Concept paper on the development of a general comment on Article 5 of the African Charter on Human and Peoples’ Rights

I. Introduction

1. A general comment is an interpretative text made by a treaty body of the meaning and purport of provisions in a human rights instrument. Human rights treaty monitoring bodies essentially use general comments as a tool for the interpretation and development of the provisions of relevant human rights instruments, in order to guide States in implementing their obligations. General Comments may cover interpretation of substantive human rights provisions or they may deal with process issues such as how states may submit reports to the treaty body. They may focus on a whole treaty provision or on a specific element of a provision.

2. Article 45 (1) (b) of the African Charter on Human and Peoples’ Rights (the African Charter) mandates the African Commission on Human and Peoples’ Rights (the African Commission) “to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislation”; and Article 45 (3) mandates the African Commission to interpret all the provisions of the African Charter.

3. Articles 60 and 61 of the African Charter establish the importance of international and regional human rights instruments and standards, as benchmarks for the application and interpretation of the African Charter.

4. The Committee for the Prevention of Torture in Africa (‘the CPTA’ or ‘the Committee’) has instituted a process for preparing general comments in relation to Article 5 of the African Charter. That Article provides as follows:

‘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.’

5. Since its establishment in 2004, the CPTA’s key vehicle for enhancing eradication and prohibition of torture in Africa has been the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or
Degrading Treatment or Punishment in Africa ("the Robben Island Guidelines’ or ‘Guidelines’). These Guidelines have established a solid basis upon which the CPTA has advised and advocated for the formulation of anti-torture policies, legislation and administrative rules across Africa.

6. The preparation of general comments on Article 5 will be additional and complementary to the Robben Island Guidelines as well as providing additional standards for enabling realisation of the absolute prohibition of torture as legislated in Article 5 of the African Charter. Indeed, in the Outcome Document of the Commemorative Seminar on the 10th Anniversary of the Robben Island Guidelines, the CPTA undertook to issue authoritative comments providing legal guidance and interpretation to facilitate the effective national implementation of Article 5 of the African Charter as well as the Guidelines by all stakeholders. A panel on torture held during the 56th Ordinary Session of the African Commission noted the need for more guidance on the meaning and purport of Article 5 of the African Charter.

II. Rationale for Developing General Comments on Article 5

7. Torture and ill-treatment are rampant on the African continent, and are particularly rife in places of detention, mental health institutions and in areas of conflict, political turmoil or other kinds of instability. Complaints/reports/allegations brought to the attention of the African Commission continue to reveal the existence of an alarming rate of torture and ill-treatment. The African Commission’s jurisprudence demonstrates that the right to freedom from torture and ill-treatment is among the most violated rights of the African Charter. This suggests that State Parties would benefit from further guidance from CPTA on the implementation of Article 5.

8. The Committee, in line with its overall mandate, intends to develop a series of general comments on various aspects of the absolute prohibition of torture and ill-treatment within Article 5. The general comments will significantly strengthen the absolute prohibition of torture and ill-treatment on the continent, and the CPTA is convinced that such strengthening is warranted.

9. The general comments will fill a number of notable gaps in current standards, and clarify the normative content of Article 5. They will strengthen existing standards by providing concrete practical guidance on the implementation of specific state obligations. The African Commission has over the years developed a rich anti-torture jurisprudence which will be used to reaffirm and enhance the current understanding of the meaning of and attendant obligations to Article 5. The general comments will incorporate the Commission’s jurisprudence, as well as relevant developments under international law that have arisen after the adoption of the Robben Island Guidelines. States could use the general comments when drafting and
presenting state periodic reports. Authors of communications could also apply the general comments to correctly assess relevant standards pertinent to Article 5.

III. Scope of the General Comments

10. Different human rights mechanisms have adopted differing approaches in relation to the scope of the general comments they developed. For instance, the United Nations (UN) Human Rights Committee has issued a widely framed general comment that covers a broad range of different aspects of the prohibition of torture and ill-treatment. On the other hand, the UN Committee against Torture has a different approach, consisting of much narrower but more detailed general comments focused on a more limited number of specific issues.

11. It will be recalled that the African Commission has adopted two General Comments to provide interpretative guidance on the overall and specific obligations of State Parties towards promoting the effective domestication and implementation of Article 14 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol).

12. The CPTA proposes the development of a series of Article 5 general comments focusing on specific aspects of torture and ill-treatment. A targeted approach is suited to the aim of providing detailed and practical guidance to State Parties and other stakeholders on how to implement specific aspects of their Article 5 obligations.

IV. Content of General Comments on Article 5

13. Many aspects of Article 5 of the African Charter remain unexplored and uninterpreted. The following are topical issues that would benefit from further clarification by CPTA:

   a. The right to human dignity conferred by Article 5 as a cross-cutting right that applies to virtually all other Charter rights;
   b. The state obligation to end impunity for torture;
   c. Provision for adequate redress for victims of torture;
   d. Gender aspects of torture, including the relationship between sexual violence and Article 5 as well as rape and gender-based violence;
   e. Slavery aspects of torture;
   f. How torture impacts prohibited grounds of discrimination such as disability (including psychosocial disabilities), and sexual orientation and gender identity;
g. Linkages between torture and other human rights violations such as capital sentences (including psychological and physical state of death row convicts);

h. Oversight and complaints mechanisms;

i. National monitoring mechanisms and institutions;

j. Definition of torture and understanding what other cruel, inhuman or degrading treatment entails;

k. Broadening the definition of torture to include acts perpetrated by private/non-state actors; and

l. Corporal punishment.

14. The separate listing of the above issues does not preclude the development of General Comments which may tackle two or more of the listed issues.

15. After careful consideration of the above topics, the Committee has decided to begin by preparing a General Comment on victims’ right to redress under Article 5 of the African Charter. States have an obligation under international law to provide redress to victims of torture [and other serious human rights violations]. This is provided for in a number of international and regional human rights instruments and declarations. Specifically in the context of the African human rights system, the African Commission has adopted a range of instruments providing for the obligation to provide redress for victims of torture, including in particular the Robben Island Guidelines.¹ The right to redress is also prominently present in a range of other instruments adopted by the African Commission, including the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Maputo Protocol and the African Commission’s Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence.

16. Even though the African Charter itself does not include a separate Article on the right to reparation, the African Commission has repeatedly confirmed that victims of violations of the African Charter, including Article 5, have a right to redress.

17. However, the above instruments, including the Robben Island Guidelines, do not comprehensively set out the right to adequate reparation. The Robben Island Guidelines for instance only provide for compensation and rehabilitation, but fail to include the right to restitution, satisfaction and guarantees of non-repetition. Furthermore, the relevant provisions in part III of the Robben Island Guidelines lack sufficient specificity and clarity to be made operational, yet experience demonstrates that States struggle to meet their obligations to provide redress and reparation to victims. This is also true

¹ See paragraph 50 of the Robben Island Guidelines on the obligation of States to offer reparation to victims of torture and their dependents.
for other instruments that include a reference to the right of victims of torture and ill-treatment to redress.

18. Elaborating guidance on the importance of the right to redress and what this means in practice would help those working with victims of torture and State officials to better understand what measures should be implemented at the domestic level. A General Comment can provide further guidance on the scope and content of the right to redress for victims of torture beyond compensation and rehabilitation in line with developments under international law and practice. Such guidance could then also reflect victims’ needs and experiences on the continent.

V. Drafting process

19. The drafting process of the General Comments could have an important impact on their acceptance – and implementation - by States and other stakeholders. The drafting process will be open to State and other stakeholder engagements from the earliest possible moment, which will foster greater ownership over the eventual text and aid in implementation. Therefore, the Committee plans to collaborate with a range of stakeholders throughout the drafting process, including representatives from State Parties to the African Charter, Organs of the African Union, National Human Rights Institutions, Non-governmental Organisations, academia and other experts.

20. The CPTA will keep these stakeholders involved while preparing Article 5 General Comments. A drafting group will develop the first draft, then make the draft available to the public, including by posting it on the African Commission’s website for comments by State Parties, AU Organs, NGOs and others prior to the adoption of the general comments by the African Commission. The CPTA also plans to hold technical meetings to facilitate development and finalisation of the general comments. The CPTA anticipates that the first Article 5 general comment will be finalised in 2016 with its adoption by the African Commission.

VI. Implementation of General Comments on Article 5

21. The Committee and the African Commission will monitor implementation, including through relevant questions in the examination of State Parties’ periodic reports and, where appropriate, making reference to the general comments under the Commission’s communication procedure, resolutions and the like. Following adoption of the general comments, the Committee could organise expert roundtable discussions with all stakeholders to consider the state of implementation at national level.