A CRITIQUE OF THE JURISPRUDENCE OF THE AFRICAN COMMISSION REGARDING EVIDENCE IN RELATION TO HUMAN RIGHTS VIOLATIONS: A NEED FOR REFORM?

BY

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ABSTRACT

The success of any human rights system at the domestic, regional or international level requires an adequate development of the normative, institutional and jurisprudential frameworks. With regard to the African Commission, its approach on the normative and jurisprudential framework on evidence obtained through human rights violations is critiqued. The study is guided by three research questions on the African Commission's normative and jurisprudential framework, and interrogates the need for improvement.

While other human rights bodies like the European Court of Human Rights and the Human Rights Committee have developed jurisprudence, their experiences can only be useful to Africa where they are subjected to a framework that speaks to an accused, in Africa in light of his or her peculiar situation. An evaluation of the African Commission's mode of dealing with evidence obtained through human rights violations, followed by an evaluation of the mode engaged by other human rights bodies offers a platform to selectively, and with necessary adoption recommend a framework that the Africa Commission can use to improve its jurisprudence. In this regard, the study draws on the experiences of other human rights bodies to aid, the development of a framework to improve the jurisprudence of the African Commission.

The study situates theoretical underpinnings that inform the decisions of the African Commission, the European Court of Human Rights and the Human Rights Committee. This is followed by an evaluation of the normative and jurisprudential frameworks of the three human rights bodies. The study proposes a framework based on a victim-centred approach to improve the jurisprudence of the African Commission on evidence obtained through human rights violations.

KEYWORDS

Admissibility

African Commission

Doctrine of the Margin of Appreciation

European Court of Human Rights

Evidence

Human Rights Committee

Liberal theory

Primarity

Right to a fair trial

Victim-centred approach

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LIST OF ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
African Court	African Court of Human Rights
AHRC	Arab Human Rights Committee.
APT	Association for the Prevention of Torture.
AU	African Union.
CIDT	Cruel, Inhumane and Degrading Treatment
CSO	Civil Society Organisation
Dakar Declaration	Dakar Declaration on the Right to a fair trial in Africa
DPT	Declaration on the Protection against Torture
ECHR	European Convention on Human Rights
EHRR	European Human Rights Reports
ECtHR	European Court of Human Rights
EEC	European Economic Community
GBP	Great Britain Pound
HRC	Human Rights Committee
IACHR	Inter-American Convention on Human Rights
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights

ICCPR	International Covenant on Civil and Political Rights
Luanda Guidelines	Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa
NGO	Non-governmental Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
Protocol	Protocol on the African Charter of Human and People's Rights on the establishment of the African Court of Human and People's Rights
Robben Island Guidelines	Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa
The Principles	Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa
Tunis Resolution	Tunis Resolution on the Right to Recourse and Fair Trial
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

DECLARATION

I, **Nanima Robert Doya**, declare that '**A critique of the jurisprudence of the African Commission regarding evidence in relation to human rights violations: A need for reform?'** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: _____ Nanima Robert Doya

July 2018

Signed: _____ Prof. Benyam Dawit Mezmur

July 2018

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DEDICATION

To my parents, Mr and Mrs Yona Gamusi and Alice Doya.

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

The success of any human rights system at the domestic, regional or international level requires an adequate development of the normative, institutional and jurisprudential frameworks.[1] The normative framework relates to the legislation and/or judicial principles in place. The institutional framework refers to the human resources in place to apply the theoretical principles to the practical challenges. The jurisprudential framework emanates from the application of the normative and institutional frameworks over a period of time. A gradual fusion of the three frameworks creates a steady development of any human rights system.

The institutional development of human rights in Africa has evolved through two stages. The first stage was under the auspices of the Organisation of African Unity (OAU), which was transformed in 2002 into the African Union (AU) for the second stage.[2] The Charter of the OAU of 1963,[3] premised on the abolition of colonialism and apartheid, made little reference to human rights as a regional concept.[4] The Constitutive Act of the AU of 2001 required it to encourage heads of State and

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1 Thomas B 'The normative and institutional evolution of the international human rights ' (1997) 19 *Human Rights Quarterly* 703 at 723.

2 Christof H 'African regional human rights system' (2003-04) 108 *Pennsylvania State Law Review* 679 at 681.

3 47 UNTS 39 (1963).

4 Preamble to OAU Charter in contradistinction with para 9 of the preamble to the Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15.

governments to promote and protect human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples Rights (ACHPR).[5]

The major institutional human rights structure of the AU is the African Commission on Human Rights (African Commission), established by the ACHPR[6] with a mandate to promote and protect human rights.[7] In the exercise of its mandate, the African Commission may 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.[8] The ability of the African Commission to formulate principles aimed at solving legal problems addresses the silence of the ACHPR regarding evidence obtained through human rights violations. This study seeks to establish the development of the jurisprudence of the African Commission in relation to evidence obtained through human rights violations and suggest ways in which it can be made more effective.

The second institutional structure of the African human rights system is the African Court of Human Rights (African Court).[9] This Court was established by the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an

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5 The Constitutive Act of the African Union, para 9 of the preamble and Arts 3(h) and 4(m).

6 The ACHPR Art 30.

7 Article 30.

8 Article 45 (1) b. See Nsongurua JU 'The African Commission and fair trial norms' (2006) 6 *Africa Human Rights Law Journal* 229 at 305.

9 Article 1 of the Protocol to the African Charter on human and people's rights on the establishment of an African Court on human and people's rights, 9 June 1998, OAU Doc. AU/LEG/EXP/AFCHPR/ PROT (III).

African Court on Human and People's Rights (the Protocol),[10] to complement the protective mandate of the African Commission.[11] This includes the interpretation and application of the ACHPR, its own Protocol and any other relevant human rights instrument that falls within the Court's jurisdiction.[12] The African Commission has a weakness in respect to the enforcement of its decisions.[13] It follows that the ability of the African Commission to make binding laws should not be an issue that questions its legitimacy. It should be recalled that any improvement on the implementation of the decisions of the African Commission would be based on an amendment to the African Charter after the States Parties have been consulted and have agreed to be bound by such terms.

As noted earlier, every human rights system requires the development of the institutional, normative and jurisprudential frameworks to succeed. In light of the current institutional framework, the development of the jurisprudence regarding

10 OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III). See Badawi E 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights: Introductory Note' (1997) 9 *African Journal of International and Comparative Law* 953 at 953.

11 Article 2 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights. In the last paragraph of the preamble of the Protocol, the African Member States declared their firm conviction that the attainment of the objectives of the African Charter requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission.

12 Article 3(1). See Stefiszyn K 'The African Union; challenges and opportunities for women' (2005) 5 *Africa Human Rights Law Journal* 358 at 382

13 Article 30. It should be recalled that enforcement in international law is often a function of the political values of states subject to any regime of international obligation and responsibility. See Murray R *The African Commission on Human and Peoples. Rights and international law* (2000) 33-34.

evidence obtained through human rights violations in the African regional human rights system has gone through two stages. The first stage is the normative development of the soft law by the African Commission, and the second stage is the implementation or jurisprudential development of the soft law. The two stages have been eclipsed by the need to improve the adequacy of the protection and promotion of the right to a fair trial.

The right to a fair trial encompasses the need not to admit evidence obtained through human rights violations.[14] This right has gone through a number of developments from 1992 to 2003. It is this period that the researcher refers to as the first stage. The general pattern of this stage saw a four-stage progressive continuum in the development of the right to a fair trial in the African Union.

First, at its 11th Ordinary Session in Tunis, and aware of the inadequacies of Article 7,[15] the African Commission passed a Resolution on the Right to Recourse and a Fair Trial,[16] which provided an accused with a right to an effective remedy for his or her rights which were violated;[17] to be informed promptly of the charges against him or her;[18] and to be brought to court promptly.[19] In addition, the accused had a right to prepare his or her defence in consultation with counsel,[20] examine witnesses,[21] and

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14 See the literature review in section 1.6 below.

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

16 Document ACHR/Res.4(XI)92: Resolution on the Right to Recourse and Fair Trial(1992).

17 Paragraph 1.

18 Paragraph 2(b).

19 Paragraph 2(c).

20 Paragraph 2(e)i.

exercise the right to an interpreter if one was needed.[22] The Resolution, however, did not provide guidance on how to deal with evidence obtained through human rights violations.

The second major development was in September 1999, when the African Commission adopted the Dakar Declaration on the Right to a Fair Trial in Africa [23] and recognised that the right to a fair trial was a fundamental right whose realisation was dependent on the existence of certain practices.[24] Some of the practices included impunity and the failure by the State to deal with human rights violations, resulting in a systematic denial of justice.[25] This development attempted to buttress the accused's pre-trial guarantees by placing positive duties on the States Parties. However, the Declaration neither offered the guidance required to ensure that evidence obtained through human rights violations is not admitted, nor elaborated on what effective redress entailed.

The third development culminated in the adoption of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines).[26] These were premised on the need to take positive steps to further the implementation of existing prohibitions on

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21 Paragraph 2(e)iii.

22 Paragraph 2(e)iv.

23 Document ACHR/Res.4 (XI) 92.

24 Introduction to the Dakar Declaration on the Right to a Fair Trial in Africa available at http://www/jstor.org/ stable/ 3558976/ (accessed 29 May 2015).

25 Robben Island Guidelines preambular paragraph 7.

26 Resolution 61 (XXXII) 02 adopted by the African Commission at its 32nd Ordinary Session, on 17 to 23 October 2002.

torture, cruel, inhuman and degrading treatment and punishment.[27] Scholars suggest that while the Robben Island Guidelines provide guidance on how to deal with evidence obtained through torture and cruel, inhuman and degrading treatment (CIDT), they do not provide guidance on evidence obtained through other human rights violations.[28] It is suggested that the Robben Island Guidelines have not provided added value with regard to the right against torture by States.[29] This is so because the Robben Island Guidelines reflect the contents of other international instruments and as such lack the detail to make them a useful interpretative text for Article 5 of the ACHPR.[30]

The fourth major development was the passing of a Resolution[31] to establish a working group to prepare a draft of general principles and guidelines on the right to a fair trial and legal assistance.[32] This culminated in the adoption of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the Principles).[33] The Principles urge States Parties to the ACHPR to incorporate them

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27 Preamble to the Robben Island Guidelines.

28 Long D & Murray R 'Ten years of the Robben Island Guidelines and Prevention of Torture in Africa: For what purpose?' (2012) 12 *Africa Human Rights Law Journal* 311 generally.

29 Long & Murray (2012) generally.

30 Oral Statement made by the Association for the Prevention of Torture (APT) at the 29th Ordinary Session of the African Commission; Report of East African Workshop 19-20 in Long D & Murray R (2012) 342.

31 Resolution on the Right to a Fair Trial and Legal Assistance in Africa, Res AHG/222(XXXVI).

32 Paragraph 3.

33 DOC/OS(XXX)247, adopted by the 33rd Ordinary Session of the African Commission on Human and Peoples' Rights (African Commission') in the Republic of Niger in May 2003. See also Banderin MA 'Developments in the African Regional Human Rights System' (2005) 5 *Human Rights Law Review* 117 118.

into their domestic law and to respect them. The Principles introduce four key concepts to aid the African Commission in dealing with evidence obtained through human rights violations.[34] These include the right to an effective remedy,[35] the role of prosecutors,[36] prohibition of the collection of evidence through a violation of a detained suspect's rights,[37] and the rule on how to deal with evidence obtained through force or coercion.[38]

The second stage involves the development of the jurisprudence beyond the content of the Principles and Robben Island Guidelines. It must be noted that since the adoption of the Principles, the African Commission has handed down a few decisions which develop the mode of dealing with evidence obtained through human rights violations.[39] Two notable decisions are discussed below.

In *Egyptian Initiative and Another v Arab Republic of Egypt (Egyptian Initiative)*,[40] the complainants claimed a violation of their rights under Articles 4, 5, 7(1) (a), 7(1) (c) and 26 of the ACHPR.[41] The African Commission found a violation of Article 5 in

34 Preamble to the Principles.

35 Principle C(a).

36 Principle F.

37 Principle M(7)(d)- (f).

38 Principle N(6)(d)1.

39 The cases to be analysed include *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt* Communication 334/2006, *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe* Communication 295/2004, *Abdel Hadi, Ali Radi & Others v Republic of Sudan* Communication 368/2009 among others.

40 Communication 334 of 2008. The study evaluates the decisions from 2003 to 2015 on the right to a fair trial with particular regard to the admission of evidence obtained through human rights violations.

41 Paragraph 36.

respect of torture[42] and of Articles 7 and 26 in respect of the right to a fair trial,[43] and decided that evidence obtained as a result of coercion or force *may be* inadmissible.[44] The African Commission did not address the issue of evidence obtained through use of unfair advantage over the person in detention.[45] In addition, it did not address the issue of the State Prosecutor's knowledge that the police used torture to obtain confessions from the complainants,[46] and had the confessions admitted in evidence.

In *Abdel Hadi and Others v Republic of Sudan*,[47] the complainants lodged a communication with the African Commission, claiming that their rights under Articles 1,5,6 and 7 of the Charter had been violated. The African Commission found there had been a violation of Article 5 (torture),[48] Article 6 (unlawful detention),[49] and Article 7 (right to a fair trial and lack of access to counsel for nine months).[50] In addition, the African Commission made reference to the Principles but limited itself to the suspect's right to a lawyer. This case shows a decline in any prospective development that the African Commission had in respect of its jurisprudence.

While the first stage saw the development of vibrant principles and guidelines to deal with evidence obtained through human rights violations; there is little jurisprudence to show for it in the second stage. It is on this basis that the research seeks to evaluate the current context of the African Commission with regard to evidence obtained

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42 Paragraphs 170 to 171 and 190.

43 Paragraph 219.

44 Paragraph 212.

45 Principle M(7) d of the Principles.

46 *Egyptian Initiative*, para 7.

47 Communication 368 of 2009.

48 Paragraph 73.

49 Paragraph 84.

50 Paragraph 90.

through human rights violations and recommend a framework to improve the situation. This framework can only be created after evaluating what other human rights monitoring bodies on the international and regional scenes have done.

1.2 RESEARCH PROBLEM

The study evaluated the development of the jurisprudence of the African Commission on evidence obtained through human rights violations in criminal cases during pre-trial detention. The normative framework, such as resolutions, declarations, the Principles and the Robben Island Guidelines, were not being utilised by the African Commission to develop its jurisprudence on evidence obtained through human rights violations. Although the African Commission had developed vibrant principles and guidelines on instances of evidence obtained through human rights violations, there was limited growth in its jurisprudence. The decisions, General Comments or Concluding Observations of the African Commission showed this position.

If this study was not conducted, the African Commission would continually develop a jurisprudence that did not reflect the normative framework that dealt with evidence obtained through human rights violations that were brought to its attention. While the decisions and the emerging jurisprudence reflected other aspects of human rights protection and promotion, they did not adequately deal with instances of evidence obtained through human rights violations.

This study questioned the reasons that informed the jurisprudential framework's failure to exhibit the principles that underscored the vibrant normative framework on evidence obtained through human rights violations. Based on this reason, the study drew on the experiences of other human rights bodies to aid the improvement of the jurisprudence of the African Commission. Subsequently, this study contextualised

Africa's status and drew lessons from other human rights bodies, that would improve its jurisprudence on evidence obtained through human rights violations.

Both international[51] and regional human rights systems[52] have different modes of dealing with the problem of evidence obtained through human rights violations. A study of these bodies substantiated this research and justifies the need for reform. The study drew on the experiences of the Human Rights Committee (HRC),[53] and the European Court on Human Rights (ECtHR)[54] as an aid in providing a solution to improve the development of the jurisprudence of the African Commission. The HRC is chosen because it has various sources of jurisprudence, coupled with a large number of signatories, yet it is hesitant to deal with evidence obtained through human rights

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51 The Human Rights Committee (HRC) established under Article 28 of the ICCPR.

52 The ECtHR: the Inter-American Commission on Human Rights, established by Art 33 of the American Convention on Human Rights, Pact of San Jose, Costa Rica; 1144 U.N.T.S. 123, entered into force 18 July 1978; the Arab Human Rights Committee created pursuant to Art 45 of the Arab Charter (reprinted in (2005) 12 *International Human Rights Reprint* 893, entered into force 15 March 2008.

53 Established by Art 28 of the ICCPR 999 UNTS 171; See Conte A, Davidson S & Burchill R *Defining Civil and Political Rights: Jurisprudence of the United Nations Human Rights Committee* (2004) 94.

54 Established by Art 19 of the European Convention on Human Rights (ECHR); On the ECtHR, see Robin CA & Claire O *Jacobs, White & Ovey: The European Convention on Human Rights* 5ed (2010) 1–3, Maffei S & Sonenshein D, 'The Cloak of the Law and Fruits Falling from the Poisonous Tree: A European Perspective on the Exclusionary Rule in the Gafgen Case' (2012–13) 19 at 19, *Columbia Journal of European Law* 22 at 48, Steven G 'Is the prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International human Rights Law?' (2015) 15 *Human Rights Law Review* 101 at 103. See Mavronicola N, 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Art 3 of the European Convention on Human Rights' (2012) 12 *Human Rights Law Review* 736 at 737; Wierenga W & Wirtz S, 'Case of *Gafgen versus Germany*: How Absolute is the Absolute Prohibition of Torture? The Outcome of an Ethical Dilemma' (2009) 16 *Maastricht Journal of European and Comparative Law* 365 at 365.

violations.[55] The ECtHR, on the other hand, has a smaller number of signatories coupled with the reliance on only its decisions, yet it has a developed jurisprudence on this nature of evidence.[56] As a result, the two human rights bodies represent extremities, which are instructive in guiding the study on the African Commission. Notwithstanding the foregoing, the research may require the fusion of experiences from other bodies, such as the Inter-American Commission on Human Rights (IACHR), Arab Human Rights Committee (AHRC) and the United Nations Convention Against Torture (UNCAT).

1.3 PURPOSE OF THE STUDY

The study seeks to evaluate the development of the jurisprudence of the African Commission in relation to evidence obtained through human rights violations. The violations may either be procedural or substantive in nature. The procedural violation refers to instances where the investigating officer does not follow the requisite procedure and subsequently obtained evidence through human rights violations. The substantive violation refers to instances where evidence in obtained following the requisite procedure but investigating officer or person in similar circumstances obtained evidence in violation of the rights of an individual. The gravity of the violation is not in issue, as long as a human right is violated. The purposes of the study are threefold:

1. To examine the context of the African Commission's mode of dealing with evidence obtained through human rights violations.

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55 See detailed discussion in Chapter Four.

56 See detailed discussion in Chapter Five.

2. To draw on the experiences of other international and regional human rights systems to enhance the development of the jurisprudence of the African Commission.
3. To recommend a framework to improve some of the shortcomings of the current practice.

1.4 RESEARCH QUESTIONS

The central research question of this study is:

Is there limited development of the jurisprudence of the African Commission as regards evidence obtained through human rights violations?

To respond to this question, the study examines three interrelated secondary questions, which are:

1. Does the African Commission have a mode of dealing with evidence obtained through human rights violations?
2. Can the experiences of other human rights bodies be used as an aid, to enhance the development of the jurisprudence of the African Commission?
3. Can a framework be recommended to improve some of the shortcomings of the current practice?

1.5 RESEARCH METHODOLOGY

This study identifies the problem of the low level of jurisprudential development of the African Commission in dealing with evidence obtained through human rights violations. As a result, the study reviews and analyses the literature and case law that is relevant to the study. The methodology was desktop research based on the review and analysis of literature and case law that are relevant to the subject of the study. The sources that were examined included the jurisprudence of regional and

international supervising bodies; international and municipal law; legal literature including textbooks and journals; and case law. The researcher adopts purposive sampling for purposes of identifying relevant complaints and communications for critique and analysis.[57] The critical use of statistics from the human rights bodies serves to enrich the desktop research in the course of the chapters.[58]

The primary sources of information that are utilised in the study include communications and complaints limited to regional and international treaty decisions. These serve the purpose of critiquing the interpretation of evidence obtained through human rights violations. Secondary sources, such as, scholarly journal articles and academic books relevant to the adjudication of evidence obtained through human rights violations, are used.

Empirical data collection methods are not used because first, the study involves a conceptualisation of the mode of dealing with evidence obtained through human rights violations; and secondly, the study employs a conceptual approach for the development of a framework for dealing with evidence obtained through human rights violations.

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57 Neuman WL *Social Research Methods: Qualitative and Quantitative methods,* 6 ed (2011) generally. See also Babbie E & Mouton J *The Practice of Social Research* (2013) generally.

58 This position is evident across the chapters. It is not an introduction of a new methodology, but rather a concretisation of the already stated methodology.

1.6 LITERATURE REVIEW

Odinkalu acknowledges that most normative developments in the AU started in 2002.[59] Odinkalu's study does not show any jurisprudential developments and presents a lacuna coupled with an analysis by this study to validate any developments in the jurisprudence of the African Commission, with an emphasis on evidence obtained through human rights violations. This analysis has, however, not been revisited or updated to establish whether the current status of the jurisprudence is a reflection of the progressive normative developments in the African regional human rights system.

Banderin analyses the jurisprudential developments of the African Commission and refers to three decisions of the African Commission. In the sphere of jurisprudential development, three recent decisions of the African Commission are analysed for their importance, namely *The Law Offices of Ghazi Suleiman v Sudan,*[60] *Curtis Francis Doebbler v Sudan*[61] and *Purohit and Moore v The Gambia.*[62] These decisions, respectively, relate to freedom of expression and democracy in Africa; Islamic law and human rights in Africa; and the human rights of mental health patients in Africa. The cases do not show any development of the jurisprudence as regards evidence obtained through human rights violations. They highlighted the limited development of the jurisprudence and the need for this study to fill the lacuna.

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59 Odinkalu CA 'Human Rights Mechanisms in Africa: Recent Developments in their Norms, Institutions and jurisprudence' (2003) 3 *Human Rights Law Review* 105 at 105.

60 Communication 228/1999.

61 Communication 236/2000.

62 Commission Communication 241/2001.

Ouguergouz suggests that the African Commission has been aware of the inadequacies of Article 7 of the ACHPR.[63] This led to the adoption of a series of Resolutions,[64] a Declaration,[65] and the Principles and Robben Island Guidelines.[66] He seems to suggest that the consistent adoption of the various resolutions, declarations, the Principles and the Robben Island Guidelines was premised on the realisation of the need to buttress the right to a fair trial. This position is rather a general approach to the right to a fair trial, and as such, requires an evaluation with regard to its relevance to evidence obtained through human rights violations.

After the adoption of the Protocol, Badawi observes, that the establishment of an African Court was seen as a particular means to enhance the efficiency of the African Commission.[67] This observation which is premised on the future relationship between the African Court and the African Commission, offers this study the opportunity to establish if it has enhanced the efficiency of the African Commission by supporting it through its protective mandate to develop jurisprudence relating to evidence obtained through human rights violations.

Long and Murray analyse the purpose of the Robben Island Guidelines and agree that they provide guidance on how to deal with evidence obtained through torture and

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63 Ouguergouz (2006) 141.

64 Document ACHR/Res.4(XI)92: Resolution on the Right to Recourse and Fair Trial(1992), ACHPR Resolution on the Right to Fair Trial and Legal Aid in Africa (1996) ACPHR/Res.41(XXVI)99.

65 Dakar Declaration Document ACHR/Res.4 (XI) 92.

66 Paragraph 3.

67 Badawi E 'The Future Relationship between the African Court and the African Commission' (2002) 2 *African Human Rights Law Journal* 252 at 253. See also Resolution AHG/Res. 230(XXX) at 30th Ordinary Session of the Assembly of Heads of State and Government, June 1994.

CIDT.[68] They suggest, however, that the Robben Island Guidelines have not provided added value to civil society which usually seeks to control the use of torture by the State.[69] This is because the Robben Island Guidelines reflect the contents of other international instruments and as such lack the detail to make them a useful interpretative text to Article 5 of the ACHPR.[70] This is an indication that the failure of the Robben Island Guidelines to offer the necessary detail to provide a useful interpretative text to Article 5 of the ACHPR, shows a limited development of the jurisprudence of the African Commission.

Mujuzi analyses the case of the *Egyptian Initiative,*[71] and applauds the African Commission on this landmark decision and engages the Principles and the decision of the African Commission. His review tends to deal with evidence obtained through torture. It must be noted that since the review of the African jurisprudence by Mujuzi, there has been a low level of development of the jurisprudence of the African Commission regarding evidence obtained through human rights violations. Viljoen provides an in-depth analysis of the international human rights system in Africa. He does not, however, offer adequate elucidation of evidence obtained through human rights violations.[72]

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68 Long & Murray (2012) 311.

69 Long & Murray (2012) generally.

70 Oral Statement made by the Association for the Prevention of Torture (APT) at the 29th Ordinary Session of the African Commission; Report of East African Workshop 19-20 in Long & Murray (2012) 342.

71 Mujuzi JD 'The African Commission on Human and Peoples' Rights and the Admissibility of evidence obtained as a result of torture, cruel, inhuman and degrading treatment: *Egyptian initiative for Personal Rights and Interights v Arab Republic of Egypt*' (2013) 17 *International Journal of Evidence and Proof* 284 at 287.

72 Viljoen F *'International Human Rights Law in Africa'* 2ed (2012) 377-78.

It is significant to note that judicial and quasi-judicial institutions are grappling with the problems of dealing with evidence obtained through human rights violations and that the African Commission is no exception. No single approach that can be categorised as a complete success is offered by either domestic jurisdictions,[73] or regional[74] or international human rights systems.[75] While the African region's human rights system has undergone a stage of adopting soft law which deals with evidence obtained through human rights violations, there has been little development of this soft law into jurisprudence that can be properly assessed. This limited development has brought about three problems. First, the African Commission has not adequately upheld its mandate to promote and protect human rights. Secondly, it has subsequently not enabled the African Court to complement the African Commission's protective mandate of human rights. Thirdly, States Parties are reluctant to enforce decisions of the African Commission.

Other regional systems have developed principles which guide the admission of evidence obtained through human rights violations,[76] despite the lack of legislative provisions to deal with this kind of evidence. It raises a concern that at the African

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73 Article 50 (4) of the Constitution of the Republic of Kenya 2010; s 35(5) of the Constitution of the Republic of South Africa, 1996. See also s 70(3) of the Constitution of the Republic of Zimbabwe, 2013 and Art 24(2) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982. See also the use of case law in Hong Kong in *HKSAR v Muhammad Riaz Khan* [2012] HKFCA 38.

74 The African Commission established by Art 30 of the African Charter. See also the ECtHR established by Art 19 of the ECHR.

75 Committee Against Torture established by Art 17 of the United Nations Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) 1465 UNTS 85. See also the Human Rights Committee established by Art 28 of the ICCPR 999 UNTS 171.

76 The mode of dealing with this kind of evidence by the various human rights supervising organisations is dealt with in section 10.

regional level there has been limited jurisprudential development, despite the wealth of legislation. In this regard, it is hoped that the African Commission as a regional body will be more receptive and more engaging in the anticipated reforms. Heyns and Viljoen agree with this position on the basis that with regard to enforcement of human rights. [77] They argue that the regional systems have some advantage over the global or UN system in enforcement because of the authentic expression they give to the values and historical peculiarities of the people of a given region. [78]

With regard to decisions of the African Commission, statistics indicate that the African Commission has handed down 229 decisions since its inception. [79] Of these decisions, 119 (52%) are with regard to the right to a fair trial. In addition, 86 decisions (38%) involve the right against torture. It is important to establish why, despite the large number of decisions, there is a limited development of the jurisprudence.

This research seeks to establish reasons why there is little development in the jurisprudence of the African Commission despite the adoption of the Principles 12 years ago. An evaluation of the developments in the jurisprudence of the regional and treaty supervisory bodies is used as a yardstick to gauge the development of the jurisprudence of the African Commission. This study offers solutions, which enable the African Commission to adequately uphold its mandate to promote and protect human rights. Secondly, the African Court complements the African Commission's

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77 Heyns C & Viljoen F 'Regional Protection of Human Rights in Africa: An Overview and Evaluation' in Zelaza PT & McConnaughay PJ *Human Rights, The Rule of Law and Development in Africa* (2004) 131.

78 Heyns & Viljoen (2004) 131.

79 Statistics from the African Human Rights Case Law Analyser available at http://caselaw.ihrda.org/doc/search/ (accessed 15 June 2016).

protective mandate of human rights and ensures that States Parties enforce the binding decisions of the African Court.

This research seeks to contribute to the field of knowledge on how to improve the development of the jurisprudence of the African Commission. The study's contribution is based on an evaluation of the experiences of other regional bodies, such as, the ECtHR and the HRC, with regard to evidence obtained as a result of violations of human rights.

1.7 CONCEPTUAL CLARITY

Evidence obtained through human rights violations covers instances where an investigating officer or a person in a similar capacity, or a person assuming the position of an investigating officer goes ahead to institute the process of or collect evidence from a person whose liberty has been curtailed.[80] The person should be in police custody, or in any custody before the charges are preferred.[81] For purposes of this thesis, while the person who is the subject of an investigation may be a suspect, or an accused, (s)he is collectively referred to as an accused. This concept relates to the collection of evidence in criminal cases; unless the developing jurisprudence of a given State Party, or human rights body extends to civil cases and needs to be evaluated.

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80 This clarity is based on an earlier study by the researcher in the course of LLM studies. See Nanima RD *The legal status of evidence obtained through human rights violations in Uganda* (LLM unpublished thesis, University of the Western Cape, 2016).See Mujuzi (2012) and (2013).

81 See Chapter Two on the normative frameworks used by the African Commission, Chapter Three on the emerging jurisprudence, Chapter Four on the four principles governing evidence obtained through human rights violations or Chapter Five on the HRC's methodology on dealing with the admissibility of evidence. All the insights point to a person in pre- trial detention.

The person who is affected by the admission of this evidence before a domestic court and subsequently seeks to obtain a remedy from a human rights body is referred to as a recognised by the respective human rights body. As such (s)he may be an accused before the domestic courts, a complainant before the African Commission, an applicant before the ECtHR and a victim before the human rights. The context refers to an individual seeking relief before the human rights bodies.

The term 'jurisprudence' is engaged in Chapter Three. Its subsequent use refers to the tools that are available to a given human rights body to interpret human rights treaty. This is an extension of the concept as the knowledge of the law.[82]

1.8 LIMITATIONS OF THE STUDY

The study examines and analyses the jurisprudence of the African Commission, and offers proposals for reform. While it would be desirable to engage the jurisprudence of the African Court in relation to the ECtHR and the HRC, a couple of reasons do not support this. First, the African Court is a relatively a new human rights right body compared to the African Commission.[83] Secondly, the African Commission complements the protective mandate of the African Court in Africa.[84] Thirdly, the African Court has handled lesser cases compared to the African Commission.[85] This mandate informs the decision to engage the African Commission instead of the African Court.

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82 See discussion in Chapter Three on jurisprudence.

83 According to the Protocol, it was established in 1998, compared to the African Commission that was established in 1982. See notes 6-9 above.

84 Article 2 of the Protocol.

85 It has handed down only 53 decisions as at 7 July 2018. See results at http://www.african- court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases (accessed 7 July 2018).

The proposals for reform are adopted from an examination of the jurisprudence of regional and international supervisory. Little emphasis is placed on domestic law dealing with evidence obtained through human rights violations, because contemporary regional and international supervisory bodies have developed extensive jurisprudence on evidence obtained through human rights violations, which the African Commission can emulate.

This study dealt with evidence obtained through human rights violations from victims by the police during pre-trial detention or by a person in a similar capacity, or by a person assuming the position of an investigating officer. In addition, the study was limited to an evaluation of normative developments from 1992 to 2003 and the jurisprudential developments from 2003 to 2015. The developments from 2003 to 2015 were limited to the decisions adopted during the 23rd to the 58th sessions of the African Commission, which deal with evidence obtained as a result of human rights violations during pre-trial detention. While a total of 13 decisions with regard to the right to a fair trial have been handed between 2016 and 2018, they do not deal with the collection of evidence.[86]

[86] Results available at http://www.achpr.org/communications/decisions/?a=863&sort=_date (accessed 7 July 2016). Compare Chapter Three, note 34 below.

1.9 CHAPTER OUTLINE

In addition to this chapter, the study consists of a further six chapters as follows:

Chapter Two examines the normative context of the ACHPR in dealing with evidence obtained through human rights violations, and whether it has served its purpose. The chapter offers an understanding of a norm and uses the liberal theory to inform the adoption of legal norms at the regional level. These, in turn, offer a yardstick that is used to evaluate the efficacy of the norms. With the aid of four normative developments between 1992 and 2003, it evaluates the extent of these developments in dealing with evidence obtained through human rights violations.

Chapter Three examines the jurisprudence of the African Commission. It pays attention to the institutional, normative and jurisprudential developments with regard to evidence obtained through human rights violations. It evaluates the milestones and the normative development from 1992 to 2003. Thereafter, the jurisprudential development from 2003 to 2015 is analysed. The chapter evaluates the argument that there is a limited development of the jurisprudence of the African Commission with regard to evidence obtained through human rights violations.

Chapter Four examines the current trends in dealing with the jurisprudence of the Human Rights Committee (HRC) of the International Covenant on Civil and Political Rights (ICCPR). It engages its jurisprudence with reference to decisions, provisions of the ICCPR, General Comments and Concluding Observations. It examines the effectiveness of the Committee's reluctance to evaluate questions relating to admissibility of evidence.

Chapter Five examines the jurisprudence of the ECtHR with regard to evidence obtained through human rights violations. It evaluates the jurisprudential developments with regard to evidence obtained through human rights violations.

Chapter Six draws on the various developments in the jurisprudence of the regional and international human rights systems, and develops a framework which improves the limited jurisprudence of the African Commission. This framework is formulated after paying particular regard to the peculiar features of the African human rights system.

Chapter Seven provides the conclusions and recommendations of the study.

CHAPTER TWO

ANALYSING THE NORMATIVE FRAMEWORK OF THE AFRICAN COMMISSION ON EVIDENCE OBTAINED THROUGH HUMAN RIGHTS VIOLATIONS

2.1 INTRODUCTION

The previous chapter provided an introduction to this study. It stated that there is a limited development of the jurisprudence of the African Commission in relation to evidence obtained through human rights violations. This Chapter examines the normative context of the ACHPR in dealing with evidence obtained through human rights violations, and whether it has served its purpose. The chapter offers an understanding of a norm and uses the liberal theory to inform the adoption of legal norms at the regional level. These, in turn, offer a yardstick that is used to evaluate the efficacy of the norms. With the aid of four normative developments between 1992 and 2003, it evaluates the extent of these developments in dealing with evidence obtained through human rights violations.

2.2 BACKGROUND

The African Commission is the major institutional structure of the African human rights system. The ACHPR[1] establishes the Commission with a mandate to promote and protect human rights.[2] As an institutional structure,[3] the Commission uses existing

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1 1520 UNTS 217, Art 30.

2 ACHPR Art 30.

3 Heyns C 'African regional human rights system' (2003-04) 108 *Pennsylvania State Law Review* 679 at 681.The institutional development of human rights in Africa has evolved through two stages. The first stage was under the auspices of the OAU, which was transformed in 2002 into the AU for the second stage.

norms to develop jurisprudence to guide it and the States Parties on human rights.[4] The Commission may formulate and lay down principles and rules designed to solve legal problems arising out of human and peoples' rights and fundamental freedoms.[5] Its mandate to solve these problems as the major organ is contested, and is beyond the scope of this study.[6] It follows, therefore, that designing solutions that arise from legal issues emanating from evidence obtained through human rights violations is within the African Commission's mandate. This chapter questions the sufficiency of the African Commission's normative framework in dealing with evidence obtained through human rights violations. It defines a norm and attaches a theoretical framework that informs its adoption. An evaluation of the sufficiency of this normative framework is undertaken and subsequent chapters provide a basis for suggestions for reform.

The major normative developments with regard to evidence obtained through human rights violations include the Tunis Resolution on the Right to Recourse and a Fair Trial (Tunis Resolution),[7] the Dakar Declaration on the Right to a Fair Trial in Africa (Dakar Declaration),[8] and the Robben Island Guidelines.[9] The Chapter also includes The

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4 Thomas (1997) 723. The success of human rights systems at the domestic, regional or international levels is derived from developed normative, institutional and jurisprudential frameworks.

5 ACHPR Art 45 (1) b. See Nsongurua (2006) 305.

6 The Advisory Opinion of the African Court of Human and People's Rights to the African Committee of Experts on the Rights and Welfare of the Child illustrates that it is highly desirable that the Committee has direct access to the Court in exercising its mandate.See Request 02/2013 generally.

7 Document ACHR/Res.4 (XI) 92: Resolution on the Right to Recourse and Fair Trial (1992).

8 Document ACHR/Res.4 (XI) 92.

9 Resolution 61 (XXXII) 02 adopted by the African Commission at its 32nd Ordinary Session, on 17 to 23 October 2002.

Principles.[10] The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa 2014 (Luanda Guidelines)[11] are not used because they are still novel and have not yet been tested by the African Commission in the exercise of its mandate. The reasons that inform the adoption of these norms are offered in the course of their evaluation. It suffices to note that the normative developments were initiated by the inadequacy of Article 7 of the ACHPR with regard to the right to a fair trial.[12] The study employs a desktop research-based review and analysis of the literature on normative frameworks. Case law and communications which offer jurisprudential developments are used to evaluate the effectiveness of the normative framework.

2.3 CONCEPTUALISING A NORMATIVE FRAMEWORK

There are various meanings that may be attached to a norm, which are intertwined with the concept of a legal principle. The various definitions show that a norm and a legal principle are synonymous. A nuanced evaluation of the two concepts is instructive in aiding this chapter in establishing a norm. According to Jordan, a norm is synonymous with a legal principle or a standard upon which legal rules should be based.[13] It is imperative to establish the standard that forms the basis of these aforementioned normative developments, who sets the standard, and where does

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10 Document DOC/OS(XXX)247, adopted by the 33rd Ordinary Session of the African Commission on Human and Peoples' Rights (African Commission') in the Republic of Niger in May 2003. See also Banderin MA 'Developments in the African Regional Human Rights System' (2005) 5 *Human Rights Law Review* 117- 118.

11 Luanda Guidelines available at www.achpr.org (accessed 17 October 2017).

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

13 Jordan D 'Legal principles, legal values and legal norms: Are they the same or different' (2010) *Academicux – International Scientific Journal* 109 at 110. See Raz J 'Principles and the limits of Law' (1972) 81 *Yale Law Journal* 823- 854 generally.

one look to point to this standard. Therefore, the African political, judicial and human rights issues need to be evaluated to ascertain the standard or basis of the norms. However, there is no drafting history of these developments, other than the writing up of the norms that have been formally adopted by the States Parties.

Jordan adds that a norm or a legal principle is a prevailing standard or set of standards of behaviour or judgment assumed to be just standards of behaviour for a society or for the humanity in its entirety.[14] This definition points, first to the existence of different standards of a legal norm. It is however not clear whether the different standards are evident in one particular norm, or exist across various norms. Secondly, the standards are assumed to be just. This is an indication that the justice of a given standard in a norm is an assumption, which may be proved or disproved by its application over time. It is prudent to establish the norms that inform these assumptions. Thirdly, the standard or set of standards are applicable to humanity as a whole. This raises issues of ensuring that the norms are upheld by the States Parties in their domestic jurisdictions.

On the other hand, Joaquin and Toube state that legal norms consist of legal rules and legal principles, which provide for standardised forms of behaviour for subjects of the law.[15] This means that legal norms play a practical role in specifying or generalising standards to be used to examine the validity of other written sources,

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14 Jordan (2010) 110. Some scholars like Dworkin use the term 'legal norm' synonimously with 'legal principles'. See Dworkin RM 'The model of rules' (1967) 35(1) *The University of Chicago Law Review*, 14 at 45.

15 Joaquin R & Toube M 'Legal Principles and Legal Theory' (1997) 10(3) *Ratio Juris* 267 at 267. See also Fabian OR 'General principles of law as applied by International Criminal Courts and Tribunals' (2007) 6 *The Law and Practice of International Courts and Tribunals* 394- 406 generally.

such as, laws and subordinate legislation.[16] This leads to pertinent questions such as, whether particular concepts are specified in a norm, the extent of their specification, and what they seek to validate.

It follows from the above analysis that a norm has salient characteristics. First, a standard or assumption that forms the basis of the norm, which sets the standard, and the content of the norm that points to this standard. Secondly, the balancing of different standards in a norm or various norms, without conflating the spirit of the norm. Thirdly, the specification of a norm and the extent of its specification, and, fourthly, the enforceability of the norm by the human rights systems. The answers to these key points aid the examination of the African Commission's mode of dealing with evidence obtained through human rights violations. Before using the four points to evaluate the norms, a review of the theoretical framework aids the understanding of a norm as a concept.

The conceptualisation of a norm is important in creating a basis for the African Commission's adoption of particular soft laws such as the Tunis Resolution, the Dakar Declaration, the Robben Island Guidelines and the Principles as items that use the right to a fair trial as the standard for their adoption, and specify the need for continued improvement of this right in Africa.[17] In addition, the extent of the specificity in these four norms with regard to a fair trial deal with evidence obtained through human rights violations. Finally, the preferred mode of enforcement of these norms in

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16 Joaquin & Toube (1997) 113. This is an indication that at its core, a norm should have a standard that is used to give it validity in a given community of persons.

17 Soft laws may include both normative and jurisprudential frameworks. As such, the researcher takes a conscious decision not to generalise the normative framework as soft laws.

the development of the jurisprudence of the African Union is expected to form the relevance of the theoretical framework.

2.4 THEORETICAL FRAMEWORK

The international relations theory explains the emergence of norms in international human rights law. It has various schools of thought that inform it such as constructivism, Marxist, idealism, realism, and liberalism.[18] Before evaluating the theory, the historical background to the theory will aid the appreciation of its current relevance.

2.4.1 BACKGROUND TO THE LIBERAL THEORY

The liberal theory is evident in the works of Immanuel Kant (1724-1804), who agitated for a peace programme that had to be followed by States.[19] He believed that the success of the programme would rely on mutual co-operation between States as they pursued freedom and benefits.[20] He offered four principles, which have over time aided the development of the liberal theory. First, he believed that the actions of the State at the international level were a product of a focus on a domestic process. This meant that there are various players on the domestic scene, who influence the State's decisions in signing treaties and adopting laws. This pointed to the need to disaggregate the State from a unitary system to an all-inclusive system, which ensured that domestic players performed a key role in State actions.[21]

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18 This is not a closed list of schools of thought that inform the international relations theory. Other theories may include international political economy, feminism, functionalism, post- modernism, post- colonialism and hegemonic stability theory.

19 Kant I, *Perpetual Peace* available at www.mtholyoke.edu (accessed 10 February 2016).

20 Kant (1795) section 1 generally.

21 Hathaway O 'Do treaties really matter' (2002) *Yale Law Journal* 1947at 1952.

Kant's works were premised on the need for a democratic process. He stated the civil constitution of every State would be republican.[22] His concept of 'republican' was understood to mean a constitution established by a democratic process, which upheld principles of freedom, the rule of law and equality.[23] This has been applied in the contemporary era as the State's engagement with its citizens in the running of its affairs with the purpose of achieving peace.[24] The State has to account to its citizens as the domestic players, with regard to its actions on the international scene. This position recognises the constitution as the grand norm in a domestic jurisdiction, which empowers its citizens to guide the State's actions. States cannot, therefore, be labelled as unitary entities that decide what they want contrary to the needs of its citizens. Rather, decisions of the State as a democratic entity are influenced by domestic players like political groups, interest groups, non-government organisations (NGOs) and civil society.[25]

Secondly, Kant formed the opinion that the law of the nations had to be established on a federation of free States.[26] This meant that the States that wished to develop rules or norms to guide them at an international level needed uniformity, which would be evident in the existence of a democratic constitution in each of the States. It follows that the States that did not comply with this requirement were not eligible to be members of or to be bound by this law of nations.[27] Citing other thinkers like Hugo and Grotius who justified the existence of war, Kant believed that war led to

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22 Kant (1795) section II, first definitive article for a perpetual peace.

23 Kant (1795) section II.

24 Hathaway (2002) 1952.

25 (2002) 1952.

26 Kant (1795), section II, second definitive article for a perpetual peace.

27 Kant (1975) section II.

lawlessness that could not be attributed to the law of States. While some writers were of the opinion that it this may mean war by States, it refers to tensions within States that arise out of the failure to have meaningful engagement on issues that affect a State in the domestic sphere.[28]

Thirdly, he stated that the law of world citizenry shall be limited to the condition of universal hospitality.[29] According to Kant, the freedoms that an individual enjoyed in his domestic jurisdiction had to be enjoyed in all domestic jurisdictions. With regard to the first principle, the effect of this principle is that the role of the domestic players in guiding States to action on the international scene had to be uniform in all jurisdictions. This uniformity was recognised in the adoption of the rules at the international level by States. This principle recognised the universality of the rights of an individual, such as, the right to a fair trial, equality, and freedom and security of a person.[30]

2.4.2 THE LIBERAL THEORY

This chapter limits its scope to the liberal school of thought in the international relations theory (liberal theory) to explain the creation of norms by the African Commission. This theory provides that:

> … the relationship between States and the surrounding domestic and transnational society in which they are embedded critically shapes State behaviour by influencing the social purposes underlying State preferences [and]

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28 Hathaway (2002) 1953.

29 Kant (1795), section II, third definitive article for a perpetual peace. See Hathaway (2002) 1952.

30 These rights are now provided for in international and regional human rights instruments.

> can be restated in terms of three core assumptions. These assumptions are appropriate foundations of any social theory of international relations: they specify the nature of societal actors, the State, and the international system.[31]

The theory assumes that there has to be a relationship between the State and its actors that are usually the government in power. However, this should not be read to imply the undermining of the continuity of a State's international obligations when governments change. It is the domestic players who have a stake in the decision making of the State, such as, civil society, NGOs, and political or socio-economic groups. They may oppose the position of the State by enforcing their own position since they have a stake in the leadership of a country. This relationship leads to the creation of a purpose in a domestic jurisdiction, which provokes a conflict between the State and domestic players. This conflict leads to the need for co-operation on the course of action. This course of action informs the action or the foreign policy of the State at an international or regional level.

The theory is informed by three principles. First, that power politics is not the only outcome that may arise from international relations.[32] Other outcomes may be decisions influenced by domestic players. Secondly, these decisions are mutual benefits, which arise out of international co-operation. This co-operation arises out of the conflict that arises in the domestic sphere and informs the need for co-operation between the State and the domestic players. Thirdly, that the domestic players shape State action and policy at the international level.[33] These three principles indicate a departure from other schools of thought in various respects. According to the realists,

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31 Moravcsik A 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *International Organisations* 513 at 516.

32 Shiraev EB & Zubok *International Relations* (2015) 7.

33 Shiraev & Zubok (2015) 78.

the central actors in international politics are the State actors other than the individuals or domestic players. Secondly, this political system at the international level uses anarchism with no recourse to a supranational authority to enforce rules. Thirdly, the State actors as the central players are rational in so far as their actions maximise their self-interest. Fourthly, the existence of power held by States Parties serves their self- preservation and not the interests of the societal players.[34] The creation of any norms, therefore, is based on what the State Party wants with no regard to the interests of domestic players.

Constructivism, on the other hand, states that the structures of human association arise out of shared ideas other than material forces, whether as domestic players or State actors.[35] This school of thought states further that the characteristics and interests of both parties arise from shared ideas, instead of the respective contemporary positions of the domestic players.[36] The outcome, therefore, of an international engagement by the States is as a result of constructive and equal engagement with various stakeholders. Norms should be created through the concerted effort of both the domestic players and the State. This school of thought disregards the fact that there are always unequal players on both the domestic arena and the State.

Another school of thought is idealism, which provides that a State should have a philosophy that guides its foreign policy and the subsequent actions it takes, as a way of having a transformation in the domestic sphere.[37] For instance, the United States

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34 Goodin RE *The Oxford Handbook of International Relations* (2011) 8.

35 Alexander W *Social Theory of International Politics* (1999) 1.

36 Alexander (1999) 1.

37 Donald M *John Maynard Keynes and International Relations: Economic Paths to War and Peace (*2006) 3.

of America (USA) negotiates the contents of international treaties, yet if it is to ratify them, it takes so long to do so.[38] The structure of the international relations of a State should be able to transform it into the desired state of being. This line of thought, however, does not consider the biases, the various shortcomings, and the negative motives that may inform its philosophy in the creation of norms. Therefore, with regard to the creation of norms using the liberal theory, one needs to evaluate the formation of norms at the international level as a result of domestic players, who engage the State to take action.

2.4.3 THE TENETS OF THE LIBERAL THEORY

The liberal theory relates to a distinct ideology that is created by the domestic players who shape the perceptions, capacities, and actions of the State in the political, social, economic and capitalistic areas of a State.[39] This may be interpreted as an ideology propagated by domestic players intended to influence decisions or actions or policies of a State at an international level. Therefore, what affects the common man forms the agenda for redress at the international level. As a result, the theory enhances the freedoms of an individual.[40] The theory assumes that people and States seek wealth, and use reason instructively to design strategies and institutions that are conducive to attaining this goal.[41] If a norm does not improve the wealth of the people within its jurisdiction, then a State should not adopt it.

The first tenet provides:

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38 Bradley CA 'Unratified Treaties, Domestic Politics, and the US Constitution' (2007) 48 *Harvard International Law Journal* 307 at 307.

39 Doyle MW 'Kant, Liberal Legacies, and Foreign Affairs' (1983) 12 *Philosophy and Public Affairs* 205 at 206.

40 Doyle (1983) 206.

41 Lebow NR *A Cultural Theory of International Relations* (2008) 74.

> The fundamental actors in international politics are individuals and private groups, who are on the average rational and risk-averse and who organise exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence.[42]

The main actors on the international political scene are individuals, or private organisations.[43] These engage collectively to promote various interests of the people within the jurisdiction of a given State Party.[44] Existing limitations, such as, different values, and differences in the ability to guide decisions, may affect their effectiveness.[45] The use of a bottom-up approach is designed to enhance independence from political influence. It advances interests for the common good of the people within its jurisdiction. The structures in a domestic framework, therefore, mould State behaviour towards a common quality of outcomes.[46]

The second tenet provides:

> States (or other political institutions) represent some subset of domestic society, on the basis of whose interests State officials define State preferences and act purposively in world politics.[47]

This provision means that the State through its actions represents the concerns of the domestic players other than its concerns as a unitary body. As a result, the State acts

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42 Movarcsiki (1997) 517.

43 Stephan H & Beth AS 'Theories of International Regimes' (1987) 41 *International Organisations* 491 at 499.

44 Stephan & Beth (1987) 499.

45 (1987) 499.

46 (1987) 499.

47 Movarcsiki (1997) 518.

as the tool that is used to achieve the goals, which may not otherwise be achieved by individuals on the international level. A State adopts a declaration or a resolution for the good of its people other than its self-preservation.[48] This tenet, however, assumes that all individuals have equal influence on State policy. The domestic players in one State may be composed of subtle groups that do not influence decisions like their counterparts or State actors in other States. While this may pass as a narrow pluralist perception of domestic politics, where all individuals and groups have equal influence on State policy, this is not always the case.[49] More often than not, the State does not represent the views of its people equally.

The third tenet provides:

> The configuration of interdependent State preferences determines State behaviour.[50]

The behaviour or the actions of the State are a reflection of the various patterns of State preferences. These actions are guided by a purpose that provokes conflict, proposes co-operation, and culminates in the adoption of foreign policy action, and benefits the people within its jurisdiction.[51] Two illustrations help to shed light on this tenet. First, when the State proposes a given course of action or submits a report to the African Commission, Civil Society Organisations (CSOs) may object to some of the assertions and require that the State accounts for, or changes, its position.[52]

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48 (1997) 518.

49 (1997) 518.

50 (1997) 518.

51 (1997) 520.

52 For instance, see the statement of the Legal Resource Centre on the Report of South Africa to the African Commission at the 60th Ordinary Session of the African Commission in Niger, 9 May 2017, requiring the latter to comply with previous Concluding Observations on the need for effective remedies for victims of torture.

Secondly, the position taken by the State is informed by the engagement of the domestic players. In instances where there are Concluding Observations in a State Report from the African Commission, they engage with the views of CSOs and other organisations.[53] It may be said that when a State Party assents to or ratifies or signs a treaty, its action is informed by the position of the domestic players. Thus the variation in the means used leads to an expected end. The fallacy with this approach is that it may be taken to be a reductionist one, rather other than a systemic understanding between the domestic players and the State.[54]

This theory is evident in various passages of the ACHPR. It provides:

> Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.[55]

This provision recognises that an individual plays a distinct role in the affairs of his family at a subtle level to the community.[56] These collective duties influence the State in its decisions. The apex of the performance of these duties is seen in the actions of the State at the international level. This chapter, therefore, validates the application of the liberal theory to the ACHPR. In addition, the individual has the duty to 'preserve

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Available at https://realisingrights.wordpress.com/2017/05/15/lrc-submissions-to-60th-ordinary-session-of-the-african-commission/ (accessed 24 August 2017).

53 The ACPHR's Concluding Observations on combined second periodic report under the African Charter on Human and Peoples' Rights and the initial report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa available at https://realisingrights.files.wordpress.com/2017/05/concluding-observations-and-recommendations.pdf (accessed 24 August 2017).

54 Movarcsiki (1997) 522.

55 Article 27(1) ACHPR .

56 For an interpretation by the African Commission, see the discussion on the four normative frameworks and its jurisprudence in Chapter Three.

and strengthen social and national solidarity, particularly when the latter is threatened.'[57] This provision mandates the individual to ensure that the State does not threaten the individual freedoms and the collective duty to agitate for State action to improve its welfare.

The Commission in the exercise of its functions, is mandated as follows:

> To promote Human and People's Rights and in particular … to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.[58]

The provision shows that national and local institutions play a role in the forging of decisions of the Commission. A balance of these views in the decisions of the African Commission is evident in two ways. First, in the views of the domestic players that inform the African Commission's recommendations to the States Parties.[59] This provision points to the critical role of domestic players in forming the foreign policy of their respective States Parties at the international level. This line of thought also forms the basis of the inclusion of the views of civil society when supervising a State Party's adherence to the ACHPR. Secondly, the use of international instruments of the United Nations and others to which that African States are party.[60] This offers the African

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57 Article 29(4) ACHPR.

58 Article 45 (1) (a) ACHPR.

59 Movarcsiki (1997) 518-522.

60 Article 60 ACHPR.

Commission with a chance to provide insightful decisions on matters that affect the human rights of the States Parties.

2.5 THE NORMATIVE DEVELOPMENTS

The right to a fair trial includes dealing with evidence obtained through human rights violations. This evidence, whose admissibility may be questioned in the course of a trial, may affect the fairness of a trial. The literature indicates that most normative developments on the right to a fair trial within the African Commission occurred between 1992 and 2003.[61] This study scrutinises this period to establish which normative developments point to the right to a fair trial with an emphasis on the mode of dealing with evidence obtained through human rights violations. The evaluation of these developments will offer insights on whether the normative developments have dealt with evidence obtained through human rights violations, and to what extent these developments have dealt with this impugned evidence.[62]

The literature review presented earlier on the scholarly work of Odinkalu, Banderin, Ouguergouz, Badawi, Long and Murray, and Mujuzi need not be repeated here.[63] It instructive to note, going forward that the studies by these authors offers a chronology to the development of the normative framework on evidence obtained through human rights violations. This is presented the normative developments from 2002, to the

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61 Odinkalu (2003) 105.

62 For a detailed analysis of evidence obtained through human rights violations as an integral part of the right to a fair trial, see Nanima RD 'The legal status of evidence obtained through human rights violations in Uganda' 2016(19) *PER/PELJ* 1-34 generally.

63 See Chapter One, section 1.6 on the literature review.

noted inadequacies of Article 7 of the ACHPR on the right to a fair trial.[64] The analysis of the African Commission's Communication of the *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt,*[65] present progressive developments in the Commission's normative framework with regard to evidence obtained through torture. It is true that the study narrows its focus to the four major normative developments include the Tunis Resolution,[66] the Dakar Declaration,[67] the Robben Island Guidelines[68] and The Principles.[69] The recent normative development with regard to evidence obtained through human rights violations is the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa adopted in 2014 (Luanda Guidelines).[70] The researcher is of the opinion that it is premature to evaluate whether these Guidelines have served their purpose. A conscious decision has been made to exclude these Guidelines from the study.

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

65 Mujuzi JD 'The African Commission on Human and Peoples' Rights and the Admissibility of evidence obtained as a result of torture, cruel, inhuman and degrading treatment: *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*' (2013) 17 *International Journal of Evidence and Proof* 284 at 287.

66 Document ACHR/Res.4(XI)92: Resolution on the Right to Recourse and Fair Trial(1992).

67 Document ACHR/Res.4(XI)92.

68 Resolution 61 (XXXII) 02 adopted by the African Commission at its 32nd Ordinary Session, on 17 to 23 October 2002.

69 Document DOC/OS(XXX) 247, adopted by the 33rd Ordinary Session of the African Commission on Human and Peoples' Rights (African Commission') in the Republic of Niger in May 2003. See also Banderin MA 'Developments in the African Regional Human Rights System' (2005) 5 *Human Rights Law Review* 117 at 117- 118.

70 Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa 2014 (Luanda Guidelines), adopted at the 56th Ordinary Session of the African Commission on Human and Peoples' Rights in Banjul, The Gambia from 21 April to 7 May 2015.

2.6 ANALYSIS OF THE NORMATIVE DEVELOPMENTS

This section engages four normative developments that speak to evidence obtained through human rights violations. The four normative developments include the Tunis Resolution, Dakar Declaration, Robben Island Guidelines and the Principles. These instruments jointly led to the improvement of the protection and promotion of the right to a fair trial in Africa. As will be seen shortly, the four instruments inform the general improvement of the right to a fair trial and the specific need to deal with evidence obtained through human rights violations.

2.6.1 THE TUNIS RESOLUTION ON THE RIGHT TO A FAIR TRIAL

The Tunis Resolution was adopted by the Commission meeting at its eleventh ordinary session in Tunis. The Commission recognised its mandate to promote and protect human rights according to the ACHPR and international standards.[71] In addition, the Tunis Resolution recognised the importance of the right to a fair trial under Article 7 of the ACHPR, in ensuring the right to a fair trial.[72] Therefore, the requirement to uphold the right to a fair trial in international and regional law was the standard that formed the adoption of the Resolution by the States Parties. This standard, however, did not address the specific aspects relating to evidence obtained through human rights violations. The Resolution assumed the provision of the right to a fair trial as a just cause, which had to be upheld by the States Parties.[73] This assumption, however, did not convey justice in so far as the Resolution did not deal with evidence obtained through human rights violations.

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71 Paragraph 1 of the Tunis Resolution.

72 Paragraphs 2- 5.

73 Paragraphs 2- 5.

The Resolution was specifically addressed to States Parties requiring that they inform persons in their jurisdiction of the remedies and the procedure relevant thereto.[74] A remedy with regard to the admission of evidence, did not feature anywhere in the Resolution. The Resolution also required the States Parties to provide needy persons with legal aid.[75] The main intention of the Resolution was to recommend to States Parties to create an awareness of the accessibility to courts for remedies, to encourage the provision of legal aid to the indigent, and to use its forum to elaborate on more principles with regard to the right to a fair trial.

The provision of legal aid did not necessarily lead to the exclusion of evidence obtained through human rights violations. The Resolution lacked guidance on the extent of the available remedies, especially with regard to evidence obtained through human rights violations. This failure indicated that the standard and assumption that formed the basis of the norm was not sufficient in ensuring the right to a fair trial in instances where there was evidence obtained through human rights violations. It is yet to be established in the course of an engagement with the jurisprudence, first, whether there is a failure to address the issue of evidence obtained through human rights violations, and secondly, whether this impeded the Resolution's ability to influence the mode of dealing with evidence obtained through human rights violations. However, its attempt at improving the standards of the right to a fair trial indicated that it recognised individuals and their wellbeing as a paramount consideration.[76]

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74 Paragraphs 2- 5.

75 Paragraphs 2- 5.

76 Movarcsiki (1997) 517, on the primacy of the domestic society that represented the interests of individuals in a domestic jurisdiction.

2.6.2 THE DAKAR DECLARATION ON THE RIGHT TO A FAIR TRIAL IN AFRICA

Another development occurred in September 1999, culminating in the adoption of the Dakar Declaration.[77] This Declaration, which was a product of engagements with CSOs, academics and lawyers, was addressed to the States Parties. Like the Tunis Resolution, the right to a fair trial was the normative standard. With regard to the balancing or extent of the standard of this norm, the Commission formed the opinion that the realisation of this right depended on four aspects. The first aspect was the elimination of certain practices by States Parties.[78] These practices included State influence in the decisions of the judiciary and the acts of impunity like torture. This aspect was informed by the political, social and economic circumstances that affected the realisation of fair trials in Africa, such as, armed conflicts, massive human rights violations, and lack of tangible methods to implement the obligations assumed under treaties.[79]

Secondly, the Declaration emphasised the need for States Parties to respect the rule of law as a way of realising this right.[80] This was instrumental in ensuring that respect of the right to a fair trial was an enabling environment where the rule of law subsisted.[81] The Declaration's insistence on the need for accountability by political institutions offered insights that evidence obtained through human rights violations would be challenged in courts of law. The rule of law required the existence of fully

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77 Available at http://www.chr.up.ac.za/chr_old/hr_docs/african/docs/achpr/achpr2.doc (accessed 23 September 2016).

78 Paragraphs 3 and 6.

79 Paragraph 4.

80 Paragraph 7.

81 Paragraph 7.

accountable political institutions, where States Parties through their agents, acquired evidence obtained through human rights violations.[82]

Thirdly, the Commission agitated for the independence and impartiality of the judiciary.[83] This independence related to the appointment, security, and tenure of the members of the judiciary, while the impartiality related to the ability of the judiciary to hand down decisions without the influence of any organ or person.[84] It is suggested that this standard referred to the entire system of appointment, tenure, and removal of judges. It, however, created a scenario where a State Party would have a vibrant legal regime governing the judiciary, while it lacked rules to govern evidence that was obtained through human rights violations.[85] As a result of this standard, the requirement to deal with evidence obtained through human rights violations was not directly dealt with, because the concept dealt with the offices of the judiciary other than issues dealing with the admission of evidence. To a small extent, the respect for the rule of law provided insights into the possibility of dealing with evidence obtained through human rights violations.

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82 This was largely limited to instances of torture, cruel, inhumane and degrading treatment, which was a small aspect of evidence that would be obtained through human rights violations.

83 Paragraph 8.

84 Paragraph 8.

85 The Constitution of the Republic of Uganda 1995, provided for a robust system in Arts 126-151 on the Judiciary. It still lacks a law on evidence obtained through human rights violations. See Nanima RD 'The legal status of evidence obtained through human rights violations in Uganda' *PER/PELJ* 2016 (19) 1- 38 generally. 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. It was also evident in the Lancaster House Constitution of Zimbabwe 1981.

Fourthly, the Commission recognised that most States Parties had military courts and the special tribunals that operated alongside the institutionalised courts of judicature.[86] It insisted that while the military courts adjudicated offences of a military nature, they had to adhere to the fair trial standards.[87] The special tribunals were not expected to try offences that would be tried by the institutionalised courts of judicature.[88]

The Commission did not pronounce itself on whether these military courts had to use the same rules of evidence, which were used in the institutionalised courts in adducing evidence. This omission affected the enforceability of the fair trial standards that the Declaration alluded to. This insight would have led to the realisation of the fact that a rule on the admissibility of evidence obtained through human rights violations would affect the trial process in all these courts. In Uganda, for instance, the Court Martial adjudicates offences that are similar to the offences in the Penal Code Act. The question of which rules of evidence are used is not clear.[89] The Commission's normative stand on evidence obtained through human rights violations remained as an issue of implication, rather than clarity.[90]

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86 Available at http://www.chr.up.ac.za/chr_old/hr_docs/african/docs/achpr/achpr2.doc (accessed 23 September 2016), para 9.

87 Paragraph 9.

88 Paragraph 9.

89 The Uganda People's Defence Act, 2005, which establishes the Court Martial, by implication uses the same rules of evidence that govern criminal law and procedure. See s 217 thereof.

90 The same was evident in the Commission's declaration in para 10 with regard to Traditional Courts. While it appreciated the courts' role in promoting social cohesion, the Commission failed to hint on the mode of admission of evidence.

The Commission recognised that the Bar Associations, as domestic players, were essential to the enhancement of the right to a fair trial.[91] The ability of lawyers to represent clients without intimidation or harassment from other organs or persons was the bedrock of the right to a fair trial.[92] While this position is disregarded by the realist school of thought that looks at the State as a unitary body that seeks to maintain its self-preservation,[93] it could be true to a given extent, which Bar Associations played an oversight role which was ignored by the States Parties. In *Law Office of Ghazi v Sudan,* the complainant was arrested and incarcerated because he was representing persons who were critical of the government.[94] This shows that the actions of the State pointed to the use of anarchism, and the need for its self-preservation.[95] The actions, however, point to a liberal view that the lodging of complaints with the Commission is indicative of a State that tries to suffocate the views of its domestic players.[96] This study indicates that the issues dealing with evidence obtained through human rights violations should have taken centre stage. The Bar Associations would then act as buffers, which ensured that evidence obtained through human rights violations would not be admitted.

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91 Available at http://www.chr.up.ac.za/chr_old/hr_docs/african/docs/achpr/achpr2.doc (accessed 23 September 2016), para 11. Refer to the tenets of the liberal theory in Movarcsiki (1997) 517.

92 Paragraph 11.

93 Goodin (2011) 8.

94 Communications 222/1998 and 229/1999.

95 Goodin (2011) 8. See the detailed discussion on the theoretical framework above.

96 Hathaway (2002) 1953

The Commission recognised the lack of effective remedies by the States Parties in dealing with evidence obtained through human rights violations.[97] The Commission seemed to refer to punitive, restorative, and compensatory remedies.[98] The failure to take a stand on evidence obtained through human rights violations affected the enforcement of a rule to that effect. It would have been better if the remedies included the exclusion of evidence obtained through human rights violations and the use of such evidence for the prosecution of the perpetrators of the human rights violations. The Commission's desire was to have fair trial standards, whereby the States Parties' provided adequate protection of the victims' rights and interests.[99] This position, however, required clarity on some procedural aspects of admitting evidence, like subjecting the evidence to a trial within a trial to ascertain its voluntariness. Although the accused were to receive legal aid, the failure to question the voluntariness of evidence obtained through human rights violations meant that the indigent would still suffer from the probable use of evidence obtained in violation of their rights.

The Dakar Declaration did not directly deal with issues concerning evidence obtained through human rights violations. Just like the Tunis Resolution, it referred to the general component of the right to a fair trial in terms of legal representation, independence of the judiciary in appointment, tenure, and removal of judicial officers. Aspects that deal with evidence obtained through human rights violations were not dealt with. In the author's opinion, the circumstances on the continent maintained the focus of the Commission on the general right to a fair trial. As result, this normative

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97 Available at http://www.chr.up.ac.za/chr_old/hr_docs/african/docs/achpr/achpr2.doc (accessed 23 September 2016), para 13. See the Tunis Resolution, paras 1-4.

98 Available at http://www.chr.up.ac.za/chr_old/hr_docs/african/docs/achpr/achpr2.doc (accessed 23 September 2016), para 13, Dakar Declaration.

99 Paragraph 13.

development was inclined to those principles that affected the right to a fair trial. This position presents the lack of oversight by the Commission with regard to questions that would arise in dealing with evidence obtained through human rights violations. However, the Declaration's recognition of the four key aspects that affected an individual and the domestic institutions, like the judiciary and the Bar Associations, showed that their legal protection was key to their contribution to the formation of the foreign policy of a State Party.[100]

2.6.3 THE ROBBEN ISLAND GUIDELINES

The Robben Island Guidelines were adopted by the African Commission; against the backdrop that there was a need to implement the various international and regional instruments with regard to torture, cruel, inhuman and degrading treatment. The requirement to deal with torture, cruel inhuman and degrading treatment informs the normative standard for the Robben Island Guidelines. The preamble states that:

> Recalling the universal condemnation and prohibition of torture, cruel, inhuman and degrading treatment and punishment.[101]
>
> 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.[102]

It is discernible from the preamble that the Robben Island Guidelines radically departed from the preceding legal norms that used the right to a fair trial as the standard for implementation of the right of dealing with evidence obtained through

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100 Movarcsiki (1997) 518, on the role of domestic players on formation of a State's foreign policy.

101 The Robben Island Guidelines, preambular para 1.

102 Preambular para 4.

human rights violations. With the aid of the universal condemnation and prohibition of torture as the standard, the Robben Island Guidelines employed a tight standard, which related to prohibition of torture, other than the general enforcement of the right to a fair trial.[103] This standard was, however, inclined to the right against torture, cruel, inhuman and degrading treatment, to the exclusion of all other rights which would be abused in the cause of adducing evidence. While the standard created a focus on evidence obtained through human rights violations, it included only the right against torture. This meant that a person, whose right to the presumption of innocence was violated, could not claim a violation of his rights under the Robben Island Guidelines unless the violation was related to torture.[104]

The generalisations in the Robben Island Guidelines related to torture, cruel, inhuman and degrading treatment and punishment, and were addressed to States Parties. They provide:

> States should ensure that they are a party to relevant international and regional human rights instruments and ensure that these instruments are fully implemented in domestic legislation and accord individuals the maximum scope for accessing the human rights machinery that they establish…[105]

It is not in doubt that there is an international human rights instrument with regard to torture.[106] This assumption of existing regional instruments creates a wrong standard for enforcement since there were no other existing regional instruments to guide States Parties, apart from Article 5 of the ACHPR. It is on this basis that one may

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103 Preambular para 7, in reference to Arts 5 and 45 of the ACHPR.

104 *Jean-Marie Atangana Mebara v Cameroon* Communication 416/2012 para 81-83.

105 The Robben Island Guidelines, guideline 1.

106 UN Convention Against Torture, Cruel, inhuman and degrading treatment.

conclude that these Guidelines reflect the contents of other international instruments, instead of providing a useful direction in interpreting Article 5 of the ACHPR.[107] The Guidelines ought to have provided a structure to use in dealing with torture, other than simply referring to the implementation of non- existing regional norms with regard to torture.

Pursuant to the implementation of the regional and international instruments on torture, the Guidelines require the ratification of the Protocol,[108] which established the African Court, with a mandate to complement the functions of the Commission in the promotion and protection of human rights in Africa.[109] It does not, however, provide clarity on the admission of evidence obtained through human rights violations. This Protocol provides that the African Court shall hear submissions by all parties and if deemed necessary, hold an inquiry. The States concerned are required to assist the parties by providing relevant facilities for the efficient handling of the case.[110]

The import of this provision, at the time of the adoption of the Robben Island Guidelines, was that the African Court would inquire into the existence or non-existence of facts to arrive at a just decision. It, however, did not spell out the bounds of the inquiry, especially in instances of evidence obtained through human rights violations. The Robben Island Guidelines, which formed the basis for dealing

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107 Long & Murray (2012) 311.

108 Robben Island Guidelines, guideline 1(a).

109 OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) Protocol to the African 'Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights Arts 1 and 2. For an discussion on the African Court on Human and Peoples' Rights and the African Commission, see Badawi (1997) 953.

110 Article 26(1) of the Protocol.

with evidence obtained through torture, required the implementation of international instruments as well. It required the States Parties to ratify or accede to:

> … the UN Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment without reservations, to make declarations accepting the jurisdiction of the Committee against Torture under Articles 21 and 22 and recognising the competency of the Committee to conduct inquiries pursuant to Article 20.[111]

Since the UNCAT prohibits torture, its scope of application is limited to evidence obtained through torture, cruel, inhuman and degrading treatment.[112] The Committee requires that States Parties bring their legislation to conformity with the UNCAT.[113]

The Protocol states that the African Court has a duty to make an appropriate order where there is a violation of any right under the ACHPR. It provides:

> If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.[114]
>
> In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.[115]

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111 The Robben Island Guidelines, guideline 1(b).

112 The UNCAT, Art 15.

113 See Concluding Observations on the third periodic report of Australia of 2008, CAT/C/AUS/CO/1 (15 May 2008) para 30. See Concluding Observations on the second periodic report of France of 1998,CAT/C/AUS/CO/1 (6 May 1998), para 11.

114 Article 27(1) of the Protocol.

The orders that the African Court makes are limited to financial reparation.[116] This is contrary to the nature of an order that deals with the non- admission of evidence obtained through human rights violations. It follows therefore that the Court would have challenges in dealing with evidence obtained through human rights violations because the Robben Island Guidelines did not provide for ways of dealing with evidence that goes beyond torture, cruel, inhuman and degrading treatment. The Robben Island Guidelines generalised or specified the context of the evidence that would be dealt with. It involved evidence obtained through torture, cruel, inhuman and degrading treatment or punishment. The normative standard of the need to deal with torture limited the applicability of the Guidelines beyond the violation of the right against torture. Secondly, this limitation affected the African Commission's role in the development of a normative framework to deal with evidence obtained through human rights violations, other than torture. Without prejudice to the foregoing, the Robben Island Guidelines recognised and concretised the right to human dignity, and the State could not violate it for purposes of its self-preservation.[117]

2.6.4 THE 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[118] to establish a working group to prepare a draft of general principles and guidelines on the right to a

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115 Article 27(2) of the Protocol.

116 This formed the main kind of remedy in the Tunis Resolution and the Dakar Declaration.

117 Movarcsiki (1997) 518, on the State taking decisions for the welfare of its citizens.

118 Resolution on the Right to a Fair Trial and Legal Assistance in Africa, Res AHG/222(XXXVI).

fair trial and legal assistance.[119] The working group involved academics, advocates, NGOs and other domestic players who engaged in the formation of the drafting of the principles.[120] This led to the adoption of the Principles.[121] There are four normative concepts in the Principles, which form the standard that guides the African Commission's mode of dealing with evidence obtained through human rights violations.[122] This standard is dealt with in respect of four aspects: The right to an effective remedy;[123] the role of prosecutors;[124] prohibition of collection of evidence through a violation of a detained suspect's rights;[125] and the rule on how to deal with evidence obtained through force or coercion.[126] Just like the foregoing normative provisions, the Principles were specifically addressed to the States Parties.[127]

First, with regard to an effective remedy the Principles state:

> 'Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity'.[128]

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119 Robben Island Guidelines preambular para 3.

120 Movarcsiki (1997) 517, with regard to the liberal theory's primacy on domestic actors as key players.

121 The Principles, Banderin (2005) 118.

122 The Principles, preamble.

123 Principle (C) (a).

124 Principle F.

125 Principle M(7)(d)-(f).

126 Principle N(6)(d)1.

127 See the Preamble to the Principles generally.

128 Principle C(a).

> 'Every State has an obligation to ensure that… any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body.' [129]

The cumulative effect of this Principle was to widen the standard of an effective remedy by extending it from actual or pecuniary remedies to evidential remedies, such as the exclusion of evidence.[130] A literal interpretation requires that at the core of a remedy is its effectiveness.[131] This includes a violation that leads to any kind of harm other than physical harm, like the violation of an accused's right to the presumption of innocence until proven guilty.[132] This normative development required that the African Commission prevails on States Parties to provide an effective remedy, like the exclusion of evidence obtained through human rights violations from a competent judicial body.[133]

Secondly, the prosecutors have a key role to play in instances where they have evidence that has been obtained through human right violations. The Principles state:

> 'When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform

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129 Principle C(c) (1).

130 Principle C(a) &(c)(1).

131 See section on an effective remedy in chapter 3.

132 *Jean-Marie Atangana Mebara* , para 81-83.

133 The Principles, principle C(c)1.

the judicial body accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice'. [134]

This Principle requires prosecutors to refrain from procuring the admission of evidence, which has been obtained through a violation of a suspect's rights unless it is being admitted to be used against perpetrators of the human rights violations. A prosecutor exercises a discretion to establish whether the evidence was obtained through a disregard of rights. Once (s)he forms the opinion that the evidence was obtained through a violation of human rights, then first, (s)he should not admit that evidence against the suspect. Secondly, (s)he should have the evidence admitted against the perpetrator(s) of the human rights violation.[135] This Principle created a standard which recognised the need to deal with evidence obtained through human rights violations and other improper ways.[136] Furthermore, it placed a duty on the prosecutors to play a significant role in ensuring that impugned evidence was not tendered for admission. These normative developments present instances that require that the State does not use its machinery to coerce people within its jurisdiction, without being accountable to the African Commission.[137] It must be noted that the concept of a grave violation has not been defined by the Principles.[138] In the researcher's view, evidence obtained through recourse to unlawful methods offers a wide scope that covers evidence obtained through human rights violations and improperly obtained evidence. [139]

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134 Principle F (l).

135 Mujuzi (2013) 287.

136 The Principles, principle M(7)(d) and F(l).

137 See the discussion on the liberal theory above.

138 This is examined in chapter 3.

139 Compare the wording of Principle N(6)(d)1. The researcher takes a conscious decision to limit the scope of the study to evidence obtained through human rights violations.

Thirdly, the Principles protect suspects in the course of the collection of evidence by the investigating arms of government. The relevant provision states:

> States shall ensure that all persons under any form of detention or imprisonment are treated in a humane manner and with respect for the inherent dignity of the human person.[140]

This Principle introduces distinct features that are instructive as regards evidence obtained through human rights violations. A person whose rights are infringed is still imbued with dignity. Further, it is indicative that the collection of evidence should use the dignity of an individual as the yardstick. Where this dignity is abused, then the evidence that is obtained may be questioned.[141]

Fourthly, with regard to undue influence, the Principles deal with evidence obtained through any other form of coercion or undue influence. With regard to coercion, it provides:

> Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing. Any confession obtained during *incommunicado* detention shall be considered to have been obtained by coercion.[142]

It is worth noting that this provision extends the standard from evidence obtained through human rights violations to improperly obtained evidence. Although from the wording of the provision, its application is limited to evidence obtained through coercion or force, Principle M (7) provides two instances where the application of the

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140 The Principles, principle M(7) (a). See principle M (7)(a)- (f).

141 Nanima RD *The legal status of evidence obtained through human rights violations in Uganda* (unpublished LLM thesis, University of the Western Cape, 2016) 19.

142 The Principles N(6)(d)1.

fourth concept, may be extended. The first instance is the prohibition of taking undue advantage of a detained or imprisoned person by compelling him or her to confess, for the purpose of incriminating himself or herself or incriminating others.[143] The second instance where the application of the fourth concept is extended is where a detained person is subjected to threats or methods of interrogation which impair his or her capacity for judgment.[144]

The interpretation of the four concepts formed the interrelated and interdependent normative framework on evidence obtained through human rights violations and improperly obtained evidence. While the developments between 1995 and 1999 related generally to the right to a fair trial, they were not specific to evidence obtained through human rights violations. It was the normative developments, like the adoption of the Robben Island Guidelines (2002) and the Principles (2003), which dealt with the concept of evidence obtained through human rights violations as an integral part of the right to a fair trial. This amounted to a change in the normative developments that would be instrumental in the subsequent jurisprudential developments. A difference between the Dakar Declaration and the Principles is that while the former was quite elaborate on the right to a fair trial, it missed the mark on evidence obtained through human rights violations. The Principles dealt with evidence obtained through human rights violations and improperly obtained evidence to a large extent.

The Principles reflect two principles that are key to the application of the liberal theory. First, they protect the vulnerable members of society when their liberty has been curtailed by the State. Secondly, they require that State actors, just like domestic players, should protect the vulnerable members of society. This is evident in the

143 Principle M(7)(d).

144 Principle M(7)(e).

requirement that prosecutors do not procure the admission of evidence obtained through human rights violations, unless the evidence is to be used in evidence against the perpetrators of the human rights violations.

2.7 CONCLUSION

This chapter has offered an understanding of a norm and used the liberal theory to inform the adoption of legal norms by the African Commission. It has been established that a norm has four characteristics, while the theory used three underpinnings to speak to the normative developments. The normative developments are narrowed down to the period between 1992 and 2003, on the basis of their insights on the right to a fair trial.

The current normative structure was developed on the standard of the right to a fair trial. This is because the States were using impunity to rule their citizens, a position that many domestic players opposed. It must be noted, however, that the practical and institutional concepts related to this right did not envisage the admission of evidence obtained through human rights violations as a key feature of this right. As a result, the Tunis Resolution and the Dakar Declaration had little to offer to resolve this problem. The use of civil society was geared towards other aspects of the right to a fair trial, other than evidence obtained through human rights violations. The normative fortunes of the African Commission turned with the development of the Robben Island Guidelines, which dealt with this impugned evidence but were limited to evidence obtained through torture. The Principles that were adopted a year later dealt with evidence obtained through human rights violations and improperly obtained evidence. Despite the change in the in-depth content, the Principles were introduced at a time when the normative framework had done little to alleviate the problem of dealing with evidence obtained through human rights violations.

Therefore, it follows that if the African Commission employs the liberal theory that is grounded in various Articles of the ACHPR, it needs to carry out mass sensitisation and dissemination of information on the rights under the ACHPR. This position should be a precursor to the subsequent use of the views of the domestic players. When the domestic players are informed, then they will offer informed views to guide the respective State's foreign policy. The dissemination of information should be placed on States to create programmes and legislation to support this cause.

There should be a study of the trends of the jurisprudence of the African Commission on evidence obtained through human rights violations, to ascertain the limitations or aided developments in the normative framework. This is coupled with the fact that since its inception, the Commission has decided 229 Communications.[145] A total of 89 Communications have been decided on their merits, which represents 38 per cent of the total number of communications.[146] About 90 Communications have regarded inadmissible, which forms another 39 per cent of the total number of Communications.[147]

145 IHRDA African Human Rights Case Law Analyser; search documents available at http://caselaw.ihrda.org/doc/search/?m=83 (accessed 6 November 2016).

146 IHRDA African Human Rights Case Law Analyser; search documents available at http://caselaw.ihrda.org/doc/search/?m=83 (accessed 6 November 2016).

147 See note 156.

CHAPTER THREE

JURISPRUDENCE OF THE AFRICAN COMMISSION ON EVIDENCE OBTAINED THROUGH HUMAN RIGHTS VIOLATIONS

3.1 INTRODUCTION

The previous chapter evaluated the normative framework that guides the admission of evidence obtained through human rights violations. It used the liberal theory and available literature to select four legal norms that guide the admission of evidence obtained through human rights violations. This evidence included the Tunis Resolution, Dakar Declaration, Robben Island Guidelines and The Principles. The Tunis Resolution and Dakar Declaration dealt with the improvement of the guarantees for the right to a fair trial generally. The Robben Island Guidelines dealt only with torture, cruel, inhuman and degrading treatment. This forms a small aspect of evidence obtained through human rights violations. It is the Principles that placed emphasis on this kind of evidence.

This chapter evaluates the jurisprudence of the Commission with a focus on evidence obtained through human rights violations. In doing so, it addresses the first research question and examines the context of the African Commission's mode of dealing with evidence obtained through human rights violations. It unpacks the meaning of jurisprudence and proffers a definition that offers guidance to this study. This is followed by an evaluation of the jurisprudential developments by the African Commission in dealing with evidence obtained through human rights violations.

3.2 QUALIFYING 'LIMITED JURISPRUDENCE'

The qualification of 'limited jurisprudence' is done in two phases. The first phase is an interim approach that offers direction to the study, without pre-empting the findings. The second phase is the final approach that is undertaken in Chapter Six, after an

engagement with the experience of the ECtHR and the HRC. The subsequent subsection offers an interim approach that uses three steps. First, it defines jurisprudence; secondly, it defines jurisprudence in relation to human rights bodies. Thirdly, an interim qualification of limited jurisprudence is offered, pending its analysis in Chapter Six.

3.2.1 Defining Jurisprudence

Jurisprudence is an imprecise term that cannot be accorded one definition. It may refer to a body of substantive legal rules or interpretations of a law by a judicial or quasi-judicial body.[1] It may refer to a scientific or philosophical investigation of law and justice.[2] As a result, the concepts of 'jurisprudence' and 'international human rights' need to be clarified before their limits are evaluated. This section performs two functions. First, it qualifies the concept of jurisprudence of the HRC and the ECtHR. Secondly, it unpacks the concept of 'limited jurisprudence'. This study draws on the experience of the HRC and the ECtHR in dealing with evidence obtained through human rights violations. The jurisprudence of these two human rights organs forms the yardstick for ascertaining 'limited jurisprudence'.

Jurisprudence may be referred to as the knowledge of the law.[3] The term 'jurisprudence' is a product of two latin words, 'juris' and 'prudentia'. The word 'juris' refers to the genitive form of jus, which means law, and 'prudentia' means knowledge.[4] Therefore, it is an inquiry into what the law is, or what it ought to be. This entails that a basis (other than the law's components) that informs the law is established. For instance, if morality informs law in a given community, all the types of

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1 Ratnapala S *Jurisprudence* (2009) 3.

2 Ratnapala (2009) 3.

3 Salmond J *Jurisprudence* 7ed (1924) 1.

4 Salmond (1924) 1

law in the given community have a basis inmorality. The same position holds if the command of the sovereign forms the basis of the law.

John Austin (1790-1859) defines jurisprudence as the philosophy of positive law.[5] He describes positive law as consisting of commands set as rules of conduct by a sovereign to a member or members of independent political society.[6] This definition ousts the position of international law in so far as it does not recognise international law as a sovereign who issues a set of commands to be followed by the subjects. In addition, the command of the sovereign is law, regardless of the absence of morality. This is an indication that the legality or non- arbitrariness of the law has to dealt with by the body that is competent to pass it. This is a point of departure from Jeremy Bentham's (1748- 1832) definition, which identifies law as the mandate of the sovereign over the subjects.[7] While Jeremy Bentham advocates for morality as a yardstick for the law, John Austin states that it does not form part of the law. The intersection of the two definitions is the requirement that law needs a basis from which to derive its authority. This basis may be morality or positivism. While having a basis for the law creates a degree of certainty as regards its form, its effect is evident in its implementation.

Thomas Holland (1835- 1926) defines jurisprudence as a formal science of positive law.[8] 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

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5 Austin J (1875) *Lectures on Jurisprudence* 10.

6 Austin (1875) 10.

7 Singer J 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' (1982) 6 *Wisconsin Law Review* 975 at 984.

8 Drake JH 'Jurisprudence: A Formal Science' (1914) 13 *Michigan Law Review* 34 at 34.

society as it leads to the redress of criminal and civil wrongs. As a result, this implementation depicts the judicial function of protection of human rights and fundamental freedoms. As a result, this definition does not aid the enforcement of human rights in a domestic or international community. Therefore, it is a definition which upholds the positive law in disregard of its implementation, and does not offer adequate guidance to this study.

John Salmond (1862- 1924) defines jurisprudence as the science of the first principle of civil law.[9] His concept includes two parts. First, generic law, which refers to the entire body of legal doctrine.[10] Secondly, the specific law, which deals with basic parts of the law, such as, the analytical, historical or ethical doctrines.[11] Therefore, jurisprudence deals with both the basis and the implementation of the law. The knowledge of the law is incomplete unless its implementation is considered. It is arguable that an adequate understanding of a legal system lies in evaluating its content, evolution, and the ideals that it ought to stand for. An evaluation of these three concepts engages with the implementation of the law. Therefore, this definition creates a fusion of the basis of the law and its implementation.

In conclusion, the definitions of jurisprudence by Jeremy Bentham, John Austin, and Holland are inclined to the basis of the law, without dealing with its implementation. This position that has little regard for the implementation of the law does not offer guidance to this study. However, Salmond's view which inculcates the basis, development and the application of the law aids the definition of jurisprudence of international human rights bodies.

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9 Salmond (1924) 1 .

10 Salmond (1924) 2.

11 Salmond (1924) 4.

3.2.2 Defining "jurisprudence of human rights bodies"

The concept of jurisprudence of the human rights bodies has no definite definition. It may only be understood in the context in which it is used and with reference to what it refers to. It may refer to human rights recommendations, or findings on individual communications, issued by human rights bodies.[12] It may also refer to the legal interpretation of international human rights law as it develops.[13] There is no uniform view of what constitutes the jurisprudence of human rights supervisory bodies. This leads to the failure of attaching a particular definition to it. It is submitted that there is rather a loose sense which includes concluding observations, general comments; and a non-so-loose one limited to decisions under the individual complaints mechanisms.[14] This section comments on the jurisprudence of the HRC and the ECtHR, and offers a detailed analysis of that of the African Commission.

The HRC supervises the implementation of the ICCPR.[15] It uses its decisions, General Comments and Recommendations in its Concluding Observations as its jurisprudence. The General Comments offer insight into how various Articles of the ICCPR may be interpreted.[16]

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12 Jurisprudence available at http://juris.ohchr.org/Home/About (accessed 10 March 2017).

13 Jurisprudence available at http://juris.ohchr.org/Home/About (accessed 10 March 2017).

14 Jurisprudence available at http://juris.ohchr.org/Home/About (accessed 10 March 2017).

15 See Art 28 of the ICCPR 999 UNTS 171.

16 General Comment 13 U.N. Doc. HRI/GEN/1/Rev.1 (1984) on Art 14 of the ICCPR. General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 (1994) on Art 7 of the ICCPR. General Comment 32, U.N. Doc. CCPR/C/GC/32 (2007) on Art 14.

Another source of jurisprudence is the decisions of an international or regional body. These decisions are key in establishing the status of a human rights body on a particular Art, or issues that may be brought to its attention by a State Party or an individual.[17] 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 torture and arbitrary deprivation of liberty in illegal detention areas are stopped.[18] It recommends that an accused appears before a judicial officer within a reasonable time.[19] These Concluding Observations may complement the work of other human rights bodies by requiring that States Parties implement the Recommendations.[20] The decisions of the HRC, the Concluding Observations to State reports and the General Comments, form its jurisprudence. Salmond's definition depicts the jurisprudence of the HRC as the understanding of the provisions of the ICCPR, and their subsequent application in the decisions, General Comments and Concluding Observations. In addition, this definition aids the implementation of this jurisprudence by States Parties.

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17 *Azer Garyverdyogly Aliev v Ukraine* Communication 781/1997, before the HRC on Torture. *Teofila Casafranca de Gomez (on behalf of Richardo Ernesto Gomez Casafranca v Peru* Communication no 981/2001 before the HRC on detention beyond the stipulated time. *Torobekov v Kyrgyzstan* Communication 1547/2007.

18 Concluding Observations on third Periodic Report of Uganda adopted by the Committee at its 2177th, 2178th and 2179th meetings CCPR/C/UGA/O3 (31 May 2004), para 17.

19 Concluding Observations on the second periodic report of Kenya adopted by the Committee at its 2255th and 2256th meetings CCPR/CO/83/KEN (24 March 2005) para 17.

20 Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013) 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 in conformity with the UNCAT.

The ECtHR was established by the ECHR to deal with an individual's or State's application alleging violations of the civil and political rights set out in the ECHR.[21] Unlike the HRC which refers to various sources to ensure that States Parties comply with human rights obligations, the ECtHR relies on only decisions.[22] However, its decisions are extensively researched, and they develop the law in the light of the merits of subsequent cases that deal with a principle of law. For instance, in *Saunders v the United Kingdom*, the ECtHR stated that evidence that arose out of a legal compulsion to incriminate an applicant rendered the trial unfair.[23] In the subsequent case of *Jalloh v Germany*, the ECtHR dealt with the issue of severity by the State in legally obtaining evidence through compulsion.[24] In *Gafgen v Germany*, the ECtHR stated that evidence obtained through cruel, inhuman or degrading treatment may be admitted in Court if its admission does not render the trial unfair.[25] Salmond's definition still supports the approach of the ECtHR in using extensive research in judgments. The approach of the ECtHR avoids the requirement for reference to sources of jurisprudence other than its own decisions. This is a positive development of human right insofar as the ECtHR use a top-down approach where its decisions are binding on domestic jurisdictions.[26] This is so because the ECtHR recognises the content of a given principle of the law, and develops it for implementation.

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21 (1950) 213 UNTS 221 Arts 33, 34.

22 *Saunders v the United Kingdom* Chamber Application 19187/1991, *Jalloh v Germany* ECHR Grand Chamber Application 54810/2000, *Gafgen v Germany* European Court of Human Rights (ECtHR) Grand Chamber Application 22978/2005).

23 *Saunders* paras 75 to 76.

24 *Jalloh* paras 113-120.

25 *Gafgen* para 108.

26 This position is explicitly seen in the discussion on the use of the doctrine of the Margin of Appreciation in Chapter Five, subsection 5.2.1.1.

In conclusion, it is imperative to engage with Salmond's definition when dealing with the jurisprudence of the human rights bodies, because it captures the basis of a law, its context, and its implementation. For purposes of this study, the basis of the law reflects a fusion of the normative framework and its subsequent context and implementation. The context and development of the law represent the emerging jurisprudence. The concept of limitation requires qualification before evaluating the developments in the decisions of the African Commission.

3.2.3 Qualifying the concept of 'limited jurisprudence'

The scope of the jurisprudence reveals that the HRC has many sources, such as, decisions, General Comments and Concluding Observations.[27] The position is different with the ECtHR which relies on only its decisions. The point of departure is in the quality of the decisions that the bodies make, having regard to their content, development, and implementation. In the interim, the concept of 'limitation of the jurisprudence' has to be qualified, to justify the subsequent evaluation of the jurisprudence of the African Commission.[28]

The previous chapter showed that the normative framework was developed on the standard of the right to a fair trial, with little regard to a mode of dealing with evidence obtained through human rights violations. The Tunis Resolution and the Dakar Declaration did not expressly deal with evidence obtained through human rights violations, while the Robben Island Guidelines were limited to evidence obtained

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27 See Chapter Four, sections 4.2 and 4.3.

28 This qualification is revisited in Chapter Six, after a substantive evaluation of the ECtHR and the HRC in Chapters Four and Five

through torture and CIDT.[29] It is The Principles that dealt with evidence obtained through human rights violations.

Black's Law Dictionary defines a limit as a boundary of scope, be it authority, power, privilege, or right.[30] 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 Dakar Declaration did not envisage evidence obtained through human rights violations. There was a limitation based on the law. Therefore, this section relates the normative to the jurisprudential position to aid in the evaluation of the context and development of the law.

It is intended that after looking at the experience from the ECtHR and the HRC this study consider either the quantity or quality of the decisions as a yardstick for the limitation of the jurisprudence of the African Commission. This yardstick will measure the limitation, because of the nature and context of the human rights bodies. The HRC has the mandate to deal with complaints and communications from 169 States Parties.[31] The ECtHR handles complaints and communications from 47 States Parties, which are litigious societies.[32] This is evident in the fact that it received 280,512 applications from 1998 to 2008, and delivered 9,399 decisions in the same period.[33] As at 15 July 2016, the African Commission had handed down 229

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29 See Chapter Two, subsections 2.6.1 to 2.6.4.

30 Definition of 'Limit' available at http://thelawdictionary.org/limit/ (accessed 11 March 2017).

31 Status of ratification of the International Covenant on Civil and Political Rights available at http://indicators.ohchr.org/ (accessed 11 March 2017).

32 Council of Europe, 47 Member States available at http://www.coe.int/en/web/portal/47-members-states (accessed 11 March 2017).

33 Ten years of the 'new' European Court of Human Rights 1998- 2008 Situational outlook, 78-90 available at http://echr.coe.int/Documents/10years_NC_1998_2008_ENG.pdf (accessed 11 March 2017).

decisions since its inception.[34] Subject to the finding in Chapters Four and Five, a quantitative approach in assessing whether the African Commission's jurisprudence is limited would be misleading. Therefore, the limitation concerns the quality of the jurisprudence in as far as it develops principles that deal with evidence obtained through human rights violations. A study of the trends of the jurisprudence of the African Commission on evidence obtained through human rights violations will ascertain the quality of the jurisprudence, whether it is limited, and which factors inform this limited jurisprudence.

In conclusion, while the HRC has many sources that inform its jurisprudence, the ECtHR only relies on the decisions it hands down as the major source of its jurisprudence. An approach that looks at the quantity of the jurisprudence or the decisions may not offer adequate guidance for creating a framework for the definition of a jurisprudential limitation. An analysis in the interim reveals that the ECtHR offers detailed and well-reasoned judgements, which develop its jurisprudence.[35] With the aid of the definition of a 'limit' from *Blacks Law Dictionary*, an approach that engages jurisprudential limits from the quality of the decision is preferred. This is so because it supercedes the arguments that uplift sources of jurisprudence and the number of decisions given by a human rights monitoring body, and not the quality of the decisions.

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[34] Statistics from the African Human Rights Case Law Analyser available at http://caselaw.ihrda.org/doc/search/ (accessed 15 June 2016). Recent statistics indicate that the Commission has decided 235 cases as at 7 July 2018. However, these cases do not have a bearing on the study insofar as the new cases do not deal with collection of evidence. See Chapter One, note 79 above.

[35] The judgments have organically developed over the years. While one may argue that the distinction between a Commission and a Court is big in terms of the nature of the mandate, the would-be unfair comparison between the African Commission and the Court is qualified. See evaluation in Chapter One, note 79.

3.3 JURISPRUDENTIAL DEVELOPMENTS

This section visits the decisions of the African Commission from 2003 to 2015, during the 32nd to the 54th sessions. Out of the 41 decisions decided on their merits, the discussion is narrowed down to four decisions.[36] These decisions have three distinct features. First, 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 the understanding of the jurisprudence of evidence obtained through human rights violations. This section uses these features in the decisions as the point of engagement.

Using the topic of the study, the section reviews four concepts. These include bringing the law into conformity with the ACHPR, exhaustion of local remedies, the responsibility of State actors, and dealing with evidence obtained through torture. These principles form the key issues in the African Commission's deliberations on the merits of the Communications.

3.3.1 Bringing the law into conformity with the ACHPR

With regard to bringing municipal law into conformity with the ACHPR, this section looks at the position in international law. This is followed by an evaluation of the African Commission's position. The evaluation includes an engagement with the normative principles alluded to in Chapter Two, and how they deal with evidence obtained through human rights violations.

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[36] *Law Office of Ghazi Suleman v Sudan* Communications 222/1998 and 229/1999, *Liesbeth v Eritrea* Communication 250/2002, *Zimbabwe Human Rights Non-Government Organisations Forum v Zimbabwe* Communication 245/2002, *Egyptian Initiative and Interights* v *Egypt* Communication 334/2006.

3.3.1.1 International and regional requirements

The Vienna Convention on the Law of Treaties[37] provides that national law cannot be invoked to justify non- compliance with international law.[38] Therefore, a State Party should adhere to the Principles and the Robben Island Guidelines, which were passed by the African Commission in the exercise of its functions.[39] When a State Party ratifies the ACHPR, 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 Charter's incorporation.[40] 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.[41]

Other international instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) require States Parties '[t]o 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'.[42] Such provisions add 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 African Commission's view on the premise that its findings are not

37 1155 UNTS 331

38 Article 27.

39 Article 45(1) b. *Purohit & Another v The Gambia* (2003) AHRLR 96 para 43.

40 Draft Declaration on Rights and Duties of States Art 13 [1949] Year Book of the International Law Commission 286 UN Doc A/CN4/SER A/1949, Wachira GM & Ayinla A 'Twenty years of elusive enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6(2) *Africa Human Rights Law Journal* 465 at 472.

41 ICCPR Art 2(2).

42 Convention for the Elimination of all Forms of Discrimination Against Women 1249 UNTS 17 Art 2(a).

binding and consequently a State may disregard them,[43] the findings remain persuasive like the opinions of the United Nations Human Rights Committee.[44]

3.3.1.2 The Position of the African Commission

The Communication of *Law Office of Ghazi v Sudan*[45] was a merger of two complaints that were brought before the African Commission. The relevant facts in the first complaint point to that the victims were arrested on 1 July 1998 and that they were detained by the Government of Sudan without charge. [46] In the course of their detention, they were denied legal counsel and contact with their families.[47] The second complaint decried the trial of civilians by a military court established by a Presidential decree.[48] Although the President later pardoned the victims,[49] this did not resolve questions about their illegal detention nor their subjection to 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 ACHPR.[50] This was evident in the State Party's widespread publicity that the complainants' were guilty of an attempted coup even before the Court found so.[51] The State Party's intention to execute the persons responsible for the bombings before the African Commission made a decision

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43 Murray R 'The African Commission on Human and Peoples Rights and international law' (2000)14 *Leiden Journal of International Law* 681 at 684.

44 Murray (2000) 684.

45 *Ghazi* para 2.

46 Paragraph 3.

47 Paragraph 3.

48 Paragraphs 5-6.

49 Paragraph 29.

50 Paragraph 8.

51 Paragraph 54.

exacerbated the situation.[52] The African Commission noted that the acts of the State Party in failing to uphold the complainants' right to counsel violated their right to a fair trial.[53] However, the African Commission found no proof of violation of the right to a fair trial with regard to confessions obtained from the complainants in the course of their detention.[54] It is the researcher's view that as long as the violations of the right to legal counsel and the presumption of innocence subsisted, any evidence obtained during this time amounted to evidence obtained through human rights violations.[55]

The African Commission required that the State Party bring its laws into conformity with the ACHPR. Some of the key provisions of the right to a fair trial included the presumption of innocence, and the right to legal counsel.[56] However, it did not expressly state the legal conformity that it required the State Party to achieve. At the same time, the State Party had laws that allowed for detention beyond 48 hours.[57] While this decision gave the African Commission the opportunity to reiterate the need for States Parties to bring their laws into conformity with the ACHPR, It did not give specific details of the laws that needed to be brought into such conformity.

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52 Paragraph 54.

53 Paragraph 57.

54 Paragraph 55.

55 There are decisions from the ECtHR and the United Kingdom that have been decided to reflect this position. See the evaluation of these decisions under Chapter Five, subsections 5.3.1.1 to 5.3.1.2. See also *Ambrose v Harris* [2011] 1 WLR 2435 paras 31 and 134. *Edward Brown v R* [2015] WLR(D) 344, para 56. *McE v Prison Service of Northern Ireland* [2009] 2 WLR 782 para 85.

56 Paragraphs 56, 59.

57 See subsequent discussion of Sudan's National Security Act of 1994, National Security Forces Act of 1999 and National Security Act 2010 below.

The National Security Act that was used to charge the victims allowed the detention of a suspect for interrogation for up to 72 hours, and the detention could be renewed for up to one month, without justification.[58] In addition, bail would not be granted to persons who were accused of crimes punishable by death or life imprisonment.[59] It should be noted, first, that the detention was illegal, and secondly, that the purported interrogations and any evidence that was obtained as a result of the illegal detention should 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. It suffices to note, however, that the final decision requiring that Sudan bring its laws into conformity with the ACHPR is specifically directed at this law. This domestic legislation that allowed the renewal of detention, has unfortunately survived all amendments and repeals of the Security Acts. First, the National Security Forces Act of 1999, which repealed the National Security Act of 1994, still provides for detention for three days, which can be renewed for a period of 30 days,[60] and for a further 30 days.[61] 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 a period of 30 days,[62] and a further 15 days.[63]

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58 Report to the US Department of Defence on Sudan Human Rights Practices 1994, paras 19- 20 available at http://dosfan.lib.uic.edu/ERC/democracy/1994hrp_report/94hrp_report_nea/Sudan.html (accessed 13 September 2016).

59 Paragraphs 20.

60 National Security Forces Act 1999 s 30(d).

61 Section 30(e).

62 Section 50(1) e.

63 Section 50(1) g.

The African Commission has not recommended in any of its Communications with Sudan that these sections should be brought into conformity with international law.[64] If the African Commission requires that a State Party brings its law into conformity with the ACHPR, it should specify the impugned Articles of the law. Although the States Parties may choose to implement the decisions of the African Commission, is instructive from the decisions handed down that evidence obtained through human rights violations have specific requirements.[65]

At the date of communication of this decision, the four norms that form the basis of this study had been enacted.[66] The African Commission referred to the Resolution on the Right to a Fair Trial and Legal Assistance in Africa[67] and the Dakar Declaration.[68] However, it did not use them to develop principles on evidence obtained through human rights violations as regards the presumption of innocence and the right to counsel as tenets of the right to a fair trial. This was evident in the requirement that States Parties adhere to the principles that govern the right to a fair trial, without offering guidance on the specific aspects that govern the right to legal representation and the presumption of innocence. It may be argued that the State Party was given specific Recommendations on how to deal with evidence obtained in violation of the right to counsel and the presumption of innocence.

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64 Concluding Observations and Recommendations on the fourth and fifth periodic Report of the Republic of Sudan adopted by the Committee at its 51st session (18 April – 5 May 2012), paras 31-33, 66-67 provide recommendations on the National Security Act 2010, but do not refer to the codified long periods of detention.

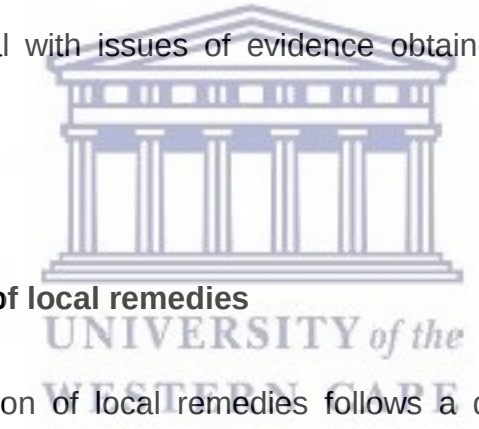
65 The same general recommendation to a State Party to bring it legislation into conformity with the ACHPR was evident in *Abdel Hadi, Ali Radi & Others v Republic of Sudan* Communication 368/2009, para 93.

66 The decision refers to The Principles and the Dakar Declaration in paras 65- 66.

67 *Ghazi* para 65.

68 Paragraph 65.

In conclusion, while the African Commission required conformity of the domestic laws with the ACHPR, it did not guide the State on the aspects of the law that required conformity.[69] It did not utilise normative principles adequately to enable the development of the jurisprudence. 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 decision did not offer guidance on issues relevant to evidence obtained through human rights violations, because the norms did not do so. There were facts that pointed to obtaining evidence through human rights violations and the African Commission's failure to engage the facts with these norms affected the quality of the decision. This became a jurisprudential limitation in so far as the African Commission did not deal with issues of evidence obtained through human rights violations.



3.3.2 Exhaustion of local remedies

The concept of exhaustion of local remedies follows a dual approach. First, this section illuminates its position in international law. Secondly, an evaluation of the African Commission's position is done. This evaluation engages the normative principles alluded to in Chapter Two, and how this speaks to evidence obtained

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69 Similar examples are evident in the Concluding Observations on the initial and combined periodic report of the Republic of Malawi on the implemetantion of the African Charter on Human and Peoples Rights (1995-2013) adopted by the African Commission at its 57th ordinary session (4 – 18 November 2015) para 54. See also Concluding Observations on the 2nd, 3rd, 4th and 5th periodic report of the Republic of Mauritius on the implemetantion of the African Charter on Human and Peoples Rights (1995-2013) adopted by the African Commission at its 45th ordinary session (13 – 27 May 2009) para 41.

through human rights violations. Please provide here what exhaustion of local remedies actually means.

3.3.2.1 International and regional requirements

Exhaustion of local remedies is linked to evidence obtained through human right violations. A complainant who seeks to have this evidence declared inadmissible is subjected to the test; whether (s)he has exhausted all domestic remedies.[70] The availability and effectiveness of local remedies require that the remedies are practically available and sufficient.[71] The principle of exhaustion requires that a complainant lodges his Communication after the exhaustion the available domestic remedies.[72] For instance, the ECtHR states that exhaustion of remedies is a recognised rule of international law that forms part of customary international law.[73] The rationale for the exhaustion of remedies is to give the national authorities, primarily the courts, and the opportunity to prevent or redress the alleged human rights violations.[74] With regard to the ECHR, It is based on the assumption, reflected in Article 13, that the domestic legal order will provide an effective remedy for violations of ECHR rights. This is an important aspect of the subsidiary nature of the ECHR machinery.[75] The European Court has developed jurisprudence for the

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70 Twenty-six Communications have been dismissed on grounds of inadmissibility. These include nineteen concerning failure to exhaust remedies and three decisions on the right to a fair trial; available at http://www.achpr.org/communications/decisions/?o=846&p=1 (accessed 12 March 2017).

71 *De Jong, Baljiet and Van den Brink* (1984) 8 EHRR 20.

72 ACHPR Arts 41(1)(c), 46, 50 and 56(5).Optional Protocol to the ICCPR General Assembly resolution 2200A (XXI) of 16 December 1966, Art 2 and 5(2)(b).

73 Practical Guide on Admissibility Criteria, 2014 Council of Europe, 22 available at http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (accessed 14 September 2016). *Switzerland v United States* (1959) Reports 6.

74 ECHR Art 22.

75 *Selmouni v France* (1999) ECHR, para 74.

application of the rule with flexibility,[76] and in compliance with domestic rules and limits.[77] In the event that more than one potentially effective remedy is available, the applicant is only required to have used one of them.[78] While this seems to clear under international law, it important to look at how the African Commission is challenged with aspects of domestic rules on the exhaustion remedies that deal with evidence obtained through human rights violations.

3.3.2.2 Position of the African Commission on exhaustion of local remedies.

The African Commission's mode of dealing with the exhaustion of remedies related to evidence obtained through human rights violations, is tagged on the procedures that States Parties use to establish whether the evidence in issue was obtained through human rights violations. While some countries do not have formal procedures to follow, others do. As such, the effect of such procedures on the rights of an individual requires scrutiny. This is because there is a need to reflect on the position where two persons from different jurisdictions lodge complaints before the African Commission. Imagine that one communication is declared inadmissible on grounds that the remedy on the admissibility of evidence obtained through human rights violations was not exhausted according to the domestic laws of that country; while in another admissibility is not in issue because there are no procedural formal requirements to deal with remedies of exclusion of evidence obtained through human rights violations.

In *Liesbeth Zegveld and Mussie Ephrem v Eritrea,*[79] the African Commission dealt with the rule regarding exhaustion of remedies. The complainant alleged that the illegal arrest of 11 former Eritrean government officials in Asmara, Eritrea, in

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76 *Selmouni* para 64.

77 Paragraph 65

78 Paragraph 66.

79 Communication 250/2002.

September 2001 violated Eritrean laws and the ACHPR.[80] A request for a writ of habeas corpus was not made because the location of the detention of the victims was not known.[81]

The African Commission acknowledged that exhaustion of a domestic remedy was a condition precedent to obtaining the right of submission before it.[82] The exhaustion of a domestic remedy is dependent on whether it is available, effective and sufficient.[83] The availability of a domestic remedy depends on the petitioner's ability to pursue it without impediment, and its effectiveness and sufficiency depend on its offer of a prospect of success and its capability of redressing the complaint.[84] This effectiveness is curtailed where the petitioner has to file an application to exclude evidence obtained through human rights violations in a domestic court, which has to be decided against him before (s)he can file an application to the African Commission with regard to evidence obtained through human rights violations.[85]Therefore, if a State Party unduly prolonged the process of accessing a remedy, then the African

80 Paragraph 2.

81 Paragraph 4.

82 Paragraph 22.

83 Paragraph 37.

84 Paragraph 37. The African Commission relied on *Sir Dawda* and *Velasquez Rodríguez* Case (29 July 1988) Series C No. 4.

85 The Zimbabwean case *of Jestina Mukoko v The Attorney General* unreported case no 36/ 2009 (20 March 2012) indicates a procedure where a victim has to apply through a formal court process for an order to exclude evidence obtained through human rights violations. Although the case has not been brought before the African Commission because the victim obtained relief from the domestic courts, such a decision places the African Commission in potentially dangerous predicament that questions its application of equality in such cases before it. This is due to the fact that the yardstick used by the African Commission in this hypothetical would depict inconsistency and inequality in decisions that indicate the violation of evidence obtained through human rights violations.

Commission found this position to be an exception to the requirement for the exhaustion of local remedies.[86] There is scholarly work to suggest that remedies that need to be exhausted should be judicial remedies and not discretionary remedies.[87] That discussion is outside the scope of this chapter. A point of concern is if the domestic laws of a country have a legislative procedure that offers a remedy for evidence obtained through human rights violations. In that event, the remedy has to be exhausted through the required procedure for one to have standing before the African Commission.

The exhaustion of remedies is a precursor to the admissibility of a Communication by the African Commission. A look at the statistics of the Communications decided on their merits, and on admissibility, is crucial to justifying the need for reform.

The African Human Rights Case Law Analyser indicates that the African Commission has handed down 229 decisions since its inception.[88] The outcomes of these decisions fall into 13 categories. These include: amicable settlements, referrals under Article 58(1), decisions on the merit, dismissals, files closed, outcome inconclusive, and postponed 'sine die'.[89] Other outcomes: are provisional measures, rejected at seizure stage, review on the merits, then: ruled inadmissible, and withdrawn.[90] While

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86 *Velasquez* para 22. *J.E. Zitha & P.J.L. Zitha v Mozambique* Communication 361/2008 para 101.

87 Enabulele AO & Bazuaye B 'Setting the Law Straight: Tanganyika Law Society & anor v Tanzania and Exhaustion of Domestic Remedies before the African Court' (2014) 8 (1) *Mizan Law Review* 237-251 generally.

88 IHRDA African Human Rights Case Law Analyser; search documents available at http://caselaw.ihrda.org/doc/search/?m=83 (accessed 6 November 2016).

89 IHRDA African Human Rights Case Law Analyser; search documents available at http://caselaw.ihrda.org/doc/search/?m=83 (accessed 6 November 2016).

90 IHRDA African Human Rights Case Law Analyser; search documents available at http://caselaw.ihrda.org/doc/search/?m=83 (accessed 6 November 2016).

it is acknowledged that the African Commission had reasons for the various outcomes, of the 229 Communications, only 89 have been decided on their merits.[91] This accounts for 38 per cent of the Communications. In addition, 90 Communications have been ruled inadmissible,[92] accounting for 39 per cent of the total number of Communications. Subject to substantial research, these figures may be instructive on how to increase the number of Communications that are decided on their merits, and to increase 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 affects their admissibility. The Charter requires that a Communication is considered if it satisfies the admissibility test.[93] The grounds, therefore, include the identity of the authors although they seek to remain anonymous,[94] that the Communications are compatible with the ACHPR and OAU,[95] and that they are not written in disparaging or insulting language against the State or the institutions of the AU.[96] It is further required that the Communication is not based exclusively on media reports,[97] that there has been an exhaustion of all local remedies,[98] and that it is submitted within a reasonable time.[99]

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91 IHRDA African Human Rights Case Law Analyser; search documents available at http://caselaw.ihrda.org/doc/search/?m=83 (accessed 6 November 2016).

92 IHRDA African Human Rights Case Law Analyser; search documents available at http://caselaw.ihrda.org/doc/search/?m=83 (accessed 6 November 2016).

93 ACHPR Art 56.

94 Article 56, ground 1.

95 Article 56, ground 2. See *Mohamed Abdullah Saleh Al Asad v Djobouti* Communication 383/2010.

96 ACHPR Art 56, ground 3.

97 Article 56, ground 4.

98 Article 56, ground 5.

99 Article 56, ground 6. *ARTICLE 19 and others v Zimbabwe* Communication 305/2005*; Samuel Muzerengwa and 110 others v Zimbabwe* Communication 306/2005.

The final requirement is that the Communication should not be under consideration by any other international or regional treaty body.[100] This chapter visits the fifth ground that requires that all local remedies be exhausted before the African Commission declares a Communication admissible. A complainant has to prove to the African Commission that the remedy in issue is unavailable, ineffective or insufficient, and not make merely generalised statements,[101] if he/she wants to benefit from the exceptions to the requirement that local remedies should be exhausted.

The rationale for exhaustion of local remedies is to ensure that national governments have a chance to provide remedies for violations of human rights within their legal framework.[102] In addition, the justification for the existence of this rule is to respect State sovereignty by offering the national government the chance to provide justice to a victim of human rights violations within its own internal system.

There is a debate as to whether exhaustion of remedies is a substantive or procedural issue.[103] This chapter 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 lodge a formal application with the court. This is distinguished from instances where one alleges that evidence was

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100 ACHPR Art 56, ground 7.

101 *Socio-Economic Rights and Accountability Project v The Federal Republic of Nigeria* Communication 338/2007.

102 D'Ascoli S & Maria K '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) 2 *European University Institute Working Papers* LAW 1 at 4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=964195 (accessed 1 January 2018) .

103 D'Ascoli & Maria (2007) 1-4.

obtained through human rights violations, and the court conducts a trial-within-a-trial to ascertain the voluntariness of the evidence.[104]

In Zimbabwe, for instance, a complainant may have to file a formal application for permanent stay of criminal proceedings before the remedy is granted.[105] The complainant's Communication may be disregarded by the African Commission for failure to exhaust the domestic remedies. In other countries such as Uganda, a case with similar facts may pass the admissibility test due to lack of a similar procedural requirement.[106] This is because the domestic courts may use a trial-within-a-trial to establish the voluntariness of obtaining the evidence without formally filing an application.[107] This requirement to exhaust domestic remedies may pose a challenge to equality before the African 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 the African Commission. 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 African Commission.

The African Commission has not taken any positive steps to provide clarity by way of Concluding Observations or General Comments on evidence obtained through human rights violations. The Concluding Observations of the African Commission

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104 Constitution of South Africa 1996 (Constitution, 1996) s 35(5).

105 *Jestina Mukoko V Attorney General* Unreported case 36/ 2009 (20 March 2012).

106 *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v Uganda* unreported case no 33 / 2001 (20 February 2003), 9. RD Nanima 'Admission of confessions in Uganda: Unpacking the theoretical, substantive and procedural considerations of the Supreme Court' 2017 (1) *East Africa Journal of Peace and Human Rights* 105 at119

107 Constitution 1996 s 35(5).

play a vital role in ensuring that evidence obtained through human rights violations is not admitted. Some of the Recommendations include advising States Parties to provide an independent police oversight body[108] and criminalisation of torture.[109] Other States Parties have been advised to conform to the definition of torture as provided for in the UNCAT.[110] The African Commission, therefore, in its Concluding Observations to States, has shown the areas of concern and made Recommendations for dealing with evidence obtained through human rights violations. Though the Recommendations are not explicit, they by implication play a vital role in ensuring the non- admission of evidence obtained through human rights violations. The silence of the African Commission shows its general mode of providing a buffer for the enjoyment of the right to a fair trial.

In conclusion, admissibility of Communications forms an integral part of the dealing with complaints mechanism. The requirement to subject all Communications to the admissibility test of exhaustion of local remedies is well-intentioned. However, instances which present different requirements in the domestic sphere raise issues of equality before the ACHPR. This position requires to be treaded on carefully while

108 ACPHR Concluding Observations on consolidated 2nd to 10th Report of Tanzania, para 24 available at http://www.achpr.org/files/sessions/43rd/conc-obs/2to10-1992-2008/achpr43_conc_staterep2to10_tanzania_2008_eng.pdf (accessed 16 September 2016).

109 ACPHR Concluding Observations on the third Periodic Report of Uganda, para 27, Part V, paras (e) and (f) available at http://www.achpr.org/files/sessions/45th/conc-obs/uganda:-3rd-periodic-report,-2006-2008/achpr45_conc_staterep3_uganda_2009_eng.pdf (accessed 16 September 2016).

110 United Nations Convention Against Torture (UNCAT)1465 UNTS 85. ACPHR Concluding Observations on initial periodic report of Botswana, 2010 dated 12 – 20 May 2010, available at http://www.achpr.org/files/sessions/47th/conc-obs/1st-1966-2007/achpr47_conc_staterep1_botswana_2010_eng.pdf (accessed 16 September 2016). Constitution of the Republic of Botswana 1997, sec 7 available at http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf (accessed 16 September 2016).

ensuring that evidence that is obtained through human rights violations can be adjudicated due to procedural technicalities.

3.3.3 Responsibility of the State for acts of non- State actors

A fruitful analysis of the responsibility for non-State actors requires that one looks at the position in international law, followed by how the African Commission has dealt with it. A subsequent engagement with the normative principles illuminates how this principle relates with evidence obtained through human rights violations.

3.3.3.1 International and regional requirements

Under international law, three categories of non-State actors are identified. These are armed groups like rebels, paramilitaries, mercenaries and militias;[111] national and transnational corporations;[112] and other non- State actors.[113] UN Special Rapporteur on the Situation of Human Rights Defenders, states that States Parties are required to exercise due diligence to prevent, investigate and punish any violation of the rights.[114] The States should prevent violations of the rights of defenders under their jurisdiction by taking legal, judicial, administrative, and all other measures to ensure the full enjoyment by defenders of their rights. These include investigating alleged violations, prosecuting alleged perpetrators, and being provided with remedies and reparation. While it is desirable that the State does not absolve itself of liability if the perpetrators of the human rights violations are non-State actors, the former has an obligation to

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

112 Report of the Special Rapporteur 4.

113 Report of the Special Rapporteur 5.

114 Statement made in reference to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, General Assembly Resolution A/RES/53/144.

exercise due diligence is a way of assessing whether it has acted in fulfilment of its obligations.[115]

3.3.3.2 Position of the African Commission on responsibility for State actors.

In *Zimbabwe Human Rights NGO Forum v Zimbabwe,*[116] 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 against White farmers, Black farm workers, teachers, civil servants, and people believed to be supporting opposition parties.[117] Because of the violence, 82 persons lost their lives.[118] The complainants stated that the Police and the Army of Zimbabwe failed to intervene in the incidents of criminal activity. The African Commission stated that the term 'State actors' referred to individuals, organisations, institutions, and other bodies that were acting outside State organs.[119]

The African Commission stated that the complainants failed to prove, first, that the war veterans were State actors,[120] and secondly that the Government of Zimbabwe acquiesced in their acts following the referendum.[121] The human standards of the ACHPR require that the State take positive steps to prevent and sanction private violations of human rights of individuals under its jurisdiction.[122] The limitations on

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115 *Velasquez* para 172; and United Nations Human Rights Committee General Comment No. 31, 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add.13), para. 8.

116 *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication 245/02.

117 Paragraphs 3 -4.

118 Paragraph 8.

119 Paragraph 142.

120 Paragraphs 139- 141.

121 Paragraphs 139- 141.

122 Paragraph 142.

violations of human rights do 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.[123] 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.[124]

There is no doubt that the actions of the non-State actors involved the arrest and detention of individuals, and that the State prevented the victims of the crimes from obtaining relief from the domestic courts.[125] The State has an obligation to exercise due diligence to ensure that it does not acquiesce in 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, may be done under the Principles.[126] These Principles prohibit the collection of evidence through a violation of a detained person's rights,[127] and require that States put in place mechanisms for the receipt and investigation of complaints.[128] The African Commission does not adequately address the issue of evidence obtained through human rights violations by non- State actors. However, it points to the need to uphold the rights of individuals violated by non- State actors. This is evident in its requirement

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123 Paragraph 143. *Association of victims of Post Electoral Violence and Interights v Cameroon* Communication 272/2003 para 89, *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt.*Communication 334/2006.

124 Paragraph 147. The African Commission referred to the ICCPR Art 2(3)a, General Comment 20 of the Human Rights Committee; Arts 2,3,8 and 14 of the ECHR.

125 *Zimbabwe Human Rights NGO Forum v Zimbabwe* para 211.

126 The Principles.

127 Principle M (7) (d) - (f).

128 Principle M (7) (h).

that Zimbabwe's enactment of Decree 1 of 2000 which forecloses access to any remedy that may be available to victims to vindicate their rights, reneges on its commitment to ensure the enjoyment of the right to a fair trial.[129]

In conclusion, this complaint presented the African Commission with the conduct of vigilantes in the course of adducing evidence. The failure by the African Commission to offer clarity on evidence obtained through human rights violations by vigilantes presents a lacuna in the jurisprudence. It was expected that the African Commission would address the issue of vigilantes, and how the evidence they obtain is dealt with. This case offered a chance to engage municipal law to develop the African Commission's jurisprudence on evidence obtained by vigilantes. With regard to the normative standards covered in Chapter Three, the African Commission did not use the standard of a fair trial to engages with the facts of the complaint that spoke to the admission of evidence obtained through human rights violations.

3.3.4 Dealing with evidence obtained through torture

This section evaluates the how the African Commission deals with evidence obtained through torture. First, it conceptualises the international law position, before evaluating the position of the African Commission. A subsequent engagement with the normative principles follows suit.

3.3.4.1 Position in international law

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.[130]

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129 *Zimbabwe Human Rights NGO Forum v Zimbabwe* paras 214, ACHPR Arts 1 and 7.

130 Declaration on the Protection against Torture (DPT), GA res 3452 (XXX) 9 December 1975, Art 5. United Nations Standard Minimum Rules for the Treatment of Prisoners

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.[131] The States Parties should ensure that there are established competent authorities to promptly, and impartially investigate on reasonable grounds that there has been the infliction of torture.[132] The States Parties should ensure the prosecution of the perpetrators of torture, upon establishing that an act of torture was committed.[133] The Committee against Torture prohibits the admission of a confession extorted by torture in evidence except against the torturer.[134] States Parties are required to streamline their legislation and bring it into conformity with the Convention Against Torture.[135] The Committee requires that the prosecution of perpetrators of torture should not be subjected to discretion.[136] Mujuzi engages the dangers associated with such perpetrators of torture notwithstanding his analysis that is situated in a domestic context.[137] It is instructive in showing how a perpetrator may torture an individual to obtain information to be used in obtaining evidence. Consider a hypothetical where the African Commission is faced with a case

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(the Nelson Mandela Rules) A/RES/70/175 para 54. The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (MED), Professional Training Series No. 8/Rev.1 Art 10(f).

131 UNCAT Art 15. DPT Arts 10(g), 12.

132 UNCAT Art 12, DPT Arts 9,10(h). Human Rights Commiittee General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 (1994) para 1. Conte A, Davidson S & Burchill R *Defining Civil and Political Rights* (2004) 94.

133 UNCAT Art 7. DPT Art 10.

134 General Comment 2 U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007), para 4(3). Human Rights Commiittee General Comment 13 U.N. Doc. HRI/GEN/1/Rev.1 (1984) para 16 which states that evidence obtained by way of compulsion of any form is inadmissible.

135 Concluding Observations on the third periodic report of Australia, para 30.

136 Concluding Observations on the second periodic report of France, para 11.

137 Mujuzi JD 'Issues to grapple with in implementing the Uganda Prohibition and Prevention of Torture Act' (2012) 1 *International Human Rights Law Review* 382 at 384.

from a domestic jurisdiction where a complainant A is tortured to obtained information with regard to a gun used in a robbery. Once this information is obtained it may be used to obtain evidence without any subsequent violation of human rights violations. As such this position informs the need to ensure that perpetrators are brought to justice to enable the development of jurisprudence in this area.

3.3.4.2 Position of the African Commission on evidence obtained through torture.

In *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt,*[138] the African Commission addressed the issue of torture and how evidence should be dealt with. The facts of the Communication are that the complainants' confessions were obtained as a result of torture.[139] 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, in order to 'confess' to the State Security Prosecutor for their involvement in the Taba bombings.[140] The complainants stated that the victims were held *incommunicado* for a long period without access to a lawyer.[141] The confessions were to be used as an aid to obtaining convictions.[142] They were then tried on the basis of the confessions and convicted by the Supreme State Security Emergency Court, and sentenced to death. The main issue that arose out of the Communication was whether the complainants' right to a fair trial has been violated.

The discussion will be limited to the confessions that were contested on account that they were procured through torture. The African Commission relied on the jurisprudence of the European Court of Human Rights to state:

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138 Communication 334/2006.

139 *Egyptian Initiative* para 7.

140 Paragraph 7.

141 Paragraph 7.

142 Paragraph 8.

> '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 Article 3 of the Convention.'[143]

The African Commission held that since the respondent did not attempt to give a satisfactory explanation, it was presumed that it was responsible for the injuries.[144] The African Commission held that where a confession is obtained through torture, it should not be admitted in evidence.[145] This decision significantly and specifically dealt with the issue of dealing with evidence obtained through human rights violations. However, the African Commission did not deal with the issue of a State Prosecutor, who having reason to believe that a confession had been obtained through improper means did not ensure that the confession is not admitted.[146] This would have established a new line of jurisprudence that required not only that law enforcement officers ensured that the rights of an individual are upheld in pre-trial detention, but that the prosecutors also had a duty to play in the court process as officers of the court. This decision tallied with the normative provisions on the need to ensure that the rights of a person under detention are upheld. It was however limited insofar as it did not expound on the role of the prosecutor. This role is central to ensuring that

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143 *Colibaba* para 43.

144 *Egyptian Initiative* paras 191, 218.

145 *Egyptian Initiative* paras 191, 218. The African Commission referred to Communications 54/1991, 61/1991, 98/1993, 164-196/1997 and 210/1998 *Malawi African Association v Mauritania* para. 96, and the Principles, principle N (6) (d) (1).

146 Principle F (l) in the Principles. Mujuzi (2013) 287. Although one may argue that guidance should be directed to the judiciary, the Principles do place a duty on the prosecutor to ensure that this evidence is not submitted for admissibility.

even in instances of human rights abuses in pre-trial detention, the prosecutor acts as a check on the admission of evidence obtained through human rights violations.

This case is instructive in the development of the jurisprudence of evidence obtained through human rights violations because it upheld the progressive stance that aims at ensuring that persons who engage in obtaining evidence improperly are discouraged from doing so. At the forefront of these theories is the deterrent theory for the exclusion of evidence. This theory requires that illegally or improperly obtained evidence must be excluded from admission, to deter the perpetrators from committing future such acts to obtain evidence.[147]

In conclusion, the African Commission made reference to a wide range of international jurisprudence from the HRC, the ECtHR, the Robben Island Guidelines and The Principles. 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 recognise that there are situations that may lead to evidence obtained through human rights violations other than torture. The African Commission's engagement with the Robben Island Guidelines affected the quality of the decision in so far as the violation of the right against torture formed the violation of the right to a fair trial. This decision presents a jurisprudential limitation in that the African Commission conflates evidence obtained through torture with the evidence obtained through human rights violations.

147 Madden M 'A Model Rule for Excluding Evidence' (2015) 33(2) *Berkeley Journal of International Law* 442 at 448.

3.4 CONCLUSION

The trends in the development of the jurisprudence of the African Commission on Human Rights on evidence obtained through human rights violations show a limited development in the jurisprudence. The context of the jurisprudence of the African Commission on evidence obtained through human rights violations requires definition and limitation of its scope. The definition of jurisprudence by Salmond engages the basis, development the implementation of the law. This enables one to approach the jurisprudence of international human rights bodies from a normative and implementational perspective. The limitations in the jurisprudence are qualified by the ability of the human rights body to offer detailed and well-reason judgments, and not merely a large number of decisions. It follows that the quality of the decisions supercedes the sources of jurisprudence that a human rights body refers to before making a decision.

At the core of the context of the requirement that domestic laws should conform to the ACHPR, the African Commission does not utilise normative principles to develop its jurisprudence. This failure may also be visited on the norms because of their failure to adequately deal with evidence obtained through human rights violations. The admissibility of Communications results in inequalities before the ACHPR in so far as some States Parties have procedural remedies that deal with evidence obtained through human rights violations. This failure stems from a fairly developed jurisprudence on the right to a fair trial, which does not engage with evidence obtained through human rights violations. There is a problem on how to deal with vigilante evidence. While the African Commission recognises them as non-State actors, it fails to address the mode of dealing with evidence collected by the vigilantes.

The African Commission has illustrated its ability to offer well-reasoned decisions, drawing on experience from the jurisprudence of the HRC, the ECtHR, the Robben Island Guidelines and the Principles. However, it seems to conflate evidence obtained through human rights violations with evidence that is obtained through torture. In the light of the African Commission's limited experience of dealing with evidence obtained through human rights violations, an evaluation of the context of the HRC as an international body may be instructive. This points to a bigger problem of a restrictive approach by the African Commission in interpreting cases that deal with evidence with evidence obtained through human rights violations.[148]

[148] Articles 60 and 61 empower the African Commission to use an extensive approach that embraces a non- restrictive mode of interpretation that borrows on the jurisprudence of other domestic, regional and international instrument in interpreting the African Charter.

CHAPTER FOUR

JURISPRUDENCE OF THE HUMAN RIGHTS COMMITTEE ON EVIDENCE OBTAINED THROUGH HUMAN RIGHTS VIOLATIONS

4.1 INTRODUCTION

The previous chapter evaluated the jurisprudence of the African Commission on evidence obtained through human rights violations. It was established that the development of the jurisprudence of evidence obtained through human rights violations was informed by two considerations. First, that the normative developments dealt with the right to a fair trial, and that they were not specifically tailored to deal with evidence obtained through human rights violations. Secondly, that the jurisprudential trajectory was inclined to enhancing the right to a fair trial rather than specifically dealing with evidence obtained through human rights violations. This position theoretically changed with the adoption of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the Principles).

The current chapter evaluates the normative and jurisprudential framework of the HRC on evidence obtained through human rights violations. It reviews General Comments, Concluding Observations and decisions by the HRC. This Chapter deals with the second research question as far as it draws on the experiences of the HRC in relation to evidence obtained through human rights violations.

It is hoped that an engagement of the second research question is instructive in enhancing the development of the jurisprudence of the African Commission. The existence of salient features will inform the possible improvement of the jurisprudence of the African Commission on evidence obtained through human rights violations. As such, this chapter establishes whether the experiences of the Human Rights Committee (HRC) as an international human rights supervisory body, may aid the

development of the jurisprudence of the African Commission. It evaluates the normative and jurisprudential framework of the HRC on evidence obtained through human rights violations. The first section unpacks its normative framework, while the second section examines the jurisprudential developments. The HRC is used because it deals with all civil and political rights, unlike the Committee Against Torture (CAT), which is limited to the existence of torture or CIDT. In addition, it will be shown that the HRC complements the work of the CAT and other international bodies like the Office of the Human Rights Commissioner for Refugees (HRCR).[1] Its fluidity, therefore, places it in a position that offers intuitive and informative insights for the study.

4.1.1 A SYNOPSIS OF THE PROVISIONS OF THE ICCPR.

This sub-section engages the provisions of the ICCPR that speak to the evidence obtained through human rights violations. This offers a platform that engages the earlier discussions of the provisions of the ACHPR and the European Convention. The ICCPR does not have an express provision that addresses evidence obtained through human rights violations. This position is presented in both the ACHPR and the European Convention as depicted in preceding chapters.[2] However, it provides for the right to equality and the right to a fair trial.[3] The relevant parts of the Article are engaged in the relevant sections of the chapter. The ICCPR provides:

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1 Concluding Observations on the third periodic report of Hong Kong CCPR/C/HKG/CO/3 adopted by the Committee at its 107th session (11 – 28 March 2013) para 8.

2 See Chapters Two and Three on the African Commission, and chapter 4 on the ECtHR.

3 Article 14, ICCPR. This right is in Art 7 of the ICCPR and Art 6 of the European Convention.

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[4]

This part of the Article places the concept of equality before the law as a crucial component of the right to a fair trial. It follows that the right to a fair trial is assessed against the notion of equality that a law presents.[5] As a result, equality before the law is key to achieving a fair trial. This is a departure from the provisions of the ACHPR and the European Convention that do not directly use the right to equality as a component of the right to a fair trial. The concept of equality under Article 14 of the ICCPR is related to Article 26, which provides for the principle right against discrimination.[6] The point of departure is in the fact that while Article 14 extends to trials before tribunals, Article 26 relates discrimination under the law against discrimination on various grounds such as race, colour, sex, language, or other status.[7] The two provisions provide a framework to deal with structural non-discrimination, where the legal provisions do not provide the same footing for all persons, before the law or under the law.[8]

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4 First part of Art 14(1) ICCPR.

5 See extensive discussion of the General Comments, Concluding Observations and Decisions of the HRC in subsections 4.2.1- 4.2.3.

6 Article 26 of the ICCPR. See General Comment 18 of the HRC on non-discrimination, adopted at the 31 session of the Human Rights Committee HRI/GEN/1/Rev.9 (Vol. I), dated 10 November 1989, para 3.

7 General Comment 18, para 1.

8 See Annual report of the Special Rapporteur to the fifty-third session of the Commission on Human Rights, E/CN.4/1997/71, 16 January 1997, para 139: see also Özden M 'The right to non-discrimination' (2011) CETIM 51, available at

Articles 7 and 14 of the ICCPR both recognise particular rights or minimum guarantees as a basis for qualifying the right to a fair trial, or the fairness of a trial.[9] While the ACHPR recognises the four rights set out in the first paragraph under this subsection, the ICCPR recognises the right to equality before the law as a key component of the right to a fair trial or the fairness of a trial. The effect of these rights is to ensure fairness, and equality before the courts. The enjoyment of this requires that an accused is informed of the nature of the charges against him or her,[10] that he or she has adequate time and facilities to prepare the defence and to communicate with counsel,[11] and to be tried without delay.[12] In addition, the accused has to be tried in his or her presence,[13] where he examines witnesses,[14] and that an interpreter be provided when needed.[15] In addition, the accused cannot be compelled to testify against himself.[16] The other right that the ICCPR recognises is

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https://www.cetim.ch/wp-content/uploads/Right-to-non-discrimination.pdf accessed 22 March 2017.

9 See Chapter Three.

10 Article 14 (3) (a) ICCPR. *Malik Medjnoune v Algeria Communication* 1297/2004, para 8.6; the HRC's General Comment 13 of 1984 on Art 14 (administration of justice), equality before the courts and the right to a fair and public hearing by an independent court established by law, adopted at the 21st session of HRC, para 8.

11 Article 14 (3) (b). *Kelly v Jamaica* Communication 253/1987, para 2.1. *Makhmadim Karimov and Amon Nursatov v Tajikistan* Communication 1108 and 1121 of 2002, para 7.5

12 Article 14 (3) (c). *Malik* paras 8.9- 9. See also *Manuel Francisco Becerra Barney v Colombia* Communication 1298/2004, para 7.2

13 Article 14 (3) (d). *Darmon Sultanova v Uzbekistan* Communication 915/2000, para 7.5. *Makhmadim and Amon*, para 7.5.

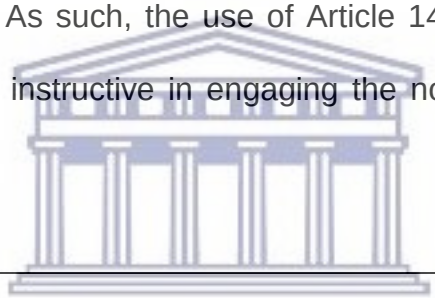
14 Article 14 (3) (e). *Sultanova*, para 7.5.

15 Article 14 (3) (f).

16 Article 14 (3) (g). *Makhmadim and Amon*, para 7.2. The State is required to investigate instances of violationson of ill treatment promptly as part of its negative obligations to

the presumption of innocence.[17] The absolute rights under the ICCPR include the right to life, rights against torture or CIDT, and the right not to be held in slavery or servitude.[18] Other absolute rights include the right not to be imprisoned due to an inability to fulfil a contractual obligation, recognition as a person and the right to freedom of thought, conscience and religion.[19]

The ICCPR also has provisions, other than Article 14, that aid the interpretation of evidence obtained through human rights violations. These include: the right against torture, and cruel, inhuman and degrading punishment or treatment;[20] right to liberty and security of person;[21] the right to dignity of persons deprived of their liberty;[22] and the right to privacy.[23] As noted, Article 4 provides for a list of absolute rights which cannot be derogated from. As such, the use of Article 14 in conjunction with other provisions of the ICCPR is instructive in engaging the normative framework of the



interfere with the individual's enjoyment of rights under the ICCPR. See General Comment 7 U.N. Doc. HRI/GEN/1/Rev.1 (1982), para. 14.

17 Article 14 (2). *Makhmadim and Amon*, para 7.6. *Ernst Zundel v Canada* Communication 1341/ 2005, paras 3.4.

18 See Arts 6, 7 and 8 the ICCPR. This list of rights is provided for in Art 4.

19 See Arts 4, 11, 15, 16 and 18 of the ICCPR.

20 Article 7 ICCPR. The rights engaged in the Concluding Observations, General Comments and Decisions are discussed in section 5.2- 5.3 below.

21 Article 9. See *Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero, Ramón Villegas Tellez and Ernesto Ascanio Ascanio v Colombia*, Communication 778/1997, para 9.4.

22 Article 10. See *Albert Wilson v Philliphines*, Communication 868/1999, para 7.3 & 8. See also *Jegatheeswara Sarma and two others v Sri Lanka*, Comunication 950/2000, para 9.2.

23 Article 17. See *Francesco Madafferi and Anna Maria Immacolata Madafferi v Australia* Communication 1011/2001, paras 9.6 – 9.7.

HRC on evidence obtained through human rights violations to establish its distinct features.

4.2 NORMATIVE FRAMEWORK OF THE INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS

As noted earlier, for a concept to form a norm or to inform the normative framework of a human rights supervisory body, it ought to possess four qualities.[24] First, an underlying assumption or reason that forms the basis, standard and content of the norm,[25] Secondly, an ability to balance different standards in a norm or various norms, without conflating the spirit of the norm.[26] The third aspect is the scope of the norm,[27] and fourthly, the enforceability of the norm by the human rights systems.[28]

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24 These aspects are reiterated in Chapter Two above. In the view of the researcher, they are not a condition precedent, but subsequent to the appreciation of a norm.

25 Jordan (2010) 110. Raz (1972) 823- 854 generally.

26 This is equated to the purpose of the norm or the rule. Gordon M intepretes the spirit of the law or the norm as the 'social and moral consensus of the interpretation of the letter of the law'. The letter of the law or the norm is the 'formal code, rule, regulation, or principle that must be followed according to governmental mandates or policies'.See Gordon M The spirit versus the letter of the law, available at https://pdfs.semanticscholar.org/51e5/a621038639b95dfa5_c56a7d2a80f79e60427.pdf (accessed 31 March 2018). See also Jordan (2010) 110, and Dworkin (1967) 45.

27 Joaquin & Toube (1997) 113. As noted in chapter three, this scope is got from the standards or the rights the the norm uses to indicate the expanse of its application.

28 Joaquin & Toube (1997) 113. With regard to the rights in a practical sense, see General Comment 7 U.N. Doc. HRI/GEN/1/Rev.1 (1982).paras 1-3, General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 (1994), paras 1-3, Weiler JHH 'The Geology of International Law – Governance Democracy and Legitimacy' (2004) 64 *Zeitschrift fu¨r o¨ffentliches Recht und Vo¨lkerrech* 547 at 562.

As indicated in Chapter Two,[29] it is important to examine the normative developments that inform the concept of evidence obtained through human rights violations, according to the HRC, and establish which theoretical underpinning inform it. As such, this section identifies and critiques the normative developments of the HRC and their theoretical underpinnings. Other than creating a separate section on the theoretical framework, this chapter engages the extent to which the HRC uses the liberal theory, principle of primarily and the doctrine of the margin of appreciation.

The HRC was established by the ICCPR, to supervise the States Parties in the implementation of their obligations thereunder.[30] The history of the establishment of the HRC hinged on a need for an international organisation that would promote and protect human rights from an international perspective, other than by infringing on the sovereignty of States Parties.[31] The HRC receives reports from States Parties on measures that they undertake to give effect to their obligations under the ICCPR.[32] It offers comments in the form of Concluding Observations to guide the States Parties to improve the performance of their obligations.[33] The HRC also receives and considers Communications from individuals and offers its views to the relevant States

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29 Chapter 2, subsection 2.6.1 – 2.6.4 and 2.4, subsection 2.4.1- 2.4.2.

30 Article 28 ICCPR. Seibert-Fohr A 'Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para. 2' (2001) *5*(1) *Max Planck Yearbook of United Nations Law Online* 399 at 401.

31 Report of the ninth Session of the Commission (1953), Annex III.B paras 56- 59. See comments by Romania, Third Committee Records (1966) meeting 1416 para 16, comments by Guinea para 41 and Jamaica, para 43.

32 Article 40 ICCPR. See Human Rights Civil and Political Rights: The Human Rights Committee Factsheet no. 15 (Rev. 1) at 15, available at http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf (accessed 12 August 2017).

33 Article 40 (4) ICCPR. Factsheet no. 15 (Rev. 1) at 23.

Parties.[34] In addition, the HRC also receives and considers inter-state complaints.[35] These functions, coupled with the obligation of the States Parties, inform the normative and the jurisprudential framework of the HRC. As a result, its normative and jurisprudential framework refers to the General Comments, Concluding Observations on States Reports, and decisions on individual and inter-State Communications. This section reviews General Comments as the normative framework of the HRC. The researcher opts to engage the decisions of the HRC as part of the jurisprudential framework. Although Concluding Observations and decisions may have normative undertones, their recurring basis indicates that they form the jurisprudential, and not the normative framework.

4.2.1 GENERAL COMMENTS

General Comments refer to texts or materials prepared by international and treaty bodies to address relevant issues and guide States Parties on how to effectively perform their obligations under the treaties or charter instruments.[36] From the advent of the adoption of the UDHR in 1948, various human rights bodies have made various steps with regard to monitoring the enforcement of the promotion and protection of human rights.[37] This has led to the adoption of General Comments as a way of requiring States Parties to adhere to the terms of the treaties.[38] This has moved from

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34 The optional Protocol to the ICCPR 999 UNTS 176, Art 2 (2). Factsheet no. 7 (Rev. 1) at 23, available at http://www.ohchr.org/Documents/Publications/FactSheet7Rev.1en.pdf (accessed 12 August 2017).

35 Article 41 ICCPR. Hüfner K 'How to file complaints on human rights violations' (1998) 44(2-3) *International Review of Education* 155 at 175.

36 Factsheet no. 15 (Rev. 1) at 24.

37 UN GA, Res. 217A (III), 10 December 1948, UN Doc. A/810 at 71 (1948).

38 Mechlem K 'Treaty bodies and the interpretation of human rights' *Vand Journal of Transnational Law.* 42 (2009): 905 at 910.

requiring the periodic reporting by the States Parties to the United Nations, to authorising human rights treaty bodies to make comments and resolutions that would be objective in guiding the interpretations of the UN treaties. As such, Alston defines them as:

> … a means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises and presents those views in the context of a formal statement of its understanding to which it attaches major importance. In essence the aim is to spell out and make more accessible the 'jurisprudence' emerging from its work.[39]

While this definition indicates that a UN human rights expert body prepares a General Comment to reflect its interpretation of a particular aspect of a treaty, it presents more problems that point to the legitimacy of the General Comment. First, from a general perspective, other human rights bodies other than those created by the UN have adopted General Comments[40] Secondly, another question is whether they are

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39 Alston P 'The Historical Origins of the Concept of "General Comments" in Human Rights Law' in Boisson de Chazournes L & Gowland DV (eds) *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001) 763–776 at 775.

40 For instance The African Commission spearheaded the adoption of *General Comment* 3 of 2014 on the right to life as recognised in Art 4 of the ACHPR available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjPwqrOkIDaAhVsIMAKHa7zDCwQFggoMAA&url=http%3A%2F%2Fwww.achpr.org%2Finstruments%2Fgeneral-comments-right-to-life%2F&usg=AOvVaw2U_LVqPQTKEPs0S267YmVc (accessed 22 March 2018); *General Comment* 4 of 2017 on the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment (torture and other ill-treatment) under Art 5 of the ACHPR available at http://www.achpr.org/files/instruments/general-comment-right-to-redress/achpr_general_comment_no._4_english.pdf (accessed 22 March 2018).

authoritative interpretations of treaty norms, or general,[41] unsystematic statements that lack adequate grounding with no attachment of legal weight.[42] These questions have led to mixed receptions from various States Parties, which has exacerbated the problem.[43]

This mixed response to the legitimacy of General Comments is an indication that, they cannot be solely relied on as authoritative texts on the enforceability of the provisions of human rights instruments. It is argued that there is available literature to show that there is no unified position of the legitimacy of General Comments with sole regard to their acceptance,[44] or the use of legislative debate by a State Party with regard to salient aspects of the General Comment.[45]

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41 Keller H & Ulfstein G 'UN human rights treaty bodies, Law and legitimacy' in Grover L *UN human rights treaty bodies: law and legitimacy* (2012) 118 See also Alston (2001) 764.

42 Alston (2001) 764; Keller & Ulfstein (2012)118. Some of the General Comments that inbihit resistance from States Parties include General Comment 14 of 1984 (Human Rights Committee) U.N. Doc. HRI/GEN/1/Rev.6 at 139 (2003, General Comment 20 of 1992 on torture and ill-treatment by the United States) U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003) , General Comment 24 of 1994 on reservations by the United States U.N. Doc. HRI/GEN/1/Rev.6 at 161 (2003).

43 An engagement on the various responses to the legitimacy of the General Comments is beyond the scope of this study. Insights can, however, be got from Harland C 'The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of States Parties: An Initial Global Survey Through UN Human Rights Committee Documents' (2000) 22 (1) *Human Rights Quarterly* 187–260 generally. See also Blake C 'Normative Instruments in International Human Rights Law: Locating the General Comment', NYU Law, Center for Human Rights and Global Justice Working Paper Series 17/2008, available at www.chrgj.org/publications/docs/wp/blake.pdf (accessed 15 March 2018).

44 These comments are reiterated by Weiler JHH 'The Geology of International Law – Governance Democracy and Legitimacy' (2004) 64 *Zeitschrift fu¨r o¨ffentliches Recht und Vo¨lkerrech* 547 at 562.

The lack of a clear stand on the authoritativeness of the General Comments is informed by the process of adoption. With regard to the ICCPR, the HRC shall:

> … Study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the states parties.[46]

A look at Travaux Preparatoires of this Article indicates the Article was adopted in the midst of the lack of a single voice with regard to the meaning of 'General', let alone the distinction between 'general' and 'specific' within the meaning of the Article.[47] According to Keller and Ulfstein, this was exacerbated by the lack of guidance on the meaning of 'comment' in the subsequent years.[48] As such, two approaches to the legitimacy of General Comments still stand. First that they are not legally binding on State Parties.[49] Secondly, that they are a source of soft law that provides non-binding norms that aid the interpretation and detail to rights and obligations in human rights treaties.[50] As such, on the basis of their non-binding nature as well as the guidance they give to States Parties, it is important to proceed to evaluate them from this

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45 Krisch N 'Global Administrative Law and the Constitutional Ambition' Law, Society and Economy Working Papers 10/2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344788 (accessed 22 March 2018).

46 Article 40 (4) of the ICCPR.

47 Bossuyt MJ *Guide to the 'travaux pre´paratoires' of the International Covenant on Civil and Political Rights* (1987) 630.

48 Keller & Ulfstein (2012) 122.

49 ILA, Committee on International Human Rights Law and Practice, Final Report on the Impact of the Findings of the United Nations Human Rights Treaty Bodies, Berlin Conference (2004); Keller & Ulfstein (2012) 158.

50 Shelton D 'Commentary and Conclusions' in Shelton D (ed) *Commitment and Compliance* (2000), 449–464 at 451.

background. This is in line with the need to look at General Comments in the interpretation of a treaty as an illumination of a subsequent practice in the application of a treaty.[51] The General Comments below are engaged on the basis of how their content has developed or added value that has, and continues to guide to States Parties with regard to the admission of evidence obtained through human rights violations.

The Right to a Fair Trial as a key component of evidence obtained through human rights instruments is the key factor in dealing with the General Comments of the HRC. The main normative developments of the HRC with regard to evidence obtained through human rights violations are the General Comments that were made between 1982 and 2007. They were adopted to guide States Parties in the execution of their obligations under the ICCPR. This is similar to the reasons that informed the adoption of normative frameworks for the African Commission, which were adopted to improve the right to a fair trial.[52] The point of departure would be how these developments evolved to indulge instances of evidence obtained through human rights violations. The study engages General Comment 7,[53] General Comment 13,[54] General Comment 20[55] and General Comment 32.[56] A subsequent chronological engagement indicates how these developments conform to the four concepts.[57]

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51 Article 31 of the Vienna Convention on the Law of Treaties.

52 See sections 2.6.1- 2.6.2 above.

53 General Comment 7 U.N. Doc. HRI/GEN/1/Rev.1 (1982).

54 General Comment 13 U.N. Doc. HRI/GEN/1/Rev.1 (1984).

55 General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

56 General Comment 32, U.N. Doc. CCPR/C/GC/32 (2007)

57 Paragraph 1 of section 4.2 above.

4.2.1.1 General Comment 7.

General Comment 7 was the first adopted by the HRC, with regard to evidence obtained through human rights violations.[58] It was adopted against the backdrop that the States Parties were required to offer information that prohibits cruel, inhuman or degrading treatment.[59] The HRC indicated that while most countries had penal provisions that dealt with torture, cruel, inhuman or degrading treatment, there was a need for effective protection through a system that ensured that such complaints were investigated effectively.[60]

General Comment 7 used the right against torture or CIDT as a non-derogable right, and the right of persons deprived of their liberty as the normative standard. It reiterated the HRC's stand on ensuring that the States Parties did not use torture, or CIDT on accused or imprisoned persons, or on pupils and patients in educational and medical institutions, respectively.[61] Furthermore, it required that States Parties do not

58 CCPR General Comment 7: Article 7 (Prohibition of Torture or cruel, inhuman or degrading treatment or purnishment) adopted at the 16th Session of the Human Rights Committee 30 may 1982.

59 Paragraph 1. The majority opinion with regard to General Comments is the guidance they offer in interpreting and understanding aspects of a treaty. See Yalçın Ş 'Extraterritorial Effect of Right to a Fair Trial: How to Test the Flagrant Denial of a Fair Trial in Extradition Cases Under International Human Rights Law?' (2013) 3 (2) *International Human Rights Law Review* 1 at 44.

60 Paragraph 1. This position is comparable to the Dakar Declaration, where the African Commission called for the need to stop acts of impunity like the use of torture and CIDT by States Parties.

61 Paragraph 2. This is a non-derogable right under Art 4 of the ICCPR. The scope of the General Comments extends beyond torture. See Flygtningehjaelp D & Menneskerettighedscenter D 'European Council on Refugees and Exiles' in Hughes J & Liebaut F (1998) *Detention of asylum seekers in Europe: Analysis and perspectives* (Volume 1) 213- 272 at 267.

derogate from their obligations under Article 7.[62] Secondly, evidence obtained through the violation of Article 7 was inadmissible in ensuring the right to a fair trial.[63] It was a requirement that all persons who were deprived of their liberty had to be treated with humanity and dignity as a positive obligation under Article 10.[64] Therefore, the requirement to uphold the right to a fair trial without recourse to the use of torture or CIDT to procure evidence was the standard that formed the adoption of General Comment 7.

However, this standard did not address the other aspects relating to evidence obtained through human rights violations such as, entrapment, use of undue influence in obtaining evidence, and an accused's lack of a lawyer. As a result, it would be difficult to deal with instances that did not have a taint of torture or CIDT. In contrast, the African Commission's chronological developments were tailored to deal with the improvement of the right to a fair trial from a general continuum, other evidence obtained through human rights violations from a specific continuum. The HRC started by specifically dealing with evidence obtained through torture.[65]

It is argued that General Comment 7 balanced various rights as the key normative standards. These included the right against torture or CIDT, and the right to human dignity of persons who had been deprived of their liberty. As such, It achieved this by reminding States Parties of their positive obligation to respect the dignity of persons who were deprived of their liberty. Furthermore, one may argue that the HRC specifically addressed the public authorities of the States Parties to ensure that they did not violate Article 7, and at the same time undertook their positive obligations to

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62 General Comment 7, para 1.

63 Paragraph 2. Flygtningehjaelp & Menneskerettighedscenter (1998) 267.

64 Paragraph 2. Flygtningehjaelp & Menneskerettighedscenter (1998) 267.

65 See discussion in chapter three on the African Commission.

treat the accused, imprisoned persons, pupils and patients humanely without recourse to the use of torture or CIDT.

The scope of General Comment 7 was the non-admission of evidence obtained through torture or CIDT.[66] While the non-admission of evidence obtained through torture or CIDT was the objective, it was limited to instances where the applicant to the HRC proved the existence of the torture or CIDT in his or her case. Consequently, the non-admission of evidence obtained through other human rights violations did not feature in the General Comment. It lacked guidance on the bounds of the available remedies, especially with regard to evidence obtained through human rights violations. This position indicated that the standard and assumption that formed the basis of the norm were not sufficient to ensure the right to a fair trial in instances where there was evidence obtained through human rights violations, other than torture or CIDT. The inability to address evidence obtained through human rights violations affected General Comment 7's mode of dealing with evidence obtained through human rights violations. However, it presented an over-reaching attempt at improving the standards of the right to a fair trial by its strong stance against evidence obtained through torture or CIDT.

The enforceability of General Comment 7 was left to the States Parties. A reading of the entire Comment indicates that it reminded the States Parties of their negative and positive obligations under the ICCPR.[67] This brings to the fore the mandate of the

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66 Paragraphs 1-3 generally. Nanima RD 'The legal status of evidence obtained through human rights violations in Uganda' 19, no. 1 (2016) 19 (1) *Potchefstroomse Elektroniese Regsblad* at 27.

67 Paragraphs 1-3 generally. See Shelton (2000) 451 on enforceability.

States Parties to uphold the obligations that they undertook at the signature, accession or ratification of the ICCPR and the Optional Protocol.[68]

4.2.1.2 General Comment 13.

General Comment 13 was adopted by the HRC and was directed at improving the right to a fair trial.[69] It was adopted because the HRC did not have a yardstick for dealing with reports on aspects of Article 14,[70] and most of the reports by the States Parties to the HRC lacked details of the legislative and other measures that ensured the application of Article 14 in the domestic courts.[71] It is argued that it was against this backdrop that the HRC adopted this General Comment to ensure that the States Parties provided sufficient details on the concepts of a criminal charge and rights and obligations in a suit at law.

General Comment 13 used three rights as the normative standard: the right to equality before the courts; the right to a fair and public hearing by an independent tribunal; and the presumption of innocence.[72] This is based on the ICCPR's wording on the right to a fair trial. It uses equality before the law as a crucial component of the right to a fair trial.[73] With regard to the presumption of innocence, the HRC required

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68 Joaquin & Toube (1997) 113. Shelton (2000) 451.

69 CCPR General Comment 13: Article 14 (Administration of justice) Equality before the courts and the Right to a Fair and Public Hearing by an Independent Court established by law. Adopted at the 21st Session of the Human Rights Committee 13 April 1984.

70 General Comment 13, para 1, Lawson EH & Mary LB eds, *Encyclopedia of human rights* (1996) 448.

71 General Comment 13, para 1; Baderin MA 'A comparative analysis of the right to a fair trial and due process under international human rights law and Saudi Arabian domestic law' (2006) 10(3) *The International Journal of Human Rights* 241 at 241.

72 Paragraphs 1, 7. This should be read against the foundation laid out in Chapter Two, subsection 2.3 on the conceptualisation of a normative framework.

73 Article 14 ICCPR.The use of equality before the courts and tribunals is a departure from the wording of Art 6 of the ECHR and Art 7 of the ACHPR.

the States Parties to treat accused persons as innocent until the court found them guilty.[74] This was not enough to indicate that it had developed a rule with regard to evidence obtained through human rights violations. Therefore it did not provide a framework that dealt with evidence obtained through human rights violations. This position was the same as that of the African Commission's Tunis Resolution and Dakar Declaration.[75]

In addition, General Comment 13 required the executive arm of States Parties to enact laws that protected the appointment, tenure and termination of the officers of the judiciary and enabled the office bearers to exhibit impartiality, competence and independence.[76] Pursuant to this, the HRC required that courts provide equitable, impartial and independent administration of justice. While these requirements pointed to a vibrant and supported judicial system, the lack of a rule with regard to evidence obtained through human rights violations would offer States a reason to admit evidence obtained through human rights violations. This is so because the existence of a vibrant judicial system does not guarantee the non-admission of evidence obtained through human rights violations unless there are rules in place.[77]

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74 General Comment 13, para 3. For more insights on the independence and impartiality of the judiciary as a link in the right to a fair trial and equality before courts and tribunals, see Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, UN Doc A/HRC/26/32/Add.1 adopted at the 26th session of the Human Rights Council on the promotion and protection of all human rights, civil, political, economic, social and cultural rights, 30 April 2014.

75 See discussion on the failure of the Tunis Resolution and the Dakar Declaration to offer guidance on evidence obtained through human rights violations in section 2.6.1. above.

76 General Comment 13, para 3. Report of the Special Rapporteur on the independence of judges and lawyers, para 13- 87.

77 Constitution of the Republic of Uganda 1995. Its chapter 8 provides for the appointment, tenure, cessation of judicial officers and rules of procedure with regard to admission of evidence. The lack of clear rules on the admission of evidence obtained through human

Just like General Comment 7, the enforceability was left to the States Parties, save that each arm of government had a direct role to play. The executive had to uphold its negative and positive obligations, the legislature had to enact laws that ensured the equality and fairness of a trial, and the judiciary had to be equitable, competent, impartial and independent. It would have to be seen how this General Comment would deal with evidence obtained through human rights violations.

4.2.1.3 General Comment 20.

General Comment 20 of the HRC effected a major shift by dealing with Article 7 in four major ways.[78] First, it generally dealt with the integrity and dignity of an individual; secondly, it pointed to the need for an effective investigation by competent authorities. It did not, however, specify the extent or nature of the investigations; thirdly, it dealt with torture as a physical as opposed to an emotional concept; and fourthly, it required that evidence obtained through torture or other prohibited treatment would not be admitted. These underpinnings ensured that evidence obtained through torture was not admitted, however, it was still limited to torture, which formed a single component of evidence that may be obtained through human rights violations.

General Comment 20 used the right against torture or CIDT, the right of persons deprived of their liberty as the normative standard. In addition, the non- qualification was evident in the HRC's lack of distinctions between torture and prohibited treatment

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rights violations still leads to an uneven trend and continued violation of the right to a fair trial.

78 CCPR General Comment 20: Article 7 (Prohibition of torture, or other cruel, inhumanor degrading treatment or punishment). Adopted at the 45th Session of the Human Rights Committee 10 March 1992.

on grounds of severity, nature and purpose.[79] The indirect cumulative effect of this standard was the enforcement of a fair trial of an accused because of the absence of torture or CIDT would lead to fairness at a trial. This position was correct in instances where the right to a fair trial was upheld from the institution of the criminal trial process to the handing down of a decision by the courts.[80] However, it can also be argued that as long as the use of torture or CIDT was proved in the collection of evidence, such evidence could not be admitted in evidence.[81]

This position resonated with the African Commission's stance on evidence obtained through torture.[82] However, as will be seen in the subsequent Chapter, it was at variance with the ECtHR, which evaluated the fairness of evidence obtained through torture against its attendant effect on the fairness of a trial.[83] In addition, the ECtHR may admit evidence obtained through CIDT if it does not render the trial unfair.[84] The point of departure is the ECtHR's reluctance to establish rules for the admission of evidence because this function is preserved for national legislatures.[85] This standard adopted by the HRC does not offer it a chance to consider other circumstances that may affect the fairness of the trial, because of its sole regard for evidence obtained through torture and CIDT.

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79 Paragraph 4. For an exposition on this paragraph, see Martin FF, Schnably SJ, Wilson R, Simon J, & Tushnet M *International human rights and humanitarian law: treaties, cases, and analysis* (2006) 327.

80 This position in engaged in section 4.3.1 below

81 See the discussion of the Communications under subsection 4.3.2

82 See chapter 2 above.

83 See discussion on jurisprudence on evidence obtained through torture in Chapter Five, subsection 5.3.1.

84 Steven (2015) 110, Maffei &Sonenshein (2012–13) 21. Mavronicola (2012) 737; Wierenga & Wirtz (2009) 365.

85 *Gafgen* paras 167-168.

General Comment 20 balanced the right against torture or CIDT, the right to human dignity of persons who had been deprived of their liberty, and the right to a fair trial.[86] In addition to the reiteration of the positive obligation to respect the dignity of persons who were deprived of their liberty,[87] the General Comment required that the States Parties have detailed safeguards for the vulnerable members of society, such as detained persons, and have a systematic review of interrogation rules and places of custody, a register of officially gazetted detention areas and the officers in charge.[88] It is the researcher's considered view that while these detailed requirements ensure that a detained person is treated fairly, they do not help with regard to the non-admission of evidence due to a violation of rights of the accused in the course of an arrest or detention that falls short of torture, or CIDT. For instance, where a confession is obtained in the absence of a lawyer, if there is no torture or CIDT, the General Comment does not come to the aid of the accused as a vulnerable member of society.

While the general scope of General Comment 20 was the non-admission of evidence obtained through torture or CIDT, the specific scope extended from the physical to the mental attributes of torture and CIDT.[89] This was a departure from the context of General Comment 7, which was limited to physical attributes of torture. In addition,

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86 General Comment 20, para 11. These rights are instructive in forging the guidelines that the HRC follows in re-evaluating the admissibility of evidence under subsection 4.3.2.3.

87 General Comment 20, para 2. See also General Comment 21 of 1992 on Article 10 (Humane treatment of persons deprived of their liberty) HRI/GEN/1/Rev.9 (Vol. I) adopted at the forty fourth session of the HRC on 10 April 1992, para 1.

88 Paragraph 11. Reports from international organisations such as indicate that the lack of this information places the detained person in a vulnerable position where they may be susceptible to torture or CIDT. See Amnesty International's 'Shadow of impunity, torture in Morocco and Western Sahara' available at http://www.refworld.org/pdfid/555ed7634.pdf (accessed 2 April 2018).

89 Paragraphs 1- 11 generally on the general scope, and 2, 5 and 6 on the specific scope.

the concept of torture was limited to its physical aspects but was extended to accused persons, pupils, and persons undergoing treatment. This was a rather horizontal trajectory that encompassed only the physical aspects.[90] General Comment 20 offered a vertical trajectory to the various kinds of torture and CIDT, which presented them as both physical and emotional.

It is further averred that this vertical trajectory encompassed more instances of torture and CIDT. As a result, the non-admission of evidence obtained through torture would not be limited to only the physical aspects, but extend to the emotional aspects as well. However, this still presented the requirement to prove torture or CIDT before a court declined to admit the evidence. This limitation indicated an inadequacy on the part of the HRC in dealing with evidence obtained through human rights violations. The continued failure to address this lack affected its ability to deal with evidence obtained through human rights violations. This position was synonymous with the African Commission's normative development of the Robben Island Guidelines that were instructive on evidence obtained through human rights violations, yet limited to evidence of torture or CIDT.[91] However, a limited and indirect approach indicated an improvement of the right to a fair trial by extending the violation of Article 7 from physical to emotional aspects.

The enforceability of General Comment 20 was left to the States Parties. A reading of the entire Comment indicates that it reminded the States Parties of their negative and positive obligations under the ICCPR.[92] It is argued that these duties bring to the fore,

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90 See discussion on General Comment 7, paras 1, 2 and 3 in subsection 4.2.1.1.

91 See section 2.6.3 in Chapter Two above.

92 Paragraph1-3 generally. A detailed exposition on the positive and negative duties, see the UN Report on State responsibilities to regulate and adjudicate corporate activities

the mandate of the States Parties to uphold the obligations that they assumed at the signing, accession or ratification of the ICCPR and the Optional Protocol.[93]

4.2.1.4 General Comment 32.

A number of reasons inform the adoption of General Comment 32, and the subsequent replacement of General Comment 13.[94] First, it was adopted to offer guidance to Member States when submitting their Periodic Reports, and to emphasise issues arising from Concluding Observations.[95] Secondly, there was a need to deal with recent developments in the international legal sphere with regard to instances where a fair trial took place outside the conventional domestic courts.[96] Thirdly, there was a need for the HRC to clarify the concepts of 'criminal charge' or 'suit in law' as the conditions which that led to the application of Article 14.[97]

This was the fourth General Comment of the HRC that effected a re-interpretation of Article 14.[98] It was adopted by the HRC as a replacement for General Comment 13; it

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under the United Nations' core human rights treaties, available at http://www.crin.org/en/docs/StatesCSR.pdf (accessed 2 April 2018).

93 Joaquin & Toube (1997) 113. The list of signature, accession and ratification of the ICCPR optional protocol is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&clang=_en (accessed 2 April 2018). The list of signature, accession and ratification of the ICCPR is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&clang=_en (accessed 2 April 2018).

94 Preambular paragraphs to General Comment 32.

95 Schmid E 'A few comments on a comment: the UN Human Rights Committee's General Comment No. 32 on Article 14 of the ICCPR and the question of civilians tried by military courts' (2010) 14(7) *The International Journal of Human Rights* 1058 at 1058.

96 Schmid (2010) 1059.

97 These concepts were not dealt with by General Comment 13.

98 CCPR General Comment 32: Article 14 Right to Equality before the courts tribunals and the right to a fair trial. Adopted at the 19th session of the Human Rights Committee 9 -27 July 2007.

reiterated the connection between the rights to a fair trial and equality as key elements in the protection of human rights.[99] The wording of the General Comment presents the possibility that Article 14 of the Covenant aims to ensure the proper administration of justice and to this end guarantees a series of specific rights. It had four key sections that dealt with: equality before courts and tribunals;[100] a public hearing before a competent, independent and impartial tribunal; rules against double jeopardy; and compensation in instances of miscarriage of justice. It pointed to the need for an effective investigation by competent authorities without specifying the extent and nature of the investigations. Thirdly, it dealt with torture as a physical concept, and it required that evidence obtained through torture or other prohibited treatment would not be admitted. These basic requirements ensured that evidence obtained through torture was not admitted, However, they were still limited to torture, which formed a single component with related to evidence that may be obtained through human rights violations.

General Comment 32 uses a dual approach in the application of its standard. It offers a specific approach that engages particular rights as the first standard,[101] and a

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99 General Comment 32 para 2. Schmid (2010) 1060. It is argued that the procedural guarantees contained in paragraphs 2-5 of the article only apply to persons charged with a criminal offence.

100 General Comment 32 paras 7-14. See the UN publication training series, The right to a fair trial- from investigation to trial available at http://www.ohchr.org/Documents/Publications/ training9chapter6en.pdf (accessed 2 April 2018).

101 General Comment 32 paras 6, 41, 60 and 61. See Yalçın (2013) 5. See also General comment No. 29 (2001) on article 4: Derogations during a state of emergency, paras 11 and 15, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 15.

general approach that engages other rights as part of the normative standard.[102] The specific rights include: the right against torture or CIDT; the right and guarantees to equality and a fair trial; the rights to liberty and security of a person; and the rights to the liberty and inherent dignity of a person.[103]

The bounds and specificity that the General Comment attaches to these rights is an improvement on the two rights (the right against torture or CIDT, and the right of persons deprived of their liberty) that formed the standard under General Comment 13. This standard under General Comment 32 remains consistently tilted towards evidence obtained through torture or CIDT. As a result, it still presents a failure by the HRC to engage circumstances that may affect the fairness of the trial without being linked to torture or CIDT.

The general approach engages other rights as part of the normative standard, by relating other Articles to the application of Article 14 from a procedural perspective.[104] The rights that inform this relationship are: the right to life; the right to non-expulsion of aliens; the right to freedom of movement; the right to access to public services; and the right against discrimination.[105] It is the researcher's view that two illustrations are

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102 General Comment 32 paras 58- 65. This involves creating a link between the right to a fair trial and equality before the courts and tribunals in Art 14 and other rights in other Arts of the ICCPR. For instance, the right to have one's conviction and sentence reviewed by a higher tribunal links Art 14 to the right to an effective remedy under Art 2. See *Terrón v Spain* Communication 1073/2002, para 6.6.

103 General Comment 32, paras 6, 41, 60 and 61. *Evans v Trinidad and Tobago* Communications 908/2000 para 6.2; *Hendricks v Guayana* Communication 838/1998 para 6.3.

104 General Comment 32, para 58. These procedural aspects are illuminated in *Singarasa v Sri Lanka*, Communication 1033/2001 para 7.4; *Czernin v Czech Republic* Communication 823/1998 para 7.5.

105 General Comment 32, paras 59, 62, 63 and 64. For instance, in this Communication, the right to life of the victims was violated due to the failure to uphold the requirements

instructive. First, the right to life cannot be violated unless the sanction is imposed after following all the procedural guarantees, or administratively because of illegal entry.[106] Secondly, an alien cannot be expelled from the territory of a State Party unless it is in accordance with a criminal sanction imposed after due process.[107]

In a bid to balance the various rights that form the specific and general standard, the General Comment reiterates a rule that acts as the yardstick for its interpretation and implementation. It states:

> It is generally for the courts of States Parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.[108]

This is an indication that the HRC limits its role to the procedural aspects that concern the application of the right to equality and to a fair trial under Article 14. Where there is no evidence of arbitrariness, the HRC limits its mandate to the pronouncement of a violation of an Article, without delving into the substantive aspects related to relevance and admissibility of evidence. This upholds the sovereignty of States

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of the right to a fair trial. *Shakurova v Tajikistan* Communication 1044/2002 para 8.5 shows a violation of Art 14 (1) (3) (b), (d) and (g). As such, the failure to uphold the right to a fair trial amounted to a violation of the right to life.

106 General Comment 32 para 59. *Ruzmetov v Uzbekistan* Communication 915/2000 para 7.6 indicates a violation of Art 14 (1), (2) and (3) (b), (d), (e) and (g). A violation of the right to a fair trial amounted to a violation of the right to life.

107 General Comment 32 para 62. *Ahani v Canada* Communication 1051/2002 para. 10.9.

108 General Comment 32 para 29. Yalçın (2013) 41. See also *Riedl-Riedenstein et al. v Germany* Communications 1188/2003 para 7.3 and *Bondarenko v Belarus* Communication 886/1999 para 9.3.

Parties and the discretion of domestic courts. It is argued however, that this affected the equality of non- nationals before domestic courts insofar as the effect of the HRC's approach illuminated the use of a different standard on nationals. The use of the rights in a specific and general manner on the basis of procedural fairness concretised the HRC's hesitation in dealing with evidence that had been obtained through human rights violations. With regard to evidence obtained through human rights violations, the HRC states:

> Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7, it is primarily for the domestic legislatures of States parties [without arbitrariness] to determine the admissibility of evidence and how their courts assess it [emphasis added].[109]

In addition to the concretisation of the hesitation of the HRC regarding the admissibility of evidence, the General Comment was limited to evidence obtained through torture or CIDT.

The overall scope of this General Comment follows the specific and general standards that it offers. This indicates an emphasis on the right to equality and a fair trial, as the guideline for the evaluation of other rights, such as, the right against torture or CIDT, the rights to liberty and security of a person, and the rights to liberty and inherent dignity of a person.[110] This scope extends to the other rights insofar as they can be engaged as procedural aspects of the right to equality and the right to a fair trial. In addition, the applicability of General Comment 32 is left to the States

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109 General Comment 32, paras 6 and 39. This position is re- echoed in all the views of the HRC in subsection 4.3.2.

110 See General Comment generally in paras 6, 41, 60 and 61. See note 239 above.

Parties. This is exacerbated by the concretisation of HRC's hesitation with regard to dealing with the evaluation of the admissibility and relevance of evidence.

It is argued that while the General Comment does not adequately resolve the issue of evidence obtained through torture, it makes a strong statement with regard to evidence obtained through human rights violations. First, it retains the stance that the right against torture or CIDT is non-derogable. Secondly, and consequently, evidence obtained through torture or CIDT is not admissible, except against the perpetrators. Thirdly, any confession or statement obtained through duress, or after a suspect has been in detention beyond the mandatory period may be interpreted as proof of the existence of torture. Fourthly, the rights to equality and a fair trial are linked to the guarantees of the presumption of innocence, the non- compulsion of a person to plead guilty or confess to a crime, and the right against torture or CIDT. This is a reiteration of its stance in General Comments 7, 13 and 20.[111]

Without prejudice to the foregoing, the principle that the States Parties' have the ability to determine rules to establish the admissibility of evidence and its assessment by Courts does not offer adequate direction on how to deal with evidence obtained through human rights violations. The HRC ought to offer more insights and direction in Communications it renders admissible for consideration.

With regard to the theoretical framework, the General Comments, to a small extent embraced the liberal theory as far as the State was constantly reminded of its duties to its citizens in light of its obligations under the ICCPR. Unfortunately, the General Comments are silent as to who are the domestic players in the process of making decisions that speak to the rights of persons in the territory of given State Party. This is against the background that the liberal theory requires that a State makes

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111 See discussion in subsection 4.2.1.1- 4.2.1.3 above.

decisions, which are criticised by domestic players who constructively engage with the State in adopting a position that is for the common good of the citizen or an individual in the territory of a State Party. In effect, countries that have robust civil society organisations or developed systems that criticise the decisions of the executive have concretised the use of the liberal theory. There is, however, silence on the role of non-governmental organisations in the formulation of these General Comments.

One may argue that the General Comments inhibit the doctrine of the MoA as far as they grant the States Parties leeway to ensure that individuals in their territory enjoy the right to a fair trial. The problem with this approach is the lack of clarity regarding the leeway accorded to States Parties.[112] This is exacerbated by the fact that the HRC treads carefully by reiterating in most of its decisions, that there has been a violation of a right without delving into the extent and nature of the violation.[113]

The use of primarity was evident in the requirement that the States Parties enforce the provisions of the ICCPR. This would, however, be limited by the stance of the HRC in two ways. First, where it did not address the violations due to lack of manifest arbitrariness. Secondly, in instances where the HRC simply found a violation of rights without engaging concepts that would be instructive with regard to evidence obtained through human rights violations.

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112 Hutchinson (1999) 641.

113 For instance, the HRC will clearly indicate that there has been a violation of the right against torture, CIDT but may be slow at indicating whether the nature of the CIDT.

4.3 JURISPRUDENTIAL FRAMEWORK OF THE OF THE HUMAN RIGHTS COMMITTEE

4.3.1 CONCLUDING OBSERVATIONS

This study qualifies Concluding Observations as a jurisprudential other than a normative development. This is because the Concluding Observations are based on the experiences of the treaty body in the execution of its mandate and its engagements with States Parties.[114] As noted earlier, the framework for the engagement of the normative developments is based on four factors. First, the underlying assumption or reason that forms the standard and content of the norm,[115] Secondly, its ability to balance different standards in a norm or various norms, without conflating the spirit of the norm.[116] The third aspect is the scope of the norm,[117] and the fourth, the enforceability of the norm by the human rights systems.[118] With regards to the reason that forms the basis of the norm, there are debates on whether Concluding Observations form a normative or jurisprudential framework.[119] In light of the first yardstick that applies to normative frameworks, it is proposed that Concluding Observations do not create a standard but develop a sense of direction for the interpretation of a given treaty, protocol or instrument in light of the discretion of the States Parties to implement the same.[120]

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114 This will be clarified in the course of the discussion that follows below.

115 Jordan DACI 'Legal principles, legal values and legal norms: Are they the same or different' (2010) Academicux – International Scientific Journal 109- 115, 110.

116 Jordan (2010) 110.

117 Joaquin & Toube (1997) 113.

118 Joaquin & Toube (1997) 113.

119 Tistounet E 'The Problem of Overlapping Among Different Treaty Bodies', in Alston P and Crawford J (eds) (2000) 383 at 394.

120 Tistounet (2000) 394.

Secondly, Concluding Observations enable the relevant Committee to establish whether the States Parties uphold their obligations under international law, via their administrative, legislative and judicial roles, to protect human rights and uphold their sovereignty.[121] It may be stated that the recommendations in the Concluding Observations add value to the existing jurisprudence.[122]

According to the UNHCR database, the HRC has delivered 476 Concluding Observations since its inception.[123] The UNHCR website neither has a categorisation criteria nor a single page with all the Concluding Observations. The researcher opted to use a sister website to the OHCHR one with the Concluding Observations to adequately use filters to narrow the search.[124] An initial search for Concluding Observations yielded 1,683 results.[125] An additional filter that used the term 'Human Rights Committee' yielded 258 results.[126] The researcher added the phrase 'right to a fair trial' as a keyword, and it and yielded 100 results.[127] The researcher looked at

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121 This is evident in the Concluding Observation's reference to the Treaty, General Comments and Case law.

122 Tistounet (2000) 394.

123 United Nations Human Rights, Office of the High Commissioner for Human Rights available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=8&DocTypeID=5 (accessed 5 September 2017). These have been adopted since 1992 acoording to the FactSheet on the Human Rights Committee, 19. See also Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system, 27 March 1997, E/CN.4/1997/74 at para.109.

124 Available at www.refworld.org (accessed 5 September 2017).

125 Available at http://www.refworld.org/type/CONCOBSERVATIONS.html (accessed 5 September 2017).

126 Available at http://www.refworld.org/type,CONCOBSERVATIONS,HRC,,,,0.html (accessed 5 September 2017).

127 Available at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=type&_publisher=HRCtype=CONCOBSERVATIONS&skip=0&querysi=right+to+a+fair+trial&searchin=fulltext&sort=date (accessed 5 September 2017).

these entries and placed an emphasis on the HRC Concluding Observations that related to the ICCPR, and this yielded 38 Concluding Observations on the Reports to the HRC from 38 States Parties.[128]

An examination of the Concluding Observations revealed that six were for 2017, with the latest dated 1 May 2017. The second batch of nine Concluding Observations was for the year 2016. The third batch of six Concluding Observations was for the year 2015. The year 2014 had eight Concluding Observations, while 2013 had six Concluding Observations. The years 2012, 2011 and 2010 had one Concluding Observation each. Thus, the Concluding Observations that the researcher dealt with were communicated between 2010 and 2017. A comparison of this chapter with the preceding study of the African Commission indicates a different period of study (1992-2013). It should be noted that the mandate of the HRC was adopted in 1969 and that it developed its substantive and normative guidelines through the evolution of General Comments between 1982- 2007. An examination of the Concluding Observations communicated between 2010 and 2017 indicates that the study starts from the normative developments from 1982 to 2007.

As noted earlier, the developments in the General Comments indicate that, first, that the HRC deals with issues of admissibility of evidence obtained through torture or CIDT as the baseline. Secondly, the rights to equality and a fair trial revolve around the need to respect the presumption of innocence, the right against compulsion to the confession of a crime or guilt, and the prevention of undue delays in detention. Thirdly, the HRC uses arbitrariness as the yardstick for its intervention in the

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128 See information available at http://www.refworld.org/type,CONCOBSERVATIONS,HRC,,50ffbce51e7,,0.html (accessed 5 September 2017).

evaluation of the admissibility of evidence. These three concepts will in part inform the evaluation of the Concluding Observations as a jurisprudential framework.

4.3.1.1 Arbitrariness and admissibility of evidence.

On the basis of the preferred methodology,[129] the researcher used the 38 Concluding Observations to establish how the HRC deals with the concept of arbitrariness.[130] He employed an additional filter with the word 'arbitrary', which returned 16 Concluding Observations representing 42.1 per cent of the results.[131] These Concluding Observations were evaluated with regard to the admissibility of evidence obtained through human rights violations. This was still in line with the use of desktop research as a mode of conducting the study.

The HRC refers to arbitrariness with regard to arrests and pre-trial detention and notes that it is a violation of various rights, such as, the rights to liberty and security of

129 Chapter One, subsection 1.5.

130 The arbitrariness under the Concluding Observations is related to instances of obtaining evidence through human rights violations. Arbitrariness with regard to the right to life, terrorism, and arbitrary restriction of the right to freedom of expression do not form part of this conversation. For instance, see Concluding Observations on the second periodic report of Thailand CCPR/C/THA/CO/2 adopted by the Committee at its 119th session (6 -29 March 2017 paras 25 and 35, and Concluding Observations on the first periodic report of Bangladesh CCPR/C/BGD/CO/1 adopted by the Committee at its 119th session (6 -29 March 2017 paras 9 and 20. See also Concluding Observations on the second periodic report of Turkmenistan CCPR/C/TKM/CO/2 adopted by the Committee at its 110th session (10–28 March 2014) para 42.

131 Results on Concluding Observations with the term 'arbitrary' at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=type&publisher=HRC&type=CONCOBSERVATIONS&toid=50ffbce51e7&skip=0&querysi=arbitrary&searchin=fulltext&sort=date (accessed 14 September 2017).

person, the right to equality before the law, the rights of children, and the right to equality before the law without discrimination.[132]

This reflects a failure to engage the procedural prescriptions that guide the application of Article 14 to engage the right to a fair trial, and the subsequent silence on evidence that may be obtained through human rights violations in the course of pre-trial detention. This position is not remedied insofar as the domestic courts restore punitive powers which undermine key rights, such as, the right against torture or CIDT, and the rights to liberty and human dignity.[133] The HRC's reminder that the States Parties should prosecute the perpetrators of torture,[134] covers only instances where evidence is obtained through torture or CIDT, other than other human rights violations.[135] This is an indication that arbitrariness is subjectively qualified by the presence of evidence of torture in disregard of the liberty and dignity of an individual. In instances where there is no evidence of torture or CIDT, the HRC points to a possible violation of the relevant Article, without engaging with the admissibility of

132 Concluding Observations on the sixth periodic report of Colombia, para 20. See also Working Group on Arbitrary Detention following its mission to Colombia in 2008 (A/HRC/10/21/Add.3). With regard to arrests, see Concluding Observations on the second periodic report of Turkmenistan CCPR/C/TKM/CO/2 adopted by the Committee at its 110th session (10–28 March 2014) paras 8 and 14.

133 Concluding Observations on the fifth periodic report of Uruguay 2013, CCPR/C/URY/CO/5 adopted by the Committee at its 109th session (2 December 2013) para 19.

134 Paragraph 19.

135 This is also seen in its appreciation of State Parties, that they adopt legislation, which offers safeguards against arbitrary detention that culminates into torture or CIDT and an unfair trial. Concluding Observations on the seventh periodic report of Ukraine, CCPR/C/SR.3002 adopted by the Committee at its 108th session (8–26 July 2013) para 4(c).

evidence obtained in the course of the violation.[136] As a result, the HRC points out the need to respect pre-trial guarantees, such as, being informed of the grounds for an arrest, and being produced in court within 24 hours.[137] This poses a question as to the probable use of an objective assessment that tests the hesitation of the HRC to engage in the evaluation of the admissibility of evidence obtained through other human rights violations.

The HRC has categorised prolonged detention into pre-trial detention, and arbitrary detention.[138] It does not define the categories and give them meaning. While both kinds of detention speak to arbitrariness by States Parties, they both connote arbitrariness where they violate the rights to liberty and security of person with regard to long periods of detention.[139] While it proposes the shortest possible time for pre-trial detention, the HRC remains hesitant to create rules to guide the admission of

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136 Concluding Observations on the first periodic report of Macau (China), CCPR/C/MAC/CO/1 adopted by the Committee at its 107th session (11–28 March 2013) para 15.

137 Concluding Observations on the second periodic report of Nepal CCPR/C/NPL/CO/2 adopted by the Committee at its 110th session (10–28 March 2014) para 11.

138 Concluding Observations on the third periodic report of Latvia CCPR/C/LVA/CO/3 adopted by the Committee at its 110th session (10–28 March 2014) paras 13 and 14. Concluding Observations on the fourth periodic report of Azerbaijan CCPR/C/AZE/CO/4 adopted by the Committee at its 118th session (17 October- 4 November 2016 para 36(b).

139 Paragraph 14. Concluding Observations on the first periodic report of Sierra Leone CCPR/C/SLE/CO/1 adopted by the Committee at its 110th session (10–28 March 2014) para 20. This includes the detention of Asylum Seekers and refugees - Concluding Observations on the sixth periodic report of Morocco CCPR/C/MAR/CO/6 adopted by the Committee at its 118th session (17 October – 4 November 2016) para 35. Detention with regard to violation of the freedom to travel abroad, see Concluding Observations on the second periodic report of Turkmenistan CCPR/C/TKM/CO/2 adopted by the Committee at its 110th session (10–28 March 2014) paras 28 and 29.

evidence obtained during pre-trial detention.[140] While these guarantees should be engaged to reduce these instances of detention, this intention is greatly curtailed where the HRC refers to the Articles, which are violated other than the explicit need to amend a domestic law. As a result, where evidence is not obtained through torture or CIDT, its admission is the probable consequence.

The HRC has extended the concept of detention to include areas outside the territorial jurisdiction but within the control of a State Party.[141] This is a welcome development that shows a dynamic application and development of the jurisprudence. This is evident in the requirement that States Parties reduce the period between investigation and the trial process.[142] The downside is that the discretion offered to the States Parties to improve their investigative and legal procedural concerns without giving directions on the admissibility of evidence obtained in violation of the rights of an individual is a failure to deal with evidence obtained through human rights violations.[143]

4.3.1.2 Right to equality and a fair trial, and admissibility of evidence.

The researcher examined the 38 Concluding Observations to establish how the HRC deals with the right to equality and a fair trial. He employed an additional filter with the word 'torture', which returned 31 Concluding Observations representing 81.6 per cent

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140 Concluding Observations on the sixth periodic report of Italy CCPR/C/ITA/CO/6 adopted by the Committee at its 119th session (6 -29 March 2017 para 25(c).

141 Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland* CCPR/C/GBR/CO/7 adopted by the Committee at its 110th session (10–28 March 2014) para 8.

142 Paragraph 9.

143 Compare para 9 (a),(b) and (c).

of the results.[144] These Concluding Observations aided the research in indicating how the HRC deals with evidence obtained through human rights violations.

The HRC has reiterated the need for States Parties to reduce the number of persons in pre-trial detention, the length of that detention, the legal procedures that are incidental to the attainment of these goals,[145] and the need to abolish solitary confinement.[146] The HRC's engagements to ensure that the pretrial detention extends for a given period of time is an indirect way of dealing with evidence obtained through human rights violations. However, the lack of a clear streamlined system that has developed organically affects the effectiveness of this position.

Where some States Parties have not held trials for particular cases, the HRC has offered specific recommendations with regard to the need to investigate and try the perpetrators.[147] To a great extent, this approach has resonated with the African Commission's general improvement of the right to a fair trial without specifically dealing with evidence obtained through human rights violations. The point of departure was in the HRC developed jurisprudence on dealing with evidence

144 Results on the right to equality and a fair trial available at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=type&publisher=HRC&type=CONCOBSERVATIONS&toid=50ffbce51e7&skip=0&querysi=torture&searchin=fulltext&sort=date (accessed 14 September 2017).

145 This included the need to review the length of criminal trials as noted in Concluding Observations on Italy, para 35.

146 Concluding Observations on the fourth periodic report of Portugal (CCPR/C/PRT/CO/4) adopted by the HRC at its 106 session (15 October- 2 November 2019) para 9. Concluding Observations on the USA para 20.

147 Concluding Observations on Bolivia, para 17 on human trafficking. Concluding Observations on Uruguay, para 15 on marital rape and incidences of violence on women. Concluding Observations on Kyrgyzstan, para 15 on torture and CIDT. Concluding Observations on Colombia on seventh report, para 25 with regard to enforced disappearances. Concluding Observations on Ecuador, para 18 on cases of abuse and sexual abuse.

obtained through torture or CIDT, and the use of the arbitrary test to evaluate the admissibility of evidence.

The HRC has in its Concluding Observations to States Parties reiterated the efficacy of other rights and guarantees that speak to the existence of a fair trial.[148] These include the presumption of innocence,[149] the right to remain silent and not to be compelled to give evidence against oneself,[150] and the right to a fair trial without undue delay.[151] In some instances, the HRC has recommended that evidence obtained through coercion should be inadmissible.[152] The HRC has insisted that these guarantees extend to areas beyond the jurisdiction of a State Party, provided the latter is in control of the territory.[153] These initiatives still show a mixed approach with regard to evidence obtained through human rights violations. In some Concluding Observations, there is a lack of direction, while in others there is a sense of the same with regard to evidence obtained through human rights violations. It may be argued that these recommendations are directed to a specific report, which has distinct facts. As such, the recommendations have to be tailored to suit the nature of the protection of human rights by the particular State Party. It is safer to state that the HRC uses the Concluding Observations as a platform to improve the right to equality and a fair trial. The improvement of the enjoyment of this right shows an engagement

148 Concluding Observations on Uruguay, para 8. Concluding Observations on Kyrgyzstan, para 19.

149 Concluding Observations on Uruguay, para 8.

150 Concluding Observations on Nepal, para 16.

151 Concluding Observations on Macedonia, para 14.

152 Paragraph 16.

153 Concluding Observations on the USA, para 21, in respect to the administrative detention of suspects at the Guantanamo Bay facility.

with other rights, such as, the right to liberty and security of a person and the rights of detained persons.[154]

The HRC's attempts to improve the right to a fair trial and the administration of justice are hinged on improving the security of tenure and the conditions of work for judges and magistrates.[155] This drive has also extended to the need to provide legal aid for indigent persons.[156] The HRC holds the view that where this is done, the judges should exhibit independence and impartiality in the discharge of their mandate. This does not cater for evidence obtained through human rights violations, especially if there is no jurisprudence on how it should be dealt with. It may be said that this situation shows that the HRC has, at this point, failed to adequately deal with this kind of evidence. The researcher is of the view that unless a State Party has jurisprudence on how to deal with evidence obtained through human rights violations, the independence and impartiality of the judges may not adequately deal with the issues that arise with regard to evidence obtained through human rights violations.

4.3.1.3 Torture or CIDT and admissibility of evidence

As indicated above, the researcher examined the 38 Concluding Observations to establish how the HRC deals with torture. He employed an additional filter with the word 'torture', which returned 31 Concluding Observations representing 81.6 per cent

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154 Paragraph 9.

155 Concluding Observations on Moldova, para 29. Concluding Observations on Jamaica, para 42. The HRC advises for increased budgetary considerations to strengthen the conclusion of cases in the courts. Concluding Observations on Morocco, para 33. Concluding Observations on the second periodic report of Serbia CCPR/C/SRB/CO/2 adopted by the Committee at its 101st session (14 March–1April 2011), para 35. Concluding Observations on Turkmenistan, para 31.

156 Concluding Observations on the second periodic report of Poland CCPR/C/POL/CO/2 adopted by the Committee at its 18th session (17 October-4 November 2016), para 33.

of the results.[157] These Concluding Observations were evaluated to show how they are used with regard to the admissibility of evidence obtained through human rights violations.

The HRC has reiterated the need for the States Parties to ensure that prompt and impartial investigations by competent authorities are carried out in instances of human rights violations.[158] While this does not expressly relate to torture only, it neither removes the use of this caution in respect of other human rights violations. The problem is that it does not directly deal with the admission of evidence obtained through human rights violations. The non-derogable nature of the right against torture and the absolute rule on the non-admission of evidence obtained through torture enable the HRC to reiterate that such evidence, such as confessions obtained through torture is not admissible.[159] However, the limitation that embraces a taint of torture reflects the HRC's failure to deal with evidence obtained through human rights violations.

From an academic perspective, the approach of the HRC in dealing with instances of torture is inclined to address administrative bottlenecks that lead to the abuse of the right against torture, rather than how torture or CIDT may lead to the admission of evidence obtained through human rights violations.[160] While this approach ensured

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157 Available at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=type&publisher=HRC&type=CONCOBSERVATIONS&toid=50ffbce51e7&skip=0&querysi=torture&searchin=fulltext&sort=date (accessed 5 September 2017).

158 Concluding Observations on Colombia, para 12. Concluding Observations on Ukraine, para 15.

159 Concluding Observations on the second periodic report of Morroco CCPR/C/MAR/CO/6 adopted by the Committee at 118th session (17 October-4 November 2016), para 24.

160 Concluding Observations on Colombia, para 21. This can be contrasted with the ECtHR's dynamic interpretation of the right against CIDT and how it is not an absolute

that the evidence obtained through torture would be greatly reduced due to administrative efficiency, it did not speak to other instances where evidence was obtained through human rights violations. As a result, the trend that informed the HRC's focus on evidence obtained through torture continued.

In addition to the above, the HRC has reiterated the need to have laws that provide for, and define acts of torture,[161] remove possible defences that undermine the protection against torture,[162] and have perpetrators brought to justice with a view to a desirable prison sentence.[163] The HRC recommended that Mauritania defines or classify torture to ensure an adequate repression of the same.[164] Similarly, in its Concluding Observations to Hong Kong, the HRC required that the State Party's Crimes (Torture) Ordinance use the non-derogable character of the prohibition of torture and eliminate any possible defences that affect the effective prosecution of the crime.[165] This requirement for clarity with regard to the definition and/or clarification of torture indicates a need for consistency. Particular regard needs to be placed on the

bar to admission of such evidence. This position also related to the need to allocate resources to the Office of the Ombudsman; see Concluding Observations on the second periodic report of Serbia, para 7. Concluding Observations on Uruguay, para 7. Concluding Observations on Ukraine, para 7.

161 Concluding Observations on the second periodic report of Sierra Leone, para 16.

162 Concluding Observations on Hong Kong, para 8. Concluding Observations on the seventh periodic report of United Kingdom and Northern Ireland, para 18.

163 Concluding Observations on the second periodic report of Serbia, para 11. Concluding Observations on the fourth periodic report of Jamaica CCPR/C/JMC/CO/4 adopted by the Committee at its 118th session (17 October-4 November 2016) para 34(a).

164 Concluding Observations on the initial report of Mauritania CCPR/C/MRT/CO/1 adopted by the Committee at its 107th session (21 March 2013) para 16.

165 Concluding Observations on the third periodic report of Hong Kong CCPR/C/HKG/CO/3 adopted by the Committee at its 107th session (11 – 28 March 2013) para 8. Concluding Observations on Bolivia, para 13.

rationale for the requirement that the definition should conform to the definition in the United Convention Against Torture (UNCAT).[166] The ability of the HRC to relate its mandate to the requirement that States Parties meet their obligations under other international treaties indicates a complementary role for the HRC. In some Concluding Observations, the HRC requires States Parties to implement the recommendations of other supervising bodies, such as the UNCAT.[167] It is yet to be seen how this complementary role engages the development of jurisprudence on evidence obtained through human rights violations other than torture.

The Concluding Observations engage interesting concepts that would be instructive in creating a jurisprudence that speaks to other instances that deal with evidence obtained through human rights violations. These include: the failure to grant effective remedies to victims of gross human rights violations,[168] police brutality,[169] and the non- justification of a violation of the rights against torture.[170] While the Concluding Observations speak to the peculiarities of a State Report, they can be used to include the accused as victims, and the admission of evidence contrary to of Article 14 as an indication of human rights violations.

166 1465 UNTS 85. See Concluding Observations on Mauritania, para 14.

167 Concluding Observations on the third periodic report of Hong Kong, para 8.

168 Concluding Observations on the second periodic report of Nepal, para 5(b). Concluding Observations on Morroco, para 24.

169 Concluding Observations on the third periodic report of Macedonia of 2015; CCPR/C/MKD/CO/3, adopted by the Committee at its 114th session (29 June–24 July 2015), para 12.

170 Concluding Observations on the second periodic report of Turkmenistan of 2017; CCPR/C/TKM/CO/2, adopted by the Committee at its 119th session (6 – 29 March 2017), para 19.

To a small extent, Concluding Observations present a loose application of the liberal theory insofar as the State is granted the initiative to make decisions that promote and protect human rights in its jurisdictions. To a great extent, the Concluding Observations do not indicate a great engagement with the liberal theory. It is not in doubt that NGOs question the Reports from States Parties before the Concluding Observations are communicated.[171] With regard to the liberal theory, the role of the non-governmental organisations as domestic players is silent as to the four major scenarios that inform the application of the Concluding Observations. First, the ability of domestic players to engage the government to ensure that the decisions that the State Party makes, protects the individual within its territory. Secondly, the subsequent participation of domestic parties by questioning or disregarding the decisions of government. Thirdly, adoption of a compromise by government as a way of giving in to the demands of the domestic players. Fourthly, foreign policy with regard to the protection of rights, which highlights the desired position of the masses.

This loose application is remedied by the UN's use of Special Rapporteurs. Two examples are instructive in this area. First, Mauritania was advised by the HRC to comply with the recommendation of the Office of the Human Rights Commissioner and the Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and its Consequences, to raise the awareness of all law enforcement officers and the general population, on the need to abolish slavery.[172] Secondly, Some States Parties have appointed National Rapporteurs to deal with domestic challenges, such as human trafficking that leads to possible violations of Articles 6 and 7 of the ICCPR.[173] Thirdly, other States Parties have been advised to engage with the recommendations

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171 Concluding Observations on the second periodic report of Turkmenistan, para 19.

172 Concluding Observations on Mauritania, para 17.

173 Concluding Observations on Jamaica, para 38.

of Special Rapporteurs. The recommendations that arise from these special procedures may engage the States Parties to improve the admissibility of evidence obtained through human rights violations.[174] This approach that engages the rights of individuals is constructively viewed as an application of the liberal theory. The point of departure is with regard to the fact that the Special Rapporteurs are appointed by the relevant UN body, rather than the executive of a given State Party.

In addition, the subsequent presence of Special Rapporteurs reduces the bar to the possible use of the margin of appreciation in instances of evidence obtained through human rights violations. This is evident where States Parties are expected to engage particular levels of human rights protection with regard to persons who are detained, imprisoned or subjected to torture, and degrading treatment.[175] Their effect is rather limited to only three States Parties with regard to evidence obtained through human rights violations.[176] This is in contrast to the fact that 42.1 per cent of the Concluding Observations indicate possible arbitrariness, 81.6 per cent present the right to equality and a fair trial and 81.6 per cent indicate the rights against torture and CIDT.

4.3.2 DECISIONS OF THE HUMAN RIGHTS COMMITTEE

In this section, the researcher refers to the accused or the convicted person who registered a Communication with the HRC as a victim. In addition, the person who registered the Communication is referred to as the author thereof, including the victim. The HRC may evaluate the evidence, based on the clarification offered by the State Party, without attracting arbitrariness.

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174 Paragraph 14 on recommendations by the Special Rapporteur on summary, arbitrary and extrajudicial executions following his mission to Colombia in 2009.

175 Concluding Observations on Jamaica, para 38.

176 These include Colombia, Mauritania and Jamaica, which represents a meagre 7.9 per cent.

4.3.2.1 Attempts at a conceptualisation of arbitrariness.

There have been various attempts to establish what arbitrariness is with regard to the urge by victims to the HRC to re-evaluate evidence obtained through human rights violations. These Communications seek to show these attempts and indicate why they failed.

In *Kelly v Jamaica,*[177] the victim brought a case against Jamaica for the violation of his rights under Articles 6 (2), 7,9 (3) and (4), 10 and 14 (1), and 14(3) (a) to (e) and (g) of the ICCPR.[178] He claimed that he was remanded for 26 days in police custody before charges were laid against him.[179] In the course of this illegal detention, he was denied access to a lawyer,[180] his family,[181] and prompt appearance before a

177 Communication 253/1987.

178 Paragraph 2.1.

179 Paragraph 2.1. The period of 26 days did not amount to reasonable period of time as completed in Art 9(3) of the ICCPR. Item (b) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly Resolution 43/173 (9 December 1988) qualifies a detained person as one who is deprived of his or her liberty without the existence of a conviction. Reasonableness of detention before trial is tagged to A person detained on a criminal charge has the right to trial within a reasonable time or to release pending trial. The reasonableness of pre-trial detention is assessed in the light of all circumstances of the particular case, such as: the gravity of the offences; the risk of absconding; the risk of influencing witnesses and of collusion with co-defendants; the detainee's behaviour; the conduct of the domestic authorities

180 Paragraph 2.1. For other instructive case from the human rights committee on the access to a lawyer, see Zhang J 'Fair trial rights in ICCPR' (2009) 2 (4) Journal of Politics and Law 39 at 40; Flynn A, Hodgson J, McCulloch J and Naylor B 'Legal aid and access to legal representation: Redefining the right to a fair trial' (2016) 40 *Melbourne University Law Review* 207 at 211. A victim has to substantiate, however how the right of access to a lawyer violated. See *Petr Kuznetsov v Belarus* Communication 1976/2010, para 8.5.

judge.[182] He also claimed that the police threatened him and beat him up to secure a confession.[183] These facts indicate that from the time of arrest to the time of preferring charges, his right against torture or CIDT and his pre-trial guarantees under Article 14 were denied. As a consequence, all evidence obtained between 20 August and 15 September was in violation of his rights.

The main issue before the HRC in light of these allegations was whether it had the competence to evaluate the admission of the evidence used in the author's case in the domestic Courts. This was based on the State Party allegation that the facts stated by the author raised issues of fact and evidence, which could not be competently evaluated by the HRC.[184] The HRC indicated that where it seeks clarification from a State Party on the allegations of violations, the State Party is enjoined to provide all the information at its disposal to counter the allegations.[185] In this regard, the HRC then attaches due weight to the author's allegations, to the extent of their sufficient substantiality.[186] Thus, the failure by a State Party to provide clarity may be used to indicate that, to a greater extent, the author has sufficiently substantiated the alleged human rights violations.

The researcher argues that this Communication illuminated seven key areas that had to be answered by the HRC which were instructive in developing the jurisprudence of the HRC with regard to evidence obtained through human rights violations. While

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181 Paragraph 2.1 and 3.2. See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 15. General Comment 20, para 11.

182 Paragraph 3.2

183 Paragraph 3.1. See also *Deollal v Guyana* Communication 912/2000, para 5.1

184 Paragraph 4.2. Compare Communications 290/1988 and 369/1989.

185 Paragraph 5.4, See Art 4(2) of the ICCPR.

186 Paragraph 5.4. *Davlatbibi Shukurova v Tajiskiatan* Communication 1044/2002, para 7.3.

most of the questions related to the evaluation of evidence by the domestic courts, it was imperative that the HRC established that the domestic courts did so, without any iota of arbitrariness. It should be recalled that the presence of arbitrariness is a ground for the HRC to re-evaluate the admissibility of evidence. It follows that the HRC has a duty to ensure that there are no grounds that require it to evaluate the admissibility of evidence. These included questioning the voluntariness of the confession made after four weeks in custody, the need for witnesses in the court of making a confession at police and the existence of inconsistencies in the prosecution evidence, the violation of the right to life under Articles 4 and 6 of the ICCPR.[187] Other aspects that had to be dealt with included the test of arbitrariness by a State Party, a legal system that condoned substantial delays in enjoying the right to a lawyer and the extent of bias of a presiding judge.[188] The HRC dealt with the voluntariness of the confession, an inept legal system that leads to human rights violations, with regard to the right to a lawyer. While it is argued that the other five areas required an engagement by the HRC, these two areas are critiqued below.

With regard to the voluntariness of the confession that was made after four weeks in custody, the HRC indicated that the (in)voluntariness depended on how a victim substantiated his or her allegations, It, however, did not offer guidance in terms of a standard that had to be followed.[189] With regard to (in)voluntariness, the HRC stated that to be:

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187 *Kelly*, paras 3.1.

188 *Kelly*, paras 3.5, 3.3. 3.4 and 3.7

189 The issue of placing a standard is crucial insofar as the jurisprudence of the HRC has no consistence in this area. Wherethe State does not counter the allegations, an author is taken to have substantiated his claims. In instances where the State responds to the victim's allegations, the HRC often indicates a failure by the author to substantiate. This is exercebated by the lack of either an objective standard to follow. The use of a

> … "compelled to testify against himself or to confess guilt" - must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.[190]

On the basis of this principle, the HRC concluded that the author failed to show that the confession was obtained involuntarily. This has to be juxtaposed against the confirmation by the HRC that:

> … the State party has not contested that the author was detained for some five weeks before he was brought before a judge or judicial officer…[191]

it is argued that while the first quotation indicates a need for direct or indirect use of physical or psychological force, the second quote indicates that the HRC was aware that the victim was in detention for five weeks earlier, the confession was obtained in the fourth week - a clear indication that the period of detention was long before the confession was obtained. In addition, it is argued that while the first narrative postulated the need for either direct or indirect force, it seems the second quote offers the answer in lieu of the detention for five weeks. The cumulative effect of the long detention, exacerbated by the non-contestation by the State Party was proof that the context of the confession exhibited involuntariness. It is believed that even if the confession was to be given voluntarily, the willingness to do so after five weeks in detention was a violation of the right to personal liberty. This approach to this question

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subjective standard breeds an inconsistency in the developing jurisprudence. For more on this, see *Barry Stephen Harward v Norway* Communication 451/1991, decided in 1994.

190 *Kelly*, para 5.5.

191 *Kelly*, para 5.5.

illuminated the HRC's use of a slow pace in engaging issues of admissibility with regard to domestic courts.

With regard to an inept legal system that leads to a violation of an individual's human rights, the author was of the view that the Jamaican legal system led to substantial delays with regard to the right to a lawyer.[192] The practical aspects of the victim exercise of the right to a lawyer and adequate time to prepare his defence were unfortunate. First, the victim met the counsel on the opening day of the trial for fifteen minutes; and secondly, when the victim consulted counsel for only seven minutes at trial. The HRC noted that this inadequacy of the victim to prepare his defence and stated:

> While Article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue before the appeals court that the appeal has no merit.[193]

This approach showed that the HRC found fault with the lawyer's failure to consult with the victim before deciding not to pursue the appeal, other than the inept legal system. This approach showed a narrow approach of the right to a lawyer. This position did not question the evidence that was admitted in the course of violation of the victim's right to counsel. It is argued that the effective representation of an

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192 *Kelly*, para 3.5. See Arts 14(3)(a) & (b) of the ICCPR that requires that is informed promptly of the charges and given adequate time to prepare his defence.

193 *Kelly*, para 5.10. Joseph S & Castan M *The international covenant on civil and political rights: cases, materials, and commentary* (2013) 497, para 14.162.

accused in a court of law is linked to the victims' ability to evaluate all evidence that is admitted by the domestic court. As such the failure by the HRC to give its views on the inept legal system was a failure to deal with evidence obtained through human rights violations that would otherwise not be admitted.

While the substantiality requirement may adequately deal with evidence obtained through human rights violations, its efficacy is dependent on how the HRC evaluates the response of the State Party.[194] Therefore, the substantiality requirement is a procedural requirement in the course of dealing with Communications and not a mode that directly addressed human rights violations. This is evident from the way that the HRC engages with the abuse of the author's pretrial guarantees as set out Article 14. It states that the absence of any compulsion to testify against oneself or to confess guilt means that there is no direct or indirect physical or psychological pressure by the investigative authorities in a bid to obtain a confession.[195] In this Communication, the HRC formed the opinion that the author did not prove this pressure, despite the fact that the State Party did not substantively clarify its position on the allegations by the author. Conversely, the HRC reiterated the violations of the pretrial guarantees to the right to a lawyer, access to family, and prompt appearance before a judge.[196]

194 *Arutyunyan v Uzbekistan* Communication 917/ 2000, para 5.9.

195 *Kelly* para 5.5. Jackson JD & Summers SJ *The internationalisation of criminal evidence: beyond the common law and civil law traditions* (2012) 247.

196 *Kelly* para 5.6. Fujimura-Fanselow A & Wickeri E 'We Are Left to Rot: Arbitrary and Excessive Pretrial Detention in Bolivia' (2013) 36 *Fordham International Law Journal* 812 at 843.

With regard to arbitrariness, the HRC was of the view that although the victim was brought before a judge after a period of five weeks in detention, it was not arbitrary. This was based on the position that the victim had not yet been charged:

> The requirement of prompt information, however, only applies once the individual has been formally charged with a criminal offence. It does not apply to those remanded in custody pending the result of police investigations; the latter situation is covered by article 9, paragraph 2, of the Covenant. … The Committee concludes that the requirements of article 9, paragraph 2, were not met.[197]

This was a narrow application of the concept of a criminal charge, as far as it did not include instances where a victim's position was substantially affected by the arrest or acts of State, or where he was arrested and detained for the purposes of bringing him or her before a competent authority.[198]

The HRC is not clear on whether the arbitrariness principle is independent on the substantiality requirement. In *Kelly*, the HRC found that there was no arbitrariness despite the fact that the author's averments and the State's failure to engage them indicated that the former had substantiated his position. Despite the allegations of judicial bias, the HRC reiterated that it is for the domestic courts and not the HRC to evaluate the facts and evidence in a particular case, unless the decision of the

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197 *Kelly* para 5.8. Theere was a dissenting opinion by Mr. Bertil Wennerg, where he agitated for a wide approach to the institution of a criminal charge to include instances of lawful arrest or dentention for purposes of bringing him or her before a competent legal authority. See p. 9 of the views of the HRC.

198 See discussion of the ECtHR in Chapter 5, subsection 5.3.1.2 on the requirement for the existence of a criminal charge. See the ECtHR's reasoning in *Shabelnik v Ukraine* Application 16404/2003, *Eckle and another v Germany* Application 8130/1978 and *Deweer v Belgium* Application 6903/1975.

domestic courts was clearly arbitrary or amounted to a denial of justice.[199] The lack of arbitrariness limits the HRC to simply hold that there has been a violation of the respective Articles of the HRC. In this Communication, it held that there had been a violation Articles 6, 9(2)-(4), 10, 14(3) (c), (d), and 5 of the ICCPR.[200] As a result, the substantiality requirement was not sufficient to declare that evidence obtained through human rights violations would not be admitted. This finding is a reiteration of the principle that it is not the task of the HRC to review the admissibility of evidence unless there has been an arbitrary act on the part of the State.[201]

It should be noted, that at the time of deciding this Communication, General Comments 7 and 13 had been adopted, but were not referred to, in the recommendations by the HRC. There was no reference to Concluding Observations on arbitrariness by States Parties, despite the high number that formed part of the jurisprudence of the HRC.[202] In addition, there were undertones of the need to widen the concept of the institution of a criminal charge, as alluded to by the dissenting opinion of Mr Bertil Wennerg.

In a subsequent case, *Barry Stephen Harward v Norway*,[203] the author alleged a violation of Articles 5, 6, 14(2), and 14(3)(a), (b), (e) and (g) of the ICCPR.[204] He claimed that he was arrested on 27 September 1986 in Tenerife, Spain, on allegations of drug trafficking. He was kept in detention for 24 days until was extradited on 21 August 1987 to Norway.[205] The allegations that relate to this

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199 *Kelly* para 5.13. *Torobekov v Kyrgyzstan* Communication 1547/2007, para 5.4.

200 *Kelly* para 6.

201 General Comment 32, paras 26, 39. *Torobekov,* para 5.4.

202 See Subsection 4.3.1 above.

203 *Barry Stephen Harward v Norway* Communication 451/1991, decided in 1994.

204 *Howard* para 1. Compare facts in *Kelly* para 2.

205 *Howard* para 12.1.

research were that the author's rights under Article 14(3) (b) and (g) (with regard to the rights to a lawyer and non- compulsion to testify) were violated insofar as he was advised by the police to plead guilty to avoid a sentence of 21 years imprisonment.[206] The issue was whether the claim with regard to Article 14 was substantiated.[207] The HRC found that since the author had a lawyer, who had access to the file, and an interpreter, his right under Article 14 was not violated.[208] With regard to the violation of Article 14(3)(g), the HRC noted that the author did not substantiate, for purposes of admissibility, a violation of Article 14, 3(a) and (g), and Article 7.

The researcher does not take issue with this position but draws attention to the following. First, the Communication accorded the HRC an opportunity to deal with the admissibility of Communications that pointed to evidence that had been obtained through illegal detention. It may be said that the issue of substantiality plays a big role in Communications before the HRC. Secondly, the ability of the HRC to deal with evidence obtained through human rights violations was dependent on the author's ability to state his complaint with precision. Thirdly, this case developed the HRC's trend with regard to the non- evaluation of evidence relating to admissibility.[209] Since the HRC has in the exercise of its jurisdiction indicated that arbitrariness is a violation of rights in the ICCPR,[210] its hesitation to create rules to guide the admission of evidence obtained during pre-trial detention exacerbates the violation of these rights.

206 Paragraph 13.6.

207 Paragraph 19.1- 9.4.

208 Paragraph 19.5

209 General Comment 32, paras 26, 39; Concluding Observations.

210 Concluding Observations on Sierra Leone, para 20. Concluding Observations on Morocco, para 35.

4.3.2.2 The standard for substantiality.

As indicated in the preceding section, the HRC seldom finds that there is arbitrariness or a manifest denial of justice, if the victim has not substantiated his or her allegations. It is argued, however, that the HRC does not have a standard form for evaluating whether a victim has substantiated his allegations. The standard is a subjective one that depends on the facts of each case. As such, while in some Communications it is hard to substantiate, in others it's not so. The evaluation of the decisions in this part of the study seeks to gain insights into substantiality and how it is used by the HRC with regard to evidence obtained through human rights violations.

In *Azer Garyverdyogly Aliev v Ukraine,*[211] the author alleged that the state authorities tortured him in order to obtain a confession from him.[212] Other violations included arrest and interrogation for four days,[213] and lack of access to counsel for five months.[214] He also pointed out fundamental flaws that compromised due process such as the registration of a murder case on 9 June 1996 for a murder that occurred on 13 June 1996.[215]

The issue before the HRC was whether there was a violation of Articles 6, 7, 10, 14(1), 14(3)(d), 14(3)(e), and 15.[216] This issue was arrived at despite the fact that the author was not able to identify the Articles that were allegedly violated. This indicates the need for clarity about the actual violations, apart from the perceived provisions of

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211 *Azer Garyverdyogly Aliev v Ukraine* Communication 781/1997 (decided on 18 September 2003).

212 Paragraphs 2.1-2.8, 3.2.

213 Paragraph 3.3.

214 Paragraph 3.4.

215 Paragraph 5.4.

216 Paragraph 1.1.

the ICCPR. This research limits itself to violations that entail the admission of evidence obtained through human rights violations. The evaluation is thus limited to the right against torture or CIDT, right to a fair trial and equality before tribunals, unless the violation with regard to other Articles presents an admission of evidence obtained through human rights violations. As such, the key areas that required the HRC to deal with in respect to substantiality was the evaluation of the violation of the right to a lawyer, right to an effective remedy, and the measures that the State Party had to take to ensure that the victim obtained an effective remedy.[217]

With regard to the right against torture or CIDT, the HRC stated:

> … the Supreme Court considered the allegation and decided that it was unfounded. The Committee recalls that it is generally for the courts of State parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. However, nothing in the information brought to the attention of the Committee concerning this matter shows that the decisions of the Ukrainian courts or the behaviour of the competent authorities were arbitrary or amounted to a denial of justice. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.[218]

As such, this position indicated that since the Supreme Court of Ukraine considered that the violation of Article 7 as unfounded, the HRC did not deal with the admissibility

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217 See paras 7.2, 7.3 and 9 of the Communication.

218 Paragraph 6.6. See similar sentiments expressed in *Antonius Cornelis Van Hulst v Netherlands* Communication 903/1999, decided 15 November 2004, para 6.5. See also *Toonen v Australia* Communication 488/1992 para. 8.3.

of evidence that was allegedly obtained through torture.[219] The HRC did not offer any indication as to what amounted to a manifest arbitrary act or a denial of justice. As such, it created a loophole that it would exploit with regard to indicating what amounted to an objective substantiality of allegations by a victim. In *Kelly*, the HRC stated that the victim's uncontested allegation that he was incarcerated for five weeks, and that he recorded a confession in the fourth week did not substantiate the allegations as required.[220] The HRC stated:

> …it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. In the present case, the author's claim has not been contested by the State party. It is, however, the Committee's duty to ascertain whether the author has sufficiently substantiated his allegation, notwithstanding the State party's failure to address it. After careful consideration of this material, and taking into account that the author's contention was successfully challenged by the prosecution in court, the Committee is unable to conclude that the investigating officers forced the author to confess his guilt, in violation of articles 7 and 14, paragraph 3 (g).[221]

It may be argued that this provision shows that a victim's depiction of human rights violations in an allegation and the State's reply form the basis of substantiality. However, the HRC may be reluctant to re-evaluate the evidence if it finds that the domestic court evaluated the admissibility of evidence. As such, in *Aliev,* the HRC stated:

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219 *Aliev* para 6.6.

220 These facts were not contested by the State Party. See para 5.5

221 These facts were not contested by the State Party. See para 5.5

> The Committee notes that, in its judgment, the Supreme Court considered the allegation and decided that it was unfounded. The Committee recalls that it is generally for the courts of State parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice.[222]

This indicates that the victim did not substantiate his allegations which were unfounded and subsequently inadmissible. In *Teofila Casafranca de Gomez (on behalf of Richardo Ernesto Gomez Casafranca) v Peru,*[223] with regard to the substantiality of CIDT, the HRC stated:

> …while the author does not provide further information in this regard, the attached copies of the records of the oral proceedings of 30 January 1998 reveal how the victim described in detail before the judge the acts of torture to which he had been subjected. Taking into account the fact that the State party has not provided any additional information in this regard, or initiated an official investigation of the events described, the Committee finds that there was a violation of article 7 of the Covenant.[224]

While the Communications of *Kelly* and *Aliev* failed to substantiate the claims, *Teofila* did so. This was through the vivid description of the victim. It should be recalled that the HRC uses documentary evidence. As such the victim's documentation of the allegations coupled with the testimony in the domestic court is instructive in aiding the HRC to agree that one has substantiated his or her allegations.

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222 Paragraph 6.6.

223 *Teofila Casafranca de Gomez (on behalf of Richardo Ernesto Gomez Casafranca v Peru* Communication 981/2001 (decided 19 September 2003).

224 Paragraph 7.1. This HRC had on earlier occasions in *Kelly* and *Alliev* stated the victims did not substantiate the violation of the rights against torture.

This shows that substantiality is used as a condition precedent to confirming the existence of arbitrariness. The disconnect with regard to the two concepts is due to the HRC's reluctance to evaluate the admissibility of evidence unless there was a manifestly arbitrary denial of justice.[225] This decision questions the yardstick for arbitrariness, as either an objective or subjective test. Secondly, it questions the effect of the violation of the right against torture, especially where it is based on the factual perceptions of a victim with regard to the arbitrariness of the responding State Party. The answers that the HRC posits to these questions ultimately require further scrutiny.

In a bid to show that substantiality may lead to the existence of arbitrariness, further examples are instructive. In *Aliev*, the HRC found that the alleged violation of Article 14 on grounds of bias was not substantiated:

> … with regard to the author's claim that the charges against him were inconsistent, that the presentation of the facts by the police and the public prosecutor were biased, that the court only heard witnesses for the prosecution, and that the judges were obviously biased, the Committee considers that these allegations have not been sufficiently substantiated for the purposes of admissibility. Consequently, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.[226]

The question of arbitrariness and its effect on due process in the domestic courts, involved the right to a fair trial, but the author's factual propositions about bias by the investigative officers were found not to be substantiated, the HRC was quick to

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225 *Teofila* para 6.6. See General Comment 32, para 39.

226 *Aliev,* para 6.7.

establish that this part of the allegation was inadmissible.[227] The lack of substantiality affected the development of jurisprudence with regard to evidence obtained through human rights violations. It may also be said that the HRC would still not have much to offer because of its hesitant position with regard to the admissibility of evidence. In addition, the HRC's inability to clarify the concept of a 'manifest and arbitrary denial of justice' was an indication that it would go no further in its engagement with States Parties than to find a violation of a right under the ICCPR. This case indicates that the HRC uses a subjective test to establish the presence of arbitrariness.

4.3.2.3 Linking arbitrariness, the right against torture, and the right to a fair trial and equality before courts and tribunals.

This subsection illuminates a relationship between arbitrariness on one hand to the existence of a violation of the right against torture and CIDT and the right to a fair trial and equality before courts and tribunals.[228] It seeks to establish whether the existence of either the violation of the right against torture or CIDT or the right to a fair trial and equality before the courts and tribunals is sufficient to render a decision of a lower court arbitrary. It is argued that this is instructive in showing how the HRC deals with the admissibility of evidence obtained through human rights violations guided by the principle of arbitrariness.

In *Teofila*, the author and mother to the victim instituted this Communication challenging the imprisonment of her son, Ricardo Ernesto Gomez Casafranca, for the offence of terrorism.[229] She alleged a violation of Articles 7, 9(1) and (3), 14(1), 14(2),

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227 Paragraph 6.7.

228 *Casafranca* and *van Hulst* above.

229 Paragraph 1.

14(3) (c), and 15 of the ICCPR.[230] She argued that the victim was arrested without a valid warrant and was detained for 22 days instead of for the mandatory maximum period of 15 days.[231] She indicated that the Courts did not take into consideration the events that occurred in the pre-trial stages, such as, the use of torture and threats of CIDT.[232] These facts presented a violation of the right to equality and a fair trial, the right against torture, and the right to human dignity. It is important to note that in her complaint, she alleged: arbitrary acts by the police, such as implicating the victim (the accused), [233] and the domestic Court's summary order of detention [234] and subsequent failure to question the pre-trial events.[235] With regard to torture, the HRC stated:

> … the attached copies of the records of the oral proceedings of 30 January 1998 reveal how the victim described in detail before the judge the acts of torture to which he had been subjected. … the Committee finds that there was a violation of article 7 of the Covenant.[236]

In light of the substantiality of torture, it would be expected that the HRC would establish whether there was a manifest arbitrariness on the part of the State PartyThe main issue before the Court was whether there was a manifest and arbitrary act. This was against the backdrop that the previous complaints did not substantially deal with

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230 Paragraph 1.

231 Paragraph 2.2. This period of detention is synonymous with 24 days for Alliev and 26b days for Kelly. These facts that indicate long periods of remand should be an indicator with regard to the continued violation of the rights to human dignity, right against torture and the right to the personal liberty of the victims.

232 Paragraph 2.2.

233 Paragraph 2.3.

234 Paragraph 2.4.

235 Paragraph 2.5.

236 Paragraph 7.1. This HRC had in *Kelly* and *Alliev* stated the victims did not substantiate the violation of the rights against torture.

the concept of arbitrariness. The HRC did not comment on the existence of arbitrariness. However, it found that there was a violation of Articles 7, 9(1) and (3), 14, and 15.[237] It should be noted that while *Teofila* is silent on arbitrariness, it involved the violation of the right against torture and the right to liberty and security of person, and the right against retrospective legislation.

It is argued that the declaration by the HRC regarding the violated Articles is not enough since it does not relate to the development of its jurisprudence. This approach did not provide value judgments that would be instructive in the development of the jurisprudence, especially on arbitrariness with regard to evidence obtained through human rights violations. The trend involves a failure to clarify 'a manifest and arbitrary' act by the State Party. This was also evident in complaints that had facts on torture, yet the decisions handed down did not engage these facts. The HRC should have commented on the international human rights standards of acceptable periods of detention of the person arrested. It follows that the remedies awarded to the victim were limited to his release and compensation to him. It did not inculcate the need to review evidence obtained in violation of the victim's rights. In the researcher's view, this case indicates the presence of torture, but with no corresponding violation of the right to equality before tribunals, and the right to a fair trial. Further cases may answer this question.

The HRC expressed similar sentiments in *Antonius Cornelis Van Hulst v. Netherlands*.[238] The author challenged the admissibility of evidence obtained through tapped telephonic conversations. He alleged that during a preliminary inquiry, telephone conversations between a victim and his lawyer were intercepted and

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237 Paragraphs 8.

238 *Antonius Cornelis Van Hulst v Netherlands* Communication 903/1999, decided 15 November 2004.

recorded.[239] He contended that it was a violation of his rights under Articles 14 and 17 of the ICCPR, which had not been remedied by the Appellate Courts of the domestic jurisdiction.[240] He stated that the use of the telephonic conversations as evidence was unlawful and arbitrary, and interfered with his right to confidential communications with his lawyer under Article 17 of the Covenant.[241] The victim alleged the arbitrariness of the domestic courts was in the act of dismissing his defence and admitting evidence obtained through the tapping of his telephone with his lawyer. He stated that the:

> Supreme Court's dismissal, by mere reference to Section 101a of the Judiciary Act, of his defence relating to the tapped telephone calls, as well as the admission as evidence and use of reports on tapped telephone calls between him and his lawyer, violated his rights under article 14 of the Covenant, and that the interference with his right to confidential communication with his lawyer was unlawful and arbitrary, in violation of article 17 of the Covenant.[242]

Concerning the taped conversations, the HRC held that it was neither arbitrary nor a denial of justice to admit the evidence of the telephonic conversations because the author had not substantiated his allegations, in that he had failed to show that the reasons given by the Dutch Courts amounted to an arbitrary act or a denial of justice.[243]

It appears that the HRC arrived at this conclusion because there was a provision in the Dutch Code of Criminal Procedure that authorised the investigating judge in the

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239 Paragraph 2.1.

240 Paragraph 1.1.

241 Paragraph 3.1.

242 Paragraph 3.1.

243 *Van Hulst* para 6.5- 6.7.

course of preliminary judicial investigations to order the interception or recording of data traffic.[244] However, at the time of handing down this decision, the section had been amended.[245] While it's argued that the HRC does not support the retrospective application of law, an application of section 125(g) of the Dutch Code of Criminal Procedure might have consequences that compromised the right to a lawyer insofar as conversations that were covered by client-lawyer privilege would be admitted. This had the potential to lead to inequality before the law in that some victims, and not others, would be subjected to the operation of this section. Furthermore, the existence of this section in a statute offered a platform for a 'legal' abuse of the right to a fair trial. As such, while there is need for the HRC to offer a definition of 'an arbitrary act' or uses a subjective test based on the merits of each case, the possible retrospective application of the section may have influenced the outcome of this Communication.

The HRC indicated a yardstick that is used to assess arbitrariness. The competing interests that this Communication presented included: client- advocate confidentiality, the right to privacy, and admission of evidence obtained through human rights violations. It also required the HRC to weigh these interests against the need for States Parties to take effective measures for the prevention and investigation of criminal offences.[246] This is an indication that the HRC uses a subjective test on a case by case basis, with due regard to the existence of any legislative provision that

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244 *Van Hulst* para 7.4.

245 Section 125(g) of the Dutch Code of Criminal Procedure was repealed in 2000, before the decision was adopted in 2004. This communication was registered in 1999.

246 *Van Hulst* para 7.6. The HRC balances both the human rights of the victim and the interests of the State. See *Kurbonov*, para. 4, *Torobekov*, para 4. *Sharifova et al. v Tajikistan*, Communications 1209/2003, 1231/2003 and 1241/2004, para. 4.

warrants the alleged arbitrary acts.[247] As a result, the HRC concluded that the requirement that a judge had to authorise the order was a sufficient check. It is argued that this position presented a fundamental flaw insofar as the HRC allowed the use of a legal provision to compromise the rights of a victim. The HRC was expected to require the State Party to show that there were other possible ways of investigating without violating the client- advocate privilege. This indicates a failure to balance the enjoyment of the rights of the author against the need to fight crime. If this decision was arrived at after establishing other possible ways of investigation, that would indicate the presence of a value judgment. It should be noted further that the HRC found no violation of Articles 14 or 17.[248] The reasoning for indicating the violation or non- violation of specific Article will be engaged in due course

In *Deolall v Guyana*,[249] the author submitted the Communication on behalf of her husband, alleging that the victim had been beaten and ill-treated by police officers during interrogations.[250] As a result of this treatment, he was forced to sign a confession, which was used as the single piece of evidence to convict him.[251] The issue for determination before the HRC was whether the Communication disclosed a violation of the right to a fair trial and a right to life under the ICCPR. [252] It is argued that the Communication provided the HRC with a chance to deal with the issue of

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247 *Van Hulst* para 7.7. The HRC neither committed itself nor offered guidance on this yardstick.

248 With regard to Art 14, the HRC was of the view that the victim's allegation that the Supreme Court's interpretation of s 101a of the Judiciary Act, deprived him of an opportunity adequately to elaborate the arguments in support of his allegations, applied to domestic proceedings, and not individual complaints before international tribunals. See para 6.3 thereof.

249 *Deollal v Guyana* Communication 912/2000.

250 Paragraph 3.1.

251 Paragraphs 3.2 – 3.3.

252 This related to a violation under Arts 14(1), (3)(g) and 6 of the ICCPR.

arbitrariness as a tool for gauging the admissibility of evidence obtained through human rights violations.

The HRC established that the Court did not instruct the jurors to be convinced that the confession was voluntary;[253] it informed them that they had two options if they formed the opinion that the victim was beaten.[254] First, they could disregard the extent of the beating, and secondly, they could acquit the victim.[255] As a result, this omission, and the failure by the Appellate Court to remedy it amounted to a violation of Article 14. This was based on the fact that the victim had three doctors who testified that the injuries he suffered indicated ill-treatment in police custody before he signed the confession.[256] The HRC found this to be a violation of Articles 6 and 14 and opted to create an inroad on the rule on the non-evaluation of the admissibility of the facts and evidence.[257] The failure by the HRC to find a violation of Article 7 still indicates a failure to relate the violation to the existence of arbitrariness.

Such an evaluation of facts reveals two points that are instructive in appreciating the HRC's evaluation of the admissibility of evidence. First, it has to be shown that an organ of the State Party has performed an act or omitted to perform its functional role that had a bearing on the outcome of the case.[258] Secondly, on the basis of this action or omission, a victim's right to, and guarantee of a fair trial have been violated to his or her detriment.[259] In juxtaposition to *Cornelis Van Hulst*, if the organ of the State Party's performance or omission to perform is backed by statute, the HRC will

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253 Paragraph 5.1.

254 Paragraph 5.1.

255 Paragraph 5.1.

256 Paragraph 5.1.

257 Paragraph 5.2.

258 See *Berry v Jamaica*, Communication 330/1988, para 11.7.

259 Relate *Deollal*, para 5.2 to Berry, para 11.7.

remain hesitant to re-evaluate the evidence. In addition, where the victim did not raise this anomaly in the course of exhausting the local remedies, the HRC will not re-evaluate the admissibility of that evidence. The common ground in both *Cornelis Van Hulst* and *Deolall* is the failure to qualify what amounts to 'arbitrary'. While the HRC in *Cornelis Van Hulst* elaborates why the facts do not disclose arbitrariness, it does not qualify them in *Deolall.* It appears that where the HRC establishes that there is an iota of evidence to indicate that the author has substantiated any direct or indirect physical or psychological pressure by the investigating authorities on the accused, to obtain a confession of guilt, the extent of the pressure is immaterial.[260] However, where the claim of violation of a right is not couched in precise and clear terms, the HRC may find the alleged violation to be vague, general, unsubstantiated and inadmissible.[261]

These two instructive principles in *Deolall*[262] on the HRC's indication of arbitrariness were tested in *Bakhridin Kurbonov v Tajikistan*.[263] The author, Kurbonov, submitted a Communication on behalf of his son and alleged that the latter was arrested on 15 January 2001 and detained until 6 February 2001.[264] In the course of the detention, he was tortured but he did not succumb to the demand of the law enforcement officers.[265] The author complained to the Prosecutor's office and the perpetrators

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260 *Nallaratnam Singarasa v Sri Lanka* Communication 1033/2001 para 7.4, *Berry* para 11.7, 11.8 and *Deolall*, para 5.1. In *Nallaratnam,* the HRC refered to the ECtHR's *Saunders. Compare Mustafakul Boimurodov v Tajikistan* Communication 1042/2001 para 7.2.

261 *Arutyunyan* para 5.9.

262 *Deolall* para 5.2.

263 *Bakhridin Kurbonov v Tajikistan* Communication 1208/2003.

264 Paragraph 2.1.

265 Paragraph 2.1.

were subjected to disciplinary action. [266] He was released and re-arrested on 28 November 2002 on grounds of engaging in three robberies, and he was tortured again until he confessed to his involvement in the robberies.[267] On 7 April 2003, the domestic Supreme Court found the author's son guilty of the robberies and sentenced him to imprisonment for nine years.[268] The Court found that the victim's attempts to retract the confessions were a defence strategy and it disregarded all the claims of torture and the fact that the police officers were disciplined.[269] The appeal was dismissed without re-evaluating the evidence of torture in the domestic Court. This Communication is instructive as far as it used this case as a platform to conceptualise arbitrariness. First, the HRC noted that attempts by the victim to retract his statement on grounds that it was obtained under torture were denied by the Supreme Court because the police officers denied any wrongdoing and the victim did not present evidence of assault by the police officers.[270] As such the decision not to re-evaluate the admissibility of the evidence of torture and the subsequent failure to exclude it was arbitrariness.[271] It follows that the Supreme Court acted in a biased and arbitrary manner as far as it summarily and without reason, rejected the author's evidence of torture.[272] This was exacerbated by the Supreme Court's placing of the burden of proof on the author to prove that the confession was made without duress It should be noted, however, that this case which presents an arbitrariness and a manifest denial

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266 Paragraph 2.1.

267 Paragraph 2.4.

268 Paragraph 2.5.

269 Paragraph 2.5.

270 Paragraph 6.3. It should be recalled that there was evidence that the police officers were cautioned for their illegal acts, facts that contradicted the possibility of innocent police officers.

271 Paragraph 6.3.

272 Paragraph 6.3.

of justice involves a violation of the right to a fair trial and equality before tribunals, the right against torture or CIDT.

The preceding paragraph shows that for the HRC to determine the existence of arbitrariness there has to be a violation of the right to a fair trial and equality before the courts and tribunals and the right against torture or CIDT.[273] This is based on the evaluation of the Communications so far and a look at the trend that is followed. In *Kelly*, there was no violation of the right against torture. Conversely, the violation was of the right to life, liberty and security of a person, and the right to a fair trial and equality before tribunals.[274] In *Howard*, there was no violation of the right to a fair trial and equality before the tribunals or the inherent right to life.[275] The case of *Aliev* indicated a violation of the right to a fair trial and the right to an effective remedy.[276] In *Teofila*, the HRC found a violation of the right against torture, the right to liberty and security of person, the right to a fair trial and equality before a tribunal and the right against retrospective legislation, but was silent on arbitrariness.[277] According to *Deollal*, while the HRC found a violation of the right against torture and the right to a fair trial, it illuminated reasons that inform the HRC evaluation of admissibility of evidence on grounds of arbitrariness. It has to be shown that the State Party has performed an act or omitted to perform its functional role that had a bearing on the outcome of the case.[278] Secondly, that on the basis of this action or omission, a victim's right to, and guarantee of a fair trial have been violated.[279] In *Cornelis Van*

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273 Paragraph 6.3.

274 Chapter Four, subsection 4.3.2.1.

275 Chapter Four, subsection 4.3.2.1.

276 Chapter Four, subsection 4.3.2.2.

277 Chapter Four, subsection 4.3.2.2.

278 See *Berry v Jamaica*, Communication 330/1988, para 11.7.

279 Relate *Deollal*, para 5.2 to Berry, para 11.7.

Hulst, while the HRC did not find a violation of the right against torture or CIDT or the right to a fair trial and equality before courts and tribunals, it indicated that it uses a subjective test in assessing arbitrariness.

In *Torobekov v Kyrgyzstan,*[280] the author claimed his arrest, search without a warrant, pre-trial detention and interrogation in the absence of a lawyer by Kyrgyzstan authorities were violations of his rights under Article 9(1) and (3); Articles 14, (1),(2), and (3)(b), (c), (d) and (e); and Article 17 (1), of the ICCPR.[281] The HRC observed that the complaints refer primarily to the evaluation of evidence adduced at the trial, and that it is for the Courts of States Parties to evaluate that facts and evidence in a particular case.[282] The HRC reiterated its position in the previous decisions. It noted that the only exception to render the complaint inadmissible was proof by the author that the evaluation by the domestic courts was done arbitrarily and amounted to a denial of justice,[283] and that the conduct of the criminal proceedings in his case suffered from such defects. The HRC noted that although the denial of counsel during interrogation was a violation of the author's right to a fair trial,[284] the author had to show how this affected the outcome of the criminal charges against him.[285] The HRC did not give instances under which the exception would be evident. It did not draw a line between the fulfilled requirements for admissibility in instances

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280 *Torobekov v Kyrgyzstan* Communication 1547/2007, para 5.4.

281 Paragraphs 3.1 -3.2 .

282 *Torobekov* para 5.4. See *Errol Simms v Jamaica* communications 541/1993, para. 6.2; *Riedl-Riedenstein v Germany* Communication 1188/2003, para. 7.3; *Bondarenko v Belarus* Communication 886/1999, para. 9.3; *Arenz et al. v Germany* Communication 1138/2002.

283 *Torobekov* para 5.4.

284 Paragraph 5.5.

285 Paragraph 5.5.

concerning the evaluation of evidence by domestic courts. It should be noted that the victim did not claim a violation of his right against torture or CIDT.

In *El Hagog Jumaa v Libya,*[286] the author claimed a violation of his rights under Articles 6, 7,9,10 and 14 of the ICCPR. He was arrested and charged with premeditated murder for causing an epidemic by injecting 345 children with the HIV virus at the public hospital in Libya.[287] In the course of the interrogations, he was compelled to confess to his guilt after torture.[288] The author claimed that the death sentence was imposed after an arbitrary and unfair trial by the State,[289] and that he was tortured during the pre-trial detention.[290] With respect to violations of Article 14, the author stated that he was not informed of the charges against him for the first four months of his detention; nor was he assigned a lawyer until a full year after his arrest.[291] He further stated that he was forced to testify against himself through torture; that he was not assisted by a lawyer when he made his confession to the Prosecutor; and that the Court, without providing sufficient reasons, dismissed the expert report despite every indication that it exonerated the author and his co-defendants.[292] He contended that these events including the unreasonable delays in the conduct of the trial were violations of Article 14 of the Covenant.[293] The HRC stated that an accumulation of violations of the right to a fair trial had taken place, including violation of the right not to testify against oneself, and the violation of the principle of equality of arms through unequal access to pieces of evidence and

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286 Communication 1755/2008.

287 Paragraph 2.2.

288 Paragraph 2.3.

289 Paragraph 3.2.

290 Paragraph 3.3.

291 Paragraph 3.6.

292 Paragraph 3.6.

293 Paragraph 3.6

counter-expertise.[294] In addition, the author's right to prepare his own defence while not having access to a lawyer prior to the beginning of the trial and the inability to speak to him freely, collectively amounted to a violation of Article 14.[295]

In contrast to *Kurbonov*, the author was able to prove that the evaluation by the domestic Courts was done arbitrarily and amounted to a denial of justice, and that as a result, the proceedings were greatly affected by such defects. The author also showed that denial of counsel during pre-trial detention affected the outcome of the criminal charges against him. The HRC by implication allowed the facts of the Communication to act as an exception to the HRC's position on the evaluation of evidence as being the preserve of the domestic Courts. The researcher is of the view that since the facts included a violation of the non-derogable right against torture and the right to life; it played a great role in proving to the HRC that there was a violation of the right to a fair trial. Although the complainant was not prosecuted, his rights were nonetheless violated by the State.

The decisions of the HRC indicate a couple of points that may be instructive in creating a framework that aids the African Commission's improvement of its jurisprudence on evidence obtained through human rights violations. The HRC deals with evidence obtained through human rights violations where there is arbitrariness, a violation of the right against torture or CIDT, and the right to a fair trial and equality before the courts and tribunals. It uses a subjective test to establish, first, the substantiality of evidence obtained through human rights violations,[296] and secondly, the existence of arbitrariness.[297] The consistent hesitation by the HRC indicates an

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294 Paragraph 8.10.

295 Paragraph 8.10.

296 *Kelly, Aliev, Casafranca* and *van Hulst* above.

297 *Deollal* and *Juma,* above.

attempt to allow the States Parties to resolve human rights violations, indicating a limited use of the margin of appreciation insofar as it required the States Parties to resolve the challenges using internal mechanisms. The lack of active domestic engagement with the domestic players is geared to ensuring that the players in the domestic arena engage the States Parties regarding policies and legislation that support human rights. The concept of primarity comes into play where the HRC requires that the State Party offers remedies to victims of human rights abuses.

The HRC presents a link that shows a relationship between the substantiality of the arbitrariness in light of the violation of the right against torture and CIDT and the right to a fair trial and equality before courts and tribunals.[298] This is an indication that the existence of torture is not enough to render a trial arbitrary, especially if a domestic court found that there was no torture or that the actions of the investigative machinery were sanctioned by the law.[299] With regard to evidence obtained through human rights violations, the HRC, to a greater extent finds the existence of arbitrariness in instances where there is a violation of the right against torture, and the right to equality and a fair trial. This position, is however inclined to cases of torture, and not evidence obtained through human rights violations.

4.4 CONCLUSION

The experience of the HRC as an international human-rights supervising body presents various principles on arbitrariness, substantiality, engagement with the rights against torture, and the right to equality and a fair trial, in dealing with evidence obtained through human rights violations. The normative and jurisprudential

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298 *Casafranca* and *van Hulst* above.

299 *van Hulst* above.

frameworks that revolve around the drafting history of Article 14 of the ICCPR, the General Comments, the Concluding Observations and the decisions, all indicate hesitation by the HRC to deal with evidence obtained through human rights violations. There is a need to have an overview on how the three human rights bodies deal with evidence obtained through human rights violations, qualify the concept of limited jurisprudence, and to identify what the African Commission needs to change with regard to improving its jurisprudence.

With regard to how the HRC deal with evidence obtained through human rights violations, it balances the existence of arbitrariness, subjective substantiality and the existence of torture or CIDT before it engages such a complaint. As such, it follows that the HRC prefers to establish a violation of rights, without establishing the specifics of the violations, unless there is a manifestation of arbitrariness by the domestic courts.[300] It is yet to be seen how other human right bodies like the ECtHR deals with the admissibility of evidence obtained through human rights violations.

[300] General Comment 32 para 29 and 39.

CHAPTER FIVE

JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON EVIDENCE OBTAINED THROUGH HUMAN RIGHTS VIOLATIONS

5.1 INTRODUCTION

The previous chapter evaluated the jurisprudence of the HRC on evidence obtained through human rights violations. Various concepts showed that its jurisprudence on evidence obtained through human rights violations was informed by various reasons. The jurisprudence of the HRC did not have a distinct normative framework, like that of the African Commission. In addition, their nature, General Comments were very instructive in developing the jurisprudence of the HRC.

This chapter engages the second research question in part, following the sequence from Chapter Four. This chapter establishes whether the experience of the European Court of Human Rights (ECtHR) can be used to enhance the development of the jurisprudence of the African Commission. This chapter evaluates the normative and jurisprudential framework of the ECtHR on evidence obtained through human rights violations. The first section unpacks the normative framework of the ECtHR, while the second section examines the jurisprudential developments.

5.2 NORMATIVE FRAMEWORK OF THE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The normative framework of the ECtHR is to a great extent based on the decisions that it hands down.[1] This is a departure from the African Commission, which has a normative framework that consists of Resolutions, Declarations, Guidelines and Principles.[2] The statistics for the ECtHR indicate that it has decided 712,659 applications and has handed down 19,200 judgments since its inception.[3] More than 40 per cent of these judgments relate to the right to a fair trial.[4] This is a sharp contrast to the statistics for the African Commission, which has handed down 229 decisions.[5] This is acceptable as the ECtHR is a relatively older human rights body in relation to the African Commission. This position validates the need to draw on its experience with regard to evidence obtained through human rights violations. This chapter deals with cases of a criminal nature that involve the use of evidence obtained through human rights violations, or evidence that may lead to an unfair trial if it is admitted.[6]

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1 European Court of Human Rights, available at http://hudoc.echr.coe.int/ (accessed 5 March 2017). While it is desirable to engage the jurisprudence of the ECtHR with the African Court in Chapters Two and Three, the latter as a new court is mandated to complement the promotional and protective mandate of the African Commission. This mandate informs the decision to engage the African Commission instead of the African Court. See notes 6,7,8,9 and 77 in chapter one above.

2 The Tunis Resolution, the Dakar Declaration, the Robben Island Guidelines, and the Principles. These are discussed in detail in Chapter Two, subsection 2.6.1- 2.6.4.

3 Available at http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdf Overview 1959-2016, ECtHR 3 (accessed 28 August 2017).

4 Overview 1959-2016 ECHR 6.

5 Statistics from the African Human Rights Case Law Analyser available at http://caselaw.ihrda.org/doc/search/ (accessed 15 June 2016).

6 See sections 5.3.1.1- 5.3.1.4 below.

There are various considerations that informed the ECtHR as a regional human rights body over others such as the AHRC,[7] the Inter-American Commission on Human Rights (Each)[8] and the Inter-American Court on Human Rights (IACtHR).[9] First, the ECtHR solely supervises the States Parties' adherence to the ECHR.[10] This is different from the position of the IACHR, which places a supervisory mandate on both the IACmHR and the IACtHR over States parties.[11] The same position is evident in the African Court's complementary role with the African Commission with regard to its mandate to supervise the States Parties' adherence to the ACHPR.[12] The sole exercise of this supervisory role by the ECtHR places it in a position to have consistent jurisprudence that the African Commission and the African Court do not offer.[13]

Secondly, the comparison with regard to the caseload and disposal rate was another factor. Although the African Commission has handed down 229 decisions since its

7 Arab Human Rights Committee created pursuant to Art 45 of the Arab Charter (reprinted in (2005) 12 *International Human Rights Reprint* 893, entered into force 15 March 2008.

8 Established under Art 106 of the Charter of the Organisation of American States 119 UNTS 3.

9 Established under Art 52 of the IACHR, 1144 U.N.T.S. 123.

10 See Art 19 of the ECHR. See Shelton D 'The boundaries of human rights jurisdiction in Europe' (2003) 13 *Duke Journal of Comparative and International Law* 95 at 96.

11 See www.oas.org/en/iachr/mandate/what.asp (accessed 2 April 2018).

12 Article 2 of the Protocol. See Wachira GM 'African Court on Human and Peoples' Rights: Ten years on and still no justice' (2008) *Minority Rights Group International* 1 at 2.

13 See Art 19 of the ECHR. The African human rights system has both the African Commission and the African Court to protect human rights. Compare Art 2 of the Protocol and Art 45(1) of the ACHPR.

inception,[14] another 222 are pending before it.[15] This is an indication that 49.2 per cent of the communications before the African Court have not been concluded. While the IACmHR has received a total of 27,036 petitions,[16] and a total of 18,191 petitions are pending before it. These figures show that the cumulative statistics indicate that 67.3 per cent of the communications before the IACmHR have formed part of the case backlog. Furthermore, statistics show that the IACmHR forwards some of its communications to the IACtHR. On this basis, a total of 149 communications have been referred by the IACmHR to the IACtHR.[17] This position is synonymous with the African Commission's mode of referring communications to the African Court.[18] The statistics from the ECtHR indicate that it has decided 712,659 applications and has handed down 19,200 judgments since its inception.[19] In addition, from a regional perspective, the ECtHR has handled a higher number of engagements with individuals, entities and States Parties than any other regional human rights body.

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14 Statistics from the African Human Rights Case Law Analyser available at http://caselaw.ihrda.org/doc/search/ (accessed 15 June 2016).

15 Paragraph 30 of the 42nd Activity report of the African Commission on human and peoples' rights submitted in accordance with Art 54 of the African Charter on Human and People's Rights available at http://www.achpr.org/files/activity-reports/42/42nd_activity_report_eng.pdf (accessed 16 January 2018).

16 Annual Report 2016; IACmHR, 3; available at http://www.oas.org/en/iachr/docs/annual/2016/docs/InformeAnual2016cap2-AyBEstadisticas-en.pdf (accessed 18 January 2018). This total refers to cases between 1997 and 2016.

17 Results available at http://www.oas.org/en/iachr/multimedia/statistics/statistics.html

18 The Protocol Art 5(1) (a). See Gumedze S 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3(1) *African Human Rights Law Journal*, 118 at 145. Murray R and Mottershaw E (2014) 36(2) 'Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights' *Human Rights Quarterly* 349-372 generally.

19 2016 Overview ECHR, 4-5 available at http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdf (accessed 14 November 2017).

Thirdly, the ECHR has a relatively same number of signatories at forty-seven,[20] which is a close comparison to the ACHPR's 53 signatories.[21] The IACHR's 23 signatories[22] and the AHRC's 22 States Parties[23] present a lower number that justifies the engagement with the ECtHR.[24] These three foregoing reasons inform the choice of the ECtHR to guide the study.

The study used the online database for the ECtHR to identify the cases that were pertinent to the study because they formed the jurisprudence of the Court. The keywords that were used to identify the cases were 'evidence obtained through human rights violations', 'fairness', and 'fair trial'. An initial search using these key terms yielded 753 cases.[25] The database provides a filter at four levels, that is, levels 3 and 2, case reports and level 1. The first filter with regard to level 3 importance returned 328 cases.[26] This was narrowed down by the second filter at level 2, which

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20 Results available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=SpysIgmA (Accessed 18 January 2018).

21 Ratification table, available at http://www.achpr.org/instruments/achpr/ratification/ (accessed 18 January 2018).

22 Ratification information available at https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm (accessed 18 January 2018).

23 Arab Human Rights Committee created pursuant to Art 45 of the Arab Charter (reprinted in (2005) 12 *International Human Rights Reprint* 893, entered into force 15 March 2008.

24 2016 Overview ECHR, 4-5.

25 Results available at http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22evidence%20obtained%20through%20human%20rights%20violations,%20fairness,%20fair%20trial%22],%22documentcollectionid2%22:[%22JUDGMENTS%22,%22DECISIONS%22]} (accessed 25 April 2017).

26 Results at http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22evidence%20obtained%20through%20human%20rights%20violations,%20fairness,%20fair%20trial%22],%22importance%22:[%224%22],%22documentcollectionid2%22:[%22JUDGMENTS%22,%22DECISIONS%22]} (accessed 25 April 2017).

returned 228 cases.[27] The level three filter with regard to case reports returned 105 cases.[28] A further evaluation narrowed the results to 43 cases. The cases revolve around four principles. These are Article 6 and pre-trial proceedings, the requirement for the existence of a criminal charge, the non-qualification of the right to a fair trial, and the privilege against self-incrimination.[29]

The ECHR does not have a provision that deals with how evidence obtained through human rights violations should be treated. However, it has developed jurisprudence based on the right to a fair trial that governs such instances. The first part of the Article provides:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[30]

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27 Results at http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22evidence%20obtained%20through%20human%20rights%20violations,%20fairness,%20fair%20trial%22],%22importance%22:[%224%22,%223%22],%22documentcollectionid2%22:[%22JUDGMENTS%22,%22DECISIONS%22]} (accessed 25 April 2017).

28 Results available at http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22evidence%20obtained%20through%20human%20rights%20violations,%20fairness,%20fair%20trial%22],%22sort%22:[%22kpdate%20Ascending%22],%22importance%22:[%221%22],%22documentcollectionid2%22:[%22JUDGMENTS%22,%22DECISIONS%22]} (accessed 25 April 2017).

29 Results available at http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22evidence%20obtained%20through%20human%20rights%20violations,%20fairness,%20fair%20trial%22],%22sort%22:[%22kpdate%20Ascending%22],%22importance%22:[%221%22],%22documentcollectionid2%22:[%22JUDGMENTS%22,%22DECISIONS%22]} (accessed 25 April 2017).

30 213 UNTS 221, Art 6. For a detailed engagement on Art 6, see Settem, O. J. (2016). *Applications of the 'Fair Hearing'Norm in ECHR Article 6 (1) to Civil Proceedings*. Springer, New York.

This provision requires that in the determination of a criminal charge against an individual, fairness should be a guiding factor. However, it does not spell out how the ECtHR deals with pre-trial proceedings, when a criminal charge is instituted, the bounds of the right to a fair trial, and issues of self-incrimination. A general reading of the Article indicates that it is silent on evidence obtained through human rights violations.

A look at the *Travail Preparatoires* of Article 6 indicates that the drafters did not discuss a mode of dealing with evidence obtained through human rights violations.[31] In the course of drafting Article 6, a debate orchestrated by representatives from France and Turkey questioned the viability of ensuring that domestic courts put the ECHR into effect.[32] Consequently, the drafting of this Article was greatly influenced by the notion that the jurisdiction of the ECtHR would extend to violations of obligations provided for by the ECHR.[33] With regard to evidence obtained through human rights violations, the nature of the jurisdiction of the ECtHR would be in a position to ensure that the Contracting States do uphold their obligations under the ECHR. The term 'Contracting States' as used by the ECtHR is synonymous with 'States Parties' by the African Commission.

The ECtHR uses the concept of the right to a fair trial as the yardstick for deciding whether evidence that has been obtained through human rights violations is

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31 Council of Europe, European Commission of Human Rights, Preparatory work on Art 6 on the European Convention on Human Rights at Strasbourg dated 8 October 1956 available at http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART6-DH(56)11-EN1338886.PDF accessed 21 April 2017.

32 Preparatory Work on Arts 6 and 4. For a detailed chronological analysis, see Van Dijk, P., Hoof, G. J., & Van Hoof, G. J. (1998). *Theory and practice of the European Convention on Human Rights*. Martinus Nijhoff Publishers.

33 Preparatory Work on Art 6, 7-8; see contribution of UK Delegate. See *Schenk v Switzerland* Application 10862/1984, para 45.

admitted.[34] The norm has been referred to as a protective mechanism that is sought to ensure that the domestic court offers guarantees that protect the procedural aspect of trial justice.[35] These include; the hearing of a case in a proper manner, with no improper outside interference, with a well-reasoned judgment.[36] In addition, the judgment should not appear arbitrary or unreasonable, based on an insurmountable burden of proof.[37] The norm was developed as a cautious approach that seeks to ensure that only evidence that rendered a trial unfair would not be admitted. In *Schenck v Switzerland,* the applicant challenged the admission of evidence of an audio recording that was illegally tape-recorded.[38] Mr Pierre Schenck, a Swiss national was charged with hiring someone to kill his wife. He challenged the use of an unlawful phone record with regard to a phone call from Switzerland to France with the man he hired.The ECtHR stated:

> According to Article 19 of the Convention, the Court's duty is to ensure the observance of the engagements undertaken by the States in the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a domestic court unless and in so far as they may have infringed rights and freedoms protected by the Convention.[39]

This proposition leads to the assertion that the ECtHR would intrude into the evaluation of evidence by a domestic court, where its decision was a manifest

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34 *Schenk* para 46.

35 Settem OJ *Applications of the 'Fair Hearing' Norm in ECHR Article 6 (1) to Civil Proceedings* (2016) 67-73.

36 Settem (2016) 67.

37 Settem (2016) 67.

38 *Schenk* paras 34, 35.

39 Paragraph 45.

violation of the right(s) under the ECHR.[40] This was confirmed by its subsequent assertion that:

> interference by a public authority with private life or with correspondence is permissible only where it is in accordance with the law and is necessary in a democratic society in the interests of, inter alia, public safety and the prevention of disorder or crime.[41]

It is averred that any intrusions in a person's right to privacy as a Convention right should be provided by domestic law. The existence of a provision that regulates intrusions into a person's privacy or lack thereof forms the basis for engaging the fairness of a trial, if the evidence obtained is to be admitted. With regard to Article 6, this was a substantive limitation of its interpretation and enforcement of the ECHR.[42] Its restriction to particular facts was a failure to address the unlawfulness of the evidence. This is based on the perception that the taking of evidence is not an abstract notion but an important process that adds value to the fairness of a criminal trial.[43]

This cautious attitude adopted by the ECtHR in evaluating the fairness of a trial has been evident in subsequent cases. In *Teixeira de Castro v Portugal*,[44] in the course of a pre-trial detention, the Applicant was subjected to an unwarranted, unauthorised, police operation, where he was tricked to supply drugs. He applied to the ECtHR to seek an order for the non- admission of evidence obtained through the search on the grounds that it violated his right to a fair trial. The ECtHR stated:

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40 Paragraph 45.

41 Paragraph 11.4.

42 *Garcia Ruiz v Spain* Application 30544/1996 para 28.

43 See dissenting judgment of Pettiti J, De Meyer J and Carrillo J.

44 [1998] ECHR 52.

> The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.[45]

The ECtHR found that the officers went beyond the normal scope of the investigation, and instigated the applicant to commit an offence. Thus the domestic court's decision to rely on this evidence rendered the trial unfair. In contrast to *Schenk*, there was an existing law on the use of evidence obtained through recording, but it did not form the basis of the conviction. This is an indication that there are statutory safeguards to guide the investigating officers in the procurement of such evidence.[46]

The researcher is of the view that these two cases show that the ECtHR's engagement of trial fairness is a subjective notion which evolves with time with respect to the applications that are brought before it. As such, the ECtHR may, in the exercise of its supervisory role, intrude upon the jurisdiction of the domestic courts where their admission of evidence leads to unfairness at a trial.[47] The ECtHR's position is a departure from the African Commission's initial role which emphasised the general development of the right to a fair trial, without delving into dealing with impugned evidence.[48] As such, these two distinct positions of the two bodies are instructive on how society regarded the concept of the right to a fair trial, in light of the States Parties' inclination to respect rights and the independence of the judiciary. It is yet to be seen whether the developments of the jurisprudence of the ECtHR may

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45 Paragraph 34.

46 Chedraui AMT 'An analysis of the exclusion of evidence obtained in violation of human rights in light of the jurisprudence of the European Court of Human Rights' (2010) 15 *Tilburg Law Review* 205 at 206.

47 Chedraui (2010) 206.

48 See sections 2.6.1 and 2.6.2 in chapter 2 above.

inform the need for reform on the basis of the non- admission of evidence that renders a trial unfair.

5.2.1 Theoretical Framework

Until the adoption of Protocol 15, the theoretical underpinnings of the decisions of the ECtHR were neither evident in the ECHR or the *Travaux Preparatoires*.[49] The theoretical underpinnings had been developed through the application of the ECHR in the handing down of decisions.[50] The ECtHR has to a considerable extent used two approaches in its decisions. These are the principle of primarity and the doctrine of the margin of appreciation. While the latter is an old concept that has developed over a long period, the principle of primarity is a new concept that has been coined and used to question the shortcomings of the margin of appreciation.[51] This section offers insights into the principles that inform these two approaches before they are engaged in the evaluation of the jurisprudential developments. From a broader perspective, the study evaluates their efficacy in the instances of admission of evidence obtained through human rights violations.

These two underpinnings have their originality in the concept of subsidiarity. According to Cardozzo, subsidiarity is referred to as a concept that requires that each social and political group aids the smaller or more local ones accomplish their

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49 Yourow HC *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996) 14.

50 See Tümay M 'The "Margin of Appreciation Doctrine" developed by the case law of the European Court of Human Rights' (2008) 5 (2) *Ankara Law Review* 201-234 generally. See discussion under sections 4.2.1.1 and 4.2.1.2 below. See also Christoffersen J *Fair balance: proportionality, subsidiarity and primarity in the European Convention on Human Rights* (2009) on primarity

51 Christoffersen (2009) 359.

respective ends without, however, assuming these tasks to itself'.[52] It is asserted that a larger group has an obligation to offer a platform that may be used by the smaller group in finding logical and agreeable solutions to its problems. It is apparent that the point of departure who be in the level of restraint by the larger group in indulging itself in the affairs of the smaller group. Follesdal, on the other hand, defines subsidiarity as a representation of five models which regulate the allocation or use of authority in a political or legal order where it (authority) is dissolved from the centre to various associate units.[53] The researcher views the second definition as an assertion of digression of decentralisation of powers from the central to the local units. It presents a departure where a larger unit offers direction to a local or small unit, an organised system which recognises the bounds of each system. This definition points to practices in German administrative that incorporated subsidiarity to distribute legal powers from an overly-engaging central government to the local governments.[54] Subsequently, one Ralph Dahrendorf, a German member of the European Commission advocated that for the application of subsidiarity to limit the bureaucratic powers of the then European Economic Community (EEC) over the agricultural policy. The cumulative effect of both definitions is that the larger groups as well as the smaller group have corresponding duties and obligations. There is a need to engage these duties and show how they speak to the two underpinnings of primarity and subsidiarity.

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52 Carozza PG 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International Law* 38 at 38.

53 Follesdal A 'The Principle of Subsidiarity as a Constitutional Principle in International Law' (2013) 2 *Global Constitutionalism* 37 at 37.

54 Mowbray A 'Subsidiarity and the European Convention on Human Rights' (2015) 15(2) *Human Rights Law Review* 313 at 315.

Until the adoption of the Protocol 15 by the Contracting States to the ECHR, the concept of subsidiarity was not expressly provided for in the Convention.[55] However, the concept had been read into various Articles of the ECHR. First, the ECHR places a duty on all the Contracting Parties to ensure that everyone enjoys the rights and freedoms in the ECHR.[56] This provision is instructive in ensuring that the enjoyment of rights under the ECHR is not limited by virtue on an individual's status as a citizen, legal or illegal immigrants.[57] Secondly, the duty on the Contracting States is extended to the need to ensure that it provides an effective remedy for a violation of any right or freedom under the ECHR.[58] On the other hand, the ECtHR is required to engage applications, which have exhausted all domestic remedies.[59] The last provision that by implication, inculcates subsidiarity in the ECHR is the express recognition that Contracting States may offer better protection than what the ECHR offers.[60] These instances point to duties on behalf of the State and the Convention. It is clear that the epitome is the extent to which a state or the ECtHR goes to engage its duties. There is scholarly literature that points to subsidiarity as a double-sided coin,

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55 See Samantha. A discussion on Protocol 15 is evident in section 5.2.2.1.2 on the MoA.

56 ECHR, Art 1.

57 These sentiments are evident in Rohan M 'Refugee family reunification rights: a basis in the European Court of Human Rights' (2014) 15 *China Journal of International Law* 347 at 347, den Exter A 'The right to healthcare under European law' (2017) 51 *Diametros* 173-195 generally.

58 Article 13. See Kuijer M 'Effective remedies as a fundamental right. In *Seminar on human rights and access to justice in the EU*' (2014) available at http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Outline_Lecture_Effective_Remedies_KUIJER_Martin.pdf (accessed 2 April 2018).

59 ECHR Art 35(1).

60 ECHR Art 53. The protection has received scholarly engagement in de Vries S, Bernitz U & Weatherill S (eds) *The protection of fundamental rights in the EU after Lisbon*(2013) generally.

which engages both the Contracting State on the one hand and the ECtHR on the other.[61]

While the Convention in its present version contains no express reference to subsidiarity, it does provide a legal framework for its operation. Firstly the High Contracting Parties are required to secure to everyone within their jurisdiction the rights and freedoms set out in the ECHR.[62] This requirement is reinforced by the stipulation that States must provide an effective remedy for violations of the Convention rights and freedoms.[63] Secondly, the ECtHR is prevented from dealing with an application before all domestic remedies have been exhausted.[64] The effect of this provision is to allow the Contracting States to use every logical opportunity within their judicial system to offer adequate remedies to aggrieved persons. Reference may also be made to express recognition that Contracting States are at liberty to offer protection that is beyond that of the ECtHR.[65] This creates an

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61 See Seminar background paper by Judge Laffranque, Raimondi, Bianku, Nuberger and Sicilianos, Subsidiarity: a two-sided coin? Seminar to mark toe official opening of a new judicial year, available at http://www.echr.coe.int/Documents/Seminar _background _paper_2015_ENG.pdf (last accessed 24 January 2018)1. The MoA is also engaged as another side of the coin in Spielmann D 'Allowing the right margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) 14 *Cambridge yearbook of European Legal studies* 381-418 generally.

62 ECHR Art 1. See a comparative engagement wit the children's rights in Detrick S. *A Commentary on the United Nations Convention on the Rights of the Child* (1999)70.

63 ECHR Art 13. See Kuijer M (2014) 2028-2029.

64 ECHR Art 35(1). See Romano CP (2013) 'The rule of prior exhaustion of domestic remedies: theory and practice in international human rights procedures' in *International courts and the development of international law* 561-572 generally.

65 Article 53. Lorenz NLA, Groussot X & Petursson GT *The European Human Rights Culture-a Paradox of Human Rights Protection in Europe?* (2013) generally.

opportunity for Contracting States to use the protection under the ECHR as the bare minimum to what they offer to persons within their jurisdiction.

The principle of subsidiarity has been embedded in the ECHR through the adoption of Protocol 15. This Protocol amends the preamble to the ECHR and provides for the application of subsidiarity and the MoA by the ECtHR. It provides:

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.[66]

First, it is submitted that this provision relates subsidiarity to the need by the Contracting States to ensure that the individuals within their territories enjoy the rights under the ECHR. The provision still fails to define the principle of subsidiarity. Rather it underscores that their engagement of the MoA is a condition subsequent to the obligation to ensure the protection of the rights under the ECHR. This is an indication that if circumstances do not point to any attempts by the Contracting Parties to protect the rights of individuals, then subsidiarity is not an option on the table.

Secondly, the direct consequence of ensuring the protection of rights under the ECHR is the Contracting States' 'enjoyment' of the MoA. This may be equated to the 'give and take' principle, where the State gives or offers the protection of the right, and effectively qualifies an individual's protection within the justifiable bounds of the former's protection.

The explanatory notes to the introduction of subsidiarity in the ECHR indicate that the Contracting States have the principal authority to ensure the protection of human

[66] Article 1 of Protocol 15, CETS No.213, amending the ECHR.

rights at the domestic level, while the ECtHR is subsidiary to enforcing this role. This position is based on the notion that the domestic courts are better placed than an international court to evaluate cases before them.[67]

It is arguable that other than the wording introduced in the preamble to the ECHR, little has changed with regard to the use of subsidiarity. This is based on the fact that the preamble does not define subsidiarity, other than requiring the Contracting States to ensure that individuals within their territories enjoy the rights and freedoms therein. This is an indication that the ECtHR is still bound to follow the implied approaches to subsidiarity prior to the adoption of Protocol 15.[68] Without prejudice to the foregoing, it is expected that this will create uniformity in the operation of the expressly provided principle of subsidiarity.[69] In light of the new amendment, it is instructive to engage the principles of subsidiarity and primarity as the theoretical framework that speaks to the ECtHR's mode of engagement with the admission of evidence obtained through human rights violations.

In relation to the discussion on the theoretical framework above, the conceptualisation of a norm is important in creating a basis for the ECtHR's adoption of its decisions as items that are used to deal with the right to a fair trial and trial fairness as aspects that speak to evidence obtained through human rights violations as the overriding standard, and need for continued improvement through the application of the MoA

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67 See explanatory notes on the amendment to the preamble, para 9. Available at http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf (accessed 25 January 2018).

68 As discussed above, subsidiarity has been implied in the ECtHR Arts 1, 13, 35(1) and 53.

69 Legal debate before the adoption of Protocol 15 was evident in various conferences. A case in point is the conference in Strassbourg by Cassese S 'Ruling Indirectly. Judicial Subsidiarity in the ECtHR' in *Subsidiarity: a Two-Sided Coin, The role of the convention mechanism; 2. The role of the national authorities* 11-18.

and the principle of subsidiarity.[70] In addition, the extent of the specificity in these four norms with regard to a fair trial deal with evidence obtained through human rights violations. Finally the currently or preferred mode of enforcement of these norms in the development of the jurisprudence of the African Union is expected to form the relevance of the theoretical framework.

5.2.1.1 The doctrine of the margin of appreciation

The doctrine of the MoA is provided for in the preamble to the ECHR. It was introduced by Protocol 15 which amended the preamble to the ECHR. With regard to the MoA, the provision states:

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.[71]

This provision expressly provides for the MoA in the ECtHR. It, however, falls short of offering a definition or the bounds of engagement of the doctrine. It is, however, clear that the MoA can only be engaged after the Contracting State has shown practical steps that speak to the protection of human rights. This leads a reader to establish the concept and content of the MoA. This position can be harnessed from the explanatory notes on Protocol 15, which present the MoA as a tool that allows the Contracting States to ensure the enjoyment of the rights in the ECHR. The reciprocity is evident in

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70 See note 17 in Chapter One above.

71 Protocol 15, Art 1. Rainey B, Wicks E & Ovey C *Jacobs, White & Ovey: The European Convention on Human Rights* 7ed (2017) 368.

the ECtHR's review of the decisions of the Contracting States to with regard to the magnitude of the MoA.[72]

The doctrine of the margin of appreciation is derived from a french term, *marge d'appréciation.* It has roots in french administrative law, where a person in a position of authority may exercise his or her discretion to perform a particular act without repercussions of a violation of administrative rights of another.[73] A literal translation of this term connotes a 'margin of assessment'. This doctrine refers to the ability of the ECtHR to shift its position to compel the Contracting States to fulfil their obligations under the ECHR.[74] In the course of the assessment of a State's fulfilment of its obligations, the ECtHR may shift its position before it makes its decision. According to Yourow, the margin of appreciation refers to leverage exerted by the Strasbourg organs on national legislative, executive, administrative and judicial bodies, to act freely, manoeuvre, have breathing or 'elbow' room, which is not interpreted by the ECtHR as a violation of the ECHR.[75] This is an indication that where a Contracting State exercises the discretion to decide an approach that is best

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72 See explanatory notes on the amendment to the preamble, para 9. Available at http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf (accessed 25 January 2018).

73 An evaluation of the the MoA is beyond the scope of this thesis. See Brown LN, Bell J & Galabert JM *French administrative law* (1998) 161. The authors assert that it may be used as a ground for judicial review of an administrative decision, where its use exceeds desired bounds.

74 Greer (2000) 1. Helfer LR 'Redesigning the European Court of Human Rights: embeddedness as a deep structural principle of the European human rights regime' (2008) 19(1) *European Journal of International Law* 125 at 128.

75 Yourow (1996) 13. See Holmer O 'Decoding the margin of appreciation doctrine in its use by the European Court of Human Rights' available at http://www.diva-portal.org/smash/get/diva2:661681/FULLTEXT01.pdf 17- 26 (accessed 2 April 2018).

suited for the protection of rights under the ECHR, it subsequently justifies this qualification of the respective individual rights. A concept similar to the latitude that a national government enjoys in applying the provisions of a treaty in factual situations is alluded to by Arai-Takahashi.[76] It is argued that while it may be stated that these definitions depict a space within which national governments may legally act in making decisions, there is a lack of clarity with regard to its use.[77] This position can only be validated against a review of the history and application of the doctrine in the subsequent discussion on the fairness of the trial.

Its application started in 1958 in *Greece v United Kingdom*,[78] where Greece claimed that the United Kingdom had violated the requirements of Article 15.[79] The United Kingdom claimed that its derogation under the Article was justified by the civil unrest, and as such, it fulfilled all the legal requirements.[80] The Commission stated that a State could exercise discretion to depart from the standard of upholding its obligations under the ECHR, when having regard to the exigencies of the situation.[81] The ECtHR elected not to place itself in the position of the UK government, but rather to evaluate

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76 Arai-Takahashi Y *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002) 2.

77 Kratochvil J 'The inflation of the margin of appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324 at 327.

78 14 December 1959, (1958-59), 2 Yearbook 174, 176.

79 *The Cyprus Case (Greece v the United Kingdom)* (1958-59) 2 Yearbook of the European Convention on Human Rights 172-197.

80 Greer (2000) 40. Callewaert J ' Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?' (1998) 19 *Human Rights Law Journal* 6-9 generally.

81 *The Cyprus Case*, 172-197. See insights from Jeroen S 'The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation' (1998) 19 *Human Rights Law Journal* 20-21.

the decision of the national government to establish whether it was compatible with the ECHR . As a result, the ECtHR extended the discretion that could be exercised by a government in the fulfilment of its obligations under the ECHR .

It should be noted, however, that the ECtHR engages a different procedure when it comes to instances of an absolute right like the right against torture. The ECtHR reminds itself of the fact that an overly broad approach to the MoA reduces rights to mere privileges, which has the effect of jeopardising the effective implementation of the rights under the ECHR.[82] In dealing with absolute rights, the ECtHR identifies the core aspects of the absolute right, and thereafter relates them to the facts before it.[83] It evaluates the Contracting State's actions towards to enjoyment of given obligation. This is an indication of health care in all Member States. First, it evaluates the core concepts of the right. For instance the right against torture

Subsequently, in *Handyside v the United Kingdom*,[84] the applicant had been convicted under the Obscene Publications Acts 1959 and 1964 for publishing and distributing a book that had sexually explicit content.[85] He stated that the domestic courts violated his right to freedom of expression.[86] The Court was hesitant to adopt a uniform code of morals that would be applied to all Contracting States, because morals evolved in time and space and that a State had direct and continuous contact with its subjects. As a result, this placed the judge of a domestic court in a better position than an international judge to assess the efficacy of action that a State took to

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82 See *Lopes de Sousa Fernandes v Italy* Application 56080/ 2013, para 74 on the right against torture with regard to mandatory health care by a Contracting Party.

83 *Lopes,* para 65.

84 *Handyside v United Kingdom* Application 24/1976.

85 Paragraph 48.

86 The violation contravened Art 10 of the ECHR.

restrict freedoms protecting morality.[87] This decision illustrates two positions. First, that the ECHR is the basis or the floor as the unqualified minimum guarantee of human rights below which a State is not able to go below. The margin of appreciation presents an area which lies above the basis or floor, within which the State may elect to exercise a discretion on condition that its decision is above the floor. However, the degree of the margin is not clearly stipulated and the ECtHR may determine the basis and then qualify the scope of the margin.

In *Lawless v Ireland*,[88] the applicant claimed that the State had violated his rights under Articles 5, 6 and 7 in that it detained him without a trial, under the emergency powers. Before this application was brought, the government had notified the Secretary-General of the Council of Europe of its intention to derogate from the provisions of the ECHR under Article 15.[89] In upholding the derogation, the Court held that the existence of the nation was threatened by the existence of the terrorist activities of the IRA, and that the State's internment of the applicant was proportionate in the circumstances.[90] It appears that the ECtHR recognised the responsibility that a

87 Paragraph 48. Von Staden A 'The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review' (2012) 10(4) *International journal of constitutional law* 1023 at 1040.

88 *Lawless v Ireland* ECtHR, Series B 1960-61 para 90.

89 Paragraph 72.

90 Paragraph 82. There is a trend that indicates the use of a wide or a narrow margin of appreciation. Some of the instances where a narrow margin of appreciation is given to the Contracting States include; the identity of an individual (*Evans v UK Application* 6339/2005); the protection of the independence of the judiciary (*Sunday Times v UK* (1979) 2 EHRR 245; and instances of racial or ethnic discrimination *D.H. v the Czech Republic* Application 57325/2000). Instances where a wide margin of appreciate is used include: periods of public emergency (ECHR Art 15 and *Brannigan & McBride v UK* (1993) 17 EHRR 539; cases involving national security (*Klass v Germany* (1979) 2 EHRR 214); cases involving the "protection of morals" (ECHR Arts 8-11 and *Handyside*

national government bore to protect its people against any threat, and that the assessment had to be left to the State's discretion.

It is argued that this decision illustrates the use of the margin of appreciation as a mode of balancing State sovereignty and the ECtHR's role in the supervising of a State's implementation of its duties. This is an indication that the ECtHR acknowledges that the State in the domestic sphere has to address pressures caused by the provisions of the ECHR provided that it does not lead to an arbitrary violation of the rights of an applicant. This position presents a challenge with regard to the possibility of going below the standards of the ECHR.

An evaluation of the origins of the margin of appreciation illustrates three approaches by the ECtHR. First, that the concept was limited to the situation where the State was derogating from particular rights under Article 15.[91] Secondly, it addressed the relationship between individual freedoms and society goals.[92] Thirdly, it restricted its moderation of the review of a State's fulfilment of its obligations under the ECHR.[93] The cumulative effect of this concept indicates that the applicant did not have the right

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v UK Application 5493/1972); and cases involving legislative implementation of social and economic policies (*Hatton v UK* [*2003*] 37 EHRR 611).

91 Scheuer C 'Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights' (1982) 9 (1) *Yale Law Journal* 113 at 115, Greer (2000) 1, Yurouw (1996) 13, Arai-Takhashi (2002) 2.

92 Radačić I 'The Margin of Appreciation, Consensus, Morality and the Rights of the Vulnerable Groups' (2010) 31(1) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 599 at 599. Similar sentiments are laid out in Rainey, Wicks & Ovey (2017) 367.

93 Klatt M 'Positive Obligations under the European Convention on Human Rights' (2011) *Heidelberg Journal of International Law* 691 at 718. See also Costa -Neto J 'Rights as trumps and balancing: reconciling the reconcilable?' (2015) 11(1) *Revista Direito GV* 95 at 100.

she claimed and that the ECtHR would not review the decision of a State to establish a violation.[94]

The major flaw with this doctrine is the possibility of a subjective, and not an objective, decision-making process that lacks adequate grounding, analysis and use by the ECtHR. In *Otto-Preminger Institute* v *Austria*, the applicant, an NGO had scheduled six shows of a movie entitled 'Council in Heaven' from 13 May 1985.[95] At the request of the Innsbruck diocese of the Roman Catholic Church, the applicant's manager, Mr Dietmar Zingl, was charged with disparaging religious doctrines contrary to section 188 of the Penal Code.[96] On 10 May 1985, the film was seized and as a result the shows could not take place.[97] The reasons that informed the institution of charges were that the depiction in the movie of God the Father:

> … both in image and in text as a senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression and in which the Eucharist is ridiculed, came within the definition of the criminal offence of disparaging religious precepts.[98]

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94 Letsas G 'Two concepts of the margin of appreciation' (2006) 26 (4) *Oxford Journal of Legal Studies* 705 at 706.

95 [1994] ECHR 26 para 10.

96 Paragraph 12. Section 188 provide[d] that: 'Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who or an object which is being venerated by a church or religious community established within the country, or a dogma, a legally authorised custom or a legally authorised institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.'

97 Paragraph 12. This was an example of a case involving cases requiring the protection of morals. Compare *Handyside v UK Application* 5493/1972.

98 Paragraph 16.

The Innsbruck Regional Court found that this work of art was an attack on the divinity of God the Father, the Son and the Holy Spirit, and an attack on the Christian religion.[99] The Regional Court also found that Zingl had waived his right to be heard and had agreed to the destruction of the film.[100] On this basis, the Regional Court held that the film was provocative and aimed at destroying the church, and that Zingl's right of access to artistic freedom came second. Zingl's right of appeal was declared to be unavailable because he had no standing before the Court.[101] The main issue before the ECtHR was whether the seizure and subsequent forfeiture of the film violated the freedom of expression as guaranteed by Article 10 of the ECHR.[102] The ECtHR reiterated that the primary duty of the Innsbruck Court as a domestic court was to interpret and apply the national law by striking a balance between the right to artistic freedom and the right to respect for religious beliefs.[103] As a result, it found that the applicant failed to adduce evidence to show that Austrian law was wrongly applied. This decision showed that because the majority of the members of the society subscribed to the Roman Catholic religion, the action of the Austrian authorities in the seizure and forfeiture of the film was justified because they were

99 Paragraph 16.

100 Paragraph 29.

101 Paragraph 34. According to the Media Act, s 41(5) owner of publisher of the media in question is summoned as a private party and accorded rights of the accused, with the ability to defend himself or herself and appeal against a conviction or sentence. According to the ECtHR, the effect of this provision in the facts where the applicant had no standing before the Court, and emerging jurisprudence from Austrian cases effectly excluded the applicability of the general provisions of the Code of Criminal Procedure with regard to private parties in forfeiture and confiscation cases.

102 Paragraph 42. For more insights on the application of the MoA and the right to freedom of expression, see Bakircioglu O 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) 8 *German Law Journal* 711- 733.

103 Paragraph 45. See *Chorherr v Austria* (1993) Series A 266-B, para 25.

better placed to assess the situation better than an international judge.[104] This position indicated a wide approach to the doctrine.

At times, the doctrine requires a narrow interpretation to enhance the ECtHR's role in supervising the enforcement of the ECHR and the Contracting States' performance of their obligations. The case of *Otto* presents a need to balance the right to freedom of religion and the right to freedom of expression. The yardstick should be whether a restriction on the freedom of expression is necessary in a democratic society. In *Handyside*, the ECtHR refers to freedom of expression as a fundamental feature of a democratic society that includes information that is favourably received, and especially that which shocks and disturbs the State or any part of the society.[105] This means that engagement with the theory that supports an accepted opinion is a broad yardstick in the application of the doctrine.

The doctrine has witnessed a shift from the restrained application in instances of periods of emergency to other Articles of the ECHR like Articles 10 and 14.[106] The foregoing discussion shows that the doctrine falls within the scope of this study in so far as the fair trial rights are contested. It appears that the doctrine does not offer a consensus on the relative importance of the rights in issues, or choices that inform the strategy that the ECtHR elects to use. The general consensus points to the need for Contracting States to manoeuvre from the protection of the rights of an individual if it is in the best interests of the community. In addition, it may be stated that the doctrine attempts to balance the private privates of an individual with public interests. The

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104 Paragraph 56. See explanatory notes on the amendment to the preamble, para 9. Available at http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf (accessed 25 January 2018).

105 *Handyside*, 19.

106 Arai-Takahashi Y (2002) generally.

underlying engagement of the doctrine points to two models of its application. First, the use of the ECHR as the threshold of the floor that provides for individual rights and, secondly; the application of the MoA as the area of compliance that either widens or narrows with regard to the merits of the case.[107]

5.2.1.2 The use of the primarity principle

The primarity principle is based on subsidiarity as far as the ECtHR has a role to play in the enforcement of the national authorities' mode of implementation of the ECHR.[108] This concept of 'primarity' was coined by Christoffersen (2009) to deal with the obligations of the Contracting Parties with regard to implementing their obligations under the ECHR.[109] This is an indication that at its core, primarity engages the international and the national elements of the enforcement of the rights under the ECHR. The striking contrast that is evident here envisions the MoA and primarity as two faces to a coin; where the MoA deals with the leverage accorded to the Contracting States to deviate from the required protection of human rights under the ECHR, while primarity questions their effectiveness in implementing their obligations under the ECHR.[110] The ECtHR requires that a State exercises its obligation to

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107 Hutchinson MR 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48(3) *International & Comparative Law Quarterly*, 638 at 642, 644.

108 Christoffersen (2009) 359.

109 Füglistaler G 'The Principle of Subsidiarity andthe Margin of AppreciationDoctrine in the European Court of Human Rights' Post-2011 Jurisprudence' 359 available at https://serval.unil.ch/resource/serval:BIB_A4FA8A7A4A0B.P001/REF (accessed 2 April 2018).

109 Christoffersen (2009) 5.

110 Cassese S 'Ruling Indirectly. Judicial Subsidiarity in the ECtHR' in *Subsidiarity: a Two-Sided Coin, The role of the convention mechanism; 2. The role of the national authorities* 11-18 available at https://www.echr.coe.int/Documents/Seminar_background_paper_2015_ENG.pdf (accessed 2 April 2018) paras 23 , 34.

protect human rights within its own system to ensure that an individual is able to enjoy his or her rights.[111] The main mandate of the Contracting State is to ensure the implementation of its obligations, other than the implementation of the freedoms.[112] As noted earlier, the Contracting State's implementation of the freedoms under the ECHR conforms to subsidiarity. The major inroad to subsidiarity is in the implementation of the MoA which may qualify manoeuvres by Contracting States from the required standard of protection under the ECHR as the implementation of these freedoms. Primarity engages the Contracting state's implementation of its obligations by evaluating the extent to which the remedies provided by the Contracting States are effective to offer redress.

The ECtHR uses the primarity principle to guide the formal implementation of the right to a fair trial.[113] From a broader perspective, an individual should have access to a remedy in a domestic court, which effectively implements the provisions of the ECHR.[114] First, the remedy should enable him or her to have a substantive review of his or her case in the domestic courts on the basis of the ECHR.[115] The ECHR is the yardstick for the enforcement of its rights in the national sphere.[116] Conversely, it may be stated that if no repercussions follow the enforcement of ECHR rights by the domestic courts, then the ECtHR has no jurisdiction. The purpose of Article 6 of the ECHR is to secure a right to a fair trial. It follows from this position that the ECtHR

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111 *Kudla v Poland* (2000) 35 EHRR 198, para 152. van Kempen PHPHMC 'Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR' (2010) 14 (3) *Electronic Journal of Comparative Law* 1 at 3.

112 Christoffersen (2009) 359.

113 (2009) 359.

114 (2009) 361.

115 (2009) 361.

116 Chedraui (2010) 206.

supervises the domestic courts with regard to the implementation of their obligations under the ECtHR.

Secondly, with regard to the primarity principle, the remedy should enable an individual to access provisional measures, in the course of the determination of the matter by the domestic court.[117] While these provisional remedies are not provided for in the ECHR, they are provided in the Rules.[118] Rule 39 states:

> The Chamber or, where appropriate, the President of the Section or a duly judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.[119]

This Rule enables the ECtHR to offer remedies that lead to the enforcement of the rights under the ECHR. Before 2005, the ECtHR did not consider the ability to adopt interim measures that would be binding on the Contracting States.[120] It held the view that it was not required to indicate whether an interim provision under Rule 36 was binding on a Respondent State.[121] This position was changed in 2005, when the ECtHR stated that the where a State failed to comply with the interim measures

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117 Christoffersen (2009) 361.

118 European Convention of Human Rights Rules, available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (accessed 20 April 2017).

119 Rule 39.

120 *Cruz Varas v Sweden* Application 15576/ 1987.

121 Paragraph 116. For a detailed enumeration of provisional remedies by the ECtHR, see De Schutte, O 'The Binding Character of the Provisional Measures Adopted by the European Court of Human Rights' (2005) 7(1) *International Law Forum* 16-23, generally. See also Bernhardt R 'Interim Measures of Protection under the European Convention on Human Rights' in Bernhardt R (ed) *Interim Measures indicated by International Courts* (1994) 102.

determined under Rule 36, it hindered the effective enforcement of a State's obligations under Article 34 of the ECHR .[122] Where evidence may be obtained through human rights violations, provisional measures may be applied for under Rule 36.[123] It follows, that the essence of the provisional measures is to ensure that an individual's claim has interim solutions, pending the determination of an application that deals with the merits of the desired remedy.[124]

Thirdly, the remedy should enable the individual to access all necessary means to address the international responsibility of the State.[125] Where the State has violated a right in the ECHR, it should offer redress as part of its obligations under the ECHR. The ECtHR should have a remedy that in three ways addresses evidence that has been obtained through human rights violations. First, by ensuring that evidence that has been unfairly obtained is reviewed; secondly, that interim measures are developed that deal with unfairness; and thirdly, that the State adopts various measures that guard against using evidence that leads to a violation of the right to a fair trial. On the basis of primarity, the remedy ought to lead to the effective implementation of the ECHR. This is an indication that the evidence that the State seeks to obtain or to use at a trial should either uphold the right to a fair trial or lead to the fairness of the trial.[126]

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122 *Mamatkulov and Askarov v Turkey* Applications 46827/1999 and 46951/1999 para 128.

123 *Ismoilov and Others v Russia* Application 2947/2006, *Othman (abu Qatada) v the United Kingdom* Application 8139/2009.

124 See the discussion on the features of the rule of admission of evidence obtained through human rights violations below.

125 Christoffersen (2009) 361. Arts 1 and 13 of the ECHR are instructive in requiring that remedies as a right under the ECHR are effectively provided for by the State.

126 See discussion on *Saunders*, *Jalloh* and *Gafgen* (on the prohibition to obtain, and the prohibition to use evidence) below.

Primarity requires that the remedies offered by a domestic court do not lead to the admission of evidence obtained through human rights violations or make a trial unfair to the accused. The principle places emphasis on the effectiveness of remedies in the ECtHR as a mode of upholding impugned evidence. This position is synonymous with the African Commission's position on domestic remedies, which should be available, efficient, and effective.[127] While this stand relates to the evaluation of national remedies in the process of deciding admissibility, the ECHR offers the three pointers as a guide its intrusion in the jurisdiction of domestic courts to give effect to the enforcement of the ECHR rights. The point of departure between the two systems is in the application of the three principles in the determination of the jurisdiction of the ECHR. Therefore, while the principles may in the African Commission's jurisprudence lead to the determination of the admissibility of a complaint, they synonymously aid the ECtHR's intrusion into the domestic court's interpretation of the same.

In conclusion, the principle of primarity points to the need to have an effective remedy that is geared towards the State's fulfilment of its obligations through the protection of the rights of an individual. Under this principle, the ECtHR theoretically requires that the domestic courts provide adequate remedies lest the jurisdiction of the former is invoked. On the other hand, the ECtHR uses the doctrine of the margin of appreciation to exert leverage to the Contracting States to shift their positions in as far

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127 See Guide to good practice in respect of domestic remedies (adopted by the Committee of Ministers on 18 September 2013) available at http://www.echr.coe.int/Documents/Pub_coe_domestics_remedies_ENG.pdf (accessed 30 January 2018). See also *Sir Dawda K. Jawara v The Gambia* Communication 147/1995 and 149/1996, *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia* Communication 71/1992, paras 11-16. See section 3.3.2 on the jurisprudence of the African Commission on exhaustion of local remedies in Chapter Three.

they can justify the non-compliance with the standards of the ECHR. In addition, while remedies take precedence with regard to primarity, the qualification of remedies or positions afforded by the Contracting States take precedence. An evaluation of the decisions of the ECtHR adds insight into this position with regard to a theoretical framework that guides the admission of evidence obtained through human rights violations.

5.3 JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The development of the jurisprudence of the ECtHR with regard to evidence obtained through human rights violations is premised on the application of Articles 6 and 13. While Article 6 provides for a right to a fair trial, the latter requires that the ECtHR exercises jurisdiction to deal with assessing evidence if its admission affects the fairness of the trial. This section of the study evaluates the right to a fair trial, the existence of a criminal charge, the non- qualification of the right and the privilege against self- incrimination. These four aspects inform the ECtHR's mode of dealing with evidence obtained through human rights violations. These form the threshold rule with regard to determining the admission of evidence obtained through human rights violations. The subsequent section deals with an evaluation of these aspects.

5.3.1 General approach to Article 6 of the European Convention

This section evaluates the Court's jurisprudential approach to using the rights to a fair trial in dealing with evidence obtained through human rights violations in four instances. These are: the conception of the right in pre-trial proceedings; the requirement of the existence of a criminal charge; the non- qualification of the right to a fair trial; and the privilege against self- incrimination. It deals with major decisions handed down between 1950 and 2016. This is so because the ECtHR lacks a period of normative development that is distinct from the handing down of decisions. The use

of this period aids the engagement with valuable experience that may inform the subsequent recommendations of this study. An engagement with the normative variants of the principle of primarity and the doctrine of the margin of appreciation is used to question or validate some of the decisions.

5.3.1.1 Article 6 and pre-trial proceedings

The ECtHR engages with Article 6 of the ECHR to ensure that an applicant has a fair trial before a competent tribunal.[128] This principle has developed from a cautious approach to a more nuanced approach in recent decisions.[129] In *Imbrioscia v Switzerland*,[130] the applicant was arrested at Zurich airport on suspicion that he was linked to heroin that was found in the luggage of another passenger with whom he was travelling.[131] He was assigned a lawyer, who was absent during his interrogation by the police.[132] The first lawyer withdrew his services to the applicant, and on the same day, another lawyer was appointed.[133] On 8 March and 11 April, the applicant was again questioned by the district prosecutor, in the absence of his lawyer.[134] The Bulach District Court's conviction of the applicant was confirmed by the Zurich Court

128 See Art 6 of the ECHR. For a detailed reading on Art 6 on criminal fair trial rights, see Goss R *Criminal fair trial rights: Article 6 of the European Convention on Human Rights* (2014) generally.

129 This caution is evident in the discussion of the cases reflected in footnotes 129- 162 below. Further insights can be obtained from Summers SJ *Fair trials: The European criminal procedural tradition and the European Court of Human Rights* (2007) generally.

130 *Imbrioscia v Switzerland* Application 13972/1988. An engagement of *Imbroscia* and the cases leading up to its position can be found in Nowicki MA 'Strasbourg and the position of the defence counsel' (1996) 4 *European journal of crime, criminal law and criminal justice* 335-347 generally.

131 Paragraph 8.

132 Paragraphs 11- 14.

133 Paragraph 15.

134 Paragraphs 15, 17.

of Appeal, the Court of Cassation and the Federal Court.[135] The Zurich Court of Appeal noted that while the applicant's lawyer had been informed of the date of the interview on 11 April, he did not attend and that subsequently, he did not put any questions about the last interview on 6 June 1985.[136] The Court of Cassation noted that the applicant did not indicate that he had either, requested the presence of his lawyer or had had his request rejected.[137] The Court of Cassation confirmed that his defence was not adversely affected by the lawyer's absence during the questioning.[138] This position was upheld by the Federal Court.[139]

The ECtHR stated that the absence of the lawyers at the various sessions did not affect the proceedings as a whole, and as such the trial was fair.[140] This was based on the position that while the purpose of Article 6 was to ensure a fair trial by a competent tribunal to determine any criminal charge, the preliminary investigations by the police and the district prosecutor took place before the existence of the criminal charge.[141] It is argued that this position adopted by the ECtHR was a miscarriage of justice as far as it insinuated that if a lawyer was not invited to attend the preliminary questioning, it could not be inferred that the questioning was unfair. The non-presence of a lawyer during the interrogations, the prosecutor's active involvement in

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135 Paragraphs 20-27.

136 Paragraphs 19, 24. The need for a lawyer and his or her engagement in the subsequent interviews is progressively dealth with in the subsequent cases under this subsection.

137 Paragraph 25.

138 Paragraph 25. See this reiteration in Australia's comparative position in Flynn A, Hodgson J, McCulloch J & Naylor B 'Legal aid and access to legal representation: Redefining the right to a fair trial' (2016) 40 *Melbourne University Law Review* 207 at 212.

139 Paragraph 26.

140 Paragraph 35.

141 Paragraph 36.

the preliminary investigations, and the applicant's failure to ask for the presence of a lawyer did not justify the violation of the right to a fair trial.

It is further argued that the perception that the absence of the lawyer during the questioning was not detrimental in that he or she would question the State witnesses in the course of cross-examination was improper. Since the applicant had made contradictory statements, his innocence would be brought into question, and no degree of questioning would alter these facts. Conversely, these contradictions would be avoided if the applicant had a lawyer to guide him in the course of answering questions during the preliminary investigations. The presence of the lawyer is crucial to ensuring that the right to legal representation is buttressed from the preliminary proceedings to the actual court proceedings.

The ECtHR noted that while the preliminary investigations may be used to determine the existence of a criminal charge and the circumstances of the case, they excluded the existence of a charge.[142] This meant that the right to a fair trial would be determined when the State recognised that a charge had been formally instituted. This would have the effect of including evidence obtained through human rights violations because it was obtained before the charge had been instituted.[143] In the instant case, the applicant was questioned by the police during the first 24 hours of his incarceration, and on many occasions by the prosecutor. It is inconceivable to hold that these preliminary investigations, which lasted for a couple of weeks, did not amount to an investigation, yet the State relied on the findings of the preliminary investigations to incriminate the applicant.[144]

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142 Paragraph 37.

143 See discussion below in section 4.3.1.1 on *O'Halloran* at para 35.

144 See dissenting opinion of Pettiti J, 13.

In addition, the ECHR provided for the right to a fair trial and the mode of enforcement of this right was left to the domestic courts.[145] The ECtHR required that Contracting States adopt a method that was practical, rather than theoretical, in the enforcement of the Convention rights.[146] While the ECHR embraced the principle of primarity in so far as it required the State to provide a remedy, its failure to examine the merits of the denial of an applicant's right to the presence of a lawyer during questioning impeded the development of its jurisprudence. It's a justification of the position of the State was an application of the margin of appreciation in that it limited its task to ascertain the existence of a method by the State to deal with the admission of evidence, other than evaluating its effect. It was expected that the ECtHR's jurisdiction to question the procedure adopted by the domestic court was validated by the State's inability to offer an effective remedy to an applicant whose right to a fair trial had been violated.[147]

The preliminary investigations in this case substantially affected the applicant's trial because the answers formed the basis for the subsequent conviction. The ECtHR's failure to hold that preliminary investigations had occurred after the charge had been instituted was an indirect use of the margin of appreciation principle. This is so because the Court offered a lot of leeway to the State in holding the latter accountable for failure to ensure the observance of the right to a fair trial. With regard to the need for the presence of a lawyer during questioning, the principle in *Imbroscia* has been upheld in *Alexandra Zaichenko v Russia,*[148] *Salduz v Turkey*,[149] and more recently in *McGowan (Procurator Fiscal) v B,*[150] as good law.[151] The point of departure in

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145 *Imbrioscia*, para 38.

146 Paragraph 38.

147 See preceeding discussion on the principle of primarity above.

148 [2010] ECHR 185, para 36. Compare with *Imbioscia*, para 36.

149 [2008] ECHR 1542.

150 [2011] 1 WLR 3121.

Zaichenko was the fact that the applicant was not formally arrested or interrogated in police custody.[152] He was rather stopped for a road check, where he volunteered to give the incriminating information to the Police.[153]

In *Brennan v the United Kingdom*,[154] the applicant was arrested under section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989 in an investigation of the murder of a former member of the Ulster Defence Regiment.[155] He was interviewed for 35 hours by the police, between 21 and 23 October.[156] From his arrest at 1.50am, the applicant was denied access to a lawyer for the first 24 hours.[157] While he challenged this denial of access, the ECtHR noted that it was not a violation of his right to a fair trial because his first admissions that were admitted in evidence were obtained after the refusal of access to a lawyer had been lifted.[158] The Court stated:

> …. the right of access to a solicitor may be subject to restrictions for good cause and the question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing. While it is not necessary for the applicant to prove, assuming such were possible, that

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151 The literature on the *Imbroscia* case agitates that the defence counsel has to be completely independent from the other parties, especially the prosecutor and the court, to ensure an organisational structure that offers guarantees to lawyers that exhibit their independence from the state institutions. See Norwiki (2008) 342.

152 *Zaichenko*, para 47.

153 See also *Kolu v Turkey*, Application 35811/1997 paras 14-22, *Brennan v the United Kingdom*, Application 39846/1998 para 41, *Quinn v Ireland*, Application 36887/1997, paras 10-13. See also *Averill v the United Kingdom*, Application 36408/1997 para 55.

154 *Brennan v the United Kingdom* Application 39846/1998

155 Paragraph 8.

156 Paragraph 8.

157 Paragraph 9.

158 Paragraph 48.

> the restriction had a prejudicial effect on the course of the trial, the applicant must be able to be claim to have been directly affected by the restriction in the exercise of the rights of the defence.[159]

It is argued that at its core, this position indicates that the restrictions to access to a lawyer that serve a common good like conducting other inquiries other than placing the suspect in a position where he would be compelled to making confessions may not be grounds to render the subsequent trial unfair. The ECtHR's position hinges on the applicant's ability to show the connection between the restriction and its effect on his defence. So if the restriction affects his defence by way of making incriminating confessions, then the probability that the evidence will not be admitted is not surreal.

Furthermore, while this position seems to resonate with the *Imbroscia* decision, the point of departure lay in the evaluation of the reasons for the refusal and the fact that the admitted evidence was obtained after he had consulted with a lawyer. The first reason was that the police acted in good faith by avoiding a possible transmission of evidence to other suspects who were still at large. Secondly, the restriction on the suspect's right to a lawyer did not affect his defence. It is averred that the ECtHR in *Imbroscia* would have arrived at a different conclusion, if the case provided similar facts as in *Brennan.* This is because the evidence which would have been obtained from the applicant in the absence of his lawyer, would have affected his defence and the fairness of the trial.

Another important aspect to note related to the occurrence of the police interviews in the absence of his lawyer, despite the applicant's request for the latter's presence.[160]

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159 Paragraph 18.

This situation needs to be contrasted with a scenario where an applicant does not request the presence of his lawyer.[161] The ECtHR would evaluate the law and the facts before arriving at its decision. It stated that the rules of admissibility and the assessment of evidence are determined by domestic courts unless there is evidence of an arbitrary or capricious assessment thereof.[162] This included the inadequate provision of safeguards to assess the admission of impugned evidence.[163] The use of a *voice dire* would be instructive in establishing the voluntariness of, and the circumstances surrounding the making of, a confession and related evidence.[164]

Other practices that the ECtHR has gradually discouraged include the presence of a police officer in the course of an applicant's consultations with his or her lawyer.[165] This presence during the exchange of communication between the applicant and the lawyer had the effect of eroding the confidentiality of the communication. In *S v Switzerland,* the ECtHR reiterated this position to ensure the effective and practical application of the right to a fair trial.[166] The margin of appreciation was applied at a basic minimum because the ECtHR evaluated the merits of the denial of an applicant's right to the presence of a lawyer during questioning, and noted that the evidence that had been admitted was obtained after the applicant's lawyer had been granted access.

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160 Paragraph 49. Further engagements on the need for the presence of a lawyer during police interviews, see Cape E 'Avoiding procedural rights: the evidence from Europe' (2013) 92 (1) *Criminal Justice Matters* 4 at 4-6.

161 See *O'Kane v the United Kingdom* Application 30550/1996, *Imbroscia's* case.

162 *Brennan*, para 51.

163 Paragraph 51.

164 Paragraph 52.

165 Paragraph 56.

166 *S v Switzerland* Application 12629/1987 and 13965/1988, para 48.

Brennan embraced the MoA, where the ECtHR stated:

> The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial. Nevertheless, article 6(3) (c) does not specify the manner of exercising this right. It thus leaves to the contracting states the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial.[167]

As a result the exercise of the right to a fair trial needs to be engaged with the investigative bodies' role in conducting further inquiries as long as the restrictions to a suspect's right to a fair trial (access to a lawyer) does not lead the collection of evidence self -incriminating evidence and confessions that would otherwise lead to an unfair trial with regard to his or her defence. As such, as long as the Contracting States ensure the enjoyment of the right to a fair trial with restrictions that do not lead to self-incrimination, then the Contracting State's exercise of the MoA maybe upheld by the Strasbourg Court.[168]

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167 Paragraph 51. reiterated in *Cadder v Her majesty's advocate* [2010] WLR(D) 268, para 32. See *Imbriosia*, para 38.

168 This position has been reiterated in subsequent domestic decisions such as *Cadder* paras 32 and 70, *Ambrose v Harris* [2011] 1 WLR 2435 paras 31 and 134. *Edward Brown v R* [2015] WLR(D) 344, para 56. *McE v Prison Service of Northern Ireland* [2009] 2 WLR 782 para 85.

5.3.1.2 Requirement for the existence of a criminal charge

The ECtHR has progressively extended the concept of a 'criminal charge' as a requirement for the application of the right to a fair trial.[169] This position is important in determining when one may allege that evidence was obtained from him or her in violation of their rights and rendered his or her trial unfair.[170]

In *Shabelnik v Ukraine*,[171] the applicant was arrested on grounds that he had kidnapped and murdered a child.[172] The applicant claimed that he was forced to make the confession with regard to the murder.[173] The domestic court disregarded the defence of the applicant and found him guilty of kidnapping and murder, and sentenced him to life imprisonment.[174] This decision was confirmed by the Court of Cassation and the Appellate Court.[175] He brought an application to the ECtHR claiming that his right to a fair trial was violated because the confession was obtained under coercion in the absence of his lawyer.[176]

169 Eeckhout P & Tridimas T (2011) *Yearbook of European Law* (2010) 29 'Guide on Article 6: Right to a fair trial (criminal limb)' available at https://www.google.co.za/search?q=The+ECtHR+has+progressively+extended+the+concept+of+a+%E2%80%98criminal+charge%E2%80%99+as+a+requirement+for+the+application+of+the+right+to+a+fair+trial.&oq=The+ECtHR+has+progressively+extended+the+concept+of+a+%E2%80%98criminal+charge%E2%80%99+as+a+requirement+for+the+application+of+the+right+to+a+fair+trial.&aqs=chrome..69i57.1259j0j4&sourceid=chrome&ie=UTF-8 (accessed 6 February 2018). ?

170 See the discussion of the cases that follow.

171 *Shabelnik v Ukraine* Application 16404/2003.

172 Paragraph 6

173 Paragraph 20.

174 Paragraph 20.

175 Paragraphs 21- 22.

176 Paragraph 35.

The parties contested the date when the proceedings were instituted. The government claimed that the proceedings were instituted when the applicant confessed to the murder of Mrs K on the 25 February 2002.[177] The applicant, on the other hand, stated that the investigative procedures instituted on 15 February 2002 that were used to obtain evidence of his involvement in the murder, formed part of the period under which he was formally charged.[178] He also stated that the failure by the government to offer legal assistance in the course of the proceedings that started on 15 February affected the fairness of the proceedings.[179]

The Court stated that a person who is charged with a criminal offence has a right to effective representation by a lawyer.[180] This was extended to instances that substantially affected the applicant, depending on the peculiar facts and features of the case.[181] The ECtHR stated that the applicant had to benefit from the assistance of a lawyer during the initial stages of interrogation.[182] The case of *Shabelnik* marked a departure from the cautious approach in the earlier cases of *Imbroscia* and *Brennan*, to a more embracing approach that spoke to the need to look at when the criminal trial process was instituted, and an appreciation of legal representation in the course of preliminary inquiries. It fused the principle of primarity in so far as it required that evidence obtained during the preliminary inquiries was scrutinised before it was admitted. The use of a substantial change in the status of an applicant was a

177 Paragraph 41.

178 Paragraphs 36- 37.

179 Paragraph 49.

180 *Imbrioscia*, para 36, *Öcalan v Turkey* Application 46221/1999.

181 *Shabelnik* para 53.

182 Paragraph 53.

yardstick for establishing the institution of the criminal process.[183] It has been correctly stated in subsequent cases that the test to be applied is:

> … whether the person's Convention rights have been breached, is to identify the moment as from which he was charged for the purposes of article 6(1). The guidance as to when this occurs is well known. The test is whether the situation of the individual was substantially affected.[184]

As such, in addition to ensuring that the suspect's restriction to access to a lawyer or other fair trial guarantees, one has to measure that against when (s) he was charged or when his position was substantially affected by the investigative or trial process.

In *Deweer v Belgium*,[185] the applicant was a local butcher in Louvain, Belgium. An officer from the Economic Inspectorate General's office established that the applicant had infringed a Ministerial Decree on the reduction of the prices of meat.[186] When the applicant was questioned, he made a statement to the Inspector, who used it to prepare a report and forwarded it to the Crown Prosecutor at the Louvain Court of First Instance.[187] A few days later, the Crown Prosecutor ordered the provisional closure of the applicant's shop until he paid the proposed settlement of 10,000 Belgian francs before the hearing of the case or on the date of judgment.[188] In a bid to mitigate the loss to himself, the applicant paid the proposed settlement.[189] He

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183 *Dvorski v Croatia* Application 25703/2011, paras 76- 77.

184 Reiterated in *Ambrose,* para 31.

185 Paragraph 7.

186 Paragraph 8.

187 Paragraph 8.

188 Paragraph 9.

189 Paragraph 9.

claimed that the combined use of the settlement and provisional closure of his business violated his right to a fair hearing in criminal proceedings.[190]

The inspection was a routine procedure, and neither any investigations leading to the collection of evidence nor a formal trial were conducted.[191] On conviction, the applicant stood to suffer imprisonment or payment of higher fines; and he did not agree to the proposed settlement.[192] The ECtHR was tasked to establish when a person was subjected to a 'criminal charge'. It stated that a 'criminal charge' existed as soon as a person was notified by a competent authority of an allegation of commission of an offence, or if he had been substantially affected by the situation.[193] This decision widened the formal communication of the institution of criminal proceedings by the police to include any other competent authority. It also included instances where the preliminary inquiries led to a substantial change in the situation of the applicant. As such, as long as the prevailing circumstances that led to the collection of evidence from a suspect substantially affected the right to a fair trial, the ECtHR would presume the existence of a criminal charge. This is an indication that for the principle in *Deweer* to apply, one needs to evaluate the circumstances of the case, which lead to a substantive other than a formal conception of the 'charge'.[194]

In this decision, the ECtHR applied the principle of primarity. This was due to the fact that initial investigations substantially affected the accused where (s)he was to be put

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190 Paragraph 23.

191 Paragraphs 2-13.

192 Paragraph 14.

193 Paragraph 46.

194 *Shablenek*, para 55; *Deweer*, para 44. See Ramos VC 'The Rights of the Defence According to the ECtHR: An Illustration in the Light of ATV Luxembourg and the Right to Legal Assistance' (2016) 7(4) *New Journal of European Criminal Law* 397 at 399. See also *Alexander Zaichenko v Russia* Application 39660/2002, paras 41- 43.

before trial. As such, the requirement to evaluate the effect of the initial investigations in absence of a formal charge is taken to be an effective remedy with regard to evidence obtained through the in violation of the right to a fair trial.[195] While its existence depended upon when it was instituted, there was a need to establish when the charge was determined.[196] The principle of primarity is further extended to instances where the Contracting States have embraced the principle in *Deweer,* and accorded it a wider interpretation in cases that are civil other than criminal in nature.[197] It has been stated that in instances that where the nature of offence is instructive in establishing the requirement for a criminal charge in evaluating fairness, it is necessary to

> look at the substance of what is involved and not the form. Moreover the question cannot be answered according to what Parliament is thought to have intended. In this context it is the effect of what Parliament has done that has to be examined. The court looks behind the appearances and investigates the realities of the procedure.[198]

As such, it the actions of the investigative officer connote possible criminal behaviour on the part of the suspect/ accused, then it is rational that court assumes the existence of a criminal charge where it is established that the accused was substantially affected. This broad concept of the existence of a criminal charge that goes beyond the conventional criminal cases indicates that the ECtHR requires Contracting States to provide remedies to individuals substantially affected by initial

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195 These sentiments are reflected in Shabelnik v Ukraine, application no. 16404/03, para 52, which cited *Deweer v Belgium* para 44).

196 *Eckle and another v Germany* Application 8130/1978, para 77b-78. See König judgment of 28 June 1978, Series A no. 27, para 98.

197 *Clingham v Royal Borough of Kensington and Chelsea* [2002] UKHL 39 paras 68- 74.

198 Paragraph 68.

investigations that lead to probable prosecution, regardless of the nature of the case.[199]

In *Eckle and another v Germany*, the first applicant, Mr Hans Eckle, had a building firm called 'Hans Eckle, timber, steel and building materials' and he employed his wife, Marianne Eckle.[200] Due to financial challenges, the applicants were prosecuted in three separate trials in the Courts of Trier (from 1959 to 1973), Saarbrücken (from 1963 to 1972) and Cologne (from 1967 to 1977).[201] The applicants claimed that the cumulative effect of these proceedings from 1959 to 1977 amounted to a violation of their right to a fair trial.[202] It is significant to note that the case did not refer to obtaining evidence or using evidence, but rather that the process of the trial was unreasonably long and made the trial unfair. This position is a departure from the use of evidence obtained through human rights violations to instances which affect the fairness of the trial. This case shows that fairness of a trial is not limited to obtaining evidence through human rights violations or using evidence with the effect of leading to an unfair trial. Where the process is imbued with unfairness, then the right to a fair trial may be invoked. The ECtHR stated that a conviction does not determine a criminal charge if the sentence is still contested.[203] This is an indication that the right to a fair trial continues to exist where an applicant, through an appeal, review or revision, questions the legality of the sentence that has been handed down.[204]

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199 *Stretford v The Football Association Ltd. & Anor* [2007] 2 All ER (Comm) 1, para 47.

200 *Deweer*, para 9.

201 Paragraph 10.

202 Paragraph 61.

203 *Eckle* para 77b.

204 *McFlaine v Ireland* Application 31333/2006 para 144. See also *Reinhardt and Slimane-Kaïd v France* Application 23043/1993, paras 91-93.

The extension of a criminal charge to a point of non- contestation in the criminal trial process embraced primarity to ensure that the fairness of proceedings had to be tagged to the duration of a case right from its inception to its determination by an appellate court. It is on this basis that the ECtHR found that these proceedings that took 18 years to complete from 1959 to 1977 amounted to a violation of their right to a fair trial.[205] Therefore, the right to a fair trial is not limited to admission of evidence obtained through human rights violations, but unduly includes protracted proceedings.

5.3.1.3 The non-qualification of the nature right to a fair trial.

The ECtHR places no qualifications on the nature right to a fair trial. This position has developed in a number of applications. It seems apparent, however, that the ECtHR deals with each case on its own merits. In *O'Halloran and Francis v the United Kingdom,*[206] the first applicant who was driving an Alvis motor vehicle, was caught on a speed camera driving at 69 mph in a 40 mph zone. In accordance with the Road Traffic Offenders Act 1988, he was notified of the intended prosecution of an Alvis motor vehicle. As the recorded owner, keeper or driver of the said vehicle, he was required to provide the full name and address of the driver at the time and location of the incident.[207] A failure to comply with this notice would lead to prosecution and, upon conviction, to a fine of GBP 1,000 and the imposition of 3-6 penalty points.[208]

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205 *Eckle* para 61.

206 *O'Halloran and Francis v the United Kingdom* Applications 15809 and 25624/2002.

207 Paragraphs 10-16. The point of departure in the application of the section was where the owner of the vehicle was not the one who was driving the vehicle at the time of the incident.

208 Paragraphs 10-16. Section 172 of the Road Traffic Act 1988 provides a duty to give information of a driver of a vehicle in certain circumstances. Sub sec 2 provides 'where the driver of a vehicle is alleged to be guilty of an offence to which this section applies– (a) the

Upon his confirmation as being the driver, the applicant was prosecuted and sentenced to a fine of GBP 100, and costs of GBP 150. He unsuccessfully challenged his conviction on the basis of the evidence given under compulsion.[209] Subsequently, he brought an application against the United Kingdom on the ground that he had been convicted on the basis of a statement that he was compelled to provide under a threat that he would suffer a penalty that was similar to that for the offence.[210]

On the other hand, Francis, the second applicant, was given a notice of intended prosecution for driving at 47 mph in a 30 mph zone.[211] He declined to supply the information with regard to the driver of the vehicle at the time and location of the incident citing his right to remain silent and the privilege against self-incrimination.[212] He was convicted for failing to comply with the notice of intended prosecution and was fined GBP 750, costs of GBP 250 and 3 penalty points.[213] He brought the application against Ireland on the ground that he was convicted for refusing to be compelled to give evidence with regard to an offence that was suspected of having committed.[214]

The ECtHR stated that although the applicants had not been charged formally, they had shown that they were substantially affected by the notices of intended prosecution, which they received with regard to the speeding offences.[215] The effect

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person keeping the vehicle shall give such information as to the identity ofthe driver as he may be required to give by or on behalf of a chief officer of police,and (b) any other person shall if requiredas stated above give any information which itis in his power to give and may lead to identification of the driver."

209 Paragraphs 14, 16.

210 Paragraph 3.

211 Paragraph 17.

212 Paragraph 16.

213 Paragraph 24.

214 Paragraph 3.

215 Paragraph 35

of this ruling indicates that the right to a fair trial may be seen as existing from preliminary incidents leading to the preferring of charges. This is so because the notices of intention to prosecute had the effect of compelling the applicants to adduce evidence to be used against them or be charged for failing to adduce the said evidence. The ECtHR's application of the right to a fair trial to pre-charging incidents illustrated the wide scope of the nature of the right. This position acts as a buffer for the protection of individuals in instances where the State may have this evidence before it forms the opinion to formally charge them.

This decision embraces primarity by stating that one does not have to be formally charged before one can benefit from the guarantees of the right to a fair trial. A chronological examination of cases decided before *O'Halloran and Francis* shows that the applicants had been charged before they were required to produce the evidence. In *Funck v France*,[216] the ECtHR stated that bureaucratic tendencies that require an individual to provide information with regard to his or her income and property were not a valid excuse to compel the person who had been charged with an offence to give evidence if it led to self- incrimination.[217] Similarly, in *John Murray v The United Kingdom*,[218] the ECtHR stated:

> Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.[219]

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216 *Funck v France, Application* 10828/1984.

217 Paragraph 44.

218 *John Murray v United Kingdom* Application 18731/1991

219 Paragraph 45.

This indicates that a person who was being questioned by the police had to have been charged. On the basis of the wide recognition of the Miranda Rule, the police have a duty to inform an accused of the nature of the offence with which he is charged before he or she is questioned.[220]

In *Serves v France*,[221] the ECtHR dealt with the right to remain silent and not to incriminate oneself. It stated:

> The[ir] rationale lies, *inter alia*, in protecting the "person charged" against improper compulsion by the authorities and thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6.

It is clear from the wording that it refers to a person who is already charged. The point of departure in *O'Halloran and Francis* is the ECtHR's extension of this right to a fair trial to instances where the State has not charged the individual, but the requirement for collecting the evidence substantially affects an individual's right against self-incrimination.

Without prejudice to the foregoing, the *O'Halloran and Francis* decision still left a grey area with regard to self- incrimination. It decisively dealt with instances of obtaining evidence outside the context of prospective criminal proceedings against the potential suspect. However, It did not deal with the use of compulsory or statutory powers to obtain evidence from a suspect, or in instances where the fairness of the trial was an issue with regard to the State's intended use of particular evidence at the trial.[222] This brought other questions to the fore, such as, the existence of the rule on the

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220 *Miranda v Arizona* 384 US 436 (1966). Referred to by the ECtHR in *O'Halloran and Francis,* 24.

221 *Serves v France*, Application 38642/1997.

222 See *Saunders*, para 100.

prohibition of evidence obtained in the course of investigations, and evidence that may be used at a trial.

In addition, the case failed to distinguish between self- incriminating and incriminating evidence: while the domestic law compelled the applicants to give evidence that incriminated them, the position was different if they were the persons who were driving the respective cars at the given time and location. A case with similar facts from Austria is *Rieg v. Austria,*[223] where the Court stated that where the purpose of the domestic law was to compel an applicant in his capacity as the registered car owner to name the driver of the car, it was not incriminating. It follows that the concepts of incrimination and self- incrimination needed to be clearly delineated. This is due to the probability that the ECtHR would have arrived at a different conclusion if the applicants were not the drivers at the given time and location.

In the recent case of *Ibrahim and others v United Kingdom*,[224] four applicants lodged an application challenging the admission of evidence obtained in the course of an investigation related to a terror attack in London.[225] The ECtHR reiterated that the nature of the right to a fair trial is an unqualified right, that depends on the circumstances of each case.[226] It required that Contracting States exercised considerable freedom in regard to their judicial systems to ensure that they complied with the right to a fair trial.[227] The ECtHR's obligation to ensure a State's compliance with the right to a fair trial arose where the process adopted by a domestic court fell

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223 Application 63207/2000,

224 ECtHR Applications 50541, 50571, 50573/08 and 40351/2009.

225 Paragraph 14.

226 Paragraph 250. Confirmed the principle in *O'Halloran and Francis*, para 53.

227 See *Taxquet v Belgium* Application 926/2005, para 84.

below a required standard and was incompatible with the ECHR. In addition, it hinted at an inconclusive list of factors that should be looked at in evaluating the fairness of the trial for the applicant.[228] These include the vulnerability of the applicant,[229] the legal rules on pre-trial proceedings, and the admissibility of evidence at trial, in light of the existence of an exclusionary rule and its effect on the proceedings.[230] Other factors include an applicant's opportunity to challenge the authenticity and use of particular evidence,[231] the quality and mode of obtaining evidence, and any other procedural safeguards adopted by domestic law and practice.[232] Therefore, the ECtHR's non-qualification of the nature of the right to a fair trial embraces the principle of primarity, the indication that the existence of a remedy about the non-admission of evidence applied to both criminal and civil cases.[233]

5.3.1.4 The privilege against self-incrimination

The concept of the privilege against self- incrimination is not expressly provided for in the ECHR. The ECtHR has, however been pragmatic in developing the concept as the privilege against self-incrimination; despite the fact that it is considered as a right against self- incrimination.[234]

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228 *Ibrahim*, para 274

229 Paragraph 274(a).

230 Paragraph 274(b).

231 Paragraph 274(c).

232 Paragraph 274(j). See *Schatschaschwili v Germany* Application 9154/2010, para 101.

233 For a detailed discussion of these three concepts, see *Khan v the United Kingdom*, Application 35394/1997, para 34, *P.G. and J.H. v the United Kingdom*, Application 44787/1998, para76, and *Allan v the United Kingdom*, Application 48539/1999, para 42.

234 A discussion of the difference is beyond the bounds of this thesis. This study, however refers to the right against self- incrimination.

In *Saunders v the United Kingdom*,[235] the applicant, a director and chief executive of Guinness PLC (Guinness), was prosecuted for causing a substantial increase in the quoted Guinness share price through an unlawful share-support operation. In the course of investigations, the accused was compelled by inspectors appointed by the Secretary of State for Trade and Industry to disclose incriminating evidence to them.[236] At the trial, the Applicant denied any knowledge of giving of indemnities or the paying of success fees, and that he had not been consulted on such matters.[237] The prosecution sought to tender the interviews carried out by the investigators which revealed that he acknowledged knowledge of the payment of a success fee of GBP 5 million.[238] On the basis of this evidence, the accused was convicted and sentenced to 5 years imprisonment.[239] On appeal against the conviction based on the admission of self-incriminating evidence,[240] the Court of Appeal held that the transcripts were admissible evidence.[241] The accused then lodged an application with the ECtHR and stated that use of statements made by him in compliance with the legal requirement to adhere to the compulsory powers of the inspectors, was a violation of his right to a fair trial.

The ECtHR held that, first, the privilege against self-incrimination formed an important element in safeguarding individuals against oppression and coercion. Secondly, the privilege was linked to the principle of the presumption of innocence and should apply

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235 Chamber Application 19187/1991.

236 Paragraph 25.

237 Paragraphs 30- 31.

238 Paragraphs 31- 32.

239 Paragraphs 33-34.

240 Paragraph 38.

241 Paragraph 38.

equally to all types of accused persons.[242] The use of this evidence substantially impaired Mr Saunders' ability to defend himself against the criminal charges he faced, thereby depriving him of a fair trial.[243] The ECtHR clarified that the rationale for the right against self-incrimination was to ensure that the prosecution proves their case against an accused without recourse to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.[244] This position guarded against the use of evidence that was obtained through human rights violations. While primarity was not applied, the ECtHR's approach was a preventive approach to a violation.

The ECtHR recognised that the right against self-incrimination is a recognised international standard for a fair trial and if a legal compulsion to give evidence yields self-incriminating evidence at the trial, it renders the trial unfair and should not be admitted. It held that although the right against self-incrimination was primarily concerned with respecting an accused's right to remain silent,[245] the instant case involved legal compulsion on the accused, independently of his will to answer questions put to him by the inspector or risk contempt of court proceedings and a two-year term of imprisonment. Therefore, when evidence arising out of the legal compulsion was used at a trial to incriminate him; it rendered the trial unfair.[246] This position embraced the principle of primarity through the reiteration of the ECtHR's development of remedies that are relevant to the merits of the applications.

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242 Paragraph 65.

243 Paragraph 65.

244 Paragraph 68.

245 Paragraph 69.

246 Paragraphs 75 to 76.

In *Jalloh v Germany*,[247] the applicant was subjected to forcible administration of emetics in order to obtain evidence of a drugs offence from his stomach. He applied to the Court to find that the actions of the German Police constituted inhuman and degrading treatment prohibited by Article 3 of the Convention.[248] He further claimed that the use of this illegally obtained evidence at his trial breached his right to a fair trial guaranteed by Article 6 of the Convention.[249] The Grand Chamber held that the forcible administration of emetics was not evidence of torture, but of inhuman and degrading treatment.[250]

In establishing whether the right to a fair trial under Article 6 of the Convention was infringed by use of the medical evidence against the applicant, the ECtHR held that it is settled law of the Court that while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such. It noted that it was not its role to determine the admissibility of the impugned evidence because the domestic legislation provided for a mode of administering the emetics to recover the evidence.[251]

The ECtHR clarified the normal instances of self-incrimination and the instant case. It distinguished between the use of real evidence and derivative evidence obtained from an accused in violation of Article 3. It noted that the privilege against self-incrimination is commonly understood in Contracting States to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement. Therefore, in a case where the self-incrimination required the State to procure real evidence from the accused and

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247 ECHR Grand Chamber Application 54810/2000.

248 Paragraph 3.

249 Paragraph 3.

250 Paragraphs 78, 82 and 106.

251 Paragraphs 33, 103- 104.

admit it in evidence, the mode of acquiring this evidence was vital.[252] This is an indication that the ECtHR was interested in the State's implementation of the freedoms apart from its obligations under the ECHR.[253]

It advanced four reasons to justify its decision that the forceful application of emetics to retrieve evidence from the accused rendered the trial unfair. First, the administration of emetics was used to retrieve real evidence in defiance of the applicant's will.[254] Secondly, the Court contrasted the present facts with the use of the *Saunders* case and held that the degree of force used differed significantly from the degree of compulsion normally required to obtain materials, such as, blood or hair samples.[255] Thirdly, the materials in question (such as, blood, hair or stool samples) were the product of normal bodily functions and not a regurgitation of evidence, with risk to the applicant's health.[256] Fourthly, the evidence in the present case was obtained by means of a procedure which violated Article 3. This decision marked a development in the jurisprudence of the ECtHR in dealing with evidence whose admission would render the trial unfair and not simply because it violated article 3 of the ECHR. However, the ECtHR would have arrived at a different conclusion if the evidence had been recovered through normal functions of the body other than the use of forced regurgitation.

The ECtHR also laid down rules to be followed in establishing if the degree of compulsion used violated the right to a fair trial. First, the nature and degree of

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252 Paragraph 110.

253 See detailed discussion of primarity as a double- sided coin to the MoA under section 5.2.1.1 and 5.2.1.2 above.

254 *Jalloh*, para 113.

255 Paragraph 114.

256 Paragraph 114.

compulsion used to obtain the evidence;[257] secondly, the weight of the public interest in the investigation and punishment of the offence in issue;[258] and thirdly, the existence of any relevant safeguards in the procedure;[259] and the use to which any material so obtained is put.[260] These rules once assessed, would enable the ECtHR to determine a violation of the right to a fair trial. This approach used the level of compulsion as a violation of a Convention right as a yardstick, but failed to draw a clear line between the use of incriminating and self-incriminating evidence.

The ECtHR embraced the use of the doctrine of the margin of appreciation. It stated:

> As it can hardly be contended that drug dealers in the applicant's position should be allowed to go unpunished, the choice between the two methods, both of which entail certain risks, largely falls within the State's margin of appreciation, provided that the principle of proportionality is respected. In view of the Government's explanation that the use of emetics is allowed only in those five Länder where the problem caused by drug offences is most acute, we accept that the practice of using emetics does not go beyond what can be regarded as necessary. Absolutely denying the State the possibility of resorting to this measure even where the drug problem has reached the alarming proportions it has in some parts of Europe in our view fails to strike a proper balance between the State's interest in fighting drug offending and the other interests involved.[261]

The ECtHR's approach is geared towards balancing the relationship between the sovereignty of a State and the supervisory function of the Court. This is based on the

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257 Paragraph 117.

258 Paragraph 118.

259 Paragraph 119.

260 Paragraph120.

261 *Jalloh*, 56.

attempts to prevent the Court from intruding in the affairs of the State.[262] However, this approach does not consider the ECtHR's use of the ECHR as the basis for the supervising of a State's compliance.[263]

In conclusion, the *Jalloh case* was distinguished from the *Saunders'* case in light of the mode of obtaining evidence. While in both cases, there was a legal compulsion to obtain evidence backed by domestic law, in the *Jalloh's* case, the compulsion involved use of force to a severity rendering the conduct of the Police inhuman. Secondly, the *Saunders'* case suggested that only audible words extracted from the mouth of the suspect are inadmissible provided their existence was independent of the will of the accused. By this yardstick, the inhuman compulsion of a suspect to obtain evidence from his stomach would be admissible as long as its existence was independent of the will of the accused. This would lead to the creation of a dangerous precedent, and as a result, the ECtHR stressed that in the *Jalloh* case, there was the use of inhumane treatment and that the ECtHR's desire to render the evidence admissible would mean that the Court did not have a strong stance against CIDT.[264]

In *Gafgen v Germany*,[265] the victim abducted one Jakob von Metzler on 27 September 2002. During the interrogation, the victim changed his story several times, including claiming to have been involved in the kidnapping but only as a courier.[266]

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262 See discussion on balancing State sovereignty and the supervisory function of the ECtHR in Hutchinson MR 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48(03) *International and Comparative Law Quarterly* 638 at 647.

263 Hutchinson (1999) 647.

264 Concurring judgment of Zupancic J, 44.

265 *Gafgen v Germany* Application 22978/2005

266 Paragraphs 24- 28.

Due to a fear that Jakob might be killed, a senior Police officer ordered a subordinate officer to threaten Gafgen with torture, and if necessary to inflict it, unless he revealed Jakob's whereabouts. After ten minutes and capitulation to the threat, Gafgen revealed where Jakob's body could be found. As a consequence, the Police collected the evidence in the form of tyre tracks matching the tyres to Gafgen's car and footprints matching his shoes. On the way to the Police station, Gafgen confessed to having killed Jakob and then took the Police to a series of locations where some of Jakob's clothing and other incriminating items were retrieved.[267] Gafgen repeated these confessions in open court during his trial and he was convicted of abduction and the murder of Jakob and sentenced to life imprisonment.[268] Gafgen applied to the ECtHR seeking orders that the treatment he had been subjected to during Police interrogation concerning the whereabouts of Jakob constituted torture prohibited by Article 3 of the Convention. In addition, that his right to a fair trial under Article 6 of the Convention, comprising a right to defend himself effectively and not to incriminate himself, had been violated in that evidence which had been obtained in violation of Article 3 had been admitted at his criminal trial.[269]

As regards torture, the ECtHR was tasked to qualify the threats and to determine whether they amounted to torture for the purpose of establishing whether the evidence obtained as a result thereof could be excluded from admissibility.[270] The ECtHR reiterated that Article 3 of the Convention is absolute and makes no provision for exceptions or any derogation therefrom, even in the event of a public emergency

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267 Paragraphs 10-23.

268 Paragraphs 34 and 63.

269 Paragraph 2.

270 Paragraph 87.

threatening the life of a nation.[271] The ECtHR also stated that the nature of the offence allegedly committed by the applicant was irrelevant for the purposes of Article 3.[272]

In respect of the threats made against Gafgen, and in contrasting the Jalloh's case, the ECtHR held that for ill-treatment to fall under Article 3, it must attain some level of severity and that the assessment thereof 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.[273] Secondly, for treatment to be inhumane there should have been premeditation and that it caused either actual bodily injury or intense physical and mental suffering.[274] For treatment to be degrading, it had to arouse in its victim feelings of fear, anguish and inferiority capable of driving the victim to act against his will or conscience.[275] In addition, for the ill-treatment to be classified as torture, it had to meet the definition in Article 1 of the UNCAT.[276] The ECtHR noted that a threat of torture would merely be inhumane treatment and would require proof beyond reasonable doubt,[277] and that the threat or conduct of the State should be sufficiently real and immediate to constitute at least inhuman treatment.[278] The Court found that the Police threatened to exert intolerable

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271 Paragraph 87. See *Selmouni v France* Grand Chamber Application 25803/1994, para 95. See also *Labita v Italy* Grand Chamber Application 26772/1995, para 119.

272 *V v The United Kingdom* Grand Chamber Application 24888/1994, para 69. *Ramirez Sanchez v France* Grand Chamber Application 59450/2000, para 116. *Saadi v Italy* Grand Chamber Application 37201/2006, para 127.

273 *Gafgen* para 88.

274 Paragraph 89.

275 Paragraph 89.

276 Paragraph 90.

277 Paragraphs 91 to 92.

278 Paragraph 91.

pain and use a truth serum if Gafgen did not disclose the whereabouts of Jakob.[279] The duration of the use of the real and immediate threats of deliberate and imminent ill-treatment of the applicant, caused him considerable fear, anguish and mental suffering.[280] The ECtHR held that this amounted to inhuman treatment and a violation of Article 3 of the European Convention.[281]

The ECtHR, however, held that in determining the effect of the evidence on the fairness of the trial, three factors had to be considered. These are: the nature of the violation and the extent to which evidence was obtained as a result of the violation; the causal link between the interrogation and the real evidence secured; and the admission of this evidence at the trial.[282] The ECtHR noted that there is no consensus among the Contracting States on the exact scope of application of the exclusionary rule.[283] This may be taken to be a move by the ECtHR to maintain its legitimacy by avoiding causing offence to national legislatures.[284] Consequently, it was an application of the margin of appreciation that led to the clogging of the development of the ECtHR's supervisory role over the Contracting States. It also noted the need to take into consideration the competing interests and the interests of the Contracting State.[285]

279 Paragraphs 94-95.

280 Paragraphs 100-104.

281 Paragraph 108.

282 Paragraphs 170-172.

283 Paragraph 174.

284 Maffei S &Sonenshein D, 'The Cloak of the Law and Fruits Falling from the Poisonous Tree: A European Perspective on the Exclusionary Rule in the Gafgen Case' (2012–13) 19 *Columbia Journal of European Law* 21 at 48.

285 *Gafgen* para 175.

An examination of the three factors identified above[286] indicates that the Court established that the confession obtained as a result of the threats against Gafgen was not adduced in evidence notwithstanding the fact that the real evidence adduced at the trial was obtained as a result of the first confession to the Police.[287] It used the technical aspects that govern the types of evidence to qualify what would be admitted. The ECtHR held further that Gafgen made a second confession in the course of the trial which was corroborated by the findings of fact concerning the execution of the crime. This included the fact that the Police had been trailing him from the time he took the ransom from the family of Jakob.[288] Therefore, the second confession, corroborated by the untainted real evidence, formed the basis for his conviction, and consequently there was no unfairness occasioned by the admissibility of evidence obtained as a result of the threats made against Gafgen by the Police.

An analysis of this case reveals that first; the ECtHR still maintains that evidence obtained through cruel, inhuman or degrading treatment may be admitted in Court if its admission does not render the trial unfair. This is an indication that if an absolute right is subjected to relativity in the admission of evidence obtained through its violation; other non-absolute rights may not be effective to countermand the admission of illegally obtained evidence. So, if the ECtHR finds that the evidence does not render the trial unfair, it is admitted. Furthermore, in instances of a conflict of rights, like an absolute right against torture of a suspect, on the one hand, and the non-absolute right to life of a victim, on the other; the absolute right takes precedence.

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286 These included the nature of the violation and the extent to which evidence was obtained as a result of the violation; the causal link between the interrogation and the real evidence secured; and the admission of this evidence at the trial.

287 Paragraph 179.

288 Paragraph 180.

This can be viewed as the ECtHR's insistence on the absolute nature of the right against torture.[289] Thirdly, the ECtHR reiterated its reluctance to establish rules on the admission of evidence, whether it was real evidence or derivative evidence, on grounds of established international standards.[290] The ECtHR left it to the national legislatures to determine the admissibility of evidence.[291]

Secondly, this decision widens the debate on whether evidence obtained in violation of an absolute right in Article 3 is to be automatically rejected by the ECtHR. This is so because the moral basis for absoluteness is usually an assumption; until a legal prohibition is qualified to be able to generate the absolute right against torture, cruel, inhuman and degrading treatment.[292] As a result, the ECtHR requires convincing reasons to support an implied absolute right for purposes of rendering evidence obtained in violation of Article 3 inadmissible. It seems that the absolute nature of the right against torture, cruel, inhuman and degrading treatment is against the State and not against private individuals leading to the conclusion that the right may be absolute in principle but relative in its application. This seems to be a view propagated by many scholars, and in light of the developing jurisprudence of the ECtHR, the researcher is inclined to agree with them. Nowak and McArthur offer a distinction between torture,

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289 Steven G 'Is the prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International human Rights Law?' 2015 (15) *Human Rights Law Review* 101 at 103. See Maffei &Sonenshein (2012–13) 21. Mavronicola N, 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 *Human Rights Law Review* 723 at 736–737; Wierenga & Wirtz (2009) 365.

290 *Gafgen* paras 167-168.

291 Paragraphs 167 -168.

292 Steven G 'Is the prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International human Rights Law?' 2015 (15) *Human Rights Law Review* 101 at 110.

cruel, inhuman or degrading treatment (CIDT) and state that the distinction between torture and CIDT relates to personal liberty and outside a place of detention, CIDT is subjected to proportionality rendering it relative as opposed to absolute in its application.[293]

In conclusion, the ECtHR has gradually developed its jurisprudence on how to deal with evidence obtained through human rights violations. First, with regard to pretrial proceedings, it has developed the concept of proceeding from the bounds of formalities that need to be communicated to the applicant, to inculcate a test of substantiality. It follows that if the preliminary investigations substantially affect the rights of an applicant, the ECtHR will construe them to include proceedings that are relevant to evaluating the right to a fair trial. This development has been evident in the use of the primarity principle.

Secondly, the concept of the existence of a criminal charge is not dependent on who institutes it but on circumstances that inform the applicant that inquiries are being carried out that have the potential of affecting his right to a fair trial. It follows that although the information is required in the normal course of the execution of administrative duties by a government department, if it requires the applicant to disclose information that may incriminate him or her, a criminal charge may be deemed to exist. In addition, the non-qualification of the nature of the right extends to pre-charging incidents. However, there are grey areas with regard to the use of compulsory or statutory powers to obtain evidence from a suspect. This also applies to the extent of the State's intended use of self- incriminating and incriminating evidence. The developments in this area illustrate the use of the primarity principle.

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293 Nowak M & McArthur E 'The distinction between torture, cruel, inhuman or degrading treatment' 2006 (16) *Torture Journal* 147 at 151.

The ECtHR has recognised the right against self-incrimination as an international standard for a fair trial and has elevated it from respect for an accused's right to remain silent to judicial scrutiny of evidence obtained as a result of a legal compulsion on the accused, independent of his will. If the legal compulsion is coupled with the use of force, independent of the will of the accused, the ECtHR will not render it admissible. This is so because; to render the evidence admissible would mean that it lacks a strong stance against cruel practices used to obtain evidence.[294]

In addition, evidence obtained through a violation of an absolute right like that against CIDT may still be admitted if its admission does not render the trial unfair. This is so because the moral basis for absoluteness is usually an assumption; until a legal prohibition is qualified to be able to generate the absolute right against torture and CIDT.[295] Where there is a conflict of rights, the absolute right takes precedence. The ECtHR is still reluctant to establish rules for the admission of evidence and has always reiterated that the national legislatures should determine the admissibility of evidence.[296] It has, however, failed to develop clear lines with regard to incriminating and self- incriminating evidence. This is exacerbated by the use of the doctrine of appreciation to justify the approaches by the domestic authorities with regard to their execution of their obligations under the ECHR.

5.4 CONCLUSION

The experience of the ECtHR shows a broad and developed jurisprudence on evidence obtained through human rights violations. Its normative framework is

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294 Concurring judgment of Zupancic J, 44.

295 Steven (2015) 110.

296 *Gafgen* Case, paras 167 -168.

composed of decisions that have been handed down. Two theoretical frameworks, the doctrine of the margin of appreciation and the principle of primarity, inform the decisions of the ECtHR. However, an evaluation of decisions with regard to evidence obtained through human rights violations indicates that the ECtHR has applied the principle of primarity to a greater extent. This may be informed by the fact that the margin of appreciation was formed to deal with instances of a state of emergency unless the right to a fair trial was contested. Most of the decisions of the ECtHR deal with other aspects of the right to a fair trial, other than evidence obtained through human rights violations. This shows the ECtHR as a guarantor of the protection of the right to a fair trial in a wider perspective.

The jurisprudential developments with regard to evidence obtained through human rights violations have developed with regard to the relationship between Article 6 and pre-trial proceedings, the existence of a criminal charge, the non-qualification of the nature of the right to a fair trial, and the privilege against self- incrimination. These concepts are instructive in determining areas for reform in the African Commission. Before this is done, the experience of the Human Rights Committee should be placed into perspective.

The ECtHR's mode of dealing with evidence obtained through human violations shows the use of a human rights and victim-centred approach, insofar as a victim's

position is engaged through the adoption of the four principles.[297] In addition, this approach illuminates the use of fairness across both criminal and civil cases.[298]

297 See the discussion in subsections 5.2 to 5.3 above on the normative and jurisprudential position of the ECtHR.

298 See Chapter Four, sections 5.3.1.3 on the non- qualification of the right to a fair trial and *Khan v the United Kingdom*, para 34, *P.G. and J.H. v the United Kingdom*, para76, and *Allan v the United Kingdom*, para 42.

CHAPTER SIX

ADOPTION OF A VICTIM-CENTRED APPROACH BY THE AFRICAN COMMISSION ON EVIDENCE OBTAINED THROUGH HUMAN RIGHTS VIOLATIONS

6.1 INTRODUCTION

The previous chapter evaluated the jurisprudence of the HRC on evidence obtained through human rights violations. It was established that it had a normative framework that consisted of four General Comments and a jurisprudential framework that included Concluding Observations and decisions of the HRC. In addition, the HRC did not have a distinct theory regarding evidence obtained through human rights violations. Various schools of thought, such as the liberal theory, the implied use of the doctrine of the MoA, and the principle of primarity, all featured in its normative and jurisprudential frameworks. This formed a departure from the positions of the African Commission that used the liberal theory, and the ECtHR that used the doctrine of the MoA and the principle of primarity.[1]

The research established that the HRC is hesitant to deal with the admissibility of evidence unless there has been a manifest arbitrariness and maladministration of justice.[2] Finally, arbitrariness has to be subjectively qualified through a process where the victim substantiates his claim, coupled with a violation of the right against torture or CIDT, and the right to equality before courts or tribunals and a fair trial.

This chapter engages the final part of the second, and the third research question, based on findings of the first research question and the second research question in

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1 The doctrine of the MoA and the principle of primarity are dealt extensively in Chapter Four.

2 Chapter 4, subsection 4.3.1.1

part. It should be recalled that Chapters Four and Five have inquired into the experiences of other human rights bodies with regard to evidence obtained through human rights violations. The final part of the second research question is whether these experiences may improve the jurisprudence of the African Commission on evidence obtained through human rights violations. Furthermore, the third research question is whether a framework can be recommended to improve some of the shortcomings of the current practice.

On the basis of these questions, it is intended that this Chapter will argue that the experiences of the ECtHR and the HRC can aid the limited development of the jurisprudence of the African Commission. The research uses three sub-claims to substantiate this position. First, it revisits and qualifies the concept of limited jurisprudence on the part of the African Commission,[3] by recapping the principles that each human rights body presents, and how they speak to the African Commission's position. Secondly, an evaluation of Africa's possible peculiar situation is undertaken, to ensure that the two frameworks do not act as rubber-stamps of the mode of operation of the ECtHR and the HRC. Thirdly, the study presents the proposed framework that aims to improve the jurisprudence relating to evidence obtained through human rights violations.

6.2 TOWARDS A VICTIM-CENTRED FRAMEWORK

As noted at the beginning of this study, this thesis deals with evidence that is obtained through human rights violations from a suspect or an accused who has not yet

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[3] The concept of limited jurisprudence is discussed in Chapter Three for purposes of offering the direction of the study. It was acknowledged there, that the actual qualification would be done after engaging with the jurisprudence of the African Commission, the ECtHR, and the HRC.

appeared in court. Secondly, it deals with criminal cases only, where the evidence in issue has been obtained in the course of investigations before the hearing has taken place.[4] As such, the proposed framework deals with this individual's perspective. The previous Chapters have shown that the human rights bodies use different approaches in dealing with evidence obtained through human rights violations. The HRC does not place an emphasison a victim-centred approach, in dealing with victims.[5] It uses a human rights-based approach, where it finds closure in establishing violations of rights, without establishing the specifics of the violations, unless there is a manifestation of arbitrariness by the domestic courts.[6] The ECtHR uses a human rights and a victim-centred approach, which deals with a victim in a broad sense. The human rights approach is evident in the use of the fairness principle across both civil and criminal cases.[7] This is evident in the ECtHR's questioning of evidence obtained through human rights violations, and the effect of admission of evidence on the fairness of a trial.[8] The point of departure from the ECtHR's approach is the HRC's procedural requirement that there has to be an arbitrary manifestation of injustice in the admission of evidence, by the domestic courts, before the HRC evaluates such admissibility.[9] As such, this section seeks to evaluate the efficacy of the African Commission using a victim-centred approach, to deal with evidence obtained as a result of human rights violations by. The use of the proposed victim-based approach requires: first, to revisit the qualification of limited jurisprudence; secondly, to consider

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4 See Chapter One, section 1.7.

5 See Chapter Four, subsection 4.3.2.

6 General Comment 32 para 29 and 39.

7 See Chapter Four, sections 4.3.1.3 on the non- qualification of the right to a fair trial and *Khan v the United Kingdom*, para 34, *P.G. and J.H. v the United Kingdom*, para76, and *Allan v the United Kingdom*, para 42.

8 *Teixeira,* 52, *Garcia,* para 28.

9 Paragraphs 29 and 39.

Africa's peculiar situation; and thirdly, to qualify various principles on evidence obtained through human rights violations that are used by the ECtHR and the HRC.

6.2.1 A qualification of limited jurisprudence.

The concept of "limited jurisprudence" is described in Chapter Three. It is, however, revisited in this Chapter after looking at the experiences of the ECtHR and the HRC.[10] During the previous discussion of this question in Chapter Three, it was explicitly stated that the final qualification of 'limited jurisprudence' would be done after an analysis of the HRC and the ECtHR. This section, thus, establishes if the earlier propositions on limited jurisprudence in Chapter Three still stand. To qualify the jurisprudence as limited, the study evaluates the duration of the existence of the three human rights bodies, the statistical percentages to aid in qualifying the jurisprudence of the African Commission, and the quality of the decisions of the African Commission.[11]

6.2.1.1 The duration of existence of the ECtHR, HRC and African Commission.

The human right bodies that inform this study were formed to protect and promote human rights. The ECtHR was formed in 1954 to counter the growing threat of communism in Western Europe and the need to respect the rights of an individual as a prisoner of war.[12] Subsequently, this progress led to the development of the doctrine of MoA and the principle of primarity.[13] The African Commission was

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10 See Chapters Four and Five above.

11 The evaluation of the statistics was still within the desktop methodlogy laid out in Chapter One. The evaluation involved looking at the statistcs, and interrogating them in a manner that aid the creation of new knowledge in the area of study.

12 Robin & Claire (2010) 1–3.

13 The same cannot be said of the Organisation of American States or the African Commission both of which have had to grapple with brutal regimes. See Cooper A F &

established in 1986 with a mandate to promote human rights on the African continent and counter the dictatorial regimes and their acts of impunity, which had no regard for individual liberties.[14] On the other hand, the HRC provided for in the ICCPR is mandated to promote and protect of the universality of human rights for all persons by sovereign States.[15] These developments by the different human rights bodies at different times, with different ideologies, cannot be ignored if a viable framework is to be adopted. In addition, one cannot qualify the jurisprudence on account of the period of existence of the human rights bodies. More has to be done by paying close attention to the statistics.

The statistics indicate that human rights bodies have dealt with different numbers of decisions during their existence. The ECtHR, the HRC and the African Commission have handed down 19,500,[16] 964[17] and 229 decisions, respectively.[18] A simplistic literal interpretation of this statistical account with regard to the quantity or number of decisions leads one to believe that the ECtHR offers higher levels of jurisprudence, followed by the HRC, and trailed by the African Commission. This line of thought does not consider the quality of the decisions as a factor in evaluating these decisions. This approach, however, focuses on the number or quantity of decisions handed down,

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Thérien JP 'The Inter-American regime of citizenship: bridging the institutional gap between democracy and human rights' (2004) 25(4) *Third World Quarterly* 731-746 generally. See also note 27 below.

14 The history to the adoption of the ACHPR available at http://www.achpr.org/instruments/achpr/history/ (accessed 14 November 2017).

15 First preambular para to the ICCPR.

16 2016 Overview ECHR, 5 available at http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdf (accessed 14 November 2017).

17 Analysis of committee's caselaw available at http://www.ohchr.org/EN/HRBodies/CCPR/Pages/AnalysisCommitteesCaseLaw.aspx (last accessed 17 November 2017).

18 Statistics from the African Human Rights Case Law Analyser available at *http://caselaw.ihrda.org/doc/search/* (accessed 15 June 2017).

without looking at the reasons for the adoption of the human rights bodies. One needs to look at the statistics from a different perspective, which embraces the ideologies that guide the different human rights bodies. As such, the universality of human rights of the HRC, the need to fight communism by the ECtHR; and the need to check human rights violations and States' acts of impunity, of the African Commission need to be placed into perspective.

6.2.1.2 Using Statistical Percentages.

A statistical percentages' approach to a number of decisions handed down by the ECtHR, the HRC and the African Commission offers a new perspective to the study. The statistics of the ECtHR indicate that 40 per cent of its decisions relate to the right to a fair trial. It has handed down 19,500 judgments since its inception,[19] and 15 per cent of the decisions deal with the right against torture.[20] In comparison, with regard to the African Commission, 52 per cent of these decisions deal with the right to a fair trial, while 38 per cent deal with the right against torture.[21] From a percentages perspective, the African Commission's 52 per cent decision with regard to a fair trial shows that it is 12 per cent higher than the ECtHR's position. The decisions by the African Commission that deal with torture present a higher margin of 23 per cent, which is over and above the position of the ECtHR. The HRC has handed down 964 decisions, which is quite less than the statistics of the ECtHR and quite more than those of the African Commission. Despite the high number of decisions, the HRC only deals with matters of admissibility where there is a manifestation of arbitrariness on

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19 Subsection 4.2 in chapter 4 above. Overview 2016 ECHR available at http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdfOverview 1959-2016 ECtHR at 6 (accessed 1 November 2017).

20 Overview 2016 ECHR (2017) at 6.

21 Statistics from the African Human Rights Case Law Analyser available at http://caselaw.ihrda.org/doc/search/ (accessed 15 June 2017).

the part of the domestic court or actions by the State Parties. It has developed a doctrine on evidence obtained through human rights violations that oscillates around three principles, which include arbitrariness and admissibility of evidence, and evidence obtained as a result of torture and CIDT. The use of the percentages indicates that the ECtHR and the HRC have something to offer to the jurisprudence of the African Commission. The statistical percentages raise the question; why, despite the African Commission's higher percentages, it still has attained a limited number of jurisprudence. The same inquiry may be directed at the ECtHR: why, despite the lower percentage, it offers more jurisprudence in terms of decisions by the African Commission. This calls for a qualitative, and not a quantitative, approach to obtain answers.

6.2.1.3 The quality of decisions as a basis.

This subsection looks at the quality of the decisions and thereafter revisits the definition of 'jurisprudence' as explicitly introduced in Chapter Three. The question that guides this subsection is: why, even though the statistical percentages of the African Commission are higher than those of the ECtHR, yet the African Commission does not have large jurisprudence on evidence obtained through human rights violations.

It may be suggested that the quality of the decisions of the African Commission does not adequately reflect the normative principles that it has adopted since 1992.[22] The African Commission's decisions tend to deal with general principles for the improvement of the right to a fair trial other than the specific issues of evidence

[22] These include the Tunis Resolution, Dakar Declaration, Robben Island Guidelines and Principles.

obtained through human rights violations.[23] The general principles include bringing the domestic law into conformity with the ACHPR, dealing with evidence of non- State actors, evidence obtained through torture, and admissibility of evidence.

It is proposed that one should relate the statistical percentages to the quality of the decisions handed down. With regard to the ECtHR: 40 per cent of the decisions[24] offer principles that speak to pre-trial proceedings, the notion of a criminal charge, the non-qualification of the nature of the right to a fair trial, and the privilege against self-incrimination.[25] On the other hand, 52 per cent of the decisions of the African Commission speak to the right to a fair trial, but have not been used to reiterate some of the normative principles that deal with evidence obtained through human rights violations.[26] The HRC is hesitant, and as a result, uses arbitrariness, the right to equality and a fair trial, torture and CIDT, and how they relate to the admissibility of evidence. Before an approach that qualifies limited jurisprudence is finally adopted, the proposed working definition of jurisprudence should be revisited. It follows that the limitation is with regard to the content or quality of the decisions.

It should be recalled that this study adopted Salmond's definition of jurisprudence, which looks at jurisprudence as a fusion of the basis and the implementation of the law.[27] With regard to the African Commission, the normative provisions on evidence obtained through human rights violations form the basis of the law, while the

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23 See Chapter Three.

24 This includes the 40 per cent on the right to a fair trial and 15 per cent on torture and CIDT.

25 Subsection 4.2 in Chapter Four above.

26 Subsection 4.2 in Chapter Four above.

27 Salmond (1924) at 2.

decisions constitute the implementation and subsequent creation of jurisprudence. This fusion may be seen from the trend of the decisions of the ECtHR, which does not distinguish the normative framework from the jurisprudential one. This consistent trend has resulted in the development of jurisprudence that speaks squarely to evidence obtained through human rights violations. The position of the HRC still reflects engagement with a normative framework that is followed in the jurisprudential developments. The point of departure is its design to maintain State sovereignty at the expense of dealing with the admissibility of evidence. Therefore, Salmond's definition places the jurisprudence of human rights bodies within the meaning of jurisprudence. It follows that where a human rights body falls short of the definition; its jurisprudence is limited insofar as the normative basis of law is not engaged in its implementation. Therefore, where the subsequent engagement with the normative principles of the African Commission is not evident in the jurisprudence, it will be an indication of a limitation in the jurisprudential developments.

6.2.1.4 Theoretical perspective.

It has been indicated in the previous chapters, that the African Commission uses the liberal theory, while the ECtHR uses the doctrine of the MoA and Primarity in the execution of their respective mandates.[28] It has to be emphasised that these theoretical underpinnings do not appear in the drafting history or the laws that establish these judicial bodies. With regard to the African Commission, the liberal theory resonates with the normative developments of the African Commission. The theory embraces the exercise of the African Commission's mandate insofar as the latter draws inspiration from international law on human and peoples' rights.[29]

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28 See Chapter Three, subsections 2.4.2- 2.4.3. See also Chapter Five, subsections 5.2.1.1- 5.2.1.2.

29 Article 60, ACHPR.

The ECtHR, on the other hand, has used the MoA to give leverage to the States Parties in upholding their obligations under the ECHR. The principle of primarity has been read into the decisions of the ECtHR to show how the latter has attempted to ensure that a victim has an effective remedy.[30] The HRC has specifically rejected the use of the MoA doctrine,[31] although there are decisions that indicate its use.[32] It follows that there could be a minimum core requirement, where the MoA doctrine is used to deal with evidence obtained through human rights violations.

There is a body of scholarly literature that suggests that the HRC in a number of decisions has resorted to the use of its discretion to broaden the capacity of the States Parties with regard to their application of the principles of the MoA.[33] The decisions that have been examined in the preceding chapter, indicate instances of the application of the MoA.[34]

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30 The victim, is referred to as the person who lodges a complaint, communication or application in the HRC, African Commission or the ECtHR respectively. In addition, as noted in chapter one, the evidence in dispute should accrue from pre-trial engagements in criminal cases.

31 Shany Y'All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee' (2017) *International Journal of Dispute Settlement* 1 at 10, doi: 10.1093/jnlids/idx011; Keller H and Grover L 'General Comments of the Human Rights Committee and their Legitimacy' in Keller and Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012) 116 at 125. Kingsbury B 'Is the Proliferation of International Courts and Tribunals a Systemic Problem?', 31 (1999) *New York University Journal of International Law & Politics* 679 at 679.

32 Yuval (2017) 11, Legg A *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012) 74. Taylor PM *Freedom of Religion: UN and European Human Rights Law and Practice* (2005) 186–87;

33 Yuval (2017) 11, Legg (2012) 74. Taylor (2005) 186–87; Brems E *Human Rights: universality and diversity* (2001) 382.

34 Yuval (2017) 11.

The direct application of the MoA by the ECtHR and its implied presence in the functioning of the HRC indicates that the doctrine forms a crucial component in the adjudication of cases by international or regional human rights systems. Against this background, some of the principles that the doctrine offers may be instructive and indispensable. It must be noted, however, that none of these inform the drafting history or the final text of any of the human rights instruments. It is prudent to ensure that principles that engage jurisprudence in evidence obtained through human rights violations are used before one attempts to attach a thorough explanation. This is so because the African Commission always relates to Africa's peculiar situation. This status should be conceptualised in the final build-up to the proposed framework.

6.2.2 Considering Africa's peculiar situation.

The concept of the 'peculiar situation' of the African people has resonated in the corridors of the African Union and most of its organs. The Constitutive Act of the African Union recalls the heroic struggles of Africans for independence, human dignity, and economic emancipation.[35] As a result, the concept of human dignity was a distinct feature that informed the formation of the AU in the field of human rights. The most recent scenario that brought the concept of the status of the African people to the fore involved the Executive Council of the AU requesting the African Commission to withdraw observer status from a non-governmental organisation because of its support of gay rights.[36] As a result, it is important to consider

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35 Third preambular paragraph to the Constitutive Act of the African Union.

36 Press Statement: African Court rejects Centre for Human Rights and CAL request, leaving political tension within AU unresolved available at http://www.chr.up.ac.za/index.php/centre-news-a-events-2017/1930-press-statement-african-court-rejects-centre-for-human-rights-and-cal-request-leaving-political-tension-within-au-unresolved-.html (accessed 17 November 2017). See also Viljeon F 'African commission turns 30, but threats to its independence remain real' *The Conversation*

peculiarity for a number of reasons. First, it introduces the distinctiveness of Africa in its human rights system. Secondly, it imputes the need for caution in making decisions for Africa. This section attempts to understand the question of peculiarity and engage it in identifying the principles of the human rights bodies, which may be used to improve the jurisprudence of the African Commission.

6.2.2.1 Understanding the peculiar situation.

While the African Commission attempts to consider the peculiar situation of the African people in the execution of its mandate, the author is not aware of a definition of this concept. However, an engagement with the contexts where it has been used may lend credence to its appreciation. Webster's Dictionary defines 'peculiar' as something that is characteristic of only one person, group, or thing that is 'distinctive or different from the usual or normal'.[37] It follows that as regards Africa, its culture and history speak to peculiarity. Various engagements by the African Union and its organs point to the wide use of the concept of peculiarity. The results, however, fail to

available at https://theconversation.com/african-commission-turns-30-but-threats-to-its-independence-remain-real-85421 (accessed 17 November 2017). Other practical limitations in addition to the peculairites of the African Commission limit its ability to perform its functions to the fullest. This includes the debates on the actual and perceived power of the African Commission to interprete the Chatter in a manner thtat binds States Parties, its limited adjudicatory powers, lack of detailed analysis of the communications that are lodged with it, and remedies that do not speak to the actual violations. Recent developments by the Afreican Union to guide the mode of operation of the African Commission as an AU organ continually questions the independence of the commission and its ability to improve the development of its jurisprudence in such a space.

37 Definition of 'peculiar' available at https://www.merriam-webster.com/dictionary/peculiar (accessed 11 November 2018).

conceptualise 'peculiarity'.[38] The literature examined below is engaged by design to arrive at a working concept of some of the main peculiarities in Africa.

Enabulele deals with the incompatibility of national laws with the ACHPR and indicates that the difficulty in enforcing the decisions of the African Court arises from the local circumstances that prevail in different States due to their peculiarities.[39] He gives examples of peculiarities as including legal traditions, religious orientations, cultural, ethnic and historical diversities, and stages of economic, social and democratic developments, among others.[40] This contribution relates peculiarity to the distinct nature of the nationals of the States Parties.[41] It is, however, silent on the need for an international perspective on peculiarity. While this contribution neither defines peculiarity nor engages it from the perspective of human rights. It instructively points to the fact that the distinctiveness of a group of people is a crucial factor in gauging the effectiveness of a human rights system.

In his analysis of the enforcement of the economic, social and cultural rights under the ACHPR, Mbazira postulates that inspiration drawn from international human rights law should maintain the identity of regional human rights treaties in addressing

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38 A search for 'peculiarity' on the African Commission website returned 43 hits, which indicate different instance of peculiarity from various perspectives. These include cultural, societal, national and regional perspectives. These results are available at http://www.achpr.org/search/?q=peculiar (accessed 11 November 2018).

39 Enabulele AO 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?' (2016) 16 *African Human Rights Law Journal* 1 at 22.

40 Enabulele (2016) 22.

41 Enabulele (2016) 22.

peculiarities.[42] Just like Enabulele, Mbazira does not define the 'peculiar' regional issues. His contribution, however, indicates that an attempt to draw on the experiences of other international human rights bodies has to measure up to the peculiar circumstances of the people or group of people, bound to be affected. It follows that the quality of the principles on evidence obtained through human rights violations from other human rights systems are not sufficient if they do not speak to the distinctiveness of the African people with regard to their culture and values. This position still poses a question with regard to how one should deal with the peculiarities of a given group of people.[43] The gap is seen in the failure to look at 'peculiarity' from a human rights perspective or a people-centred perspective as alluded to by Enabulele.

Dorujaye and Oluduro evaluate the African Commission's development of jurisprudence on the rights of women.[44] In justifying their argument, they propose that the African Commission's development of the jurisprudence of the rights of women requires that it not only asks the woman question but the African woman question.[45] They indicate that by asking the right question, the African woman is placed at the centre of any decision with due regard to her peculiarities, such as, her historically disadvantaged position and the effects of patriarchy in Africa.[46] They indicate that the experiences of other human rights bodies, such as, the ECtHR and the Committee on

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42 Mbazira C 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) 6 (2) *Africa Human Rights Law Journal* 333 at 354.

43 While the conversation by the Executive Council and the African Commission is beyond the scope of this thesis, the guiding principle is that the peculiarity of the African people is crucial to the latter's execution of its mandate.

44 Dorujaye E & Oluduro O 'The African Commission on Human and People's Rights and the woman question'(2016) 24(3) *Feminist Legal Studies* 315 at 315.

45 Dorujaye (2016) 315.

46 Dorujaye (2016) 315.

Elimination of All Forms of Discrimination against Women (CEDAW Committee)[47] may offer insight in asking the right woman question.[48]

In principle, their contribution is instructive to this research for two reasons that are evaluated below. First, it requires that the right question is asked about the particular African problem. Thus, a question on principles that govern evidence obtained through human rights violations should be channelled to the person who is affected by the violations. In this case, the person affected is the victim who is either a suspect, an accused or remanded person in the course of pre-trial proceedings. This inculcates the use of the notion of specificity from a generalised approach that improves the right to a fair trial to a specific approach that requires that instances of evidence obtained through human rights violations are dealt with.[49] Secondly, inspiration from other human rights bodies should be used to show how evidence obtained through human rights violations should be dealt with, in light of Africa's peculiar situation.

In conclusion, this chronological engagement with scholars' views has provided four guidelines on peculiarity in the African context. First, peculiarity deals with the distinctiveness of a group with regard to benefitting from a human rights system. Secondly, the quality of legal principles from other human rights systems should not be instructive if they do not speak to the distinctiveness of African values and cultures. Thirdly, the answer to the question of improving the manner of dealing with evidence obtained through human rights violations should have the accused at its core as an

47 Dorujaye (2016) 315.

48 Dorujaye (2016) 315.

49 This position shows that the normative developments of the African Commission regarding the improvement of the right to a fair trial did not deal with the problems of evidence obtained through human rights violations. See discussion in Chapter Two.

affected party.[50] Fourthly, the experiences of other human rights bodies should act as guidelines to the answers that require the centrality of question three. These questions are in accordance with the need to adopt principles that speak to the circumstances of the victim in the African context. Jurisprudence from the ECtHR shows that domestic courts should follow the clear and constant jurisprudence of the European Court, in the absence of some special circumstances.[51] There are doubts whether a decision of the ECtHR which leads to unconstitutional consequences in a domestic jurisdiction would be followed.[52] In the same vein, a decision from the ECtHR or the HRC should speak to the limitations of evidence obtained through human rights violations in Africa. Finally, questions on improving the manner of dealing with evidence obtained through human rights violations to be qualified by the peculiar features that are presented by the African Commission before proposing the adoption of the experience of other human rights bodies.

6.2.2.2 Qualifying the 'peculiarity question'.

Before the various principles are engaged, the peculiarities of dealing with evidence obtained through human rights violations need to be established. It should be recalled that dealing with evidence obtained through human rights violations is based on the right to a fair trial accepted by all the three human rights bodies. The four questions

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50 The different methods used by the States Parties creates an elusive platform that may not adequately offer a solution in the interim. To see the modes of dealing with human rights violations in selected countries of Uganda, Kenya, Zimbabwe, South Africa, Canada and Hong Kong, see RD Nanima *The legal status of evidence obtained through human rights violations in Uganda* (Unpublished LLM Thesis University of the Western Cape 2016).

51 *R (on the Application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 para 26.

52 *Secretary of State*, para 76.

that should be addressed are: whether the right to a fair trial in Africa presents peculiarities with regard to its distinctiveness as compared to a universal application thereof; whether the principles examined in Chapters Four and Five are instructive as far as they address this distinctiveness; whether the current normative framework places the accused at its core; and what guidelines may be derived from the principles of the ECtHR and the HRC.

The right to a fair trial has to be placed in perspective before the foregoing questions are answered. The right to a fair trial is of universal application that obtained prominence after the two World Wars. It was established that the right is a cornerstone of a just society that is used to distinguish the guilty from the innocent. In addition, it is used to justify the conviction of an accused after the process of a fair hearing. This universality of the right is evident in the UDHR and the ICCPR.[53] The question is whether this universal right to a fair trial applies to Africa. It is argued, that the right to a fair trial, with particular regard to evidence obtained through human rights violations, extends to the accused in Africa.[54]

An engagement with any peculiarities of the right to a fair trial answers the question posed in the preceding paragraph. The peculiarities of the right to a fair trial may be garnered from the reasoning that informed the African Commission's need to improve it.[55] The improvement was premised on the need for the African Commission to exercise its mandate in the promotion and protection of human rights according to the

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53 Article 11(1) Universal Declaration of Human Rights G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Art 14 ICCPR.

54 This position is based on the need for the ratification of the provisions of the ACHPR and soft law, such as, the Principles and the Robben Island Guidelines. This involves a limitation on the application of the principles that emerge from this study, where the States Parties have not domesticated these provisions in their laws.

55 See chapter 2 on the evaluation of the normative framework on evidence obtained though human rights violations.

ACHPR and international standards.[56] In addition, the Dakar Declaration put specific safeguards in place to buffer the right to a fair trial: such as, the independence of the judiciary and the need for the States Parties to stop human rights abuses with impunity.[57] The Robben Island Guidelines were adopted to deal with the prohibition of torture as an enforcement of the right to a fair trial.[58] Finally, the Principles dealt with evidence obtained through human rights violations, evidence improperly obtained, and the duty of the prosecutors and the courts in dealing with evidence obtained through human rights violations.[59] These reasons indicate that the right to a fair trial is peculiar, premised on the need to improve it rather than to limit its full implementation. This is an indication that the right to a fair trial needs a broad-based approach that treats the right as critical other, rather than looking for the peculiarities that limit the developments in the jurisprudence on the right to a fair trial and evidence obtained through human rights violations. It follows that the universal right to a fair trial applies to Africa, including that the need to deal with evidence obtained through human rights violations extends to the accused.

Without prejudice to the foregoing, the peculiarity of the African human rights system needs to be placed in perspective as well, in juxtaposition with the other human rights system. First, the instrument that created the African Commission was adopted by the States Parties in 1981.[60] The adoption was against a background of colonialism, dictatorships and political upheaval. This was due to the fact that the African leaders could no longer remain indifferent to human rights abuses by dictatorships and

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56 Paragraph 1 of the Tunis Resolution.

57 Paragraph 4 of the Dakar Declaration.

58 Paragraph 7, Robben Island Guidelines.

59 The Principles, principle M(7) (a) - (f) & N(6)(d)1.

60 The history to the adoption of the ACHPR available at http://www.achpr.org/instruments/achpr/history/ (accessed 14 November 2017).

regimes in States like Uganda, Equatorial Guinea, and the Central African Empire.[61] It may be said that the political undertones spoke to the need for the protection of human rights.

In contrast, the ECHR was adopted in 1953 to avoid the human rights abuses that were pronounced in the wake of the Second World War, and to respond to the emergence of communism in Central and Eastern Europe that was a threat to the values and principles of a democratic society.[62] Therefore, unlike the ACHPR that sought to address gross human rights violations, the ECHR sought to deal with communist ideologies that threatened established democracies.[63]

This explains the responses that the two human rights bodies had with regard to the right to a fair trial. While the African Commission adopted a slow response, calculated to improve the right to a fair trial, the ECtHR had an established human rights system that could engage the concepts of evidence obtained through human rights violations through the use of fairness.

The ICCPR was adopted in 1966 with inspiration from the UDHR and sought to promote the universality of human rights for people from all walks of life, and irrespective of race, creed and culture.[64] This meant upholding the inherent dignity of an individual on the basis of freedom, justice and peace.[65] The mandate of the HRC requires dealing with different cultures across the globe as an international treaty body. This is different to the African Commission and the ECtHR which have few

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61 Ewunetie N and Alemayehu A 'The African Charter on Human and People's Rights' available at http://www.abyssinialaw.com/study-on-line/item/360-the-african-charter-on-human-and-peoples%E2%80%99-rights-achpr# (accessed 14 November 2017).

62 Rainey, Wicks and Ovey (2010) 1–3.

63 Rainey, Wicks and Ovey (2010) 1–3.

64 First preambular paragraph to the ICCPR

65 First preambular paragraph to the ICCPR

States Parties. While the ICCPR has 172 States Parties,[66] the ECtHR deals with 47 Contracting Parties,[67] while the African Commission deals with 53 States Parties.[68] This is instructive insofar as the smaller number of States Parties need to be evaluated against the period the regional parties have been in existence and the ideals that led to their creation. As a result, distinct features, such as, Africa's progressive steps in the improvement of human rights to the creation of principles that deal with evidence obtained through human rights violations, should be the yardstick for the periodic improvement of the jurisprudence.

These peculiarities range from political, cultural and economic relativism,[69] as a means of finding a solution to the distinct problems of Africa. This position is also shared by the ECtHR as it deals with its own peculiarities in Europe.[70] In conclusion, the right to a fair trial in Africa does not present any peculiarities that require any limitation of the right because of its universal nature; however, the African Commission's historic ideologies create peculiarities that require a nuanced approach in adopting principles from the ECtHR and the HRC. On this basis, the next logical step involves looking at the various principles, evaluating their engagement by the current normative and jurisprudential frameworks and proposing what should be

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66 Ratifications and reservations available at http://indicators.ohchr.org/ (accessed 14 November 2018).

67 Chart of signatures and ratifications of Treaty 005 available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=krZPWne8 (accessed 1 November 2018)

68 Ratification table: African Charter on Human and Peoples Rights available at http://www.achpr.org/instruments/achpr/ratification/ (accessed 1 November 2018)

69 Rubasha H *Accommodating diversity: Is the doctrine of margin of appreciation as applied in the European Court of Human Rights relevant in the African human rights system?* (Unpublished LLM thesis, University of Pretoria 2006) 253.

70 Brems E *Human Rights: Universality and Diversity* (2001) 362.

adopted. Any possible adoption should be with regard to the peculiarities identified above and the centrality of the accused as the affected party.

6.2.3 Engagement of the various principles.

The ECtHR has four major principles, based on trial fairness, which guide the evaluation of evidence obtained through human rights violations. These include: the concept of pre-trial proceedings; the existence of a criminal trial; the non-qualification of the nature of the right to a fair trial; and the rule against self-incrimination. The HRC also deals with evidence obtained through human rights violations if arbitrariness is manifested in the decision of the domestic court. It is these five principles that the research uses as possible pointers to the improvement of the jurisprudence on evidence obtained through human rights violations.

6.2.3.1 Pre-trial proceedings.

The first principle derived from the ECtHR reiterates that pre-trial proceedings speak to either the admission or the non- admission of evidence where there is conduct by the State, which substantially affects the position of the accused and the subsequent fairness of the trial.[71] The Principles, as a normative base for evidence obtained through human rights violations, provide that everyone has a right to an effective remedy.[72] The ECtHR indeed, has agreed that the non- admission of evidence obtained during pre-trial proceedings when it substantially affects the fairness of a trial, is an effective remedy.[73]

The jurisprudence of the African Commission has in the recent past developed to use pecuniary remedies in addition to the physical remedies that may be offered to the

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71 See subsection 4.3.1.1 in chapter four above.

72 The Principles, principle (C) (a).

73 See *Umbloscia, Brennan* and *Shabelnik* in subsection 4.3.1.1 in chapter 4 above.

affected party, other than remedies that relate to the admission of evidence.[74] For instance, in *Egyptian Initiative,*[75] the fact that the evidence was obtained through torture, was the major reason that the African Commission considered the violation of Article 7. It would have been prudent if it declared the evidence inadmissible. Other cases, that have had evidence obtained through human rights violations other than torture, have not been decided in a similar manner. One may argue that this position originates from the definition and understanding of torture and CIDT.[76] It follows that there is a need for emerging jurisprudence to expand the concept of an effective remedy to include instances of evidence obtained through human rights violations that are not limited to torture or CIDT.

This approach places the accused at the core of the improvement of the jurisprudence of the African Commission insofar as it engages a process that leads to the decision to either admit or reject the evidence. In addition, this approach speaks to the peculiarities of Africa where investigative organs explore loopholes to rely on evidence that would otherwise not be admissible. A good example that requires the African Commission's qualification of an effective remedy is where a domestic law may not be used to admit evidence obtained through torture but may use information obtained through torture to adduce evidence.[77] So while the evidence may not be admitted, the information obtained through torture to obtain evidence may be admitted.[78] It follows that the ECtHR's principles of pre-trial processes and how they

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74 A decision on the non-admission of evidence may be handed down when there are clear instances of torture, or CIDT.

75 Communication 334/2006. See discussion in subsection 3.3.4.2 in chapter three.

76 This is exacerbated by different understanding accorded to torture by the African Commission and some States Parties. See Mujuzi (2012) generally.

77 Mujuzi (2012) 388.

78 Mujuzi (2012) 388.

substantially affect the accused need to be engaged to improve the African Commission's jurisprudence. What needs to be qualified is that the States Parties may not have the logistic capacities, like their counterparts in Europe, to ensure that an accused enjoys the right to a lawyer during the pre-trial proceedings.[79] It follows that jurisprudence emerges that indicates that the accused has to be informed of this right in light of the circumstances that may substantially affect his position in pre-trial proceedings.

6.2.3.2 Existence of a criminal charge.

The second principle derived from the ECtHR regards the existence and scope of a criminal charge from its institution to its determination. The ECtHR states that a 'criminal charge' exists as soon as a person is notified by a competent authority of an allegation of commission of an offence, or where he has been substantially affected by the situation'.[80] This is an indication that from the time one's position is substantially affected by a competent authority, with regard to questioning or interrogation that subsequently affects his right to a fair trial, a charge is deemed to exist. This principle of the existence of a criminal charge is similar to the African Commission's normative principles that place a duty on the prosecutor and the court to ensure that evidence that has been obtained in violation of the accused's rights is not admitted.[81]

It is the researcher's view that at the core of this duty is the need to uphold the sanctity of the criminal trial process from the stage where the actions by the State in

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79 See discussion in subsection 4.3.1.2 in Chapter Four, above and compare with discussion in Chapter Three.

80 See discussion in subsection 4.3.1.2 in chapter four above.

81 Principle F (l) in the Principles. For a further discussion of the Principles and the duty of the prosecutor, see Mujuzi (2013) 287.

relation to an accused would substantially affect his or her right to a fair trial. This effect may be through the admission of evidence obtained through a violation of his or her rights. For instance, in *Zimbabwe Human Rights NGO Forum v Zimbabwe,*[82] the actions of the non-State actors substantially affected the rights of the accused to a fair trial. This provided the African Commission with an opportunity to indicate that although the non-State actors had obtained the evidence at a time when the complainants were not charged, their position with regard to such evidence was substantively affected.[83] Although the African Commission would have arrived at a similar conclusion in relation to the procedural due process, it would nevertheless have enunciated a principle on dealing with evidence obtained through human rights violations where an accused has not been charged. This approach would protect the accused during the processes engaged in by investigative organs when there is no de facto preference of charges. Secondly, it would place the accused at the centre of the question of dealing with evidence obtained before the trial commenced. In addition, the peculiarities of impunity by the police that led to the admission of evidence obtained through human rights violations would be dealt with.

It follows that clarity on the presumed existence of a criminal charge by the ECtHR, is worth engaging with in order to improve the African Commission's jurisprudence. The limit of the application of this principle would be the status of the principle in the domestic courts. Unlike the ECtHR that requires enforcement of its decisions, the African Commission requires that the States Parties ratify the principles in their domestic laws.

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82 Communication 245/02.

83 See discussion in subsection 3.3.3.2 in chapter three above.

6.2.3.3 Non-qualification of the nature of the right to a fair trial.

The third principle derived from the ECtHR relates to the non- qualification of the right to a fair trial. The ECtHR states that a 'criminal charge' exists as soon as a person is notified by a competent authority of an allegation of commission of an offence, or where he has been substantially affected by the situation.[84] This charge continues to exist until it is no longer contested.[85] This period runs from when one's position is substantially affected by a competent authority until he has gone through the trial process that includes the courts of first instance and subsequent appeals. This principle of the non- qualification of the right to a fair trial is similar to the African Commission's normative frameworks. For instance, the Dakar Declaration's reiteration of the four major principles that engaged the improvement of the right to a fair trial ideally indicated that they ought not to be qualified. These included the need for States Parties to stop the acts of impunity and the influence of court decisions, observe the rule of law, uphold the independence and impartiality of the judiciary, and ensure that military courts adhere to fair trial standards.

The point of departure is the limited development of a jurisprudence that uses these principles to deal with the scope of a fair trial with regard to the need for caution in admitting evidence that has been obtained through human rights violations at the start of a trial. Secondly, these principles need clarification in the African Commission's decisions with regard to trials that are excessively long and effectively tarnish their fairness with regard to the accused, applicant, or appellant. A case where the principles could have been used was *Law Office of Ghazi v Sudan,* where the accused were incarcerated for close to nine months before the trial started.[86]

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84 See discussion in subsection 4.3.1.2 in chapter four above.

85 See discussion in subsection 4.3.1.2 in chapter four above.

86 See discussion in subsection 3.3.1.2 in chapter three.

This substantially affected them in that the evidence obtained in the course of the illegal detention was admitted. This was exacerbated by the fact that the appeal process was limited by provisions of the Criminal Procedure Act.[87] The African Commission ought not to have shied away from indicating the need for the non-qualification of the nature of the right to a fair trial. Such an approach would protect and promote the accused's right to a fair trial. Secondly, it would place the accused at the centre of the question of dealing with evidence obtained during the illegal incarceration, and the question of the right to appeal as protecting the right to a fair trial.[88] In addition, the peculiarities of Africa's political terrain that usually uses impunity to lead to the admission of evidence obtained through human rights violations would be questioned. Therefore, from a jurisprudential perspective, clarity on this principle from the ECtHR in the African Commission's context is instructive in improving its jurisprudence.

Without prejudice to the foregoing, African States still use values that may provide for qualification of the right to a fair trial. For instance, there are mixed messages with regard to LGBTI rights. A case in point involves a non-governmental organisation called Coalition of African Lesbians (CAL) which was granted observer status by the African Commission in 2005.[89] Subsequently, the Executive Council of the AU requested the African Commission to withdraw observer status from CAL because of

87 See discussion in subsection 3.3.1.2 in chapter three.

88 See principles from Durojaye & Olurudu (2016) above on asking the right question to a peculiar party by placing the former at the centre of the engagement.

89 ND Sekyiamah (2015) After Years of Activism CAL Attains Observer Status at ACHPR available at https://www.awid.org/news-and-analysis/after-years-activism-cal-attains-observer-status-achpr (accessed 7 July 2018).

its support of gay rights.[90] Unfortunately, the African Court's was unable to offer an advisory opinion on the issues because CAL was not an NGO that was recognised by the African Commission.[91] This is exercebated by the fact that the AU has publically indicated distaste with regard to some rights.[92] The lack of a regional consensus on these aspects remains an obstacle that affects the development of the jurisprudence.

6.2.3.4 Principles on the right against self-incrimination.

The fourth principle derived from the ECtHR relates to the right against self-incrimination where, the use of legal compulsion coupled with the use of force, independent of the will of the accused, renders the evidence inadmissible.[93] This principle resonates with the Principles that use the right to human dignity as a yardstick to ensure that evidence is not obtained in violation of one's rights or improperly.[94]In this regard, Principle M (7) prohibits taking undue advantage of a detained or imprisoned person by compelling him or her to confess, for the purpose of

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90 Press Statement: African Court rejects Centre for Human Rights and CAL request, leaving political tension within AU unresolved available at http://www.chr.up.ac.za/index.php/centre-news-a-events-2017/1930-press-statement-african-court-rejects-centre-for-human-rights-and-cal-request-leaving-political-tension-within-au-unresolved-.html (accessed 17 November 2017). See also Viljeon F 'African commission turns 30, but threats to its independence remain real' *The Conversation* available at https://theconversation.com/african-commission-turns-30-but-threats-to-its-independence-remain-real-85421 (accessed 17 November 2017).

91 See also Viljeon F 'African commission turns 30, but threats to its independence remain real' *The Conversation* available at https://theconversation.com/african-commission-turns-30-but-threats-to-its-independence-remain-real-85421 (accessed 17 November 2017).

92 Executive Council's position that the grant of Observer status to an NGO that promotes gay rights, should be revoked.

93 Concurring judgment of Zupancic J, page 44.

94 Principle N(6)(d)1 of the Principles.

incriminating himself or herself or incriminating others.[95] With regard to the jurisprudential framework, the African Commission acknowledges that the rule against self –incrimination forms the core of the right to a fair trial, but does not engage this principle beyond that. In *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials/Ethiopia),*[96] the African Commission states that the protection against self-incrimination should be dealt with by States Parties. It should be noted, however, that to deal with the dangers of self-incrimination to the human dignity of individuals, the right to a fair trial should form the conversation with regard to the admission of evidence that may be obtained through human rights violations. The facts (above) reveal that there was a need for this principle to be dealt with by the African Commission. This would lead to the protection and promotion of an accused's right to a fair trial by ensuring that evidence that has been obtained through self-incrimination is inadmissible. It is suggested that the specific rules would emerge as the jurisprudence develops.

By ensuring that evidence obtained through an accused's self-incrimination is not admitted, places him at the centre of the question. Peculiarities, such as States' use of information acquired through torture to obtain incriminating evidence, may be dealt with in this approach.[97] This offers the African Commission the opportunity to deal with instances where States Parties exploit loopholes in the law to use information obtained through human rights violations. The fact that such information leads to the admission of evidence obtained through human rights violations, means that this principle would be instructive in creating jurisprudence with regard to evidence

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95 Principle M(7)(d).

96 Paragraph 128.

97 See Mujuzi (2012) generally with regard to Uganda's police using a loophole with regard to using information to lead to the admission of otherwise inadmissible evidence.

obtained through self- incrimination. Another area that raises questions is the use of incriminating evidence that has been obtained in violation of a third party's rights. Such instances would gradually be dealt with. It should be stated that this principle is instructive in improving the position regarding evidence obtained through human rights violations.

6.2.3.5 Arbitrariness as a measure of dealing with evidence.

The HRC uses arbitrariness, equality and the right to a fair trial, and the concept of torture or CIDT as the principles that guide its discretion in dealing with the admissibility of evidence.[98] It should be recalled that the HRC uses substantiality in establishing arbitrariness, but on a very subjective basis.[99] In addition, the rationale for doing so is to maintain the legitimacy of its decisions without creating principles that do not objectively relate to all the States Parties. In comparison, the African Commission has to tread carefully with regard to engaging the principles derived from the HRC. Although the arbitrariness principle was to be used, it fails to conform to the various considerations examined in this chapter, as discussed below.

The principle does not reflect the peculiarity of the right to a fair trial and the need for its improvement from a regional perspective. Conversely, this principle recognises improvement by the States Parties and not the HRC. This is so because the HRC views admissibility of evidence as a peculiar issue that is better left to the domestic courts to deal with without intervention from the HRC. Where the African Commission adopts this reasoning it means that the normative framework is adequate to offer guidance to the States Parties to improve their jurisprudence to conform to the standard of the African Commission. This approach presents a fundamental flaw

98 Subsection 5.2.2.1 in chapter 5 above.

99 Subsection 5.2.2.1 in chapter 5 above.

insofar as jurisprudence may not develop at the regional level. Secondly, in comparison to the jurisprudence of the ECtHR, the HRC does not have lots of jurisprudence on how to deal with evidence obtained through human rights violations. Thirdly the arbitrariness of the HRC perspective is too subjective to lead to tangible results. While an objective standard may embrace modifications to deal with questions of substantiality, it places a State Party at the core of the peculiarity question. A shift from the accused to the State Party would perpetuate the problem. Consequently, the use of arbitrariness conflates the contemporary normative and jurisprudential principles.

6.3 CONCLUSION

This chapter has dealt with the final part of the second, and the third research question by inquiring whether the experiences of other human rights bodies can be used as an aid, to enhance the development of the jurisprudence of the African Commission. It has used the argument that the experience of the ECtHR and the HRC regarding evidence obtained through human rights violations can assist the limited development of the jurisprudence of the African Commission. The discussion has presented a synopsis of the normative and jurisprudential principles of the three human rights bodies, and confirmed the qualification of 'limited jurisprudence' as a matter of quality, rather than the quantity of the decisions. In addition, it has considered the peculiarity of the African regional human rights system by suggesting an understanding and qualification thereof. The final step required a discussion of the adoption of the principles derived from the ECtHR and the HRC by the African Commission, with possible qualifications that related to the desired quality of the decisions of the African Commission.

With regard to pre-trial proceedings, the African Commission should require a framework that ensures that an accused can access his right to counsel such that instances that substantially affect his position in pre-trial proceedings are adequately dealt with in term of legal advice.

A framework that offers a wide interpretation of the existence of a charge ensures the protection of human rights during the collection of evidence. A framework that implies the existence of a charge before an accused is charged if the actions of the State party or investigating officer ensures the protection of human rights during the collection of evidence. This is instructive in dealing with taints of human rights violations where an accused has not been charged. This approach ensures the protection of an accused in the course of processes engaged in by investigative organs.

Furthermore, a framework that interprets the non- qualification of the right to a fair trial is an indication that a 'criminal charge' exists from the moment one is notified by a competent authority of an allegation of commission of an offence, or where he has been substantially affected by the situation.[100] This remains the position until the charge is no longer contested.[101] Where protection of the rights of an individual is effective from investigation to the appeal processes, impunity on the part of the State Parties is greatly curtailed.

The non-admission of evidence obtained through an accused's self-incrimination is an approach that places the former at the centre of any interventions. As such, peculiarities, are significantly disregarded on account of their failure to be

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100 See discussion in subsection 4.3.1.2 in chapter four above.

101 See discussion in subsection 4.3.1.2 in chapter four above.

contextualised as part of a solution that embraces the accused at the centre of improving the mode of admitting evidence obtained through human rights violations. As noted earlier, the African Commission has the opportunity to deal with loopholes that are exploited by States Parties with regard to information obtained through human rights violations. In effect this approach protects the accused and the third parties whose rights would otherwise be violated in the course of collecting evidence to incriminate an accused.

Finally, where the African accused person is looked at as the victim, the foregoing principles on pre-trial proceedings, existence of a criminal charge, non- qualification of the right to a fair trial, principles of the rights against self-incrimination and the use of arbitrariness should all envisage the position of the African accused person in light of his circumstances. This would move from a human rights-based approach, a hybrid approach to a victim centres approach.[102]

[102] See principles from Durojaye & Olurudu (2016) above on asking the right question to a peculiar party by placing the former at the centre of the engagement.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

7.1 GENERAL CONCLUSIONS

The study sought to establish the status of the African Commission's jurisprudence on evidence obtained through human rights violations, and whether there was need for reform. It was guided by three research questions. First, whether the African Commission had a mode of dealing with evidence obtained through human rights violations. Secondly, whether it could use the experiences of other human rights bodies to improve the development of its own jurisprudence. Thirdly, whether a framework could be recommended to improve some of the shortcomings of the current practice. The first research question was dealt with in Chapters Two and Three, which dealt with the normative and jurisprudential developments of the African Commission, respectively. The second research question was partly dealt with in Chapters Four and Five, by looking at experiences from other human rights bodies. Furthermore, the second research question was re-engaged in Chapter Six along with the third research question. Chapter Four involved an evaluation of the experiences of the HRC, and how they dealt with evidence obtained through human rights violations. In addition, Chapter Five visited the experiences of the ECtHR with regard to this kind of evidence. Chapter Six was used to create a model framework that evaluated how principles from the HRC and the ECtHR inform the improvement and development of jurisprudence relating to evidence obtained through human rights violations. This had to be done, subject to the peculiarities of Africa. The peculiarities of Africa were instructive in as far as they interrogated the African Commission against the backdrop that the former is a treaty body, which doesn't have well-developed rule of procedure like a Court. It suffices to note that the use of the right to a fair trial cuts across all the

three human rights bodies regardless of the difference in the wording of the ACHPR,[1] the ECHR,[2] and the ICCPR.[3]

Each of the preceding chapters has its own conclusions, and as such, most of them will not be repeated here. It should be noted, however, that these subsequent general conclusions and observations deserve attention.

It was established that while the African Commission had a normative framework on evidence obtained through human rights violations, the jurisprudential developments were limited. The limitations were with regard to various aspects as illuminated here. First, the African Commission's normative structure did not present a clear position in dealing with the admissibility of evidence obtained through human rights violations. Initially, the normative framework was developed on the need to improve the standard of the right to a fair trial other than the admission of evidence obtained through human rights violations. As such, the Tunis Resolution and the Dakar Declaration had little to offer to resolve this problem. This position changed with the adoption of the Robben Island Guidelines, which dealt with evidence obtained through torture. This move addressed only evidence obtained through torture and CIDT other than other human right violations. The adoption of the Principles was at a time when the normative framework had done little to alleviate the problem of dealing with evidence obtained through human rights violations.

Secondly, the trends in the development of the jurisprudence of the African Commission on Human Rights on evidence obtained through human rights violations shows a limited development in the jurisprudence. These trends are informed by two reasons. First, the normative developments were not specifically tailored to

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1 Article 6.

2 Article 6.

3 Article 14.

adequately deal with evidence obtained through human rights violations. As such, the development of the jurisprudence has been generally targetted at enhancing the right to a fair trial rather than specifically dealing with evidence obtained through human rights violations.

The normative framework that consists of the Tunis Resolution, the Dakar Declaration, the Robben Island Guidelines and the Principles is guided by the liberal theory that has foreseen a lot of involvement by NGOs, CSOs and key informers in the foreign policy of African States. The trend of the normative developments has been in three phases. First, a general improvement of the right to a fair trial;[4] secondly a radical departure to concentrate on the non-admission of evidence obtained through torture and CIDT;[5] and thirdly, an engagement with evidence obtained through human rights violations.[6]

The jurisprudential developments are based on the normative principles which deal with the general improvement of the right to a fair trial, until they are engaged through the use of the Robben Island Guidelines and the Principles. Most decisions of the African Commission illuminate principles of international law, such as recommendations to bring the law into conformity with the ACHPR;[7] exhaustion of local remedies;[8] responsibility of the State for the actions of non-state actors;[9] and dealing with evidence obtained through torture.[10] These decisions, however, fail to

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4 The Tunis Resolution and the Dakar Declaration.

5 The Robben Island Guidelines only deal with evidence obtained through torture or CIDT. See Chapter Two subsection 2.6.3.

6 The Principles.

7 Chapter 3, subsection 3.3.1.

8 Chapter 3, subsection 3.3.2.

9 Chapter 3, subsection 3.3.3.

10 Chapter 3, subsection 3.3.4.

adequately deal with evidence obtained through human rights violations. This is because the facts presented questions on the admission of evidence obtained through human rights violations, but the African Commission either ommitted to address these issues or did not address them adequately in its recommendations.[11] An evaluation of these decisions was key in illuminating the limited scope of the jurisprudence emanating from the African Commission. In line with the purpose of the study, this engagement of the decisions of the African Commission created a ground to evaluate the concept of jurisprudence and showed how it may be limited.[12] Subsequently, it led to how the experiences of the HRC and the ECtHR are instructive in aiding the development of the African Commission's jurisprudence.

The evaluation of the decisions of the ECtHR shows the use of the fairness principle in dealing with evidence obtained through human rights violations. This principle cuts across four major themes of: Article 6 and pre-trial proceedings; the requirement for the existence of a criminal charge; the non- qualification of the nature of the right to a fair trial;[13] and the privilege against self-incrimination. The experience of the ECtHR shows a developed jurisprudence that is informed by two theoretical underpinnings of the doctrine of the margin of appreciation and the principle of primarity. The HRC, on the other hand, is hesitant to deal with the admissibility of evidence, unless there is evidence of arbitrariness and a violation of the rights to equality and a fair trial before

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11 The detailed engagement with this case is evident in Chapter Three, subsections 3.3.1 – 3.3.4.

12 See Chapter Three generally.

13 The non-qualification of the nature of the right to a fair trial is hinged on the wide application of fairness of a trial by extending it from criminal to civil cases. In addition this involves dealing with evidence, though not obtained through human rights violations, but its admission would lead to an unfair trial. This concept of admission of evidence that would render the trial unfairness is beyond the scope of this study. See Chapter Five, subsection 5.3.1.3.

tribunals and the right against torture and CIDT.[14] The HRC perspectives show that deals with the theories of liberalism, MoA and primarity in various instances.[15]

A cumulative engagement with the African Commission's position, the ECtHR and the HRC informed the need to adopt a framework that aids the development of the limited jurisprudence of the African Commission.[16] In dealing with the final part of the second, and the third research question, Chapter Six adopted a victim-centred approach after the qualification of limited jurisprudence; consideration of Africa's peculiar situation; and the qualification of various principles on evidence obtained through human rights violations that are used by the ECtHR and the HRC.

7.2 RECOMMENDATIONS

The recommendations bridge the gap between the current jurisprudential trend of the African Commission and the proposed principles set out in the previous chapter. This forms a practical expression of the viability of an improvement of the jurisprudence regarding evidence obtained through human rights violations, through the use of principles that speak to the peculiarities of the African accused.

The African Commission should adopt a complete approach shift with regard to the interpretation and application of Articles 60 and 61 of the African Charter as far as it engages a broad, rather than a restrictive approach in interpreting communications involving a right to a fair trial and evidence obtained through human rights violations.

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14 Chapter 5, subsections 5.3.2.1 to 5.3.2.3.

15 Chapter 5, subsections 5.3.2.1 to 5.3.2.3.

16 This is the victim- centred approach that is discussed in Chapter Six subsections 6.2.1-6.2.3.

The remedies offered should improve the status of the subjective person whose rights are violated other than the general improvement of the right to a fair trial.[17]

The scope of the right to a fair trial should include instances where one has not been formally charged. The facts should show that the suspect's position has been substantially affected by the actions of the police or law enforcement officers.[18] It follows that where any evidence obtained substantially affects the fairness of the trial of an accused, its admission has to be carefully engaged.[19] This means that the rights of a person who has not been formally charged are protected, regardless of the outcome that could have been reached. This is an indication that actions of the State should not affect the core and settled criminal law principles, such as the presumption of innocence. As such, the actions of the investigators should be examined with regard to how they substantially affect the accused's right to a fair trial, before (s)he has been formally charged. As such, Communications that involve evidence obtained before an individual is charged would be looked at from a different perspective, with regard to how an individual is substantially affected by the actions of the investigating officers before the charges are prefered.[20]

The laws of States Parties that do not conform to the ACHPR should be progressively changed to reflect the desired position.[21] In addition, where the African Commission requires that a State conform its domestic law to the ACHPR, the specifics of what

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17 See the two decisions of the African Committee of Experts on the Rights and Welfare of the Child in *MRGI and another v Mauritania*, Communication No 006/Com/002/2015, paras 47-58 and *IHRDA v Cameroon* Communication No 007/Com/003/2015, para 46-57.

18 See Chapter Five, subsection 5.3.1.2.

19 See discussion in Chapter Four subsection 4.3.1.2 in above.

20 *Ghazi* para 2.

21 The National Security Act of Sudan, the Prohibition and Prevention of Corruption Act of Uganda.

should be changed have to be clearly recommended. This should be followed up through State Party Reporting and Guidelines on how explicit decisions on Communications need to be carried out to ensure that the recommendations of the African Commission are upheld.[22] While it is expected that the State ought to know the parts of the domestic law that do not conform to the ACHPR, at times a State Party may exploit this loophole.[23] For instance in Sudan, the provisions on illegal detention have survived all the amendments, and repeals of the National Security Act. It is proposed that to avoid these eventualities, the African Commission offers clarity on the law that should conform to the ACHPR.[24] While there is a danger that lurks in offering details, this can be solved through an evaluation of how the affected State Party has upheld the rights under the ACPHR in light of the conformity. The African Commission should exercise diligence in determining the margin to which States Parties should be allowed to deviate from their obligations under the Charter.[25]

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22 The African Commission's requirement that the State Party bringing its laws into conformity includes various areas such as the definition of torture as provided for in the UNCAT. See insights in the African Commission's Concluding Observations on the initial periodic report of Botswana, 2010 dated 12 – 20 May 2010, available at http://www.achpr.org/files/sessions/47th/conc-obs/1st-1966-2007/achpr47_conc_staterep1_botswana_2010_eng.pdf (accessed 16 September 2016). Constitution of the Republic of Botswana 1997, s 7 available at http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf (accessed 16 September 2016).

23 Mujuzi (2012) generally.

24 Report to the US Department of Defence on Sudan Human Rights Practices 1994, paras 19- 20 available at http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_nea/Sudan.html (accessed 13 September 2016). See the National Security Forces Act 1999 ss 30(d)& (e), 50(1)(e) & (g).

25 While this sounds like an application of the MoA, a study which inquires into the African Commission's implied uses of the MoA is instructive. Insights can be obtained from carrying out a similar study and evaluating recent decisions of the Africn Court such as Abubakari, Nguza and Owino v Tanzania.

A study should be undertaken by the African Commission to establish the approaches that each of the States Parties use with regard to the remedy of the non- admissibility of evidence obtained through human rights violations.[26] This is in line with its mandate to formulate and lay down principles and rules aimed at solving legal problems, which relate to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation.[27] This should lead to the development of principles on admissibility of complaints which depict a lack of equality with regard to complainants by the African Commission. The lack of equality is evident where the African Commission requires that a Complainant exhausts domestic remedies with regard to admissibility of a complaint that contests the admissibility of evidence obtained through human rights violations. The inequality is depicted in two scenarios. First, a complainant from a State Party that does not provide for a procedural framework that questions a domestic court's admission of evidence obtained through human rights violations does not have to show that (s)he used all the domestic remedies before approaching the African Commission.[28] Secondly, a Complainant from a State Party that does not have a procedural requirement in contesting the admission of evidence in a domestic court.[29] The African Commission, therefore, has a duty to develop a soft law to deal with the

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26 This is based on the discussion emanating from Chapter Three, subsection 3.3.2.1; Chapter Six, section 6.2.

27 Article 45 (1) b. See Nsongurua JU 'The African Commission and fair trial norms' (2006) 6 *Africa Human Rights Law Journal* 229 at 305.

28 *Mukoko* (2012) generally.

29 It is imperative that the jurisprudence of the African Commission strives for uniformity in desling with admissibility of evidence obtained through human rights violations among state Parties. This will offer a preventive mechanism in engaging its subsequent jurisdiction with regard to dealing with evidence obtained through human rights violations.

issues of admissibility before the seizure stage, with regard to evidence obtained through human rights violations.

This will streamline the current dual system of the existence of procedural requirements for the admission of evidence obtained through human rights violations in some States Parties, and the lack of similar requirements in other States Parties.[30] It will aid the availability and effectiveness of the rule relating to the admissibility of evidence obtained through human rights violations.[31] Thus, the principle of exhaustion of domestic remedies[32] will enable the African Commission to develop a different yardstick with regard to the exhaustion of the remedy of admissibility of evidence obtained through human rights violations.[33] Furthermore, States Parties which have domestic laws that provide for procedural remedies to exhaust, with regard to obtaining locus for the exclusion of evidence obtained through human rights violations need to be reminded about their obligations under the African Charter; to '… recognise the rights, duties and freedoms enshrined in the Charter and to 'subsequently adopt legislative or other any other measures to give effect to them'.[34]

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30 See discussion on Zimbabwe and South Africa in Nanima (2016) 83-91.

31 *De Jong, Baljiet and Van den Brink* (1984) 8 EHRR 20.

32 ACHPR Arts 41(1)(c), 46, 50 and 56(5).Optional Protocol to the ICCPR General Assembly resolution 2200A (XXI) of 16 December 1966, Art 2 and 5(2)(b).

33 Insights may be obtained from the adoption of the use of a Trial-within-a-trial. For instance, in South Africa, such impugned evidence is subjected to a trial-within-a-trial see the Constitution of South Africa 1996 (Constitution, 1996), s 35(5). As a procedural issue, see Zimbabwe's case of *Jestina Mukoko V Attorney General,* unreported case 36/ 2009 (20 March 2012). See also D'Ascoli & Maria (2007) 4.

34 ACHPR Art 1. The use of the MoA should be subjected to a study and evaluate the intricacies in dealing with evidence obtained through human rights violations in a manner that does not create a lot of discretion or an inclination to political expediency.

A reflection on the evaluation of the decisions from the African Commission indicates that the State Parties are responsible for various human rights violations, which questions whether the States Parties would take up these recommendations. It is argued that these recommendations will be taken up by the States Parties because the theoretical underpinning to this study indicates that the liberal theory plays a great role in forging the international policy of African States. First, the fundamental actors in international politics are individuals and private groups or private organisations.[35] These collectively promote the various interests of the people within the jurisdiction of a given State Party.[36] Secondly, the State through its actions represents the concerns of the domestic players other than its concerns as a unitary body. As a result, the State acts as the tool that is used to achieve the goals, which may not otherwise be achieved by individuals on the international level. Thirdly, the behaviour or the actions of the State are a reflection of the various patterns of State preferences. As such, when the State proposes a given course of action or submits a report to the African Commission, Civil Society Organisations (CSOs) may object to some of the assertions and require that the State accounts for, or changes, its position.[37] It follows that the position taken by the State is informed by the engagement of the domestic players. In instances where there are Concluding Observations in a State

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35 Stephan H & Beth AS 'Theories of International Regimes' (1987) 41 *International Organisations* 491 at 499.

36 Stephan & Beth (1987) 499.

37 For instance, see the statement of the Legal Resource Centre on the Report of South Africa to the African Commission at the 60th Ordinary Session of the African Commission in Niger, 9 May 2017, requiring the latter to comply with previous Concluding Observations on the need for effective remedies for victims of torture. Available at https://realisingrights.wordpress.com/2017/05/15/lrc-submissions-to-60th-ordinary-session-of-the-african-commission/ (accessed 24 August 2017).

Report from the African Commission, they engage with the views of CSOs and other organisations.[38]

The African Commission should strive to offer guidance on the interpretation of Article 6 of the ACHPR with regard to evidence obtained through human rights violations through its Concluding Observations or General Comments. First, this guidance should be through the use of an empirical study to inquire into how the State Parties deal with instances of evidence obtained through human rights violations. Secondly, the answers from inquisitorial approach should inform the amendments to the Guidelines on State Party Reporting (Guidelines) on instances of evidence obtained through human rights violations. At their core, these guidelines should place the African accused at the centre of any interventions by the States Parties at a domestic level, and the African Commission at the regional level. This will be an inculcation of the framework laid out in Chapter Six. It is imperative that the Guidelines are reconciled with the normative developments on evidence obtained through human rights violations as a basis for the improvement. Thirdly, the empirical study and the Guidelines should inform the drafting of a General Comment on how the African Commission interprets Article 6 of the ACHPR with regard to evidence obtained through human rights violations. The proposed General Comment should reconcile the normative developments on evidence obtained through human rights violations to the contemporary interpretation by the African Commission.

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38 The ACPHR's Concluding Observations on combined second periodic report under the African Charter on Human and Peoples' Rights and the initial report under the Protocol to the African Charter on the Rights of Women in Africa of the Republic of South Africa available at https://realisingrights.files.wordpress.com/2017/05/concluding-observations-and-recommendations.pdf (accessed 24 August 2017).

These recomendations will play a great role in improving its jurisprudence on evidence obtained through human rights violations. Some of the areas that need emphasis by the African Commission include: issues of pre-trial proceedings that substantially affect an accused, the scope of the the right to a fair trial, and issues of self- incrimination in instances where it is legalised or is exploited by the investigative organs.

Another area that requires engagement with evidence obtained through human rights violations relates to the State responsibility for non-State actors. This may be intepreted to extend to vigilante Groups in the domestic jurisdictions, who usually deal with crime.[39] The actions of these vigilante Groups with regard to the violation of an individual's rights during the collection of evidence have to be seen as actions of non State actors. In the light of the possible violation of the rights of an individual in the course of fighting crime, evidence that is obtained has to be tested against the principles that the African Commission uses. A step in this direction will ensure that the African Commission places the accused at the centre of its interventions with regard to its responsibility for non- State actors.[40] In instances where investigations by non-State actors are not checked by the Police, the rights of the suspects may be violated in the course of investigations.[41] Therefore, the African Commission should require that the States Parties go beyond the observance of human rights, to ensuring

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39 See insights in the following South African cases of *S v Songezo Mini and 4 others,* unreported case 141178/2015 (30 April 2015), paras 20, 21, 22 ; and *S v Zuko,* unreported ECD case CA & R159 of 2001. This persuasive jurisprudence from South Africa indicates that these vigilante groups include private security guards.

40 *Velasquez* para 172; and United Nations Human Rights Committee General Comment No. 31, 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add.13), para. 8.

41 See *Zimbabwe Human Rights NGO Forum,* generally.

that non-State actors do not violate the rights of suspects in the course of collecting evidence.

The African Commission should embrace the reality that there are instances where evidence may be obtained through the violation of an accused's rights other than the violation of his or her right against torture.[42] While the African Commission has pronounced itself on evidence obtained though torture;[43] it should, concretise its position on evidence obtained through human rights violations as well.

The nature of the right to a fair trial should progressively embrace diversity to illuminate its non-qualification. Some of these instances include conducting very long trials, where an accused is incarcerated for a long period. A good illustration is *Ghazi,* where the accused were detained for about nine months before the trial started.[44] This was exacerbated by the limitations on the appeal process, that were sanctioned by the Criminal Procedure Act.[45] As such, the criminal processes that substantially affect the rights of an accused at the beginning of the trial process should be questioned through an appeal process. While the improvement of the trial process is within the domain of the States Parties, the African Commission, as an institution that promotes and protects human rights has to give guidance to this engagement.

The principle of self-incrimination should be engaged beyond the rhetorical declaration that it is at the core of the right to a fair trial.[46] This involves taking a firm

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42 Most of the cases in chapter 3 that found in favour of the accused had a taint of torture. See *Egyptian Initiative*; compare *Abdel Radi.*

43 In *Egyptian Initiative*, the African Commission referred to *Colibaba v Moldova* Application 29089/2006 para 43.

44 See discussion in Chapter Three subsection 3.3.1.2.

45 See discussion in Chapter Three subsection 3.3.1.2.

46 *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials/Ethiopia* para 128.

stand that evidence obtained through an accused's self-incrimination is not to be admitted. Areas, such as incrimination by a third party on account of a violation of his rights, should also be engaged. This position is, however, subject to an accused's waiver of his rights which may not depict any unfairness of the trial or detriment to the administration of justice.

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