Evaluating the jurisprudence of the African Commission on evidence obtained through human rights violations

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SUMMARY

The normative framework of the African Commission, which regulates the admission of evidence obtained through human rights violations, is largely based on a number of instruments. These include the Tunisian Resolution, the Dakar Declaration, the Robben Island Guidelines and the Principles and Guidelines on the Right to a Fair Trial and Legal Representation in Africa. It is argued that the emerging jurisprudence on evidence obtained through human rights violations has a limited developmental framework, owing to the normative framework. This contribution discusses the normative framework, and qualifies the limited jurisprudence. The final step engages the jurisprudence of the Commission followed by a conclusion and recommendations.

1 Introduction

The success of any human rights system is based on its institutional, normative and jurisprudential framework. The institutional framework of human rights protection in Africa is the African Union.[1] In its Constitutive Act of 2001, the African Union engages heads of States Parties to promote and protect human and peoples' rights as provided for in the African Charter on Human and Peoples Rights (The African Charter).[2] The African Commission on Human and Peoples' Rights (African Commission) was established by the African Charter,[3] with a mandate to promote and protect human rights.[4] It must be noted, that in the exercise of this mandate, the African Commission may formulate and lay down principles and rules aimed at solving human rights issues, on which States Parties may base their legislation.[5] The African Charter is silent on the mode of dealing with evidence obtained through human rights

1 Heyns "African Regional Human Rights System" 2003-04 *Pennsylvania State Law Review* 681.
2 Constitutive Act of the African Union (CAAU), adopted by the OAU in Sirte, Libya, on 2000-07-11 and entered into force 2001-05-26, para 9 of the Preamble and arts 3(h) and 4(m).
3 African Charter on Human and Peoples' Rights (ACHPR) adopted by the OAU in Nairobi, Kenya, on 1981-06-27 and entered into force on 1986-12-21, art 30.
4 ACHPR, art 30.
5 ACHPR, art 45(1)(b) Udombana "The African Commission and Fair Trial Norms" 2006 *AHRLJ* 305.

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violations. However, its institutional ability to formulate principles aimed at solving legal problems deal with this silence.

Another institutional structure of the African human rights system is the African Court of Human Rights.[6] Several reasons inform the author's decision to use the African Commission other than the African Court in this study. This Court complements the protective mandate of the African Commission.[7] In its interpretation and application of the African Charter, it uses decisions of the African Commission and other relevant human rights instruments that will fall within its jurisdiction.[8] In addition, the African Commission has handed down approximately 358 decisions,[9] unlike the African Court's 88 decisions.[10] The African Commission has also been actively involved in the development of the normative framework on evidence obtained through human rights violations, between the period of 1992 and 2003. The African Court started operating in 2004 and the African Commission as the focal point of the study is instructive in evaluating its normative framework and the emerging jurisprudence.

For purposes of this contribution, the normative framework refers to the development of soft law by the African Commission that guides it in adjudicating complaints or communications which arise concerning human rights violations. This stage has foreseen four normative developments between 1992 and 2003. These include resolutions, declarations, guidelines and principles. As shall be discussed in the subsequent section, a great part of this soft law was adopted through resolutions in a bid to improve the right to a fair trial. This right is a direct reflection of the subtle issues that form the basis of this contribution about evidence obtained through human rights violations.[11] An overview of the normative framework will aid the analysis of the emerging jurisprudence.

2 Normative framework of the African Commission

The normative developments of the African Commission on evidence obtained through human rights violations took place between the year

6 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (Protocol) adopted by the OAU in Ouagadougou, Burkina Faso on 1998-06-09 and entered into force on 2004-01-25, art 1.

7 Protocol, art 2.

8 ACHPR, art 3(1). Stefiszyn "The African Union; challenges and opportunities for women" 2005 *AHRLJ* 382.

9 Institute of Human Rights Defenders in Africa (2018-06-30) African Human Rights Case Law Analyser, https://bit.ly/2EdkHqc (last accessed 2020-08-17).

10 African Court (2018-06-30) Statistics from the African Court's website, https://bit.ly/3iKJm4c (last accessed 2020-08-17).

11 See the discussion on the normative framework below.

1992 and 2003. This can be ascribed to the drastic developments concerning the right to a fair trial experienced during this period. The chronological developments foresaw the adoption of the Resolution on the Right to Recourse and a Fair Trial (Tunis Resolution)[12] and the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa (Dakar Declaration).[13] The other developments were the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)[14] and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (The Principles).[15] This section gives an overview of these developments.

2 1 Resolution on the Right and Recourse to a Fair Trial

In 1992, at its 11th Ordinary Session in Tunis, the African Commission indicated that the right to a fair trial was not adequately provided for in the African Charter.[16] It did not provide for the right to an effective remedy[17] or require that an individual be promptly informed of the charges against him or her,[18] or that an individual is promptly brought before the court.[19] The African Commission adopted the Tunis Resolution to address these issues and required that the State Parties ensured that person in their jurisdiction had effective remedies and a procedure that addressed violations of the right to a fair trial.[20] Although the resolution dealt with the right to a fair trial, it did not specifically deal with instances of admission of evidence obtained through human rights violations. This shortfall affected its effectiveness in dealing with impugned evidence as a crucial component of the right to a fair trial.[21]

12 The Resolution on the Right to Recourse and a Fair Trial (Tunis Resolution) adopted by the ACHPR at its 11th Ordinary session in Tunis, Tunisia, on 1992-03-09, Res.4(XI)92: 11th session ACHR/Res.4(XI)/1992.

13 The Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa (Dakar Declaration), adopted by the ACHPR at its 26th ordinary session in Dakar, Senegal on 1999-11-15, ACHR /Res.41(XXVI)1999.

14 The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) adopted by the ACHPR in Banjul, Gambia at its 32nd session on 2002-10-29, ACHR/Res.61(XXXII)/2002.

15 The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (The Principles) adopted by the ACHPR in Banjul, Gambia at its 33rd ordinary session on 2003-05-29, DOC/OS(XXX)247/2003. Mashood "Developments in the African Regional Human Rights System" 2005 *HRLR* 118.

16 Ouguergouz *The African Charter on Human and Peoples' Rights. A comprehensive Agenda for Human Dignity and Sustainable Development in Africa* (2006) 141.

17 Tunis Resolution, para 1.

18 Tunis Resolution, para 2(b).

19 Tunis Resolution, para 2(c).

20 Tunis Resolution, paras 2-5.

21 Moravcsik "Taking preferences seriously: A liberal theory of international politics" 1991 *International organization* 517 on the primacy of the domestic society that represent the interests of individuals in a domestic jurisdiction.

2 2 Dakar Declaration on the Right to a Fair Trial

In September 1999, the African Commission adopted the Dakar Declaration on the Right to a Fair Trial in Africa.[22] It established that the right to a fair trial was a fundamental right whose realisation depended on the extinction of certain practices by the States Parties.[23] These included the elimination of state influence in the decisions of the judiciary [24] and acts of impunity like torture.[25] The Declaration required that States Parties respect the rule of law as a way of realising the right to a fair trial.[26] Where the States recognise the right to due process from the institution of preliminary investigations to the handing down of decisions by courts, the instances of admitting evidence obtained through human rights violations would be greatly reduced.

Besides, the African Commission reiterated that the judiciary had to be independent and impartial.[27] While its independence dealt with the appointment, security, and tenure of the members of the judiciary, impartiality resonated with its ability to hand down decisions without the influence of any person or organ.[28] However, the existence of an effervescent legal regime governing the judiciary, without rules on evidence obtained through human rights violations would still fail to solve the problem. [29] The adoption of this Declaration still pointed to the general improvement of the right to a fair trial without dealing with the specifics such as evidence obtained through human rights violations. It referred to the general aspects such as legal representation, practices of impunities by the States Parties, and independence of the judiciary. The concept of legal representation would have been a specific issue if it was engaged with instances of obtaining evidence through human rights violations. It showed that while the African Commission kept its perspective on the improvement of the right to a fair trial, it also indicated a lack of foresight in dealing with the admission of impugned evidence. However, its recognition of various aspects about the judiciary showed that the African Commission would be instructive in forging the foreign policy of States Parties.[30]

22 Dakar Declaration, para 1.
23 Dakar Declaration, para 1.
24 Dakar Declaration, para 2.
25 Dakar Declaration, paras 3 and 6.
26 Dakar Declaration, para 7.
27 Dakar Declaration, para 8.
28 Dakar Declaration, para 8.
29 Arts 126-151 of the Constitution of the Republic of Uganda, 1995 (hereafter Constitution 1995) provides for a robust system on the judiciary. It still lacks a provision on evidence obtained through human rights violations. See Nanima "The legal status of evidence obtained through human rights violations in Uganda" 2016 *PELJ* 1-38. The same was evident in the Constitution of the Republic of Kenya 1963, which had a legal regime concerning the judiciary, but lacked a provision on evidence obtained through human rights violations.
30 Moravcsik 518.

2 3 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

The third development culminated in the adoption of the Robben Island Guidelines. This development was informed by the requirement to tackle instances of torture, cruel, inhuman and degrading treatment and punishment.[31] The preamble stated:

> "Recalling the universal condemnation and prohibition of torture, cruel, inhuman and degrading treatment and punishment."[32]

> "Recognising the need to take positive steps to further the implementation of the existing provisions on the prohibition of torture, cruel, inhuman and degrading treatment and punishment."[33]

This was a departure from the Tunis Resolution and the Dakar Declaration that offered a general standard concerning the improvement of the right to a fair trial. The Robben Island Guidelines offered a constricted standard, which adequately dealt with evidence obtained through torture, cruel, inhuman and degrading treatment.[34] However, this position did not embrace evidence that was obtained outside these bounds. This posed another problem, namely, its failure to deal with evidence obtained through other human rights violations that lacked a taint of torture, cruel, inhuman or degrading treatment.[35]

2 4 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

The fourth major development was the passing of a resolution to establish a working group to prepare a draft of general principles and guidelines on the right to a fair trial and legal assistance. This led to the adoption of the Principles, which introduced four key concepts. These included the right to an effective remedy[36] the role of prosecutors,[37] the prohibition of collection of evidence through a violation of a detained suspect's rights,[38] and the rule on how to deal with evidence obtained through force or coercion.[39] These four concepts represented a departure from a general model that sought to develop the right to a fair trial to the specific issues that inform the admission of evidence through human rights violations.

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31 Robben Island Guidelines, preamble.
32 Robben Island Guidelines, para 1 to the preamble.
33 Robben Island Guidelines, para 4.
34 Robben Island Guidelines, para 7. See the ACHPR, arts. 5, 45.
35 Communication 416/2012, *Jean-Marie Atangana Mebara v Cameroon* paras 81-83.
36 The Principles, principle (C)(a).
37 The Principles, principle F.
38 The Principles, principle M(7)(d)-(f).
39 The Principles, principle N(6)(d)1.

First, the Principles require that everyone has the right to an effective remedy by the domestic courts, which are competent with regard to their composition and the officers who adjudicate cases.[40] The State Parties have an obligation to ensure that victims of human rights abuses have an effective remedy.[41] This requirement extends the scope of an effective remedy from the conservative judicial remedies to those that deal with the admission of evidence. The prosecutors have a key role to play in instances where they have evidence that has been obtained through human right violations. Where they come into possession of evidence that has been obtained through a violation of the suspect's human rights, such evidence should not be admitted unless it is to be used against the perpetrators.[42]

This principle creates a standard, which recognises the need to deal with evidence obtained through human rights violations by the court and the prosecution.[43] Furthermore, it indicates that the prosecutors play a significant role in ensuring that impugned evidence is not tendered for admission. This principle reminds the parties not to engage in practices that violate the rights of persons within its jurisdiction.[44]

The principles protect suspects in the course of collection of evidence by the investigating arms of government. The States Parties are required to ensure that all persons under any form of detention or imprisonment are treated humanely.[45] While it does not define "humane manner', the fact that the African Commission can engage the jurisprudence of other human rights bodies offers a remedy to the situation. The relevant article provides that:

> "The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members."[46]

The State Party should collect evidence as it upholds the dignity of an individual such that the subsequent admission of the evidence is not contested.[47]

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40 The Principles, principle C(a).
41 The Principles, principle C(c)(1).
42 The Principles, principle F (l).
43 The Principles, principle M(7)(d) and F(l).
44 See the discussion on the Dakar Declaration above.
45 The Principles, principle M(7)(a)-(f).
46 ACHPR, arts 60, 61.
47 For an extensive discussion on The Principles and evidence obtained through human rights violations, see Nanima *The legal status of evidence obtained through human rights violations in Uganda* (LLM thesis UWC 2016) 17-20.

3 Qualifying "limited jurisprudence"

3 1 Defining jurisprudence

Jurisprudence is an imprecise term, which cannot be accorded one definition. An engagement of the various definitions depicts a challenge in defining it within the meaning of human rights bodies. It may refer to a body of substantive legal rules or interpretations of a law by a judicial or quasi-judicial body.[48] In this regard, the African Commission uses its substantive rules to hand down decisions.[49] The challenge in their enforcement eludes it of the conventional character of a judicial body.[50] On another hand, jurisprudence is referred to as a scientific or philosophical investigation of law and justice.[51] This points to the notion that jurisprudence refers to the knowledge of the law.[52] This is further expounded in the origins of the term. Jurisprudence is a product of two Latin words, "juris" and "prudentia".[53] The term "juris" means law, and "prudentia" means knowledge.[54] This is an indication that the knowledge of a law needs to have theoretical underpinnings that guide its application. As a result, there should be an inquiry into what the law is, or what it ought to be. This inquiry emphasises the basis other than the components of the law. For instance, if morality forms the basis of a law in a given community, the types of law, from criminal to civil laws, adjectival to procedure laws ought to have elements of morality. Morality is an abstract notion that changes from one society to another, and human rights bodies are hesitant to enforce morals.[55]

The foregoing two definitions fail to offer guidance on the jurisprudence of a human rights body. A look at the perceptions of the various schools of thought will aid our understanding of the concept of jurisprudence. John Austin (1790-1859) defines jurisprudence as the philosophy of positive law.[56] He states that positive law consists of commands set as rules of conduct by a sovereign to a member or members of independent political society or the sovereign.[57] This

48 Suri *Jurisprudence* (2009) 3.
49 Murray "The African Commission on Human and Peoples Rights and international law" 2000 *Leiden Journal of International Law* 684.
50 Olukayode "Enforcement and Implementation Mechanisms of the African Human Rights Charter: A Critical Analysis" 2015 *Journal of Law, Policy and Globalization* 52. Wolfgang "The African Charter and Commission on Human and Peoples' Rights: How to make it more Effective" 1993 *Netherlands Quarterly of Human Rights* 25.
51 Suri 3.
52 Salmond *Jurisprudence* (1924) 1.
53 Salmond 1.
54 Salmond 1.
55 *Handyside v United Kingdom* European Court of Human Rights, Application 24/1976, para 48. *Otto-Preminger Institute* v *Austria*, (1994) 19 EHRR 3, para 56 where the EctHR declined to rule on a single moral code for the State Parties.
56 Austin *Lectures on Jurisprudence* (1875) 10.
57 Austin 10.

definition ousts the position of international law as far as it does not recognise international law as a sovereign entity that issues a set of commands to be followed by the subjects. The point of departure is the definition of Jeremy Bentham (1748-1832), which identifies law as the mandate of the sovereign over the subjects.[58] While Jeremy Bentham advocates for morality as a yardstick for the law, John Austin states that the former does not form part of the law.

The intersection in the two different definitions is the requirement that the law needs a basis to derive its authority. This basis may be in morality or positivism. Concerning this conversation, it still requires the existence of a sovereign entity to hand down the law. This contrasts the nature of human rights bodies which recognises the sovereignty of States Parties.[59]

Thomas Holland (1835-1926) defines jurisprudence as a formal science of positive law.[60] He alludes to the definition by John Austin and adds the concept of "formality" of the law. This definition shows the command of the sovereign as the basis of the law, without concern for its implementation. The implementation of the law is important in society as it leads to redress of criminal and civil wrongs. It shows that the judicial function of the courts is the protection of human rights and fundamental freedoms. In addition to the concept of sovereignty does not aid the enforcement of human rights in a domestic or international community and as such it does not offer adequate guidance to this study.

John Salmond (1862-1924) defines jurisprudence as the science of the first principle of civil law.[61] His concept includes two parts. First, generic law, which refers to the entire body of legal doctrine.[62] Secondly, the specific law, which deals with basic parts of the law such as the analytical, historical or ethical doctrines.[63] According to this definition, jurisprudence deals with both the basis and the implementation of the law. This is an indication that the knowledge of the law is not complete unless its implementation is considered. Arguably, an adequate understanding of a legal system lies in evaluating its content, evolution and the ideals that it stands for. An evaluation of these three concepts engages with the implementation of the law as far as they deal with the substantive law, the reasons that inform its existence and its implementation. Therefore, this definition creates a fusion of the basis of the law and its implementation.

The definitions of jurisprudence by Jeremy Bentham, John Austin, and Holland are inclined to the basis of the law, without dealing with its

58 William "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" 1982 *Wisconsin Law Review* 984.
59 Olukayode 52. Wolfgang 25.
60 Drake "Jurisprudence: A Formal Science" 1914 *Michigan Law Review* 34.
61 Salmond 1.
62 Salmond 2.
63 Salmond 4.

implementation. This position that has little regard to the implementation of the law does not offer guidance to this study. However, Salmond's view aids the understanding of the jurisprudence of international human rights bodies. On this basis, the article sets out to place the jurisprudence of the African Commission into context.

3 2 Defining Jurisprudence of human rights bodies

The jurisprudence of the human rights bodies has no definite definition. It may only be understood in the context it is used. It may refer to human rights recommendations or findings on individual communications that are issued by human rights bodies.[64] It may also refer to the legal interpretation of international human rights law as it develops.[65] There is no uniform model about this jurisprudence of human rights monitoring bodies despite the comparisons of the general principles that govern the universality of human rights across the globe.[66] For instance, the African Commission may have resolutions, declarations, guidelines, decisions and General Comments.[67] The European Court of Human Rights (ECtHR) relies on the decisions it hands down. The question is whether a limitation may exist despite the existence of various forms of jurisprudence.

The Human Rights Committee (HRC) of the United Nations monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR).[68] It uses its decisions, General Comments and recommendations in its Concluding Observations as its jurisprudence. The General Comments offer insight on how various articles of the ICCPR may be interpreted.[69] The Human Rights bodies also use Concluding Observations to enforce the observance of rights by States Parties. In some of its Concluding Observations, the HRC requires that State Parties desist from the use of torture and arbitrary deprivation of liberty in illegal detention areas.[70] It recommends that an accused must appear before a

64 Jurisprudence, 1997 (2018-06-30), http://juris.ohchr.org/Home/About, (last accessed 2020-08-17).

65 Jurisprudence, 1997 (2018-06-30), http://juris.ohchr.org/Home/About, (last accessed 2020-08-17).

66 Cerna "Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts" 1994 *Human Rights Quarterly* 740; Donnelly "The relative universality of human rights" 2007 *Human Rights Quarterly* 281.

67 See discussion above on normative frameworks.

68 International Covenant on Civil and Political Rights (ICCPR) adopted by the General Assembly in New York, USA on 1966-12-19 and entered into force on 1976-03-23, 999 UNTS 171, art 28.

69 CCPR General Comment No 13 Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law Doc HRI/GEN/1/Rev.1 (1984); CCPR General Comment No 20 Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment U.N. Doc. HRI/GEN/1/Rev.1 (1994); CCPR General Comment No 32 Right to equality before courts and tribunals and to fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

70 UN Doc CCPR/CO/80/UGA (30 June 2004) para 17.

judicial officer within a reasonable time.[71] These Concluding Observations may be used to complement the work of other human rights bodies by requiring that States Parties implement these recommendations.[72]

Like the African Commission, the HRC has various forms of jurisprudence. The three bodies all offer principles on human rights as the overriding factor. Salmond's definition depicts the jurisprudence of human rights bodies as the principles that guide their decisions, regardless of the tools that are labelled as "jurisprudence". Besides, this definition aids the implementation of this jurisprudence by the State Parties.

3 2 Qualifying the concept of "limited jurisprudence"

The experiences of other human rights bodies can be used to elaborate on the "limitation" of the jurisprudence of the African Commission. The HRC has many sources like decisions, General Comments and Concluding Observations. This is synonymous with the African Commission that has resolutions, declarations, General Comments, Concluding Observations and decisions on the communications. About this study, the jurisprudence includes the Tunis Resolution, the Dakar Declaration, Robben Island Guidelines and the Principles. The position is different with the ECtHR, which only relies on its decisions as part of its normative framework. The cumulative effect of the application of the normative framework should be the use of this jurisprudence to hand down informed decisions that are based on legal principles in the normative framework. It is on this basis that the concept of "limitation of the jurisprudence" has to be qualified, to justify the subsequent evaluation of the Commission.

The lack of a normative framework that is distinct from the decisions that a human rights body passes should not be used as the yardstick for ruling out the existence of emerging jurisprudence.[73] For instance, in *Saunders v the United Kingdom*, the ECtHR dealt with compulsion and stated that evidence that arose out of a legal compulsion to incriminate an applicant rendered the trial unfair.[74] In the subsequent case of *Jalloh v Germany*, the ECtHR used the concept of severity to qualify the use of legal compulsion to obtain evidence.[75] In *Gafgen v Germany*, the ECtHR balanced compulsion and fairness of a trial. It stated that evidence obtained through cruel, inhuman or degrading treatment may be

71 UN Doc CCPR/CO/83/KEN (28 March 2005) para 17.
72 UN Doc CCPR/C/CHN- HKG/CO/3 (12-13 March 2013) para 8. The HRC recommended that Hong Kong implements the recommendations of the CAT, requiring it to bring its laws to conform with the UNCAT.
73 *Saunders v the United Kingdom* (1996) ECHR Series A No. 6, *Jalloh v Germany* (2007) 44 EHRR 32, *Gafgen v Germany* (2010) 52 EHRR 1.
74 *Saunders v the United Kingdom supra,* paras 75, 76.
75 *Jalloh v Germany supra,* paras 113-120.

admitted in Court if its admission does not render the trial unfair.[76] In this vein, a limitation in developing jurisprudence is not in the number of decisions of a human rights body, but rather the quality of the decision. This quality is evident in the developments on a given principle of law.

At this point, it is clear that the normative framework of the African Commission was developed to improve the standard of the right to a fair trial, with little regard to the mode of dealing with evidence obtained through human rights violations. This is noted in the fact that the Tunis Resolution and the Dakar Declaration do not expressly deal with evidence obtained through human rights violations. This is exacerbated by the fact that the Robben Island Guidelines are limited to evidence obtained through torture, cruel, inhuman and degrading treatment. As a point of departure, the Principles present a streamlined mode of dealing with evidence obtained through human rights violations.

Black's Law Dictionary defines the term "limit" as a boundary of scope, be it authority, power, privilege, or right.[77] The application of this definition to the norms of the African Commission on evidence obtained through human rights violations specifies that the scope of the Tunis Resolution and the Dakar Declaration did not envisage evidence obtained through human rights violations. Therefore, this section evaluates both the normative framework and the jurisprudence of the African Commission.

The human rights bodies resonate with the universality of human rights. The concept of universality is the over-arching principle and not the normative framework.[78] The HRC has the mandate to deal with complaints and communications from 174 States Parties.[79] The ECtHR handles complaints and communications from 47 States Parties, which are litigious societies.[80] This is evident in the fact that it received 280,512 applications from the year 1998 to 2008, and delivered 9,399 decisions in the same period.[81] The Commission has handed down 229 decisions since its inception.[82] A quantitative approach in assessing whether the Commission's jurisprudence is limited would be misleading. Therefore, the limitation concerns the quality of the jurisprudence in as far as it

76 *Gafgen v Germany supra,* para 108.
77 Definition of "Limit" (2018-06-30), http://thelawdictionary.org/limit/ (last accessed 2020-08-17).
78 The European Convention on Human Rights, adopted by the members of the Council of Europe in Strasbourg, France on 1950-11-04 and entered into force 1953-09-03, 213 UNTS 221, preambular paras 2 and 6; ACHPR, preamble, para 4; ICCPR preamble, para 2.
79 Ratification table to the ICCPR (2018-06-30), https://bit.ly/2E5CHTr (last accessed 2020-08-18).
80 47 Member States (2017-06-30), https://bit.ly/326MNvg (last accessed 2020-11-18).
81 Ten years of the "new" European Court of Human Rights 1998- 2008 Situational Outlook, 78-90 (2017-06-30), https://bit.ly/2Q2gZ5h (last accessed 2020-08-17).
82 Statistics from the African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).

develops principles that deal with evidence obtained through human rights violations. A study of the jurisprudence of the Commission on evidence obtained through human rights violations will look at the quality of the jurisprudence, whether it is limited, and the factors that inform this limited jurisprudence.

An approach that looks at the number of the decisions passed may not offer adequate guidance to creating a framework for the definition of a limited jurisprudence. An analysis in the interim reveals that the ECtHR offers detailed and well reason judgments, which develop its jurisprudence.[83] With the aid of the definition of a "limit" from Black's law dictionary, an approach that engages the limits in the jurisprudence in the quality of the decisions is preferred. This is because it supersedes the arguments that uplift sources of jurisprudence and the number of decisions passed by a human rights monitoring body, other than the quality of the decisions.

4 Emerging jurisprudence

This section visits the decisions of the Commission from the year 2003 to 2015, from the 32nd to the 54th sessions. Out of the 41 decisions that were handed down, the discussion is narrowed down to four decisions.[84] These decisions have three distinct features. Firstly, they relate to the right to a fair trial. Secondly, they reiterate the principles that ensure the enjoyment of the right to a fair trial. Thirdly, they aid in the understanding of the jurisprudence of evidence obtained through human rights violations. These features inform an engagement that deals with these four concepts. These include bringing the law into conformity with the African Charter, exhaustion of local remedies, the responsibility of state actors, and dealing with evidence obtained through torture. These principles form the key issues in the Commission's deliberations on the merits of the communications.

4 1 Bringing the law into conformity with the African Charter

The general rule regarding international treaties is that a State cannot invoke its national law as a justification for the non-compliance with international law.[85] Concerning the Principles and the Robin Island Guidelines, State Parties are expected as a matter of principle to comply

83 *Saunders v the United Kingdom supra; Jalloh v Germany supra* and *Gafgen v Germany supra* on incriminating evidence.

84 Communications 222/1998 and 229/199, *Law Office of Ghazi Suleman v Sudan* 9; Communication 250/2002, *Liesbeth v Eritrea*; Communication 245/2002, *Zimbabwe Human Rights Non-Government Organisations Forum v Zimbabwe*; Communication 334/2006, *Egyptian Initiative and Interights v Egypt*.

85 Vienna Convention on the Law of Treaties (VCLT) adopted by the General Assembly in Vienna, Austria on 1969-05-23 and entered into force 1980-01-27, 1155 UNTS 331, art 27.

with this soft law.[86] When a State Party ratifies the African Charter, it has an obligation to uphold the fundamental human rights contained therein, even in instances where it does not enact domestic legislation to effect the African Charter's incorporation[87]

The ICCPR requires that each State Party "undertakes to take the necessary steps, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant."[88] This is to ensure that the State Parties uphold their obligations under the international treaties.

Other international instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) require States Parties to:

> "… embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle".[89]

This provision adds a voice to the requirement to uphold the rights enshrined in international and regional treaties, provided the parties are States Parties. While some authors have criticised the Commission's view on the premise that its findings are not binding and consequently a State may disregard them,[90] the findings remain persuasive like the opinions of the United Nations Human Rights Committee.[91]

The African Charter requires that a complainant enjoys the right to a lawyer as a component of the right to a fair trial.[92] The position formed the adoption of the Tunis Resolution as far as the failure to engage the right to a lawyer affected the right to a fair trial.[93] The practice of violating this right with impunity formed the adoption of the Dakar Declaration.[94] This position was tested in *Law Office of Ghazi v Sudan.*[95]

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86 ACHPR *supra* art 45(1)b; *Purohit v The Gambia* (2003) Africa Human Rights Law Reports 96 para 43.
87 Draft Declaration on Rights and Duties of States adopted by the International Law Commission at its first session and forwarded to the General Assembly as a report on 1949-12-06, GA Res 375/1949. Wachira & Abiola "Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy" 2006 *AHRLJ* 472.
88 ICCPR, art 2(2).
89 Convention for the Elimination of all Forms of Discrimination against Women (CEDAW) adopted by the General Assembly in New York, USA on 1979-12-18 and entered into force on 1981-09-03, 1249 UNTS, art 2(a).
90 Murray 684.
91 Murray 684.
92 ACHPR, art 7.
93 See discussion on Tunis Resolution above.
94 See discussion on Dakar Declaration above.
95 *Ghazi supra,* para 2.

The victims were arrested and detained without charge by the government of Sudan on 1 July 1998.[96] In the course of their detention, the complainants were denied a lawyer and contact with their families.[97] The second complaint decried the trial of civilians by a military court established by a Presidential decree.[98] Although the President later pardoned the victims,[99] this did not solve questions about the violation of the right to counsel and other questions concerning their illegal detention and allegations of torture.

The gist of the matter is that the admission of evidence obtained in the course of the illegal detention would be contested. The complainants alleged a violation of the right to a fair trial under article 7 of the African Charter.[100] This was evident in the State Party's wide publicity that the complainants attempted to overthrow the government. This publicity presumed them guilty before the domestic court could make its findings.[101] This kind of publicity potentially rendered any subsequent trial unfair because of the utterances by the state officials, about the complainants' guilt. While the African Commission did not consider this position, this turn of events substantially affected the position of the complainants about their right to the presumption of innocence.[102] There is persuasive jurisprudence that a process that substantially affects the position of a complainant may lead to a finding of an unfair trial, especially in instances where evidence has been obtained through human rights violations.[103] The African Commission ought to have advised the State Party to ensure that its laws on the right to a counsel and the right to a fair trial conform to the principles of the African Charter.

While the African Commission noted that the State Party's failure to uphold the complainants' right to a lawyer violated their right to a fair trial,[104] it found no proof of violation of the right to a fair trial concerning confessions obtained from the complainants in the course of their detention.[105] The fact that the complainants were denied the right to a lawyer as soon as they were detained, was an indication that any evidence following this violation was tainted with illegality.

The African Commission did not expressly state the section of the domestic law that was required to be brought into conformity with the African Charter.[106] At the same time, the State Party had laws that provided for detention beyond 48 hours. The State Party would use its

96 *Ghazi supra,* para 3.
97 *Ghazi supra,* para3.
98 *Ghazi supra,* paras 5-6.
99 *Ghazi supra,* para 29.
100 *Ghazi supra,* para 8.
101 *Ghazi supra,* para 54.
102 Compare *Shabelnik v Ukraine* [2009] ECHR 302 para 53.
103 *Shabelnik supra,* para 53.
104 *Shabelnik supra,* para 57.
105 *Shabelnik supra,* para 55.
106 *Shabelnik supra,* paras 56, 59.

National Security Act to charge, detain and interrogate an individual for 72 hours.[107] This detention could be renewed for up to one month, without justification.[108] In addition, bail would not be granted to persons who were accused of crimes punishable by death or life imprisonment.[109] This detention beyond 48 hours was illegal, and the subsequent purported interrogations and any evidence that was obtained could not be relied on as admissible evidence. The African Commission did not evaluate the contents of the National Security Act, probably because they were not brought to its attention. However, the final decision requiring that Sudan brings its laws into conformity with the African Charter was specifically directed at this law. At the time of conducting this research, the author noted that provisions of the National Security Act that allowed the renewal of detention have survived all repeals to the Security Acts. Firstly, the National Security Forces Act of 1999, which repealed the National Security Act of 1994, still provides for detention for three days, which could be renewed for 30 days,[110] and a further 30 days.[111] Secondly, the National Security Act 2010, which repealed the National Security Forces Act of 1999, still provides for detention for 30 days, which can be renewed for 30 days,[112] and a further 15 days.[113] At the time of preparing this article, the author was not aware of any communication by the African Commission to Sudan to ensure that these sections conform to the principles of international law.[114]

At the date of communication of this decision, the four norms that form the basis of this study had been enacted.[115] The Commission did not use the Tunis Resolution or the Dakar Declaration, to point to the evidence obtained through human rights violations.[116] However, it emphasised the right to freedom of expression.[117] This was evident in the requirement to States Parties to adhere to the principles that govern the right to a fair trial, without offering guidance on the specific aspects

107 Report to the US Department of Defence on Sudan Human Rights Practices 1994, paras 19-20 (2018-06-30), https://bit.ly/3haek5C, (last accessed 2020-08-17).
108 Report to the US Department of Defence on Sudan Human Rights Practices 1994, paras 19-20 (2018-06-30), https://bit.ly/3haek5C, (last accessed 2020-08-17).
109 Report to the US Department of Defence on Sudan Human Rights Practices 1994, paras 19-20 (2018-06-30), https://bit.ly/3haek5C, (last accessed 2020-08-17) para 20.
110 S 30(d) of the National Security Forces Act 1999 (hereafter NSFA).
111 S 30(e) of the NSFA.
112 S 50(1)(e) of the NSFA.
113 S 50(1)(g) of the NSFA.
114 Concluding Observations and Recommendations on the 4th and 5th Periodic Report of the Republic of Sudan, paras 31-33, 66-67 provide recommendations on the National Security Act 2010, but do not refer to the codified long periods of detention.
115 The decision refers to The Principles, and the Dakar Declaration in paras 65- 66.
116 *Ghazi supra,* para 65.
117 *Ghazi supra,* paras 54, 66.

that govern the instances of the right to legal representation and the presumption of innocence. The failure by the African Commission to give specific recommendations to States Parties on how to deal with evidence obtained violation of the right to a lawyer and the presumption of innocence indicated a limited development in its jurisprudence with regard to human rights violations.

4 2 Exhaustion of local remedies

The exhaustion of local remedies is a tool used by various regional and international bodies to gauge the complaints and communications that they should address.[118] This rule ensures that the domestic institutions have the opportunity to deal with violations before the human rights bodies.[119] This tool engages the principle of non-intervention and state sovereignty in matters that the latter can rectify, without interference from other states.[120] The local remedies have to be available, effective and sufficient.[121] According to the ECtHR, the exhaustion of remedies is a recognised rule of international law that forms part of the customary international law.[122]

The African Commission uses the exhaustion of local remedies as a tool that deals with instances of evidence obtained through human right violations, by subjecting a complaint to the admissibility test.[123] In *Liesbeth Zegveld and Mussie Ephrem v Eritrea,* the Commission dealt with the rule regarding exhaustion of remedies. The complainant alleged that the illegal arrest of eleven former Eritrean government officials in Asmara, Eritrea, in September 2001 violated Eritrean laws and the African Charter.[124] The African Commission acknowledged that exhaustion of a domestic remedy was a condition precedent to obtaining the right of appearance before it.[125] It also reiterated that the exhaustion of a domestic remedy is dependent on whether it is available, effective and sufficient.[126] The availability of a domestic remedy depends on the petitioner's ability to pursue it without impediment, and its effectiveness depends on its offer of a prospect of success and its sufficiency depends on its capability to redress the complaint.[127]

118 ACHPR, art 56(5); European Convention, art 41(1) (c).
119 Cancado "Origin and Historical Development of the Rule of Exhaustion of local Remedies in International Law" 1976 *Belgium Review of International Law* 521; European Convention, art 22.
120 Cancado 521.
121 *De Jong, Baljiet and Van den Brink* (1984) 8 EHRR 20.
122 Practical Guide on Admissibility Criteria, 2014 Council of Europe, 22 (2018-06-30), https://bit.ly/3kRbcgW (last accessed 2020-08-17).
123 ACHPR, art 56(5). As at 17 June 2018, a total of twenty-six communications had been dismissed on grounds of inadmissibility. These included 19 concerning failure to exhaust remedies and 3 decisions on the right to a fair trial (2018-06-30), https://bit.ly/3axjJBd (last accessed 2020-08-17).
124 *Liesbeth supra,* para 2.
125 *Liesbeth supra,* para 22.
126 *Liesbeth supra,* para 37.

This is closely related to the principle of primacy, which recognises that the ECtHR has a role to play in monitoring the enforcement of the domestic authorities' implementation of the European Convention.[128] This principle requires that an individual has access to a remedy in a domestic court, which effectively implements the provisions of the European Convention.[129] This resonates with the availability of a remedy as laid out in *Liesbeth,* where an individual should be able to pursue it without any impediment. The requirement by the principle of primacy that an individual should have a substantive review of his or her complaint in the domestic court[130] is a point of departure in the two human rights bodies as far as the question of substantiality has not yet been dealt with directly by the African Commission.

The African Commission reiterates that the effectiveness of a remedy lies in its prospect of success.[131] This is synonymous with the principle of primacy, which indicates that an individual should have access to provisional measures in the course of the determination of a matter by a domestic court.[132] Besides, the Tunis Resolution recognised the need for the effectiveness of a remedy to buttress the right to a fair trial.[133] The grey area was evident in its failure to offer guidance on how to deal with evidence obtained through human rights violations. Therefore, if a State Party unduly prolonged the process of accessing a remedy, then the Commission would find that the principle of exhaustion of the remedy would not be applicable.[134] Some scholars suggest that remedies that need to be exhausted should be judicial remedies and not discretionary remedies.[135] That discussion is outside the scope of this contribution. A point of concern is where the domestic laws of a country have a legislative procedure that offers a remedy for evidence obtained through human rights violations. This is an indication that the remedy has to be exhausted through the required procedure for one to have standing before the Commission.

The exhaustion of remedies is a precursor to the admissibility of a communication by the African Commission.[136] A look at the statistics of the communications decided on their merits, and on admissibility is crucial to informing the conversation on the exhaustion of remedies. The

127 *Liesbeth supra,* para 37. The ACHPR relied on Communications 147/95 and 149/96 *Sir Dawda K. Jawara v The Gambia* and *Velasquez Rodríguez* Case (29 July 1988) Series C No. 4.
128 Christoffersen *Fair balance: proportionality, subsidiarity and primarity in the European Convention on Human Rights* (2009) 359.
129 Christoffersen 361.
130 Christoffersen 361.
131 *Liesbeth supra,* para 37.
132 Christoffersen 361.
133 The Tunis Resolution, para 1.
134 Communication 361/2008, *Zitha & Zitha v Mozambique* para 101.
135 Enabulele & Bazuaye "Setting the Law Straight: *Tanganyika Law Society v Tanzania* and Exhaustion of Domestic Remedies before the African Court" 2014 *Mizan Law Review* 237.
136 See notes 121-130 above.

African Human Rights Case Law Analyser indicates that the African Commission has handed down 229 decisions since its inception.[137] The outcomes of these decisions fall into 13 categories. These include amicable settlements, referrals under art 58(1), decisions on merit, dismissed, files closed, outcome inconclusive, and postponed "sine die".[138] Other outcomes include provisional measures, rejection at seizure stage, review on merits, rulings of inadmissibility and the withdrawal of communications.[139] While it is acknowledged that the Commission had reasons for the various outcomes, as at 30 June 2017 only 89 out of the 229 communications have been decided on merits.[140] This accounts for 38% of the communications. Besides, 90 communications have been ruled inadmissible,[141] accounting for 39% of the total number of communications. Subject to substantial research, these figures may be instructive in increasing the number of communications that are decided on merit and increasing the number of decisions that are declared inadmissible.

In the interim, the admissibility of communications that deal with evidence obtained through human rights violations poses a potential loophole, which disregards the cases with merit. The African Charter requires that a communication be considered if it satisfies the admissibility test.[142] The grounds require that the authors disclose their identity although they seek to remain anonymous [143] and that the communications are compatible with the African Charter.[144] The communication should not be written in disparaging or insulting language against the State or the institutions of the African Union,[145] that it is not based exclusively on media reports.[146] The complainant should have exhausted all local remedies,[147] and that the communication is submitted within a reasonable time.[148] The final requirement is that the communication should not be under consideration by any other international or regional treaty body.[149] This contribution visits the ground that requires that all local remedies be exhausted before the

137 IHRDA African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).
138 IHRDA African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).
139 IHRDA African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).
140 IHRDA African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).
141 IHRDA African Human Rights Case Law Analyser (2018-06-30), https://bit.ly/2EdkHqc (last accessed 2020-08-17).
142 ACHPR, art 56.
143 ACHPR, art 56, ground 1.
144 ACHPR, art 56, ground 2; Communication 383/2010 *Mohamed Abdullah Saleh Al Asad v Djobouti*.
145 ACHPR, art 56, ground 3.
146 ACHPR, art 56, ground 4.
147 ACHPR, art 56, ground 5.
148 ACHPR, art 56, ground 6. Commission Communication 305/2005 *Article 19 v Zimbabwe*, Communication 306/2005 *Samuel Muzerengwa v Zimbabwe*.
149 ACHPR, art 56, ground 7.

Commission considers a communication. Where the local remedies cannot be exhausted, the complainant has to show that the remedy in issue is unavailable, ineffective or insufficient, other than making generalised statements.[150]

There is a debate as to whether exhaustion of remedies may be a substantive or a procedural issue.[151] This section unpacks the exhaustion of remedies as a procedural issue and places it within the context of the evidence obtained through human rights violations. Some States Parties have laws that require that a person seeking a remedy for evidence obtained through human rights violations files a formal application with a domestic court. This is distinguished from instances where one alleges that evidence was obtained through human rights violations, and the court conducts a trial-within-a-trial to ascertain the voluntariness of obtaining the evidence.[152]

In Zimbabwe, a complainant who seeks the non-admission of evidence obtained through human rights violations has to file a formal application for permanent stay of criminal proceedings before the remedy is granted.[153] On this basis, his or her communication may be technically disregarded by the African Commission for failure to exhaust this procedural domestic remedy. In other countries such as South Africa, a case with similar facts may pass the admissibility test due to lack of a similar procedural requirement. This is because the domestic courts may use a trial-within-a-trial, to establish the voluntariness of obtaining the evidence without formally applying.[154] This requirement to exhaust domestic remedies poses a challenge to equality before the Commission since complainants from jurisdictions that have this procedural requirement have to apply formally for the remedy. Conversely, complainants from jurisdictions that do not provide for a procedure to follow do not have to prove the exhaustion of this remedy to court. Therefore, persons with similar complaints, other than this procedural requirement, may receive different treatment in the course of establishing the admissibility of the complaint before the Commission.

The Commission has not taken any positive steps to provide clarity by way of Concluding Observations or General Comments. The Concluding Observations of the Commission play a vital role in ensuring that evidence obtained through human rights violations is not admitted.[155] Some of the recommendations included advising States Parties to

150 Communication 338/07*Socio-Economic Rights and Accountability Project v The Federal Republic of Nigeria*.
151 Silvia & Kathrin "The rule of prior exhaustion of local remedies in the international law doctrine and its application in the specific context of human rights protection" 2007 *European University Institute* 1-4.
152 S 35(5) of the Constitution of the Republic of South Africa, 1998 (hereafter Constitution).
153 *Jestina Mukoko V Attorney General* Unreported case 36/ 2009 (20 March 2012).
154 S 35(5) of the Constitution.
155 See notes 159-161, below.

provide an independent Police oversight body[156] and criminalisation of torture.[157] Other States Parties have been advised to conform to the definition of torture as provided for in the *United Nations Convention Against Torture* (UNCAT).[158] The African Commission, therefore, in its Concluding Observations to States, has shown the areas of concern and recommendations for dealing with evidence obtained through human rights violations.

4 3 Responsibility for non-state actors

Under international law, three categories of non-state actors are identified. These include armed groups like rebels, paramilitaries, mercenaries and militias;[159] national and transnational corporations;[160] and other non-state actors.[161] The Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, (Declaration)[162] requires that States Parties exercise due diligence to prevent, investigate and punish any violation of the rights enshrined in the Declaration. The African Commission is empowered to use the provisions of this Declaration under the African Charter.[163] The States should prevent the violations of the rights of defenders under their jurisdiction by taking legal, judicial and administrative and all other measures to ensure the full enjoyment by defenders of their rights. These include investigating alleged violations, prosecuting alleged perpetrators and providing defenders with remedies and reparation. The state cannot absolve itself of liability if the perpetrators of human rights violations are non-state actors. The requirement on the state to exercise due diligence is a way of assessing whether the state has acted in fulfilment of its obligations.[164]

156 Concluding Observations on consolidated 2nd to 10th Report of Tanzania of 2008, para 24 (2018-06-30), https://bit.ly/2DQVTVa (last accessed 2020-08-17).

157 Concluding Observations on 3rd Periodic Report of Uganda of 2006 para 27, article V, paras (e) and (f) (2018-06-30), https://bit.ly/2YaFNMR (last accessed 2020-08-17).

158 United Nations Convention against Torture, and other Cruel, inhuman and degrading treatment (UNCAT) adopted by the General Assembly in New York, USA on 1984-02-04 and entered into force on 1987-06-12, 1465 UNTS 85. Concluding Observations on initial periodic report of Botswana, of 2010 (12th to 20th May 2010), https://bit.ly/3atL1s6 (last accessed 2020-08-17).

159 Report of the Special Rapporteur, Margaret Sekagya on the situation of human rights defenders A/65/223 dated 4 August 2010, 3.

160 Report of the Special Rapporteur, Margaret Sekagya on the situation of human rights defenders A/65/223 dated 4 August 2010, 4.

161 Report of the Special Rapporteur, Margaret Sekagya on the situation of human rights defenders A/65/223 dated 4 August 2010, 5.

162 Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, adopted by the General Assembly at its 53rd session on 1999-03-08, GA Res 53/144, UN GAOR, UN Doc A/RES/53/144 annex.

163 ACHPR, arts 60 and 61.

An assessment on whether the African Commission offers clarity on evidence obtained through human rights violations by vigilantes is instructive. This is because some countries have developed jurisprudence that deals with evidence from vigilantes. In South Africa, evidence obtained through human rights violations may still be admitted if it was obtained in a manner that did not violate the rights of an accused person.[165] In *Zimbabwe Human Rights NGO Forum v Zimbabwe,* the African Commission dealt with the issue of the scope of responsibility for state actors in human rights violations. The facts are that the Zimbabwe NGO Forum, brought this claim, alleging that following the Constitutional Referendum in 2000, there was widespread violence targeted at white farmers, black farm workers, teachers, civil servants and people believed to be supporting opposition parties.[166] Because of the violence, 82 people lost their lives.[167] The complainants stated that the police and the army of Zimbabwe failed to intervene in the incident of criminal activity. According to the Commission, the term "state actors" referred to individuals, organisations, institutions, and other bodies that were acting outside State organs.[168]

The Commission stated that the complainants failed to prove, first, that the war veterans were state actors,[169] and secondly that the government of Zimbabwe acquiesced to their acts.[170] The human standards of the African Charter require that the state takes positive steps to prevent private violations of human rights of individuals under its jurisdiction.[171] The prevention of these violations of human rights does not end with the observance of the human rights standards by state organs, but require the state to ensure that third parties, like non-state actors, do not interfere with the enjoyment of rights of individuals under its jurisdiction.[172] The state is expected to exercise due diligence to prevent the violation of the human rights of individuals by non-state actors by organising state organs to apprehend such individuals and ensure that they are brought to justice.[173]

There was no doubt that because the non-state actors were involved in the arrest and detention of individuals, the state prevented the victims

164 See *Velasquez supra*, para 172.
165 *S v Songezo Mini* Unreported Case 141178 of 2015 (30 April 2015), paras 20, 21, 22. *S v Zuko* Unreported ECD Case CA & R159 of 2001. *S v Hena* 2006 2 SACR 33 (SE 40i-41b).
166 *Zimbabwe Human Rights NGO Forum supra,* paras 3-4.
167 *Zimbabwe Human Rights NGO Forum supra,* para 8.
168 *Zimbabwe Human Rights NGO Forum supra,* para 142.
169 *Zimbabwe Human Rights NGO Forum supra,* paras 139-141.
170 *Zimbabwe Human Rights NGO Forum supra,* paras 139-141.
171 *Zimbabwe Human Rights NGO Forum supra,* para 142.
172 *Zimbabwe Human Rights NGO Forum supra,* para 143. Communication 272/2003 *Association of victims of Post Electoral Violence and Interights v Cameroon* para 89.
173 *Zimbabwe Human Rights NGO Forum supra,* para 147. The Commission referred to the ICCPR article 2(3)a, General Comment 20 of the HRC; articles 2,3,8 and 14 of the European Convention.

of the crimes from obtaining relief from the domestic courts.[174] The state had an obligation to exercise due diligence and ensure that it did not acquiesce to the use of evidence obtained through human rights violations by non-state actors like vigilantes. Consequently, bringing such individuals to justice for human rights violations, such as obtaining evidence through torture or cruel, inhuman and degrading treatment ought to have been alluded to by the African Commission under the Principles. These Principles prohibit the collection of evidence through a violation of a detained person's rights[175] and require that States Parties put in place mechanisms for the receipt and investigation of complaints.[176] The African Commission did not address the issue of evidence obtained through human rights violations. However, it pointed to the need to uphold the rights of individuals who were affected by the non-state actors. As such, laws like the Zimbabwe Decree 1 of 2000 which forecloses access to any remedy that may be available to victims to vindicate their rights, had to be amended to ensure that Zimbabwe does not renege on its commitment to the enjoyment of the right to a fair trial by persons in its jurisdiction.[177]

This complaint presented the Commission with a chance to rule on the position of the vigilantes and the evidence they obtain. Its failure to offer clarity on evidence obtained through human rights violations by vigilantes presented a lacuna in its jurisprudence. It was expected that the African Commission addressed the issue of vigilantes and how the evidence they obtain is dealt with. This case offered the African Commission a chance to use the development of domestic law to improve the jurisprudence on evidence obtained by vigilantes.[178]

4 4 Dealing with evidence obtained through torture

Various international and regional instruments impose obligations on States Parties about evidence obtained through torture. There are protective measures to ensure the training of law enforcement officers on what constitutes torture or ill-treatment.[179] The States Parties are supposed to ensure that any statement made because of torture is not used in evidence in any proceedings, except against the perpetrators as evidence that the statement was made.[180]

174 *Zimbabwe Human Rights NGO Forum supra,* para 211.
175 The Principles, principle M(7)(d) - (f).
176 The Principles, principle M(7)(h).
177 *Zimbabwe Human Rights NGO Forum supra,* paras 214, ACHPR, arts 1 and 7.
178 Municipal law has been used before, to develop law at the regional level. Compare the judgment of Sachs J in *S v M* 2008 (3) SA 232 (CC) and the General Comment 1 of 2014 on children and caregivers (2015-11-30), https://bit.ly/3110vke (last accessed 2020-08-17).
179 Declaration on the Protection against Torture (DPT) adopted by the UNGA res 3452 (XXX) 1975-12-9, art 5. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) A/RES/70/175 para 54.

The States Parties are required to ensure that there are established competent authorities to promptly and impartially investigate reasonable grounds that there has been the commission of torture.[181] It is expected that there is subsequent prosecution of the perpetrators once it is established that an act of torture has been committed.[182] The States Parties are required to streamline their legislation and bring it into conformity with the Convention against Torture (CAT).[183] The CAT requires that the prosecution of perpetrators of torture should not be subjected to discretion.[184] This principle forms the core of the content in the Robben Island Guidelines. However, this is limited to evidence obtained through torture, cruel, inhuman and degrading treatment.

In *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt,* the African Commission addressed the issue of evidence obtained through torture.[185] According to the complainants, agents of the State Security Intelligence (the SSI) subjected the victims to various forms of torture and ill-treatment during their detention to "confess" before the State Security Prosecutor for their involvement in the Taba bombings.[186] The victims were held *incommunicado* for a long period without access to a lawyer.[187] Subsequently, these confessions were used to convict the complainants in the domestic court and sentenced to death.[188] The main issue before the African Commission was whether the complainants' right to a fair trial was violated.

The African Commission relied on the jurisprudence of the ECtHR to state:

> "Where a person is injured while in detention or otherwise under the control of the police, any such injury will give rise to a strong presumption that the person was subjected to ill-treatment. It is incumbent on the State to provide a plausible explanation of how the injuries were caused, failing which a clear issue arises under art 3 of the Convention."[189]

The African Commission held that since the respondent did not attempt to give a satisfactory explanation, it was presumed that it was

180 CAT General Comment No. 2 Implementation of article 2 by States parties, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007), para 4(3). CCPR General Comment No 13 Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law Doc HRI/GEN/1/Rev.1 (1984) para 16 indicates that evidence obtained by way of compulsion of any form is inadmissible.
181 UNCAT, art 12. General Comment 20, para 1.
182 UNCAT, art 7.
183 UN Doc CAT/C/7/Add.1 (23 November 1995) paras 10, 30. See also Concluding Observations on the third periodic report of Australia of 2008, UN Doc CAT/C/AUS/CO/1 (15 May 2008) para 30.
184 UN Doc CAT/C/AUS/CO/1 (6 May 1998) para 11.
185 *Egyptian Initiative supra,* para 7.
186 *Egyptian Initiative supra,* para 7.
187 *Egyptian Initiative supra,* para 7.
188 *Egyptian Initiative supra,* para 8.
189 *Colibaba v Moldova* European Court of Human Rights Application 29089/2006 para. 43

responsible for the injuries. In addition, a confession obtained through torture should not have been admitted in evidence.[190] While this decision marked the dawn of developing specific jurisprudence on evidence obtained through human rights violations, the African Commission did not question the State Prosecutor's reluctance to disallow the admission of the confession that was obtained through human rights violations. This would have established a new line of jurisprudence that required that both the law enforcement officers and the prosecutors play an active role in ensuring that the rights of an individual are upheld in pre-trial detention. This decision resonated with the Principles in ensuring that evidence is not obtained through human rights violations. The decision, however, did not expound on the role of the prosecutor. This role is central to ensuring that in instances of human rights abuses in pre-trial detention, the prosecutor evaluates which evidence should be admitted.

The African Commission referred to a wide range of international jurisprudence from the HRC, the ECtHR, the Robin Island Guidelines and The Principles.[191] It adequately dealt with evidence obtained through human rights violations as long as it amounted to torture, cruel, inhuman and degrading treatment. The decision did not, however, recognise that there are instances that may potentially lead to evidence obtained through human rights violations other than torture. The Commission's engagement with the Robben Island Guidelines affected the quality of the decision as far as the violation of the right against torture formed the violation of the right to a fair trial. This decision presents a limitation in the development of the jurisprudence as far as the African Commission has not adequately dealt with other instances of evidence obtained through human rights violations other than torture.

5 Conclusion

The definition of "jurisprudence" by Salmond, engages the basis, development and the implementation of a law. This enables one to approach the jurisprudence of international human rights bodies from a normative and implementation perspective, based on the principles that they present. Therefore, the limits in the jurisprudence of human rights body are qualified by its ability to offer detailed and well reason judgments other than a high number of decisions. It follows that the quality of the decisions supersedes the sources of jurisprudence that a human rights body uses in its decision.

On this basis, the emerging jurisprudence of the African Commission shows a limited development on evidence obtained through human rights violations. First, the normative developments were not specifically tailored to adequately deal with evidence obtained through human rights

190 *Egyptian Initiative* paras 191, 218. The Principles, principle N(6)(d)(1).
191 ACHPR, art 60.

violations. This position changed with the adoption of the Robben Guidelines and the Principles. Second, the development of the jurisprudence has been generally targeted at enhancing the right to a fair trial rather than specifically dealing with evidence obtained through human rights violations.

The African Commission has not adequately utilised its normative principles to develop its jurisprudence concerning bringing the law into conformity with the foregoing principles. It should make a deliberate effort that engages evidence obtained through human rights violations. This would be a departure from the general development of the right to a fair trial that does not question the admission of evidence obtained through human rights violations. Subject to further research rules on admissibility should be revisited to ensure that the African Commission deals with the merits of a communication with due regard to the procedural technicalities involved. This is due to the existence of procedural processes in various domestic jurisdictions on evidence obtained through human rights violations. This failure stems from the various levels of national developments on evidence obtained through human rights violations.

Where the African Commission requires that a State Party bring its law into conformity with the African Charter, it should specify the impugned parts of the law. Although the States Parties may choose to implement the decisions of the Commission, it is instructive that the decisions handed down due to evidence obtained through human rights violations have specific requirements.[192] This will aid the development of the jurisprudence through its normative principles. Its reference to the Dakar Declaration was hinged generally on the right to a fair trial and not on evidence obtained through human rights violations. The decisions did not offer guidance to issues of evidence obtained through human rights violations because the norms did not do so. Some facts pointed to obtaining evidence through human rights violations. The Commission's failure to engage the norms with these facts affected the quality of the decision. This became a limitation in the development of its jurisprudence as far as the Commission did not deal with issues of evidence obtained through human rights violations.

The recommendations of the African Commission in its Concluding Observations on State Party Reports play a vital role in ensuring the non-admission of evidence obtained through human rights violations. It should use the same tools to advise States Parties on how to deal with this kind of evidence. The admissibility of communications forms an integral part of the complaint's mechanism. The requirement to subject all communications to the admissibility test of exhaustion of local remedies is well-intentioned. The merits of each communication may have to be known so that a value decision on admissibility is made. This addresses the inequality because of domestic procedural requirements.

192 Communication 368/2009 *Abdel Hadi, Ali Radi v Republic of Sudan*, para 93.