) discussed below.

a) Burden of proof

7. The long-standing legal principle that he who alleges must prove, applies to complaints before the Commission as well. Though the Commission has not expressly defined the extent of the application of this principle, it has interpreted the same to mean any complaint before it should make precise allegations of facts by attaching relevant documents, if possible, and avoid making allegations in general terms.¹
8. The Commission has held that complainants before it bear the initial onus of laying a factual foundation in support of their allegations especially, allegations of torture under Article 5, which it has found must be substantiated by the persons making them².
9. The Commission applies a lower threshold to the burden of proof than the Court. Though the Court has found that the burden of proof is on the applicant, it may shift to the Respondent State in limited circumstances where the applicant can demonstrate that the other party has more, or exclusive access to relevant information about the case³. Based on its jurisprudence, the Commission has on the other hand found that a state's failure to deny allegations has been sufficient to have a complaint determined on its merit⁴. It has held that where allegations are not disputed or responded to by the State involved, the Commission may take the facts as provided by the complainant as a given⁵.
10. The Commission has also confirmed that when an individual is injured in detention or while under the control of State forces, there is a strong presumption that the person was subjected to torture or ill treatment. In that instance, the Burden of proof then shifts to the respondent state to prove that the allegations of torture are unfounded⁶.

b) Substance of Article 5

8. Article 5 addresses torture and ill treatment as well as the right to dignity and freedom from slavery all of which are discussed as follows. With regards to torture, the Commission has found that: a) severe pain or suffering has to have been inflicted; b) the severe pain or suffering must have been inflicted intentionally; c) this must have been inflicted for a specific purpose, such as to obtain

¹ The African Commission on Human and Peoples' Rights Information Sheet No. 3 <http://hrlibrary.umn.edu/africa/achpr-infosheet3.html>

² ACHPR, Civil Liberties Organisation, Legal Defence Centre and Legal Defence and Assistance Project v. Nigeria, Comm. No. 218/98, 29th Ordinary Session (7 May 2001), para. 45

³ Admissibility of complaints before the African Court : <https://www.refworld.org/pdfid/577cd89d4.pdf>

⁴ ACHPR, Gabriel Shumba v. Zimbabwe, Comm. No. 288/04, para. 132; Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt, Comm. No. 334/06, paras. 170-171.

⁵ ACHPR, Malawi Africa Association and Others v. Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164-169/97 & 210/98, paras. 92, 103.

⁶ ACHPR, Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt, Comm. No. 334/06, para. 171

information, as punishment or to intimidate, or for any reason based on discrimination; and d) this must have been inflicted by or at the instigation of or with the consent or acquiescence of state authorities. This is similar to the findings by the Court on this point⁷.

9. The Commission applies a wide interpretation to the acts that could constitute cruel, inhuman, or degrading treatment or punishment under of Article 5. It has stated in a number of its decisions that that the term '*cruel, inhuman or degrading treatment or punishment*' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental⁸. In seeking to expand on the criteria for a breach, the Commission has applied the case law of the European Court of Human Rights and has held that the prohibition is absolute but that acts require a minimum level of severity that is relative, depending on the circumstances of the case⁹. These circumstances can include the duration of the treatment, its mental or physical effects and the attributes of the victim including their age and state of health. The acts do not need to cause serious physical and psychological suffering, as acts which humiliate an individual or force them to act against their will or conscience can suffice¹⁰.
10. The Commission also recognises the 'right to dignity' within the definition of Article 5, which offers a broader protection. It has held that dignity, as a value, informs the content of all personal rights in the African Charter. The Commission has also held that the right to dignity is an inherent and enforceable right and that exposing victims to personal sufferings and indignity violates the right to human dignity. It has elaborated that personal suffering and indignity can take many forms and will depend on the particular circumstances of each case. For example, the Commission has confirmed that in addition to provisions of laws that when implemented may unfairly discriminate against and deny individuals their dignity, specific terminology in national laws that dehumanise and deny individuals any form of dignity will fall foul of Article 5.
11. The Commission has also confirmed that the 'right to legal status' is protected under Article 5. The Commission has identified that this includes a right to nationality and that 'legal haziness' in relation to nationality laws can violate Article 5. It has also recognised that dignity and legal status are fundamentally interdependent and that failure to grant nationality because it is tantamount to denying one's existence and excludes one from exercising their human rights and obligations would also be an infringement on human dignity. The Commission has also stated that a failure by a state to take measures to prevent individuals being stateless can also violate the right to legal status.
12. Finally, the Commission has also dealt with cases concerning slavery allegations under Article 5. Whilst it stopped short of concluding slavery had occurred, the Commission held that practices analogous to slavery, including unremunerated work, violate Article 5. In making this finding, the Commission held that the unremunerated work was tantamount to a violation of the right to respect for dignity inherent in the human being.

c) Specific acts falling under Article 5

13. Based on the jurisprudence reviewed, the Commission has found the following acts to be a breach of Article 5: arbitrary detention; various acts of physical harm and abuse; repeated deportations; being forced to live in disputed territories as a result of failed deportation; refusal to inform a family

⁷ Article 1 : Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

⁸ ACHPR, Curtis Francis Doebbler v. Sudan, Comm. No. 236/00, paras. 49-50; see also, ACHPR, Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria, Comm. No. 224/98; ACHPR, Huri-Laws v. Nigeria, Comm. No. 225/98

⁹ ECHR, Ireland v. United Kingdom, para 162 ; see also ECHR, Selmouni v. France para-160.

¹⁰ Although Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) is generally considered to be the internationally agreed definition of torture, it contains a fairly narrow interpretation of torture. Other regional treaties have broader definitions and interpretations of what treatment amounts to torture, such as the IACPPT. Further definitions of torture have developed through the jurisprudence of regional courts such as the ECHR. (REDRESS, 2018, p. 9)

of whether an individual is being held and their whereabouts; denial of prompt medical attention when suffering from a health threatening condition; forced eviction; destruction of property, water wells, food crops, livestock and social infrastructure; rape; displacement internally and outside national borders; failure to prevent non-state actors from carrying out forced evictions and destruction of housing; failure to prevent non-state actors from committing other violations of Article 5; threats; forced disappearance; a sentence of lashing; failure to effectively investigate violations of Article 5 and bring perpetrators to justice; failure to afford redress to victims; failure to promptly be brought before a judicial authority; unclear nationality laws that regulate acquisition of national identity documents discriminatorily and arbitrarily; failure to take measures to prevent statelessness; unremunerated work; and national mental health laws that use derogatory language.

14. The Commission has also found the following detention conditions to breach Article 5: deprivation of light; denial of water and use of bathroom facilities; exposure to constant electric light; denial of prompt medical attention; denial of access to family and lawyers; denial of access to journals, books, and newspapers; overcrowding; provision of extremely poor-quality or insufficient food; and sleep deprivation.
15. There have been some complaints submitted to the Commission concerning the relationship of Article 5 with the death penalty. The Commission has not held that the death penalty *per se* would violate Article 5. However, the Commission has found that death by hanging could be a breach of Article 5 as it causes excessive suffering. It has also found that failure by prison authorities to inform a prisoner's family and lawyers of the date, hour, and place of execution as well as place of the burial would violate Article 5. The Commission reasoned that this failure to inform represented a failure to respect the human dignity of both the family and the prisoner. The Commission has also held that a failure to provide prompt access to independent legal assistance for capital cases can violate Article 5.¹¹ Separately, the Commission has held that no government has the right to apply physical violence to individuals convicted for offences, as such a right would be tantamount to sanctioning State-sponsored torture¹². In its guidance to states on the right to life, in General Comment No. 3, the Commission acknowledges that abolition of the death penalty would secure, not only the right to life but also the right to be free from torture, cruel, inhuman, or degrading treatment¹³. Based on the review of communications since General Comment No. 3 was adopted, the Commission has not yet applied their interpretation on the death penalty and its relation to Article 5 in a decision.

d) Summaries of the Commission's decisions on Article 5

16. The Commission's decisions, issued in the form of 'communications', regarding Article 5 are summarised below. As with the decisions of the African Court discussed below, only information about the Commission's finding relating to Article 5 has been included. The decisions are categorized thematically based on the violation as it relates to Article 5.

Arbitrary Arrest and Detention

IHRDA & Ors v Burundi, Communication 636/16

17. In August 2016, IHRDA and three Burundian Lawyers on behalf of 8 victims seized the commission, alleging several violations of rights protected under the African Charter on Human and Peoples' Rights. This was after widespread protests were held in Burundi following former President Pierre Nkurunziza's announcement to run for a third term in April of 2015. These protests were violently repressed by Burundian law enforcement agents, leading to the torture, and forced disappearance of many civilians, while several others fled into exile. The Complainants submitted that the

¹¹ ACHPR, *Interights & Ditshwanelo v. The Republic of Botswana* Comm No 319/06 – para 87

¹² CPTA, *Inter-Session Activity Report (May 2015 to November 2015) and Annual Situation of Torture and Ill-treatment in Africa* Report, November 2015, para.15

¹³ General Comment 3 on the right to life(Article 4), pg. 9 <https://achpr.au.int/en/node/851>.

beatings and wounds administered to the eight victims constitute torture within the meaning of the Convention against Torture.

18. The commission noted that though Article 5 does not define torture, inference could be drawn from the commission's precedence to the effect that the term "torture" designates any act by which severe pain or suffering, physical or mental, is intentionally inflicted on a person for the purposes in particular to obtain information or a confession from him/her or a third person, to punish him/her for an act that s/he or a third person, or for any other reason based on any form of discrimination whatsoever, when such pain or suffering is inflicted by a public official public or any person acting in an official capacity.

Law Office of Ghazi Suleiman v Sudan, 3 May 2003, Communication 222/98, and 229/99

19. The Complainant alleged the victims, accused of endangering the security and peace of the country and civilians, were held in the detention facilities for a period of two months. The victims were tortured and not allowed contact with their families, which amounted to a violation of Article 5. Their families were also not informed of the fact that they were being detained, which the Complainant alleged amounted to inhuman treatment of both the detainees and their families.
20. The Commission found that the acts of torture had been recognised by the State and thus held that Article 5 had been violated. It did not then consider the issue of whether the families' rights had been violated.

Huri-Laws v Nigeria, Communication 225/98

21. The Complainant, Huri-Laws, which is a non-governmental organisation, filed a complaint on behalf of Civil Liberties Organisation (CLO). Huri-Laws alleged that CLO had experienced all forms of harassment and persecution from the Nigerian Government, that its staff had been *"detained in a sordid and dirty cell under inhuman and degrading conditions (...) denied medical attention and access to (...) family and lawyer (...) denied access to journals, newspapers and books (...) tortured and rigorously interrogated."* It further alleged that their offices had been subject to raids and searches without the required warrants, and that their staff were kept in the library during the raids and searches.
22. With regards to the Article 5 violations, the organisation stressed that *"Being detained arbitrarily, not knowing the reason or duration of detention, is itself a mental trauma" and when "added to this deprivation of contact with the outside world and health threatening conditions, it amounts to cruel, inhuman and degrading treatment."*
23. The Commission noted that the prohibition of torture, cruel, inhuman treatment or punishment is absolute, but recalled The European Court of Human Rights decision in Ireland v. United Kingdom, in which the Court held that *"... the treatment prohibited under Article 3 of the Convention is that which attains a minimum level of severity and...the assessment of this minimum is, in the nature of things, 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 etc."*
24. The Commission observed that : *"...[t]he treatment meted out to the victim in this case constitutes a breach of the provision of Article 5 of the Charter and the relevant international human rights instruments cited above. Also, the denial of medical attention under health threatening conditions and access with the outside world do not fall into the province of 'the respect of the dignity inherent in a human being and to the recognition of his legal status', nor is it in line with the requirement of Principles 1 and 6 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment." The Commission held that Article 5 was violated.*

Media Rights Agenda v Nigeria, Communication 224/1998

25. The complaint was filed by Media Rights Agenda, which is a Nigerian Human Rights NGO, on behalf of Mr. Niran Maloulu, Editor of an independent Nigerian daily Newspaper, The Diet. The Complainant alleged that Mr. Niran Maloulu was arrested together with three other staff of the Newspaper by armed soldiers at the editorial offices of the Diew Newspaper in Lagos in December 1997, without any information of the reasons for their arrest or an arrest warrant.
26. With regards to Article 5, the Complainants submitted that they were subject to "... such cruel, inhuman, or degrading treatment, as having his legs and hands chained to the floor day and night. From the day he was arrested and detained, until the day he was sentenced by the tribunal, a total period of 147 days, he was not allowed to take his bath. He was given food twice a day, and while in detention, both in Lagos and Jos before he faced the Special Investigation Panel that preceded the trial at the Special Military Tribunal, he was kept in solitary confinement in a cell meant for criminals."
27. The Commission noted that "... the term 'cruel, inhuman, or degrading treatment or punishment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental." The Commission further noted that "...the alleged violations took place during a prolonged military rule and that such regimes, as rightly pointed out by the Government, are abnormal (see the Commission's Resolution on the Military, adopted at the 16th ordinary session in Banjul, the Gambia)." Therefore, the Commission held that Article 5 was violated.

John Modise v Botswana, Communication 97/93 (2000)

28. The Complainant was one of the founders and leaders of the Botswana National Front opposition party. The Complainant claimed Botswana citizenship by descent since his father was a citizen of Botswana.
29. The Complainant submitted that he was declared a "prohibited immigrant" by the Botswana government due the fact that he was the founder of the Botswana National Front opposition party. For these reasons he was arrested and handed over to the South African Police, without being brought before any tribunal. When he returned to Botswana he was arrested and deported again without any hearing.
30. With regards to Article 5, the complainant alleged that he "... was then forced to live for eight years in the "homeland" of Bophuthatswana, and then for another seven years in "No Man's Land", a border strip between the former South African Homeland of Bophuthatswana, and Botswana." He had been deported four times to South Africa but had, on all these occasions, been refused admission to South Africa. The Commission observed that "Not only did this expose him to personal suffering, but it also deprived him of his family, and it deprived his family of his support. Such inhuman and degrading treatment offends the dignity of a human being and thus violates Article 5." The Commission thus held that these acts denied him his legal status and exposed him to personal suffering and indignity in violation of the right to freedom from cruel, inhuman, or degrading treatment guaranteed. The Commission thus held that Article 5 was violated.

Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan, Communications 48/90, 50/91, 52/91 and 89/93

31. The Complainant Comité Loosli Bachelard dealt with the arbitrary arrests and detentions that took place following the coup of 30 July 1989 in Sudan. They submitted that members of opposition groups, had been detained and subjected to torture.
32. With regards to Article 5, the Complainants submitted that they were subjected to torture, including;

"Forcing detainees to lie on the floor and being soaked with cold water; confining four groups of individuals in cells 1.8 metres wide and one metre deep, deliberately flooding cells to prevent detainees from lying down, forcing individuals to face mock executions, and prohibiting them from washing. Other accounts describe burning with cigarettes and the deliberate banging of doors at frequent intervals throughout the night to prevent sleeping. Individuals were bound with rope such that circulation was cut off to parts of their bodies, beaten severely with sticks, and had battery acid poured onto open wounds."

33. The Commission observed that.

"There is substantial evidence produced by the complainants to the effect that torture is practised. All of the alleged acts of physical abuses, if they occurred, constitute violations of Article 5. Additionally, holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned."

The Commission held that "Since the acts of torture alleged have not been refuted or explained by the government, the Commission finds that such acts illustrate, jointly and severally, government responsibility for violations of the provisions of article 5 of the African Charter. The Commission thus held that Article 5 was violated."

Article 19 v Eritrea, Communication 275/03

34. The complaint was concerned the detention incommunicado without trial of approximately 18 journalists in Eritrea. The Complainant submitted that "that on 18th and 19th September 2001, 11 former Eritrean government officials including former the Vice President Mahmoud Sherifo and the former Foreign Minister Petros Solomon were arrested in Asmara."

35. The Commission held that the fact that the detainees were being held incommunicado merited consideration in terms of international human rights law. The Commission pointed out that the United Nations Human Rights Committee has directed that States should make provisions against incommunicado detention, which can amount to a violation of Article 7 (torture and cruel treatment and punishment) of the International Covenant on Civil and Political Rights, to which Eritrea has acceded. It also pointed out that the Commission itself has stated that, "*holding an individual without permitting him or her to have contact with his or her family and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned.*"

36. The Commission found that Eritrea had not denied the Complainant's contention that the detainees were being held incommunicado, with no access to legal representation or contact with their families. The Commission pointed out that it had "*enunciated in many of its previous decisions, where allegations are not disputed by the State involved, the Commission may take the facts as provided by the Complainant as a given.*"

37. The Commission also held that Eritrea could not use the status of the political climate to excuse it of its actions. The Commission reasoned that this is because "*Article 5 permits no restrictions or limitations on the right to be free from torture and cruel, inhuman or degrading punishment or treatment.*" The Commission therefore found that Eritrea had violated Article 5.

International PEN (on behalf of Ken Saro-Wiwa) v Nigeria, 31 October 1998. Communication 137/94, 139/94, 154/96 and 161/97

38. The two complainants, International Pen, the Constitutional Rights Project, Interights and Civil Liberties Organisation, were human rights organisations. They were joined because they all concern the detention and trial of Kenule Beeson Saro-Wiwa, a writer and Ogoni activist, president of the Movement for the Survival of the Ogoni People.

39. The Complainant submitted that Mr Saro-Wiwa "*was kept in leg irons and handcuffs and subjected to ill-treatment including beatings and being held in cells which were airless and dirty, then denied medical attention, during the first days of his arrest*" and that other victims were "*manacled in their cells, beaten and chained to the walls in their cells.*"
40. The Commission recalled that "*Article 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.*"
41. It thus found that the "*government had made no written submission in these cases, and ha[d] not refuted these allegations in its oral presentation. It is well-established jurisprudence of the Commission that where allegations go entirely unchallenged, it will proceed to decide on the facts presented ... Therefore, the Commission held that article 5 was violated.*"

Abdel-Aadi, Al Kadi and Others v Republic of Sudan, 5 November 2014, Communication 368/09

42. The complaint concerned an allegation that the victims, Sudanese nationals who were displaced as a result of war and ended up living in the IPDs camp. On May 18, 2005, police entered the camp, violence broke up resulting in several people being killed and arrested. The victims alleged that police returned couple days and arrested the victims who were not informed of the reason for their arrest, had no contact with the lawyers or families and went through various forms of physical torture during detention. The facts were not disputed.
43. The Commission held that torture requires "*that severe pain or suffering has to have been inflicted; for a specific purpose, such as to obtain information, as punishment or to intimidate, or for any reason based on discrimination; by or at the instigation of or with the consent or acquiescence of state authorities*". It found that the treatment experienced by the victims amounted to torture, which violated Article 5.
44. The Commission also held that "*'cruel, inhuman, or degrading treatment or punishment' is to be interpreted so as to extend to the widest possible protection against abuse, whether physical or mental*" and includes an obligation to "*put in place certain procedural safeguards in order to prevent detainees from being subjected to abuse*". If abuse occurs, States have an obligation to "*initiate a prompt, impartial and effective investigation in order to bring the perpetrators to justice as well as to afford redress to the victims.*" The Commission found that the Respondent had failed to uphold these standards and therefore violated Article 5.

John D. Ouko v Kenya, 6 November 2000, Communication 232/99

45. The Complainant, a student Union Leader, alleges that he was forced to flee the country due to his political opinions, including condemnation of corruption and nepotism. Prior to fleeing Kenya, the victim was arrested and detained without trial for 10 months. The cell he was held in was two by 3 metres and the electric bulb in the cell was left on throughout his detention. He was denied the use of bathroom facilities and alleges he suffered physical and mental torture.
46. The Commission found that the conditions of his detention amounted to a violation of the "*right to the respect of his dignity and freedom from inhuman and degrading treatment under Article 5*". However, the Commission found that although "*the Complainant has claimed a violation of his right to freedom from torture, he has not substantiated on this claim. In the absence of such information, the Commission cannot find a violation as alleged.*"

Lisbeth Zegveld and Messie Ephrem v. Eritrea, Communication 250/2002

47. The complaint was filed on behalf of individuals illegally arrested and detained simply for opposing government policies in Eritrea. At the time of the filing of the complaint with the Commission, the whereabouts of the individuals were still unknown despite repeated requests submitted through courts to force the government to release them or provide information on their location.
48. This communication did not allege a violation of Article 5, the Commission in dealing with a violation of article 6 right to liberty and security of the person stated that;
"Incommunicado detention is a gross human rights violation that can lead to other violations such as torture, or ill treatment or interrogation without due process safeguards. Prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment."

Death Sentence / Penalty

Interights & Ors (on behalf of Bosch) v. Botswana, Communication No. 240/2001

49. The complainant, Mrs. Bosch was sentenced to death for murder. The Complainant alleged that the sentence of death in the case was a disproportionate penalty in the circumstances and therefore a violation of Article 5. The Complainant also alleged that, in breach of Article 5, Mrs. Bosch was likely to suffer inhuman treatment and punishment because the execution would be conducted by *"the cruel method of death by hanging, which exposes the victim to unnecessary suffering, degradation and humiliation"*.
50. The Commission considered the facts of the case and the domestic court's decision making. The Commission thus assessed that "While it is accepted that the death penalty should be imposed after full consideration of not only the circumstances of the individual offence but also the circumstances of the individual offender, (Inter-American Commission of Human Rights in Downer and Tracey v. Jamaica (41/2000) 14 April 2000), there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed. It should be pointed out here that apart from stating the trend in other jurisdictions and decisions of other Human Rights bodies governed by specific statutes, it has not been established that the courts in this case did not consider the full circumstances before imposing the death penalty. If anything, the courts fully considered all the circumstances in this case (See pages 48 to 55 of the judgement of the Court of Appeal). It is clear that the submission that the imposition of the death penalty was disproportionate to the gravity of the crime in this case is based on an erroneous assumption of what amounts to extenuating circumstances."

51. The Commission observed that.
"The seriousness or gruesome nature of an offence does not necessarily exclude the possibility of extenuation; it cannot be disputed that the nature of the offence cannot be disregarded when determining the extenuating circumstances. As such, the African Commission finds no basis for faulting the findings of both the trial court and Court of Appeal as it relates to this issue."
52. Thus, the Commission found that Article 5 had not been violated."

Interights & Ditshwanelo v. The Republic of Botswana, Communication 319/06

53. The complainant were two human rights organisations, International Centre for Human Rights, and Ditshwanelo-the Botswana Human Rights Centre. The Complainants submitted that the victim, Mr. Oteng Modisane Ping, was sentenced to death by hanging and executed for the murder on his girlfriend and minor son.
54. With regards to Article 5 the Complainants submitted that *"the death penalty is cruel and inhuman treatment because it undermines the sanctity of human life and is against the modern judicial attitude of substituting the death penalty with other forms of punishment such as life*

imprisonment" and that the victim's "execution by the unnecessarily painful method of hanging constituted a cruel, inhuman and degrading form of punishment."

55. The Complainants also claimed that the mother of the prisoner and his representative were denied access to the prisoner a day before his execution which they learnt of via the radio. The Complainants submitted that *"the failure to inform the prisoner, his mother or his lawyer in advance of the scheduled execution constitutes inhuman treatment. Similarly, the failure to release the body to the family for burial constitutes a violation of Article 5 of the Charter."*

56. The Commission held that from the totality of submissions, there were three sub-issues to be considered by the Commission in the context of Article 5. These included: (i) hanging as a method of execution; (ii) "death row" phenomenon concerning mental suffering from being on death row for a prolonged period of time; and (iii) secrecy of the execution and refusal to hand over body for burial.

57. With regards to (i), the Commission found that hanging as a method of execution causes excessive suffering and is not strictly necessary and therefore constitutes a violation of Article 5 of the African Charter. On (ii), the Commission held that it was not evident from the facts that the victim had been on death row for a prolonged period and therefore that Article 5 had not been violated in this regard. On (iii), the Commission held that secrecy of the execution and refusal to hand over body for burial, along with the lack of transparency concerning the refusal of petition of mercy and the serving of an execution warrant, combined with the denial of access to his lawyer and family during the intervening period between the serving of the warrant and the execution (in secret) constituted a potential violation of Article 5 of the Charter.

58. The Commission thus held that;

"The failure by the prison authorities of the Respondent State to inform the family and the lawyers ... , of the date, the hour, the place of the execution as well as the exact place of the burial, violates article 5 of the African Charter, and by their conduct, have failed to respect the human dignity of both the family and the prisoner, which further violates Article 5."

Egypt Initiative for Personal Rights and Interights v Egypt, 3 March 2011, Communication 334/06

59. The individuals on behalf of whom this complaint was brought were tried and sentenced to death by hanging after being accused of bombings. The individuals were allegedly subjected to various forms of torture and ill-treatment during their detention in order to confess before the State Prosecutor. They were also held incommunicado for a prolonged period of time without access to a lawyer and denied medical attention. They also alleged that their trial was characterised by procedural and substantive anomalies. The complaint alleged that all these acts violated Article 5, including the sentence of death by hanging, which is "a notoriously slow and painful means of execution" and poses risks that are "not compatible with respect for the inherent dignity of the individual".

60. The Commission reiterated the definition of torture as in the Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment. The Respondent had disputed whether the individuals had any injuries and who was responsible for such injuries. The Commission held that "[i]t is a well-established principle of international human rights law, 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." The Commission further held that "under such circumstance, the burden now shifts to the Respondent State to convince this Commission that the allegations of torture raised by the Complainants is unfounded. The context of the Victims incommunicado detention and interrogation is such that available evidence is necessarily limited. However, the allegations of torture and ill-treatment are supported by the victim's independent testimonies of similar ill-treatment."

61. The Commission found that the Respondent had made no attempt to give a satisfactory explanation to how the injuries were sustained by the individuals or to investigate. The Commission concluded that the "marks on the victims evidencing the use of torture could only have been inflicted by the Respondent State". The Commission also found that the right to prompt medical services during detention, provision of prompt access to independent legal assistance in capital cases and the right to be brought promptly before a judicial authority fall within the protection against torture and ill-treatment. The Commission found that Article 5 had been violated.
62. The Commission did not deal with the issue of the death penalty and hanging under Article 5 and instead dealt with this under a different article of the Charter.

Violations resulting from warfare and military Operations.

Sudan Human Rights Organization and Center for Housing Rights and Evictions v Sudan, Communication 279/03 – 296/05

63. The Complaints were submitted jointly by different human rights organisations. The Complainants alleged large-scale and indiscriminate killings, torture, poisoning of wells, arrests, rape, forced evictions and displacement and destruction of property.
64. With regards to Article 5, the complainants submitted that "... the various incidences of armed attacks by the military forces of the Respondent State, using military helicopters and the Janjawid militia, on the civilian population, forced eviction of the population from their homes and villages, destruction of their properties, houses, water wells, food crops and livestock, and social infrastructure, the rape of women and girls and displacement internally and outside national borders of the Respondent State, constitute violation of the various cited articles of the African Charter, one of which is Article 5.
65. The Commission observed that ,
"The totality of the aforesaid violations amounts to both psychological and physical torture, degrading and inhuman treatment, involving intimidation, coercion and violence." It further stated that *"In Media Rights Agenda v Nigeria [summarised above], the Commission stated that the term 'cruel, inhuman and degrading punishment or treatment' is to be interpreted so as to extend the widest possible protection against abuse, whether physical or mental. In John Modise v Botswana [summarised above], the Commission elaborated further and noted that 'exposing victims to personal sufferings and indignity violates the right to human dignity.'* It went on to state that *'personal suffering and indignity can take many forms and will depend on the particular circumstances of each communication brought before the African Commission.'*" The Commission thus held that *"forced evictions and destruction of housing carried out by non-state actors amounts to cruel, inhuman and degrading treatment or punishment, if the State fails to protect the victims from such a violation of their human rights."* It found that the *"the Respondent State and its agents, the Janjawid militia, actively participated in the forced eviction of the civilian population from their homes and villages. It failed to protect the victims against the said violations"*.
66. Thus, the Commission concluded that Article 5 had been violated.

Monim Elgak, Osman Hummeida and Amir Suliman (represented by International Federation for Human Rights (FIDH) and World Organization Against Torture (OMCT)) v Sudan, Communication 379/09

67. The three Complaints, Mr Suliman, Mr Elgak and Mr Hummeida were human rights defenders. They alleged that the State's National Security and Intelligence Service in Khartoum arrested Mr Suliman at the offices of the Khartoum Centre for Human Rights and Environmental Development and took him to an area close to the police station, where the security officers arrested Mr Elgak and Mr Hummeida. The three were taken to the security service's headquarters and questioned

over their NGO work and alleged work with the International Criminal Court. They complained that the security officers beat them, threatened to kill, and rape them, denied them medical attention and subjected them to long hours of interrogation.

68. With regards to Article 5, the Complainants submitted that they were subjected to *"a series of acts that, singly and in combination, caused severe physical and mental pain and suffering inflicted by officials with the purpose of extracting information and inflicting punishment, which amounted to torture."* These acts included: severe beatings; deprivation of medical treatment; threats and a creation of a pervasive climate of fear causing mental pain and anxiety.
69. The Commission recalled its decision in *Sudan Human Rights Organization and Center for Housing Rights and Evictions v Sudan* [summarised above], in which it set out the principal elements that constitute torture under the Charter: *"that severe pain or suffering has to have been inflicted; for a specific purpose, such as to obtain information, as punishment or to intimidate, or for any reason based on discrimination; by or at the instigation of or with the consent or acquiescence of state authorities."*
70. The Commission observed that *"these complained of acts, characterised amongst other things by severe beatings, credible threats and sleep deprivation, resulted in severe physical and mental pain and suffering on the three complainants."* It also observed that the Complainants adduced evidence in the form of a medical certificate and sworn testimonies to prove these facts and that the Respondent had not contested these facts or initiated an investigation into these facts. Therefore, the Commission held that Article 5 was violated.

Civil Liberties Organisation v Nigeria, 15 November 1999, Communication 151/96

71. The communication alleged that individuals, civilians, serving and retired military officials were detained and being held under inhuman and degrading conditions, after the government of Nigeria discovered a plot to overthrow the regime. The Nigerian government set up a Special Military Tribunal to prosecute the accused and no civilian oversight was provided.
72. The victims were held in military detention places (as opposed to regular prisons) and deprived of access to lawyers and family. They were allegedly held in dark cells, given insufficient food and no medicine or medical attention. The Respondent did not respond specifically to any of these accusations and did not provide any information to contradict the allegations of inhuman and degrading treatment.
73. The Commission held that *"while being held in a military detention camp is not necessarily inhuman ... Being deprived of the right to see one's family is a psychological trauma difficult to justify and may constitute inhuman treatment. Deprivation of light, insufficient food and lack of access to medicine or medical care also constitute violations of Article 5."*

Violations against Vulnerable Persons and Groups

Purohit and Moore v The Gambia, 29 May 2003, Communication 241/01

74. The Complainants, mental health advocates, submitted the communication on behalf of patients detained at a psychiatric unit and existing and 'future' mental health patients detained under the Mental Health Acts. They alleged that within the Lunatics Detention Act ("LDA"), which is the principal instrument governing mental health, there is no definition of who a 'lunatic' is, and that there are no provisions and requirements establishing safeguards during the diagnosis, certification, and detention of the patient. The Complainants also alleged that psychiatric units were overcrowded, and the living conditions were not independently examined. The Complainants submitted that the legislative scheme of the LDA, its implementation and the conditions under which persons detained under the Act are held, constitute separately and together violations of

respect for human dignity in Article 5 of the African Charter and the prohibition against subjecting anybody to cruel, inhuman or degrading treatment.

75. The Commission stated that;

"Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right." It reiterated that the term *"'cruel, inhuman, or degrading punishment and treatment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental"* and that *"exposing victims to 'personal suffering and indignity' violates the right to human dignity. Personal suffering and indignity can take many forms and will depend on the particular circumstances of each communication brought before the African Commission"*.

76. The Commission found that *"under the LDA, persons with mental illness have been branded as 'lunatics' and 'idiots.' Terms, which without any doubt dehumanise and deny them any form of dignity in contravention of Article 5 of the African Charter."* It also stated that the right to human dignity *"should be zealously guarded and forcefully protected by all States party to the African Charter in accordance with the well-established principle that all human beings are born free and equal in dignity and rights"*.

Physical Assault & Police Misconduct

Curtis Francis Doebbler v Sudan, 4 May 2003, Communication 236/00

77. **The complaint concerned the arrest and subsequent sentencing of female students.** During the arrest, police officers and security agents physically assaulted the students. They were sentenced with fines and lashes. The lashes were conducted in public on their bare backs using a wire and plastic whip that left scars. The Complainant stated that the sentences constituted cruel, inhuman, and degrading punishment in violation of Article 5. The facts were not in dispute, but the Respondent argued that lashings did not constitute cruel, inhuman, and degrading punishment.

78. The Commission stated that *"while ultimately whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case, the African Commission has stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses"*.

79. The Commission held that there *"is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the [African] Charter and contrary to the very nature of this human rights treaty."* Thus, it found a violation of Article 5 of the Charter.

Egypt Initiative for Personal Rights and Interights v Egypt, 16 December 2011, Communication 323/06

80. The Communication was brought by the above-named organisations on behalf of four individuals. The complaint concerned allegations that riot police committed, and failed to intervene and investigate, incidents of insults, violence, intimidation, and sexual harassment.

81. One of the individuals alleged that she had been *"pushed to the ground, her clothes torn, her private parts fondled, and her bag and documents seized from her"* whilst the police officers on the scene failed to prevent the assaults from taking place. An intelligence officer then ordered the individual to leave the scene without being able to recover her items, and investigators refused to record the statements of eyewitnesses to the assault. The individual later received threats from intelligence officers to withdraw her criminal complaint.

82. The other individuals also alleged that they were assaulted and that, whilst fleeing the attacks, were physically assaulted, including sexually assaulted, by security officers, police, and civilians. They alleged that investigators failed to take eyewitness statements and that they were threatened to withdraw their criminal complaints.
83. The individuals' cases were all dismissed before domestic courts for failure to identify the perpetrators. All individuals attended hospital after the attacks, where their physical and emotional injuries as a result of the incidents were recorded.
84. Amongst other violations of the Charter, the Complaints alleged a violation of Article 5. "The Complainants stated that the treatment received amounted to a violation of their dignity and to inhuman and degrading treatment and that the assaults were severe and gravely humiliating in violation of Article 5 of the African Charter. They cite[d] the case of Purohit and Moore v. The Gambia, [summarised above] where the African Commission ascertained the test for violation of human dignity." The Article 5 allegations included both the actual violence they experienced by state forces and the failure of the police to prevent and investigation the violence inflicted by other civilians.
85. The Commission confirmed the scope of inhuman and degrading treatment as going beyond physical and psychological suffering. It cited *International Pen and Others v Nigeria* (summarised above), confirming that Article 5 include actions "which humiliate the individual or force him or her to act against his will or conscience". It also confirmed that Article 5 violations should be "established on the circumstances of each case", and that Article 5 should be interpreted as widely as possible.
86. The Commission looked at the questions of "whether sexual molestation is not 'inhuman and degrading' to qualify as a violation under Article 5 of the African Charter. Is it not tantamount to sexual humiliation, especially with the use of degrading references such as whore and slut?" The Commission recognised there was an "aspect of indignity" and held that the treatment had reached the level of severity required. Thus, it found that "the treatment against the Victims amount[ed] to physical and emotional trauma. The treatment also had physical and mental consequences obvious from the injuries sustained".
87. On the issue of whether a failure to investigate acts that are inhuman and degrading or impact upon dignity could amount to an Article 5 violation, the Commission looked at the 'Guidelines and Measures for the Prohibition of Torture, Inhuman and Degrading Treatment or Punishment in Africa', the 'Declaration on the Elimination of Violence against Women' and the jurisprudence of the Inter-American Court of Human Rights. All referred to the State's due diligence obligation to investigation or respond to violations. It also acknowledged that the Charter created an obligation to prohibit inhuman and degrading treatment, and also looked at Egypt's other treaty commitments which provided similar obligations. On the facts, it found that Egypt had failed to conduct an effective investigation.
88. Thus, the Commission concluded that Egypt "owed an obligation to the Victims to effectively investigate the acts of ill-treatment that impacted on their dignity and punish the perpetrators accordingly. Failing to do so only amounted to an infringement of the rights of the Victims under Article 5". The Commission held that Egypt was in violation of Article 5, as well as other articles of the Charter, and urged Egypt to ratify the Protocol to the African Charter on the Rights of Women in Africa.

Gabriel Shamba v Zimbabwe, 2 May 2012, Communication 288/04

89. The Complainant, a human rights lawyer, was arrested while in his office. During the arrest, he alleged he was physically assaulted by the officers, detained without charge, and denied food and water. He was also stripped naked, had his hand and feet bound in a foetal position and a plank was placed between his legs and arms. Whilst in this position, he was questioned and threatened

with death. He also alleged that he was electrocuted, and a chemical substance was applied to his body, that he was forced to drink his own urine and blood and on which he was urinated. He asserted that this Article 5 rights had been violated.

90. The Commission recognised that the *"African Commission, in several previous decisions, has set out the principle that where allegations of human rights abuse go uncontested by the Government concerned, the African Commission must decide on the facts provided by the Complainant and treat those facts as given."* In any event, the Commission found that the Complainant had *"submitted more than adequate evidence to support the ... allegations of torture and ill-treatment"* that should have prompted an official investigation by the Respondent. The Commission declared that the Respondent violated the right of the victim not to be tortured and ill-treated as recognised in Article 5.

Citizenship, Nationality & Related Rights

Open Society Justice Initiative v Côte d'Ivoire, 27 May 2016, Communication 318/06

91. The Complainant alleged that the Respondent's nationality laws constituted an arbitrary violation of the right to nationality. The Complainant pleaded that the right of recognition of legal status is guaranteed by Article 5 of the Charter and imposes on the Respondent State an obligation to prevent statelessness.

92. On this, the Commission considered whether the right to nationality falls within the right to recognition of legal status, as protected by Article 5. The Commission held that "nationality is a basic component of this right in view of the fact that it is the legal and socio-political manifestation". In ascertain what 'nationality' is, the Commission looked at the decision of the ICJ which found that nationality is "a legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties." The Commission recognised that "legal haziness" in relation to nationality laws could violate Article 5 as it "renders it impossible to precisely determine the criteria for the acquisition of the legal status of a national or a foreigner". After an assessment of the facts, the Commission held that "on the right to nationality as a recognition of legal status, the Commission observes that the Ivorian nationality Code establishes original nationality for Ivorians and acquired nationality for foreigners but fails to clearly define who an outright Ivorian is, who an Ivorian by origin is and who a foreigner is. This way, the Code and laws adopted by successive Governments of the Respondent State have prevented access to nationality both theoretically and practically." Therefore, it found that the laws and practices of the Respondent violated Article 5.

93. The Complainant also alleged that Article 5 was violated by the discriminatory application of the nationality laws, which deprived certain individuals of any legal identity and amounted to a violation of the right to respect of dignity inherent in a human being. The Commission recognised the crucial importance of the right to respect of dignity, holding that "[w]hen dignity is lost, everything is lost. In short, when dignity is violated, it is not worth the while to guarantee most of the other rights." It confirmed that "dignity and legal status are fundamentally interdependent". Therefore, the Commission held that "that failure to grant nationality as a legal recognition is an injurious infringement of human dignity" and that "the violation of [the victims'] right to dignity is constituted by the mere fact that they have been prevented from living in dignity in Côte d'Ivoire as members of the universal and Ivorian human society".

The Nubian Community in Kenya v Kenya, 28 February 2015, Communication 317/2006

94. The Complainants submitted that the restrictions imposed on Kenyan Nubians to obtain recognition of their Kenyan citizenship amounted to an arbitrary deprivation of the right to effective nationality, preventing recognition of their legal status in violation of Article 5 of the Charter. The complaint alleged that many Nubians had been rendered stateless as a result of these restrictions.

95. The Commission recognised that States have an obligation to prevent statelessness. It found that the "facts of the present case reveal that Kenya has been remiss in fulfilling its obligation to prevent Statelessness because its arbitrary administrative practices affect the ability of Nubians to obtain ID cards, which have the effect of placing them outside the State's juridical system, thereby rendering many of them stateless." Therefore, it concludes that "[b]y failing to take measures to prevent members of the Nubian Community from becoming stateless and by failing to put in place fair processes, devoid of discrimination and arbitrariness for the acquisition of identity documents, the Commission considers that Kenya has failed to recognize the legal status of Nubians, in violation of Article 5 of the Charter."

Detention & Treatment in Prisons

Krishna Achuzhan (on behalf of Aleker Banda), Amnesty International (on behalf of Ortan and Vera Chirwa) v Malawi, 27 April 1994, Communication 64/92, 68/92 and 78/92

96. The complaint concerned the detention and treatment of individuals in prison. Mr. Banda was detained in prison for 12 years without a legal charge or trial and Chirwas were held without access to legal representation and held in solitary confinement without access to adequate medical health, given poor food and shackled for prolonged periods of time.

97. The Commission held that the "conditions of overcrowding and acts of beating and torture that took place in prisons in Malawi contravened ... article [5]. Aspects of the treatment ... such as excessive solitary confinement, shackling within a cell, extremely poor-quality food, and denial of access to adequate medical care, were also in contravention of" Article 5.

Trafficking in Persons and Modern Slavery

Malawi Africa Association v Mauritania, 11 May 2000, Communication 54/91, 61/91, 96/93, 98/93, 164/97 and 196/97

98. The Complaints, 54/91 and 98/93 alleged that a majority of the Mauritania population, over 100,000 Black slaves living in Beidouns houses and over 300,000 freed slaves who bought their freedom remain second grade citizens. They cannot speak their own language and any freed slaves kept close traditional and social links with their former masters, which constituted another form of exploitation.

99. During its mission to Mauritania, the Commission found that "*The descendants of slaves find themselves in the service of the masters, without any remuneration. This is due either to the lack of alternative opportunities or because they had not understood that they had been freed of all forms of servitude for many years.*" Therefore, the Commission concluded that "*there was a violation of article 5 of the Charter due to practices analogous to slavery and emphasise[d] that unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being. It furthermore considers[ed] that the conditions to which the descendants of slaves are subjected clearly constitute exploitation and degradation of man; both practices condemned by the African Charter. However, the African Commission [could] not conclude that there is a practice of slavery based on this evidence before it.*"

Extra Judicial Killings and Enforced Disappearances

Commission Nationale des Droits de l'Homme et des Libertés v Chad, Communication 74/92

100. The complaint concerned attacks, detention, torture and ill treatment in detention and the assassination of individuals by State and non-State actors. The complaint alleges Government agents violated the rights outlined in the Charter by failing to protect the rights from violation by other parties, including the violation of Article 5. The Respondent asserted that no violations were

committed by its agents and that it had no control over the violations committed by other parties as Chad was in a state of civil war.

101. The Commission stated that the African Charter does not allow for derogation during emergency situations. It held that Chad had the "*responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders*". With respect to Article 5, as with the other violations, the Commission found that there had been no substantive response from the government, only a "*blanket denial of responsibility*". Thus, it stated that "*where allegations of human rights abuse go uncontested by the government concerned, the Commission must decide on the facts provided by the complainant and treat those facts as given. This principle conforms with the duty to protect human rights*". Therefore, it found a violation of Article 5.

Mouvement Burkinabè des Droits de Lhomme et des Peuples v. Burkina Faso, 7 May 2001, Communication 204/97

102. The complaint concerned several human rights violations committed in Burkina Faso. One of these alleged violations concerned the disappearance of persons accused of plotting against the State. Amongst other articles, the Complainant alleged a violation of Article 5.

103. The Commission held that forced disappearance constitutes a violation of Article 5, noting "*any acts leading to forced disappearances excludes the victims from the protection of the law and causes grave suffering to the family and the victims. It constitutes a violation of rules of international law, especially the right not to be subjected to torture or any other inhuman, or degrading treatment or punishment*".

104. In making this finding, the Commission confirmed that "*Article 5 of the Charter guarantees respect for the dignity inherent in the human person and the recognition of his legal status. This text further prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture cruel, inhuman or degrading punishment and treatment*".

Child Marriage

Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia 341/2007

105. The complaint concerned a young girl aged 13 known as Negash who was abducted and raped, held for a month and thereafter forced to sign a marriage contract. She managed to escape after a month and reported the matter to the police. The perpetrator and his accomplices were convicted and sentenced to 10 years and 8 years respectively without Parole. The perpetrators appealed the decision, and the High Court quashed the conviction of the 5 men stating that the evidence on record suggested that the act was consensual.

106. The commission found that the acts of violence against Negash and the subsequent failure by the state to prevent further abuse was in violation of Article 5.

107. The Commission held that :

"...When Ms Negash was abducted and kept captive on both occasions, her liberty was manifestly violated, and her person grossly invaded. Accordingly, the abduction of Ms. Woineshet Zebene Negash by the private individuals was a clear infringement of both the liberty and the security of her person guaranteed under Article 6 of the Charter. However, this does not per se entail the international responsibility of the Respondent State, which is considered below. Secondly, Article 5 of the Charter guarantees that every individual shall have the right to respect of the dignity inherent in a human being. Human dignity is the fountain of all other rights. At the core of human dignity is the idea and recognition that a human being has unique worth, value and significance that is innate, and not acquired. It also entails that a human being is a moral agent possessed with the conscience and personal volition to decide what happens to his or her body. The right to

respect of dignity is a guarantee that a human being should not be subjected to acts or omissions that degrade or humiliate him or her. The worth, value and significance of a human being may not and need not be conceptualised with scientific precision. As such, the point at which the intensity of a given act or omission amounts to degradation of a human being cannot and need not be delineated and fixed with mathematical precision. The preoccupation of human rights law which recognises human dignity is the pragmatic protection of rights as opposed to vexing over theoretical conceptions of dignity. Thus, in addition to guaranteeing the dignity of a human being, Article 5 of the Charter also enunciates the clear principle that all forms of degradation and exploitation of human beings shall be prohibited. It further provides for a sample of acts and omissions which in and of themselves amount to exploitation and degradation of a human being. These listed acts outright constitute violations of the dignity of a human being and are prohibited without reserve. Specifically: slavery, slave trade, torture, cruel, inhuman, or degrading punishment and treatment are absolutely prohibited. Beyond the listed acts, there is a spectrum of acts or omissions that would constitute exploitation and debasement of a human being depending on the circumstances. In this regard the list of prohibited acts and omissions that amount to exploitation and degradation of a human being is not closed under Article 5 of the Charter.

V. Other Relevant Regional, Sub-Regional and National Bodies

108. This section considers the decisions of other relevant regional and sub-regional human rights bodies and their interpretation of Article 5. These bodies include the African Court, the African Children's Committee, and the Economic Community of West African States' Court of Justice.

I. Jurisprudence of the African Court on Human and Peoples' Rights (the "Court")

109. The majority of Article 5 cases that have reached the merits stage at the Court concern the detention of an individual in a state prison or jail and their treatment in that context. Most claims have also concerned allegations of torture and cruel, inhuman, or degrading punishment and treatment.

a) Burden of proof

110. The Court has confirmed that in cases concerning Article 5, the burden of proof does not solely lie with the claimant. The Court requires that claimants provide *prima facie* support for their allegations and the burden then shifts to the respondent to disprove the allegations. The term *prima facie* denotes that, upon initial examination, a legal claim has sufficient evidence to proceed to trial or judgment. On the other hand, the burden proof has been interpreted by the court to mean proof that the victim suffered harm and that the harm suffered was caused by the violation perpetrated by the Respondent State. The burden of proof is on the applicant(s); however, the burden may shift to the Respondent State in certain circumstances where the applicant can demonstrate that the other party has more, or exclusive access to relevant information about the case¹⁴. The preponderance of the evidence is the standard of proof to be met or claims before the Court, meaning that the applicant carries the burden of providing proof to show that what has occurred is more probable than not. As a human rights court, the Court is not bound to apply the standard strictly, but like other regional human rights courts may remain flexible, allowing for the circumstances of each case to be considered and remaining sensitive to victim conditions of vulnerability affecting their access to evidence¹⁵. The Court has however confirmed that general statements by claimants regarding a breach of Article 5 will not suffice in substantiating the claims. The Court will evaluate all the circumstances of the case with a view to establishing the facts.

¹⁴ African Court on Human and Peoples' Rights Fact Sheet on filing reparation claims pg. 6

¹⁵ African Court on Human and Peoples' Rights Fact Sheet on filing reparation claims pg. 6

b) Substance of Article 5

111. In cases concerning allegations of torture, the Court has looked to the definition of torture as set out in Article 1 of the United Nations Convention Against Torture. As a result, the Court has held that for an act to be deemed torture, it must cause severe mental or physical pain which was intentionally inflicted for a particular purpose particularly to obtain information or a confession from him/her or a third person, to punish him/her for an act that s/he or a third person, or for any other reason based on any form of discrimination whatsoever, when such pain or suffering is inflicted by a public official public or any person acting in an official capacity.
112. In cases concerning allegations of cruel, inhuman, or degrading punishment and treatment, the Court has held that Article 5 of the Charter is absolute and that acts in breach of the provision can take various forms. A determination whether the right has been breached will depend on the circumstances of each case. The Court has indicated that an act should meet a threshold of severity, intention, and severe humiliation.
113. Recently, the Court has also found that a right to dignity is also encompassed within Article 5. The Court has held that torture and cruel, inhuman, or degrading punishment and treatment would violate the right to dignity. The Court has also held compromising an individual's reputation would be a violation.

c) Specific acts falling under Article 5

114. Based on the jurisprudence of the Court, the failure to provide food during detention, prolonged detention, failure to provide medical treatment during detention, the making of statements that compromise an individual's reputation in the eye of their partner and the public at large and a sentence of execution by hanging could be deemed a breach of Article 5.
115. The Court has held that a delay in the hearing of an appeal, having to sleep on the floor without a blanket during detention, restricted access to friends and relatives during detention and court decisions (which an applicant alleged tarnished their reputation) do not constitute a violation of Article 5¹⁶. Note though the Court did find that undue delay amounted to a violation of Article 7 of the Charter but did not define what would amount to undue delay. In this instance, the court stated that the complainant was arrested in October 2005 but it was not until 2010 that he was actually convicted which was after a period of almost five years. The Court found that the whole trial process was unduly prolonged, which constituted an infringement of his right to be tried within a reasonable time under Article 7 of the Charter¹⁷.
116. Claimants have attempted to raise claims of an Article 5 breach outside of the context of acts committed because of, or during detention in a jail or prison, but most of these claims have been dismissed on admissibility grounds for other reasons and therefore have not been dealt with on the merits. For example, claimants have alleged a breach of Article 5 for dismissal from a university position, where they have been the victim of a crime, but the domestic courts have convicted the perpetrator of a lesser crime and for treatment of demonstrators during a protest. Given that these claims were not assessed at the merits stage, it is unclear whether the Court would have found these acts to constitute a breach of Article 5.
117. The Court has also held that the implementation of the death penalty by hanging, where such a penalty is permitted, is “inherently degrading” and “encroaches upon dignity in respect of the prohibition of cruel, inhuman and degrading treatment” and constitutes a violation of the right to dignity under Article 5 of the Charter.

¹⁶African Court No. 001/2015 : Armand Guehi v United Republic of Tanzania

¹⁷ African Court No. 001/2015 : Armand Guehi v United Republic of Tanzania ,Para 9 (iv)

118. There is currently an on-going case before the Court concerning an allegation of a violation of Article 5 in relation to a costs award levied against an individual who brought a public interest litigation in Zambian courts. At the time of writing, there has not been a ruling on the merits but any merits ruling on this issue should be monitored.ⁱ

d) Summaries of the Court's decisions on Article 5

119. Summaries of the Court's decision dealing with Article 5 that have been reviewed for the purpose of this report are included below. Only findings in relation to Article 5 in each case have been included.

Alex Thomas v Tanzania (merits) (2015) 1 AfCLR 465

120. The Claimant was convicted of armed robbery and sentenced to thirty years' imprisonment. He alleged that the undue delay in the hearing of his appeal and review by Tanzanian courts amounted to torture and cruel, inhuman, and degrading punishment and treatment contrary to Article 5.

121. Whilst the Court found that an undue delay had occurred, it stated that it had to determine if undue delay would amount to a violation of Article 5.

122. The Court took into consideration the 2008 African Commission's Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa. The guidelines refer to the definition of torture as set out in Article 1 of the UN Convention Against Torture:

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

2. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider Application."

123. The Court held that in light of the above language, Mr Thomas has not proved that delay in the hearing on his appeal amounted to torture, The Court reasoned that this was because he had "not proved that the delay caused him severe mental or physical pain which was intentionally inflicted for a particular purpose."

124. The Court also found that the delay did not amount to cruel, inhuman, and degrading punishment and treatment, as it did "not meet the threshold of severity, intention, and severe humiliation required by the definitions established in jurisprudence."

125. Finally, the Court also held that delay did "not per se, constitute cruel, inhuman or degrading punishment and treatment, even if it may have caused the Applicant mental anguish".

Peter Joseph Chacha v Tanzania (admissibility) (2014) 1 AfCLR 398 – Separate opinion Akuffo, Thompson and Kioki

126. The Applicant alleged that he was unlawfully arrested, interrogated, detained, charged, and imprisoned without trial. The Court declared the application inadmissible due to non-exhaustion of local remedies.

127. Three judges, Akuffo, Thompson and Kioki, issued a dissenting opinion. In that opinion, they found that the claims were admissible and dealt with the merits. They found that Article 5 had been violated based on the following facts:

"... the Applicant was purportedly arrested when he presented himself at the Police station to enquire why his wife was being detained. Strangely, no warrant of arrest had been issued against the Applicant at any time during the period of two months that, as alleged in Court, he had run away, and the Police were looking for him. In the absence of a warrant of arrest, the Police could arrest the Applicant provided that they complied with the other procedural requirements particularly that requiring that he be arraigned in court within twenty (24) hours. There is no good reason, and none was provided to this Court for not charging him in court within twenty (24) hours and for detaining him at the Police Station for fourteen (14) days in violation of the Criminal Procedure Act and the Charter. In addition, the charges in these cases kept metamorphosing and increasing year to year. From the time the Applicant was arrested and detained in remand and subsequently in prison awaiting trial from 26 October 2007 to 3 May 2013, when he was released, a period of about five and half years had lapsed."

Onyachi and Njoka v Tanzania (merits) (2017) 2 AfCLR 65

128. The Claimants submitted that, following their arrest, they were detained for four days in a police cell without food and access to the outside world. They alleged that their detention violated Article 5.

129. The Court acknowledged that *"human rights violations relating to cases of incommunicado detention and enforced disappearances are shrouded with secrecy and are usually committed outside the shadow of law and public sight. The victims of human rights may thus be practically unable to prove their allegations as the means to verify their allegation are likely to be controlled by the State."* As a result, the Court held that neither party alone bore the burden of proving the facts.

130. However, the Court found that the applicants had not submitted *"any prima facie* evidence to support their allegation which could enable the Court to shift the burden of proof to the Respondent" and dismissed their article 5 allegations for lack of merit.

Mugesera v Rwanda (provisional measures) (2017) 2 AfCLR 149

131. The Claimant applied for provisional measures requesting an order that he be allowed to access his lawyers, be visited, and communicate with family members and have access to medical care.

132. The Claimant alleged to be a victim of cruel, inhuman, and degrading treatment, in violation of Article 5. He alleged this on the basis on the following facts: *"a. an ... atmosphere of fear and intimidation ...; b. his inclusion on the list of people to be executed; c. constant death threats by security agents, police and prison wardens; and d. refusal to provide him with sufficient food."* He also argued that lack of access to medical care amounted to cruel, inhuman and degrading treatment.

133. Whilst not ruling on the merits of the Article 5 claim, the Court ordered that the Claimant be allowed access to all medical care required, and that the Respondent refrain from any action that may affect the Claimant's physical and mental integrity and health.

Johnson v Ghana (provisional measures) (2017) 2 AfCLR 155

134. The Claimant had been convicted of murder and sentenced to death. The Claimant alleged, inter alia, that the imposition of the mandatory sentence of death, without consideration of the individual circumstances of the offence or the offender, violated the prohibition of cruel, inhuman, or degrading treatment or punishment under Article 5. The Claimant requested provisional

measures to suspend his execution until his case before the Court was determined. The Court ordered provisional measures, reasoning that the risk of execution of the death penalty would jeopardise the enjoyment of the right guaranteed under Article 5.

Nguza v Tanzania (merits) (2018) 2 AfCLR 287

135. The Claimants were convicted and sentenced for rape and unnatural offences." They claimed that their detention and trial violated Article 5. Specifically, they contended that they were ill-treated by police officers who insulted and molested them and that they were held there incommunicado for four days. They also claimed that they were put in a cell which had unbearable sanitary conditions.

136. On the burden of the proof, the Court reiterated its position in *Onyachi and Njoka v Tanzania (merits) (2017) 2 AfCLR 65* (summarised above) that cases of incommunicado detention are usually shrouded in secrecy and would mean that "*victims of human rights may thus be practically unable to prove their allegations as the means to verify their allegation are likely to be controlled by the State.*" The Court also relied on ICJ jurisprudence and stated that "*neither party is alone in bearing the burden of proof and the determination of the burden of proof depends on the type of facts which it is necessary to establish for the purposes of the decision of the case.*" It is therefore for this Court to evaluate all the circumstances of the case with a view to establishing the facts".

137. However, the Court held that the Claimants had not submitted any *prima facie* evidence to support their allegations which could enable the Court to place the burden of proof on the State. Therefore, it dismissed the Article 5 claims.

Mango v Tanzania (merits) (2018) 2 AfCLR 314

138. The Claimants had been convicted and sentenced for armed robbery and claimed a violation of Article 5 as a result of their detention and trial.

139. In dealing with the Article 5 claims, the Court held that "[o]ther than claiming that they were denied medical treatment and they overstayed in police custody, the Applicants make general statements in this regard." The Court added that "[g]eneral statements to the effect that this right has been violated are not enough. More substantiation is required." It found that the Claimants were making general claims regarding Article 5 without substantiation and therefore dismissed the claims.

Guehi v Tanzania (merits and reparations) (2018) 2 AfCLR 477

140. The Claimant had been convicted and sentenced to death for the murder of his wife. He claimed a violation of Article 5 because of his detention and trial. Specifically, he claimed the Respondent violated his right not to be subjected to inhuman and degrading treatment by detaining him for ten days in extremely poor conditions, including being given little to no food, having to sleep on the floor without blankets with the same set of clothes, and being deprived of the support of his friends and relatives. He claimed that he was questioned without being given food or water for extended periods of time and that food was only provided to him on two occasions over the course of ten days.

141. The Court noted "*that the allegations being examined relate to deprivation of food, conditions of detention, and restriction of access to friends and relatives.*" It further noted that "*the prohibition of cruel, inhuman and degrading treatment under Article 5 of the Charter is absolute [and] ... such treatment can take various forms and a determination whether the right was breached will depend on the circumstances of each cause.*"

142. The Court held that "*the ordinary evidentiary rule that who alleges must prove may not apply rigidly in human rights adjudication*". It restated its position in *Onyachi and Njoka v Tanzania (merits) (2017) 2 AfCLR 65* (summarised above) that "*in circumstances where the Applicants are in custody and unable to prove their allegations because the means to verify the same are likely to be in the*

control of the State, the burden of proof will shift to the Respondent State as long as the Applicants make a prima facie case of violation".

143. The Court found that the Claimant had adduced prima facie evidence that he was given food only two times in the course of ten days. It held that the Respondent bore the duty to provide the Claimant with food so long as he was in its custody. The Court stated that "*[o]nce the Applicant adduces prima facie evidence that he was not given food on a regular basis, the burden shifts to the Respondent State to prove the contrary. Given that it has not done so in the present circumstances, this Court finds that the Respondent State violated the Applicant's right not to be subjected to inhuman and degrading treatment.*"

144. With regard to the allegations that the Claimant was left to sleep on the floor without a blanket and restricted from accessing friends and relatives, the Court held that "*that detention conditions necessarily involve some restrictions of movement, communication and comfort.*" It held that the Claimant had not adduced any prima facie evidence to support these allegations and they were therefore dismissed.

Urban Mkandawire v Malawi (admissibility) (2013) 1 AfCLR 283

145. The applicant sought redress following his dismissal as lecturer by the University of Malawi. He alleged generally that the dismissal violated Article 5. The Court held that this claim was inadmissible due to failure to exhaust local remedies and therefore did not deal with the merits of the claim.

App. No. 020/2015 Livinus Daudi Manyuka v. United Republic of Tanzania, Judgement of 28 November 2019

146. The applicant alleged that the Respondent had violated Article 5 through the judgment of its domestic court which ordered him to be caned. The applicant submitted that caning violates the right to respect, dignity and integrity of the person as protected under the Article 5 of the Charter.

147. The Court found the claim was inadmissible as it had not been filed within a reasonable time after the exhaustion of local remedies and therefore did not deal with the merits of the claim.

Kouma and Diabaté v Mali (merits) (2018) 2 AfCLR 237

148. The Claimants were attacked by a man with a machete in 2014. They alleged that the Mali national courts incorrectly classified the facts of the case. They asserted that the fact of classifying the acts of their aggressor as assault rather than attempted murder with premeditation resulted in the violation of their dignity and rights under Article 5. The Court declared the case inadmissible finding that the Claimants had contributed to the prolongation of the national proceedings and had not shown that local remedies were insufficient. Therefore, the Court did not deal with the merits concerning Article 5.

App. No. 007/2015 Ally Rajabu and Others v. United Republic of Tanzania, Judgment of 28 November 2019

149. The applicants, who were sentenced to death, alleged that the execution of the death penalty by hanging violates the right to dignity under Article 5. The Respondent State submitted that the death penalty is not abolished in international law. The Court found that the methods used to conduct the death penalty amounted to torture and inhuman and degrading treatment given the level of suffering. The Court therefore found that the Respondent State had violated Article 5 of the Charter.

App. No 013/2017 Sébastien Germain Ajavon v Republic of Benin, Judgment of 29 March 2019

150. The applicant was acquitted for cocaine trafficking offence by the Cotonou First Class Court of First Instance. He was subsequently sentenced to twenty years in prison by the newly created Anti-

Economic Crimes and Terrorism Court. He contested this ruling and asserted several violations of the Charter, including under Article 5. The applicant alleged that there was a violation to his right to respect for dignity and reputation, covered by Article 5 of the Charter. He alleged that he was brutally arrested without explanation as to why he was arrested and the arrest was conducted instantly, without consideration, and in a *"high-handed and brutal manner"* without prior notice. The Court held that an arrest must *"be based on plausible grounds, that is, on facts or information capable of persuading an objective observer that the person arrested may have committed the offence."* Based on the facts of the case, the Court held that the arrest conformed to this test. The Court also held that the applicant had not provided a description of the acts that constituted the brutalities alleged. Thus, the Court dismissed the claim based on this ground.

151. The applicant also alleged that remarks made by the Respondent's Head of State to the media and public had tainted the applicant's reputation and dignity. The Head of State had made statements regarding the case of cocaine trafficking against the applicant without mentioning the fact that applicant had been acquitted of such charges by the Cotonou First Class Court of First Instance. The Court held that these statements *"would compromise the Applicant's reputation and dignity in the eyes of his partners and in the public at large"* and thus were a violation of Article 5 of the Charter. The applicant also alleged that the court decision acquitting him also soiled his reputation and honour in violation of Article 5. The Court held that *"in law or in fact, a court decision cannot be regarded as a reason to tarnish the honour or reputation of an individual"* and dismissed this argument.

II. African Committee of Experts on the Rights and Welfare of the Child (the African Children's Committee or "Committee" or "ACERWC")

a) Substance of Article 5

152. **Article 16 of the African Charter on the Rights and Welfare of the Child mirrors in principle, the provisions of Article 5.**¹⁸In two cases identified where a violation of Article 5 of the Charter was asserted, the Committee held that it did not have a mandate to pronounce violations on instruments other than the African Charter on the Rights and Welfare of the Child¹⁹. Therefore, it considered the Article 5 allegations under the relevant provisions of the African Charter on the Rights and Welfare of the Child. This position was a missed opportunity to ensure states comply with Article 5 of the African Charter with respect to Children and adolescents. Nevertheless, the Committee's decisions concerning cases where Article 5 violations have been alleged are summarised below. This is to aid in the understanding of what types of incidents are being cited by complainants as violating Article 5. As with the above decisions, only information about the Committee's finding relating to Article 5 has been included.

African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) V. the Government of Republic of Sudan, No. 005/Com/001/2015, Decision of May 2018

153. The complaint concerned an individual female's access to university and loss of nationality. The female's deceased father was born in Juba, but the family resided in a town in Sudan and the female had completed her primary and secondary education in Sudan. The female applied for university in Sudan after the secession of South Sudan occurred. Sudan had passed a law revoking the Sudanese nationality of individuals where a parent's nationality is revoked on the basis of de facto or de jure entitlement to South Sudanese nationality. The university application form required that she indicate her national identity details (including a national identity number), which she did not have.

¹⁸ Article 16(1) ACRWC. States Parties to the present Charter shall take specific legislative, administrative, social, and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.

¹⁹ ACERWC Comm No : 006/Com/002/2015 : The Institute for Human Right and Development in Africa and Finders Group Initiative on Behalf of Tfa (A Minor) Against the Government the Republic of Cameroon

154. When she attempted to apply for a nationality certificate using her birth certificate, she was told that she had lost her Sudanese nationality as her father would have become South Sudanese upon the separation of Sudan and South Sudan. This resulted in the individual not being able to attend university and becoming stateless.

155. Amongst other complaints under the African Charter on the Rights and Welfare of the Child and the Charter, the Complainants argued that the arbitrary deprivation of nationality violated the individual's right to dignity and legal status under Article 5. On this point, the Committee held that it did not have a mandate to pronounce violations on other instruments apart from the African Charter on the Rights and Welfare of the Child and could only draw inspiration from other international human rights instruments. It therefore held that it was not able to find violations of rights enshrined under the African Charter. Instead, it considered the allegations brought under the Charter (which included the Article 5 allegations) under Article 11 of the African Charter on the Rights and Welfare of the Child concerning the Right to Education. The Committee found that Sudan had violated Article 11 (as well as other provisions of the African Charter on the Rights and Welfare of the Child).

The Institute for Human Right and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) V. The Government of Republic of Cameroon, No. 006/Com/002/2015, Decision of May 2018

156. The Complainants stated that a minor, aged 10, was raped on various occasions. This had been confirmed by a medical examination. The victim's aunt went to the police. The victim had been asked to lead the police to the suspect's house. Upon reaching the house, which belong to a prominent and influential figure in the area, the police did not enter. The suspect was then reported to have left the area. He was later summoned to an identification parade, where he disguised himself. When the victim was called to identify the suspect from the line-up, the lawyers of the suspects yelled at her. This scared the victim, and she was unable to identify the suspect.

157. The Complainants further stated that under domestic law, the suspect should have been remanded in custody during the investigation, but this did not happen. The case was filed at the relevant court, which dismissed the evidence. A lawyer later requested this court decision, but the court refused to hand over a copy. The Complainants alleged this refusal violated domestic law. The victim's aunt and lawyer were later charged with defamation over the aunt expressing her frustration about the matter and stating that she believed the magistrate who dealt with the case was corrupt.

158. The Complainants alleged that the failure by the Respondent to investigate the crime violated, amongst other provisions, Article 5 of the Charter.

159. The Committee found that whilst it could draw inspiration for other international human rights treaties, including the Charter, it did not have a mandate to find violations of these instruments. It was only mandated to find violations under the African Charter on the Rights and Welfare of the Child. It therefore did not consider the Article 5 allegations. Nevertheless, the Committee did consider the allegations under Article 16 of the African Charter on the Rights and Welfare of the Child regarding an individual's right to be free from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse. It found that the lack of due diligence to investigate the rape and effectively prosecute and punish perpetrator, as well as the failure to ensure effective remedy to the victims, was a violation of Article 16.

Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania Communication No: 0012/Com/001/2019

157. The Legal and Human Rights Center and Center for Reproductive Rights, both non-governmental organizations filed a case against the United Republic of Tanzania, acting on behalf of Tanzanian girls. The Communication challenged the government of Tanzania's policy and practice of subjecting

primary and secondary school girls to forced pregnancy testing and expelling them from school when they are found to be pregnant or married. It was the Complainants' case that, due to these policies and practices, thousands of schoolgirls were dropping out of school each year due to pregnancy.

158. The communication alleged that Tanzania's policy and practice of mandatory pregnancy testing, expulsion of pregnant and married adolescent girls, denial of re-entry back to the formal education system, and detentions, violated the rights of Tanzanian girls' right to education, right to equality and non-discrimination, right to health as it includes the right to access sexual and reproductive health services, and right to be free from cruel, inhuman, and degrading treatment, amongst others.

159. ACERWC found that the mandatory pregnancy testing of girls and their expulsion from school when found pregnant or married impairs the enjoyment of their rights under the Children's Charter and that such practice is discriminatory within the ambit of article 3 of the Children's Charter and violates the right to dignity, freedom from torture. Similarly, the detention of girls who have not committed or are not suspected of having committed a crime but are survivors of the suspected crime, violates children's right not to be unlawfully or arbitrarily deprived of their liberty. This detention negatively impacts upon girls' dignity and physical and mental integrity²⁰. ACERWC highlighted that Tanzania had not fulfilled its obligation to provide children with legal protection in conditions of freedom, dignity, and security in as far as it had failed to investigate suspected illegal detentions, and to prevent such illegal detentions from occurring.²¹

160. ACERWC noted that education that is being provided by States should align with respect for human rights and fundamental principles set out in human rights instruments²². Therefore, schools should be free from any kind of violence, abuse, and practices that result in deprivation of rights²³. In addition, forced or mandatory pregnancy testing to access education is a pre-condition that is not aimed at fostering education, rather it violates the right to dignity, freedom from torture and the right to privacy of children. As such, mandatory pregnancy testing is a violation of the right to education.

161. Agreeing with the African Commission that the right to health includes the right to control one's health and body and the right to be free from interference,²⁴ ACERWC specified that enforcement of mandatory pregnancy testing in schools does not respect the right to health in this regard and that the fulfilment of the right to health includes the facilitation of access to information and services which includes access to comprehensive, age-appropriate sexuality education on consent to sex.

II. Economic Community of West African States Court of Justice ("Court of Justice")

a) Burden of proof

162. On the burden of proof, the Court of Justice has held that applicants need to provide prima facie evidence to substantiate their claim of an interference with their rights. Where evidence is produced, the burden then shifts to the State to produce evidence to show that the State was not responsible.

163. The Court of Justice has provided examples of the type of evidence it deems sufficient to discharge an applicant's burden of proof. This could include corroborative depositions under oath; pictures and videos; newspaper articles; factual information on certain elements linked to the alleged

²⁰ ACERWC, Communication No. 006/Com/002/2015, IHRDA and Finders Group Initiative on behalf of TFA v. Cameroon, para 68.

²¹ ACERWC, Communication No 0012/Com/001/2019, Decision on, Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania, para 35

²² Article 11 (2) (b) of the ACERWC

²³ 4] ACERWC, Communication No 0012/Com/001/2019, Decision on, Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania, para 41

²⁴ ACHPR, Communication 379/09: Monim Elgak, Osman Hummeida, and Amir Suliman (represented by FIDH and OMCT) v Sudan (2015) para 134.

violation (for example, information about a vehicle used in operations to destroy homes); expert evidence when health allegations are made; oral testimony; and documentary evidence.

164. In one case, the Court of Justice has indicated that something more than proof of assault is needed to prove that the assault amounts to torture. In that case, the applicant had proved an assault had occurred by submitting photographs and medical reports and an INTERPOL report confirming he had been assaulted. However, the Court of Justice found that he had not proved the assault amounted to torture.

b) Substance of Article 5

165. The Court of Justice has held that a party alleging torture must prove a high minimum of severity to fall within the meaning of 'torture,' and that some acts of physical assault that are acts of cruel, inhuman, or degrading treatment or punishment could also not amount to torture. The Court of Justice has held that for acts to be mental or psychological forms of torture, they need to cause disruptions of the senses or personality.

166. It has held that for treatment to be "degrading," the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment.

167. The Court of Justice has held that forced eviction and destruction of homes leaving individuals internally displaced will violate the right to dignity. It has also held that negative press by the respondent in the run up a trial will not violate the right to dignity.

168. The Court of Justice has also confirmed that the failure to protect an individual from slavery is a violation of Article 5.

c) Summaries of the Court of Justice's Decisions on Article 5

162. Below is a non-exhaustive list of case summaries in which the Court of Justice has considered Article 5. For the purposes of this report, the Court of Justice cases have only been included below where: the case concerns certain situations not covered in any of the above-mentioned cases; and/or the Court of Justice has made notable findings on the law.

Hon. Justice Aladetoyinbo VS Federal Republic of Nigeria, ECW/CCJ/JUD/18/20, 2020

163. The proceedings arose from allegations by the "Applicant that the Respondent violated his right to freedom from torture, when it subjected him to a disciplinary process which culminated in a written warning which was widely publicised causing him great mental torture as it destroyed his integrity respect and good name and thus violated his right under Article 5 of the African Charter."

164. The Court of Justice held that;

"Mental or psychological forms of torture, which very often have the most long-lasting consequences for victims, are those that cause disruptions of the senses or personality, without causing physical pain or leaving any visible physical mark. These include mock executions, mock amputations, sleep deprivation; solitary confinement; fear and humiliation; severe sexual and cultural humiliation, forced nudity, exposure to cold temperatures, light deprivation."

In the instant case to address the allegation of torture by the Applicant, the Court recalls that he alleged that following the decision to issue him a warning and as well as put him on a judicial watch list and its wide publication, the Applicant said he suffered grave and grievous perversion of justice that had mentally tortured him, traumatized and demoralized him and these amounts to violation of his freedom from torture particularly mental torture."

The Court having imputed the facts as pleaded by the Applicant to the components of torture listed above, notes that they do not support the allegation of torture. As a start there is no indication that the alleged pain and suffering was intentionally inflicted by the Respondent, nor that same was inflicted for specific purpose(s) such as to obtain information, to punish, or to intimidate, or for any reason based on discrimination; neither is there evidence to support that the act (the publication), was carried out by or at the instigation of, or with the consent or acquiescence of State authorities."

Ousainou Darboe & 31 Ors VS The Republic of the Gambia, ECW/CCJ/JUD/01/20, 2020

165. The Applicants alleged that they had been victims of a number of physical acts of violence, which amounts torture and inhuman and degrading treatment.
166. On proof, the Court of Justice held that;
"In the instant case, in their deposition on oath, Applicants presented a prima facie substantiation of an interference with their rights and arguable basis for violation. Where evidence is produced that suggests the victim suffered ill-treatment while in the custody of State authorities, the burden may shift to the State to produce evidence to show that the State was not responsible".
Under the principle of proof, where the Applicants make depositions on torture, inhuman and degrading treatment, the Respondent needs to go beyond mere denial to adduce evidence to show that the Applicants were treated with respect and dignity. No single person was brought before the Court to testify in this regard neither was there any form of documentary evidence to persuade the Court to reason with the Respondent as to the falsity of the Applicants claims. In the absence of convincing evidence, the Court is again inclined to believe that the allegations of the Applicants in this regard were true."
In custody situations it is incumbent on the State to provide a plausible explanation for injuries. The Respondents failed to annex any evidence to proof that the Applicants were not subjected to any form of torture inhuman or degrading treatment. No pictures to convince the Court that the Applicants came in and remained in good condition while in detention. The Applicants however provided a series of corroborative depositions on oath which was arguably the best they could provide considering their incarceration."

Private Barnabas Eli VS the Federal Republic of Nigeria, ECW/CCJ/JUD/29/19, 2019

167. On the burden of proof, *"The Court notes that the Applicant has also not adduced any evidence that shows he was subjected to any cruel, inhuman and degrading treatment or punishment by the Respondent State during his detention. The Court will not hold that his detention alone meets the required threshold of severity and intention established under international law for establishing cruel, inhuman and degrading treatment or punishment."*

Chief Damian Onwuham (Alabeke) & 22 Ors VS Federal Republic of Nigeria and Imo State Government, ECW/CCJ/JUD/ 22 /18, 2018

168. The Applicants alleged that the Respondent, through its agents, arbitrarily demolished their homes. Amongst other violations, the Applicants alleged a violation of their right to dignity under Article 5. The Applicants contended that they had been *"turned to destitute and internally displaced persons and subjected to terrible sleeping conditions and severe suffering as a result of the arbitrary deprivation of their property [which] constitutes a violation to the right of dignity inherent in the human person."*
169. The Court of Justice held that:*"Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities are entitled to without discrimination. It is an inherent right which every State is obligated to respect and protect by all means possible."* It look at other cases to conclude that force eviction and destruction of homes could threaten the right to dignity.

170. On the burden of proof, the Court held:

"The initial burden of proof thus rests on the Applicant who is to establish through evidence, all the requisite elements to succeed in his case. If that burden is met, the burden of proof then shifts to the Respondent who now has to lead evidence in rebuttal of the Applicants' assertions by preponderance of evidence."

In substantiating their claims, the Applicants' annexed as evidence pictures and videos showing the property prior to demolition and the bare land after demolition. They attached annexures which reveal that indeed there was a joint task force being a coalition of the Army, police, civil defence etc. for purposes of eradicating the kidnapping menace. They also annexed newspaper publications on the mandate given to this set as well as information on brand new patrol Hilux cars given to them in furtherance of their operations."

Having provided these pieces of evidence in substantiation of their allegation, the Applicants' have thus discharged the burden on them. Consequently, it is incumbent on the Respondent to provide the relevant proof to rebut the facts."

171. The Respondent failed to adduce rebuttal evidence. The Court of Justice found a violation of the right to dignity.

Gabriel Inyang & Linus Iyeme VS Federal Republic of Nigeria, ECW/CCJ/JUD/20/18, 2018

172. The Applicants alleged that the conditions of their detention, which allegedly resulted in one of the Applicant's being paralysed, violated Article 5. The Court made the following findings:

"In order for treatment to be "degrading," the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment."

"It is trite that he who alleges must prove. The burden of proof in civil cases rests on the party that will lose if no evidence is led. Proof of facts alleged is either by production of documents, oral testimony or production of material for examination by the Court."

"The Court has stressed that merely stating allegations without more does not discharge the burden placed on the Applicants to prove their case." The Applicant failed to annex any document evidencing the stringent and humiliating treatment meted out on him. Being an allegation on health, it is only but right to secure expert evidence to prove that the alleged disability was as a result of the dehumanizing prison conditions. There is also no evidence before this Court that the said disability did not predate the incarceration."

Benson Olua Okomba VS Republic of Benin, ECW/CCJ/JUD/05/17, 2017

173. *"The Plaintiff alleges acts constituting torture wherein the Defendant's officers jointly assaulted him using their boots to pound on his chest until he began to vomit blood. There is therefore needed to clarify the distinction between torture and physical assault. A party alleging torture must prove a high minimum of severity to fall within the meaning of 'torture' under Article 5 of the African Charter. On the other hand, physical assault falls within other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture."*

174. *"It is a general principle of law that he who asserts a claim, must prove same. The rule on burden of proof determines which party is responsible for putting forth evidence and the level of evidence which must be provided in order for their claim to succeed."*

175. *"In most cases, the burden of proving the fact of a claim or allegation rests on the Plaintiff who is required to present persuasive evidence to support those allegations."*

176. *"In the instant case, the Plaintiff in a bid to establish his case attached supporting documents to his Initiating Application as evidence of his averment to prove that he was physically assaulted but not tortured as alleged. The Plaintiff attached photographs and medical reports both from Nigeria and Valencia showing he sustained lacerating injuries on his body from the physical assault inflicted on him. He also attached Photocopies of his Nigerian passport duly stamped by the officers at the*

border indicating that he had passed through the borders of the Defendant on the said date. He further attached a Police investigating report signed by the Assistant-Commissioner of Police (INTERPOL) confirming that from the preliminary enquiry conducted by the team, the Plaintiff was "assaulted" by officers from the Beninois National Police."

177. "Considering the injuries inflicted on the Plaintiff which the Defendant gave no convincing evidence in rebuttal, the Plaintiff has established facts of his allegation of physical pain inflicted on him which amounts to assault and not torture by the officers of the Defendant."

Dorothy Chioma Njemanze & 3 Ors VS Federal Republic of Nigeria, ECW/CCJ/JUD/08/17, 2017

178. The Applicants alleged that they were abducted, physically assaulted, sexually assaulted, verbally assaulted, and unfairly detained, in violation of Article 5.

179. "The burden of proving the facts of their allegation rests on the plaintiffs and they are required to present evidence to support those allegations made in their Originating Application. ... The Plaintiffs in the bid to establish their case filed a motion supported by an affidavit to which they attached witness depositions on oath in evidence of their averments. ... The Defendant did not lead any evidence to controvert or disprove these testimonies ... The Court usually presumes the fact of arrest and its unlawfulness, and the Defendant have to rebut it by producing credible evidence of absence of arrest and detention of the Applicant. A general denial by the Defendant as in this case is not sufficient." Thus, the Court of Justice found a violation of Article 5.

Djot Bayi & 14 Others v Nigeria & 4 Others, ECW/CCJ/APP/10/06, 2009

180. The Court of Justice held that negative press in the run up to a trial did not violate the right to personal dignity under Article 5."The Applicants declared that during their detention, they were paraded before the world press in 2004 without real grounds; that they were regarded as thieves and vandals of Nigerian crude oil. That these defamatory acts brought disrepute to their dignity of human being and are contrary to Article 5 of the African Charter."

181. The Court of Justice held "that for the fact that the Defendants presented the Applicants before the press when no judge or court has found them guilty, certainly constitute a violation of the principle of presumption of innocence such as provided in Article 7 (b) of the same African Charter and not a violation in the sense of Article 5 of the said Charter."

Hadijatou Mani Karaou v Niger, ECW/CCJ/JUD/06/08, 2008

182. The Applicant was sold to a 46-year-old tribe chief when she was 12 years old. She worked at his property and was sexually assaulted by him. She also bore his children. She was later granted a liberation certificate from slavery. "Following this liberation act, the applicant decided to leave the house of her former master. He refused, on the ground that she was and remained his wife." She escaped and married. Her former master lodged a criminal complaint for bigamy, and she was arrested. The national courts failed to hear her claim regarding the fact that she had been a slave. The Applicant alleged a violation of Article 5, amongst other violations.

183. "The applicant claim[ed] that she was held in slavery in violation of Article 5 of the African Charter of Human and Peoples' Rights as well as other international human rights instruments that provide for the absolute prohibition of slavery." The Respondent argued that despite her slave status, she was the chief's wife and they had lived as a happy couple.

184. The Court of Justice held that "Slavery is considered as a serious violation of human dignity and is formally prohibited by all international human rights instruments." It found on the facts that the Applicant was being held as a slave and that "the slavery situation of the applicant, although it was due to a particular individual acting in a so-called customary or individual context, gave her the right to be protected by the Nigerien authorities, be they administrative or judicial. Consequently, the

defendant becomes responsible under international as well as national law for any form of human rights violations of the applicant founded on slavery because of its tolerance, passivity, inaction and abstention with regard to this practice." Therefore, the Court of Justice found that the Respondent had failed its responsibility to protect the Applicant's human rights and violated Article 5.

185. The Applicant also argued that her slave status was a crime against humanity. The Court of Justice held that it did not have jurisdiction to assess this argument, as jurisdiction over this question would be with the International Criminal Court.

III. Application of Art. 5 of the Charter in National Level Jurisprudence

Millicent Awuor Omuya alias Maimuna Awuor & Another v. The Attorney General & 4 Others (2015), Petition No. 562 of 2012
High Court at Nairobi Constitutional and Human Rights Division

186. The two petitioners were women who at various times were admitted and treated at Pumwani Maternity Hospital, a respondent in the matter. The petitioners alleged that they had been detained at Pumwani Hospital for several days, and treated in a cruel, inhuman, and degrading manner by staff, for failing to pay the medical bills incurred for receiving maternal health services. This detention included restricted movement, being made to sleep on the floor, deliberate lack of attention including failure to provide medical treatment, and verbal abuse. They claimed violation of various rights guaranteed under the Constitution of Kenya, 2010 as well as under Article 5 of the African Charter.

187. Following a review of several decisions including *Isaac Ngugi v. Nairobi Hospital and Three Others* (Petition No 407 of 2012, High Court, Kenya), *Sonia Kwamboka Rasugu v. Sandalwood Hotel and Resort and Another* ([2013] eKLR (Petition No. 156 of 2011, High Court, Kenya), and *Malachi v. Cape Dance Academy International and Others* ((2010) CCT 05/10 ZACC 13 (South Africa Constitutional Court)), the Court found that there was nothing in the law that mandated or authorised health institutions to detain patients or clients for non-payment of bills. It therefore held that the detention of the petitioners by Pumwani Hospital because of their inability to pay their medical bill was arbitrary, unlawful, and unconstitutional.

188. The Court also referred to the case of *Institute for Human Rights and Development in Africa v. Angola* ((2008) AHRLR 43 (ACHPR 2008)), wherein the African Commission stated that conditions of detention where food was not regularly provided and detainees had no access to medical treatment was tantamount to cruel, inhuman, and degrading treatment and was a violation of Article 5 of the African Charter on Human and Peoples' Rights.

189. The court therefore concluded that detaining the petitioners under poor conditions including making them sleep on the floor, and without sanitary conditions amounted to cruel, inhuman, and degrading treatment.

J O O (also known as J M) v Attorney General & 6 others [2018] eKLR
Bungoma High Court Petition Case No. 5 of 2014

190. The case relates to a woman from a marginalized setting in Kenya who was admitted at the then Bungoma District Hospital, on the 8th of August 2013 for childbirth. She had passed her due date of delivery at the time of her admission and the doctors advised that due to a delayed delivery, she

would undergo induced labour. Upon admission, the hospital asked her to purchase cotton wool and the inducement drug. Due to a limited number of beds, she was forced to share a bed with another patient. She received information from the nurses on duty that at the onset of labour pains, she would have to walk to the delivery room. After administering the inducement drug, the nurses failed to physically check and monitor her progress and on the onset of labour pains, she sought for help that was not forthcoming. At the time of delivery, a nurse concluded that she was not due for delivery without conducting the required physical examination.

191. It was her testimony that due to the intensity of the labour pains, she walked to the delivery room where she found the only available three beds occupied by other women who were in the process of delivery. She attempted to walk back to the labour ward, and lost consciousness along the way, delivering her baby on the floor. She woke up to shouts and verbal insults from two nurses who questioned the delivery on the floor. Despite her weak and vulnerable condition and without any assistance, she was ordered to carry her placenta and walk to the delivery room to have the same expelled.

192. When she filed the case before the High Court in Kenya, she cited violations of human rights including Article 5 of the African Charter. The Court found that the mistreatment and verbal abuse amounted to inhuman and degrading treatment. The court held that;

“The action of the nurses is inexcusable no matter how overstretched they were. The petitioner was in a vulnerable state, what she needed was care and attention which they failed to offer, she could not have delayed her labour processes so as to await a vacancy in the delivery room, they were not available for her either, in hour of need. The Petitioner certainly did not deserve cruelty and abuses meted on her. The nurses as healthcare providers owe a duty of care to their patients at all times, theirs is a calling to serve humanity in vulnerable circumstances. What the Petitioner required was understanding and compassion at the time.

Consequently, the Court granted the following orders;

- a) *A declaration that the physical and verbal abuse meted out to the Petitioner at the 5th respondent facility amounted to violation of her right to dignity, right not to be subjected to cruel, inhuman, and degrading treatment.*
- b) *A declaration that the National Government & the County Government of Bungoma failed to implement and/or monitor the standards of free maternal health care and services thus resulting in the mistreatment of the Petitioner and violation of her right to dignity, and treatment that is devoid of cruelty, inhuman and not degrading.*

PAK & another v Attorney General & 3 others (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR) (24 March 2022)

Malindi High Court Petition Case No. E009 of 2020

193. In this case PAK,” the patient who was a minor, and Salim Mohammed, a health care provider were arrested and charged for procuring an abortion. PAK had experienced pregnancy complications and sought emergency care at the nearby Chamalo Medical Clinic. Mohammed, a trained clinical officer qualified to provide legal abortion care, treated her after determining she had lost her pregnancy.

194. Both PAK and Mohammed were arrested and detained by the police—she was accused of attempting an abortion; he was accused of providing her a medication abortion. PAK was remanded to juvenile prison for one month as she sought to secure funds for bail. They petitioned the High Court of Kenya seeking a declaration that arresting and detaining PAK from her hospital bed, charging her for seeking medical care, detaining her in a children’s remand home ,denying her treatment and a chance to be in school violated her rights to health including reproductive healthcare, access to emergency healthcare, dignity, equality, non-discrimination, privacy, education and freedom from cruel, inhuman and degrading treatment and not in the best interest as a child.The Court found that the actions of the pole amounted to cruel, inhuman, and degrading treatment in violation of the right to be free from torture.

IV. Recommendations

a) Clarification on the meaning of 'prima facie' evidence

195. The African Court acknowledges that the burden of proof for Article 5 claims is shared between both parties. Similar to the ECOWAS Court of Justice, the African Court requires that claimants provide prima facie support for their allegations and the burden then shifts to the respondent to disprove the allegations. The African Court has confirmed that general statements by claimants regarding a breach of Article 5 will not suffice in substantiating the claims.
196. However, a number of Article 5 allegations at the African Court have failed because claimants have failed to provide prima facie evidence. Based on these decisions, it is unclear what would constitute satisfactory prima facie evidence for this purpose. For instance, in the case of *Onyanchi and Njoka v Tanzania* (2017) 2 AfCLR 65 the Court dismissed the applicants case for failure to provide evidence to prove their allegations stating that “In the instant case, the Applicants simply assert that they were detained for four days in a police cell without food and access to the external environment. Given the particular condition of their detention, the Court understand that it may be difficult for them to prove their contention. Nevertheless, the Applicants have not submitted any prima facie evidence to support their allegation which could enable the Court to shift the burden of proof to the Respondent.”
197. Similarly, in the case of *Alex Thomas v Tanzania (merits)* (2015) 1 AfCLR 465, the court established that the Complainant did not have a prima facie case saying: “In view of the above, the Court finds that the Applicant has not proved that the delay in the hearing of his appeal is tantamount to torture. This is because he has not proved that the delay caused him severe mental or physical pain which was intentionally inflicted for a specific purpose.”
198. The ECOWAS Court of Justice has provided guidance on what types of evidence could be prima facie evidence. It has stated that the following could suffice corroborative depositions under oath; pictures and videos; newspaper articles; factual information on certain elements linked to the alleged violation (for example, information about a vehicle used in operations to destroy homes); expert evidence when health allegations are made; oral testimony; and documentary evidence.
199. For instance, in *ECW/CCJ/JUD/29/19 Private Barnabas Eli v. Nigeria* the court stated the following after establishing that the burden of proof had not been discharged.
“The Court notes that in the instant case, the Applicant has not shown any proof, including a medical report that indicates that the Respondent State through the Nigerian Army conducted any of the acts listed amounting to torture during his detention. The Court will not conclude that detention automatically amounts to being tortured within the meaning of the provisions of the UNCAT. Such allegation must be proved. The Court therefore holds that the allegation of torture fails.”
200. The ECOWAS court has also in some instances established that where the burden shifts to the respondent, silence or mere denial does not suffice. The respondent must also adduce evidence in rebuttal to prove that the alleged violations never occurred. This was the position of the Court of Justice in *CW/CCJ/JUD/01/20 Ousainou Darboe & 31 Ors v Gambia*.
201. Whilst the above is a helpful list, one concern is whether this may be a burdensome requirement for certain violations which may be difficult to prove. For example, it will be difficult for a victim to obtain evidence of Article 5 violations that occur in arbitrary or forced detention. In that situation, could a statement made under oath be enough to shift the burden without additional evidence?
202. In *ECW/CCJ/JUD/20/18 - Gabriel Inyang & Linus Iyeme v Nigeria*, the court increased the threshold to include believability of the evidence adduced by the person who alleges a violation. The Court stated that;

“It is trite that he who alleges must prove. The burden of proof in civil cases rests on the party that will lose if no evidence is led. Proof of facts alleged is either by production of documents, oral testimony, or production of material for examination by the Court. The Court has stressed that merely stating allegations without more does not discharge the burden placed on the Applicants to prove their case.... The burden of proof will only shift to the Respondents when the Applicants have discharged onus placed on him.... A party having a burden of proof must not only bring evidence in support of his allegation but must also convince the Tribunal of their truth less they Be disregarded for want of sufficiency or proof. In the instant case, there is no such evidence for the Court to even equate its sufficiency or otherwise. In the light of the foregoing, the Court holds that the Applicant has not made out any case relative to the allegations of inhuman and dehumanizing treatment for the Respondent to answer.”

203. The Commission seems to apply a lower threshold to the burden of proof. It has held that where allegations are not disputed or responded to by the State involved, the Commission may take the facts as provided by the complainant as a given. It has also confirmed that when an individual is injured in detention or while under the control of State forces, there is a strong presumption that the person was subjected to torture or ill treatment. This might be a more appropriate standard for certain situations such as allegations of Article 5 violations that occur in private or in situations of arbitrary detention including in non-traditional settings such as health facilities.
204. From the above, the approach of the various mechanisms towards the questions of prima facie evidence and the burden of proof are quite different. The African Commission’s approach is implied and not express, and, in a way, there is no strict requirement as to the fulfilment of these two elements. However, it would appear that the African Commission makes up for this in the widening of the scope of the definition of torture. This broad scope allows various parties a chance to have their cases heard and determined.
205. The ECOWAS Court and the African Court are strict with the two doctrines and have more than once dismissed cases on the grounds that none have been discharged fully. It is worth pointing out that the discharge or lack of it is strongly pegged on the definition of torture and degrading treatment. Their strict and rigid definition affects the standard of prima facie evidence and the burden of proof.
206. The divergent approaches from the various mechanisms as to what constitutes prima facie evidence as it relates to allegations of violation of Article 5 creates confusion due to lack of uniformity. A guidance document which assists claimants and applications understand what could constitute prima facie evidence in the context of different acts that fall under Article 5 would be a helpful tool.
- b) Potential outreach to expand Article 5 jurisprudence.**
207. One pattern in the above-listed cases is that the majority of Article 5 claims concern detention in a jail or prison and related treatment in that context.
208. Potential outreach could be made to NGOs to ensure applicants pursuing claims or complaints at the above-mentioned fora are aware that they can include allegations of Article 5 breaches outside of the context of detention in a jail or prison. This could be achieved by highlighting the diverse types of claims brought before the different bodies as described above.
209. This may assist in developing the jurisprudence as it could lead to more decisions rendered outside the context of detention and treatment in jails and prisons and therefore provide more clarity on what other acts could constitute a breach of Article 5.
210. Additionally, the African Committee of Experts position that, the Committee does not have a mandate to find violations of other instruments aside from the Charter on the rights and welfare of the child limits jurisprudence on Article 5 when it comes to cases involving children. It is instructive that Article 16 of the Charter on the rights and welfare of the child, mirrors Article 5 but an expanded

mandate of the Committee to pronounce itself on the violations of Article 5 would enrich the jurisprudence especially on Article 5 violations involving children. For countries such as Morocco and Tunisia that have ratified the African Charter but are yet to ratify the African Charter on the Rights and Welfare of the child, an expanded mandate of the committee to find violations of other instruments would provide effective remedy to children who may suffer a violation of their rights, Article 5 rights by the state party.

c) Accounting for the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

211. The Commission in General Comment No 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa, specifically urged State parties;

"To ensure that women are not treated in an inhumane, cruel or degrading manner when they seek to benefit from reproductive health services such as contraception/family planning services or safe abortion care, where provided for by national law and the Maputo Protocol.

212. It is however worth noting that the different mechanisms have not used the Maputo Protocol as much as is expected in their decisions. However, in some cases involving women, the mechanisms have strived to use the Protocol and refer to provisions therein. An example is the case of ECW/CCJ/JUD/08/17 Dorothy Chioma Njemanze & 3 Others v Nigeria where the ECOWAS court highlighted various provisions of the Protocol that had been violated. The court held that,

"That the failure on the part of the Defendant State to recognize, promote and protect the rights of the Plaintiffs and the failure to take measures to give effect to the rights of the Plaintiffs constitute multiple violations of Articles 1, 2,3,5 and 18 (3) of African Charter on Human and Peoples' Rights, Articles 2,3,4(1) and (2), 5, 8 and 25 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African, Articles 2,3,5 (a), and 15 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, Articles 2(1) and (3), 3, 7 and 26 of the International Covenant on Civil and Political Rights, Articles 10, 11, 12, 13 and 16(1) Covenant Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and Articles 1,2,5,7 and 8 of the Universal Declaration of Human Rights"

213. The lack of reference to the Protocol by the different mechanisms stems from the absence of reference by the applicants since the mechanisms cannot decide on matters that have not been brought before them.

214. Parties bringing complaints before any of the regional mechanisms stand a chance of benefiting from expanded jurisprudence when they rely on Maputo Protocol. In the Tanzania decision for example, state parties can draw the following benefits.

- The decision provides crucial interpretation of the Charter to member States in relation to their obligations to non-discrimination, protecting the best interests of the child, protection of privacy, right to education, right to health and health services, protection against child abuse and torture, and protection against harmful social and cultural practices.
- Many countries in the region do not have re-entry policies and when they do, they are not adequate. Therefore, for those that have ratified the Charter, it clarifies their obligation on these issues, and they can be held accountable.
- Similarly, for the first time, a regional human rights body affirms that adolescents have the right to access sexual reproductive health (SRH) information and services. This is an important precedent regionally because adolescents in Africa face multiple challenges when it comes to accessing SRH information and services.
- By agreeing to consider the decision, the committee affirmed that States cannot unnecessarily prolong a national level proceeding to escape accountability.
- The decision adds more clarity and predictability in how government officials and domestic courts in Africa will apply the Charter.

- The decision affirms children as rights holders with unlimited right to health and age-appropriate reproductive health information and services.
- The capacity of adolescents to consent to healthcare services has been affirmed by the Committee as protected under the Charter and the Maputo protocol.

215. As the Commission has done in some of its Communications, it could continue to encourage states to adopt and ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and address Article 5 violations that occur including in the context of women's access to reproductive healthcare services as seen in the Kenyan cases above.

ⁱ See App. No. 055/2019, *Charles Kajoloweka v. Republic of Malawi*.

**REPORT ON ARTICLE 5 OF
THE AFRICAN CHARTER'S
JURISPRUDENCE**

by

**COMMITTEE FOR THE PREVENTION
OF TORTURE IN AFRICA**



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