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Glenda Mezarobba

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PRESENTATION



We are very pleased to present the 13th issue of *Sur Journal*, which addresses the subject of regional human rights protection mechanisms. The purpose of this issue is to examine the development of these regional systems, their drawbacks and potentials, and to discuss the possibility of cooperation and integration between them and the international human rights system. The journal's first article, titled **Urgent Measures in the Inter-American Human Rights System**, by Felipe González, reviews the treatment given urgent measures by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (precautionary measures, in the case of the Commission, and provisional measures, in the case of the Court).

Juan Carlos Gutiérrez and Silvano Cantú, in **The Restriction of Military Jurisdiction in International Human Rights Protection Systems**, examine cases from the Universal, Inter-American, African and European human rights protection systems in order to place the matter of military jurisdiction in a comparative perspective, particularly when this jurisdiction applies to civilians, whether they are passive or active subjects.

Addressing the African system specifically, Debra Long and Lukas Muntingh, in their article titled **The Special Rapporteur on Prisons and Conditions of**

Detention in Africa and the Committee for the Prevention of Torture in Africa: The Potential for Synergy or Inertia?, analyze the mandates of these two special mechanisms and consider the potential for conflict generated by two mandates being held by a single member.

This edition of the journal also contains an article by Lucyline Nkatha Murungi and Jacqui Gallinetti on the role of the courts of Africa's Regional Economic Communities regarding the protection of human rights on the continent, in **The Role of Sub-Regional Courts in the African Human Rights System**.

Magnus Killander, in **Interpreting Regional Human Rights Treaties**, illustrates how regional human rights courts have, for the purposes of interpreting international treaties on the subject, followed the rules established by the Vienna Convention on the Law of Treaties.

Antonio M. Cisneros de Alencar, in **Cooperation Between the Universal and Inter-American Human Rights Systems in the Framework of the Universal Periodic Review Mechanism**, makes the claim that despite new opportunities for cooperation between the global and regional human rights systems, a great deal more can still be done to make the Inter-American system benefit from the UN Human Rights Council's Universal Periodic Review Mechanism.

We hope that this issue of Sur Journal will draw the attention of human rights activists, civil society organizations and academics to the possibility of a greater cooperation and integration between the regional and the international human rights systems.

We have also included in this issue the article **Strong Link in the Chain**, by Borislav Petranov, a homage to Professor Kevin Boyle, an exceptional academic and human rights defender, and a tireless partner of Sur Journal and the other initiatives of Conectas Human Rights. His life will remain a major source of inspiration for us. This issue includes another two articles, both dealing with the topic of transitional justice in post-dictatorship Latin America. The article by Glenda Mezarobba, titled **Between Reparations, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil**, reconstructs and analyzes the process developed by the Brazilian State for making amends with victims of the dictatorship and with society. It also looks at what has already been done and what still needs to be done in terms of truth and justice and in relation to reforming the country's institutions.

The article by Gerardo Alberto Arce Arce, meanwhile, discusses the process of establishing a Truth and Reconciliation Commission in Peru, and the judicialization of the human rights violations that occurred dur-

ing the country's armed conflict in light of the relations between the Peruvian armed forces and the political and civil spheres of its society, in **Armed Forces, Truth Commission and Transitional Justice in Peru**.

This is the second issue released with the collaboration of the Carlos Chagas Foundation (FCC), which started supporting Sur Journal in 2010. We would like to thank the FCC once again for its support, which has guaranteed the continued production of the print version of this journal. Similarly, we are grateful to the MacArthur Foundation and to the East East: Partnership Beyond Borders Program (Open Society Foundations) for their support for this issue.

We would also like to thank the Centre for Human Rights, of the University of Pretoria (South Africa), and the Center for Legal and Social Studies (CELS, Argentina) for their involvement in the call for papers and the selection for this 13th issue.

Exceptionally, the present issue, dated December of 2010, was printed in the first semester of 2011.

Finally, we would like to remind everyone that the next issue of Sur Journal will address the UN Convention on the Rights of Persons with Disabilities and the importance of tackling this issue within the realm of human rights.

The editors.



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ABSTRACT

This article examines the implications arising out of the recent decision of the African Commission on Human and People's Rights (African Commission) to appoint the Chair of the Committee for the Prevention of Torture in Africa (CPTA) as the Special Rapporteur on Prisons and Conditions of Detention (SRP). The article reviews the mandates of these Special Mechanisms and considers the potential impact of one Commissioner holding both mandates at the same time. The article then considers whether the current practice of the African Commission to appoint Commissioners as Special Rapporteurs can in fact deliver the necessary expertise and level of action required to function effectively and meet the increasing demands for more mechanisms to be established. Finally, the article suggests that lessons can be drawn from the recent review of the UN Special Procedures in order to reform the Special Mechanisms procedure of the African Commission.

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Torture – Prison – African Commission on Human and People's Rights

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THE SPECIAL RAPPORTEUR ON PRISONS AND CONDITIONS OF DETENTION IN AFRICA AND THE COMMITTEE FOR THE PREVENTION OF TORTURE IN AFRICA: THE POTENTIAL FOR SYNERGY OR INERTIA?

Debra Long and Lukas Muntingh

1 Introduction

At the 46th Ordinary Session of the African Commission on Human and People's Rights (African Commission), held in The Gambia between 11 and 25 of November 2009, two important and linked resolutions were adopted. The first concerned the renaming of the Follow-up Committee on the Robben Island Guidelines to the 'Committee for the Prevention of Torture in Africa' (CPTA) (ACHPR, 2009b). The same resolution also extended the tenure of the current chairperson, Commissioner Dupe Atoki, for a further two years. The resolution bestowed upon the newly named committee the same mandate as on its predecessor. The change in name was primarily motivated by the conclusion that the mandate to prevent torture was not clearly identifiable in the name of the Follow-up Committee on the Robben Island Guidelines.

The second resolution appointed Commissioner Atoki as the Special Rapporteur on Prisons and Conditions of Detention in Africa (SRP) as well (ACHPR, 2009a). While it is not unique for a Commissioner of the African Commission to hold a Special Rapporteurship at the same time as being a member of a Working Group, it is the first time that the same person has held the position of SRP and Chair of the CPTA, or its predecessor. The "doubling-up" of these particular mandates raises a number of crucial questions regarding the African Commission's approach to issues relating to the deprivation of liberty and the prevention of torture specifically, and the sustainability and efficacy of the African Commission's Special Mechanisms procedure generally.

Notes to this text start on page 116.

This article outlines and compares the mandates and activities of the SRP and CPTA and considers the potential positive and negative consequences of one Commissioner holding both mandates at the same time. The article then considers whether the current Special Mechanisms procedure of the African Commission as a whole can deliver the necessary expertise and level of action required to function effectively and meet the increasing demands for more mechanisms to be established. Finally, the article suggests that the experience and recent review of the UN Special Procedures can be instructive for considering the future sustainability of the African Commission's Special Mechanisms.

2 The mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa

The position of SRP was established in 1996 following a period of intensive lobbying from NGOs, in particular Penal Reform International (PRI). Once established, PRI continued to be closely associated with the mandate of the SRP, and was responsible for securing funding,¹ organising and accompanying the SRP on various in-country missions, and assisting with the preparation of reports up until 2003 when it was no longer able to provide such assistance. The first person to be appointed as the SRP was Professor Victor Dankwa, a Commissioner of the African Commission and law professor from Ghana. He served as the SRP until 2000 when Commissioner Dr. Vera Chirwa was appointed. She was a well known and respected human rights activist and had herself been arbitrarily detained in Malawi for more than 10 years. In 2005, Commissioner Mumba Malila, the Attorney-General for Zambia at the time, was appointed and served until his election as Vice-Chair of the African Commission in November 2009, at which time Commissioner Dupe Atoki, a lawyer from Nigeria, took over the position.

The mandate of the SRP is to examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights (African Charter). The SRP's mandate and methods of work were adopted at the 21st Ordinary Session of the African Commission in 1997. In accordance with these terms of reference the SRP is empowered to:

- Examine the state of the prisons and conditions of detention in Africa and make recommendations with a view to improving them;
- Advocate adherence to the African Charter and international human rights norms and standards concerning the rights and conditions of persons deprived of their liberty, examine the relevant national law and regulations in the respective States Parties as well as their implementation and make appropriate recommendations on their conformity with the African Charter and with international law and standards;
- At the request of the Commission, make recommendations to it as regards communications filed by individuals who have been deprived of their liberty, their families, representatives, by NGOs or other concerned persons or institutions;
- Propose appropriate urgent action;
- Conduct studies into conditions or situations contributing to human rights

violations of prisoners deprived of their liberty and recommend preventive measures. The Special Rapporteur shall co-ordinate activities with other relevant Special Rapporteurs and Working Groups of the African Commission and United Nations;

- Submit an annual report to the Commission. The report shall be published and widely disseminated in accordance with the relevant provisions of the Charter. (ACHPR, 1997, p. 21).

This mandate has been described as encompassing four main implementation mechanisms namely: investigation and reporting by way of country visits; intervention through “urgent action”; assistance with communications; and promotion (VILJOEN, 2005, p. 131). However, in practice the SRP has primarily focused his or her attention on visits to places of detention (MURRAY, 2008, p. 205). From 1997 to 2004 the SRP conducted 16 visits to 13 States, due in most part to the external funding and support received from PRI (VILJOEN, 2005, p. 137). Unfortunately, once external support was no longer available to the SRP the productivity of the mandate inevitably declined and, according to the activity reports of the African Commission, between 2005 and 2009 the SRP was only able to carry out one country mission to Liberia in 2008, which, notably, was conducted jointly with the Follow-up Committee on the Robben Island Guidelines. It should also be added that, to date, none of the SRPs have conducted any comprehensive and analytical studies on prisons and conditions of detention in Africa as envisaged in the mandate and similar to that of, for example, the UN Special Rapporteur on Torture.² The mandate of the SRP has also been interpreted in a narrow sense by the successive incumbents, preferring to focus exclusively on prisons and paying scant attention to other situations of detention, for example police cells and immigration detention centres.

3 The mandate of the Committee for the Prevention of Torture in Africa (formerly the Follow-up Committee on the Robben Island Guidelines)

The forerunner to the CPTA, the Follow-up Committee on the Robben Island Guidelines (Follow-up Committee), was established by the African Commission during its 35th Ordinary Session, held in The Gambia from 21 May to 4 June 2004. The Follow-up Committee was established in order to raise the profile of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa: The Robben Island Guidelines (RIG). The RIG contain a set of provisions dealing specifically with issues relating to the prohibition and prevention of torture and other ill-treatment and the rehabilitation of torture victims. The RIG were drafted in an expert meeting held in South Africa between 12 to 14 February 2002 and were formally adopted by the African Commission through a resolution in October 2002 (ACHPR, 2002). This Resolution also included a commitment to create a Follow-up Committee although it was not until almost two years later that this Special Mechanism was eventually established.³

The mandate of the Follow-up Committee was set out in the African Commission Resolution on the Robben Island Guidelines as follows (ACHPR, 2002):

- To organise, with the support of interested partners, seminars to disseminate the Robben Island Guidelines to national and regional stakeholders;
- To develop and propose to the African Commission strategies to promote and implement the Robben Island Guidelines at the national and regional levels;
- To promote and facilitate the implementation of the Robben Island Guidelines within member States;
- To make a progress report to the African Commission at each ordinary session.

This mandate contrasts starkly with the more detailed mandate of the SRP, being more promotional than investigatory and complaints driven. In particular, the ‘operational’ part of the Follow-up Committee’s mandate i.e. to develop, propose and facilitate strategies to implement the RIG, is less well defined than the many operational aspects of the SRP’s mandate. This perhaps reflects a difference of approach between the two mandates, with the SRP mandated to take a more traditional investigatory approach and the CPTA taking a “preventive” one. (This difference in approach is examined below.) However, this lack of detail in the mandate of the Follow-up Committee has meant that the full scope of its mandate and its terms of reference have been ambiguous from the start and has contributed to a lack of clarity surrounding the relationship between this Special Mechanism and the SRP. (The need to address this lack of clarity is discussed further below.)

In the first few years of its establishment, unlike the SRP, the Follow-up Committee did not receive any external funding and was significantly less active. The first meeting of the Follow-up Committee took place in Bristol on 18 to 19 February 2005 and was hosted by the School of Law at the University of Bristol, UK.⁴ At this meeting the Follow-up Committee adopted its internal rules and procedures and drafted a plan of action. Recommendations for the promotion and implementation of the RIG were also produced at this meeting. However, due to a lack of resources the Follow-up Committee was unable to carry out any official in-country activities between 2005 and 2007. In November 2007, Commissioner Dupe Atoki was elected as Chair of the Follow-up Committee to replace Commissioner Sanji Monageng after she had to stand down from the Follow-up Committee in order to take up the position as Chairperson of the African Commission.

In April 2008, the Follow-up Committee held its second meeting in Cape Town, South Africa, as part of a Conference on the Optional Protocol to the UN Convention against Torture in Africa, which was also organised by the University of Bristol. The purpose of this meeting was to review the progress of the Committee and to draw up an effective programme of activities for the promotion, dissemination and implementation of the RIG. At the 43rd Ordinary Session of the African Commission, held in May 2008, the Chairperson of the Follow-up Committee reported that at the meeting in Cape Town three countries had been identified by the Follow-up Committee for pilot activities,⁵ and that it was decided to arrange another meeting

of the Committee in Nigeria (ACHPR, 2008, p. 1-2). Thus, finally, in July 2008, using additional funding given to the African Commission by the African Union, the Follow-up Committee undertook its first official in-country activity when it held a sub-regional meeting in Nigeria for heads of police and prison services within West African States. Since this first activity the Committee has undertaken a promotional visit or training activity in the following countries: Liberia (September 2008); Benin (October 2009); and Uganda (October 2009). Similarly to her predecessor, the Chairperson has also promoted the RIG during her activities undertaken in her general capacity as a Commissioner of the African Commission.

At the 47th Ordinary Session of the African Commission in November 2009, following the change of name, four of the members of the Follow-up Committee were re-appointed as members of the CPTA and one Commissioner was newly appointed to join the Committee. The CPTA membership continues the past practice of including Commissioners as well as representatives of civil society.⁶

To all intents and purposes the change of name of the Follow-up Committee to the CPTA has not altered the aim and working practices of the CPTA. The change was in name only and the CPTA continues to work within the scope of the mandate established for the Follow-up Committee. Unfortunately, the acronym 'CPTA' raises concerns that this Committee may be perceived as functioning as a monitoring mechanism along the same lines as the European Committee for the Prevention of Torture (CPT) and the UN Subcommittee for Prevention of Torture (SPT), which have very specific preventive mandates including the power to conduct visits to places of detention without prior consent, whereas in fact the CPTA does not have the necessary mandate or powers to function in a similar way. [However, this issue is outside the scope of this article.]

At the time of writing, the CPTA has not carried out a mission to a country and unfortunately the Follow-up Committee has been unable to produce country mission reports due to a lack of resources. As result of this lack of information it is unclear from the few country visits that the Follow-up Committee has carried out what the purpose and methodology are for these visits, and consequently what the difference is between visits conducted by the CPTA and those of the SRP.

4 Synergy or inertia?

On the face of it, the decision to appoint the Chair of the CPTA to the position of SRP could be regarded as nothing more than a pragmatic choice; there are 11 Commissioners of the African Commission and 11 Special Mechanisms (4 Special Rapporteurs; 6 thematic working groups; and a Working Group on Specific Issues related to the work of the African Commission). Accordingly, most of the Commissioners are involved with more than one Special Mechanism at the same time. Yet the decision to have one Commissioner to be the mandate holder of such closely related, but potentially divergent, Special Mechanisms was not simply the result of a number-crunching exercise but was a purposeful choice, and it is likely to create some deliberate and/or unintentional consequences. Time will tell whether this decision will result in a doubling of efforts on related issues or whether the result

will be less than the sum of its parts. It is also uncertain whether the “doubling-up” of these two mandates will be repeated when the tenures are due for renewal at the end of 2011. However, there are some particular opportunities and challenges posed by the current decision to have the Chair of the CPTA as the SRP at the same time.

4.1 The need for transparent working practices and terms of reference

One of the reasons it was felt to be desirable to appoint the Chairperson of the CPTA to be the SRP, was that a nexus exists between the prevention of torture and the deprivation of liberty. Prior to the establishment of the CPTA (and its predecessor the Follow-up Committee) there was no Special Mechanism with the express mandate to consider issues relating to the prohibition and prevention of torture and other ill-treatment. During discussions on the establishment of the SRP, the issue arose as to whether there should be a specific reference to torture and other ill-treatment within the title of the mechanism. However, proponents of the SRP mandate were reluctant to include torture and other ill-treatment within the title of the Special Rapporteur because of a desire that the SRP should be clearly associated with broader issues related to deprivation of liberty. In practice however, the corollary of good prison management is the prevention of abuse, accordingly, the various SRPs have inevitably commented on aspects of conditions of detention and the treatment of persons deprived of their liberty that may amount to a violation of Article 5 of the African Charter. However, the overall approach of the various SRP mandate holders to the documentation of abuse has been rather *ad hoc* and lacking any consistent strategy (MURRAY, 2008, p. 208-210). A further criticism against the SRP missions has been that too much emphasis has been placed on the material conditions of detention as opposed to the legal situation of detention (VILJOEN, 2007, p. 395).

To some extent the development of the RIG and the establishment of a Special Mechanism to promote the prevention of torture and other ill-treatment in Africa was an attempt to respond to criticism that the African Commission lacked a coherent strategy on the prevention of these forms of abuse.⁷ (It is beyond the scope of this article to examine whether the CPTA, and its predecessor, has actually been able to provide a well articulated and considered strategy on torture prevention.) One of the natural consequences flowing from the establishment of the Follow-up Committee was the need to decide how this mandate would work with the SRP and how the two mandates would respond to overlapping issues within their respective mandates. Unfortunately, to date, there has been a failure to provide such clarity. Furthermore, as noted above, this problem has been compounded by a lack of clear and transparent terms of reference for the Follow-up Committee itself. Although, because both mandates have not been that active in recent years this absence of clarity has, so far, not presented so much of an obstacle and uncertainty as it might otherwise have done, nevertheless the appointment of one person as the Chairperson of the CPTA and the SRP can only accentuate the problems caused by a lack of clarity surrounding the relationship between these two Special Mechanisms. This needs to be addressed as a matter of priority.

There have been previous attempts to try and establish a formal collaborative relationship between the two mandates, however these have been largely

unsatisfactory. For instance in 2006, the SRP at that time, Commissioner Malila, was appointed “to sit” on the then Follow-up Committee (ACHPR, 2005, p. 2). Presumably this decision was taken in order to try and strengthen collaboration between the SRP and the Follow-up Committee and assist with a sharing of information and common strategies. This much was indeed required by the 2002 RIG Resolution, namely to involve ‘prominent African experts’ in the work of the Follow-up Committee (ACHPR, 2002). Indeed, this can be presumed from the SRP’s formal participation in the second meeting of the Follow-up Committee in Cape Town in April 2008. It may also have occurred in order to “pool resources” at a time when both mandates, and indeed all the Special Mechanisms, were stymied due to a lack of resources. However, there was some ambiguity in this process and it was not clear externally whether Commissioner Malila was officially a member of the then Follow-up Committee and in what way there was formal cooperation between the two mandates. This collaborative experiment may indeed have led to the joint mission undertaken by the SRP and CPTA to Liberia in 2008. However, it is unclear whether any particular advantage was gained by having a joint mission and to some extent this joint activity may in fact have highlighted the ambiguity surrounding the relationship between these two Special Mechanisms.

It is possible that the bringing together of the SRP and CPTA mandates through one representative may in effect strengthen the collaboration and cooperation between these two mandates on common issues. Yet, now more than ever, there is a pressing need to develop the terms of reference of the CPTA and to set out clearly how the CPTA and SRP will work together and to what extent their mandates and responsibilities will be distinguished from each other.

4.2 A potential blurring of mandates

One of the main challenges facing Commissioner Atoki as Chair of the CPTA and the SRP is that it notoriously difficult for an individual to wear different “hats” at the same time and to maintain the distinctions between roles. Distinctions between different but closely related mandates inevitably blur in the minds of stakeholders and those coming into contact with the mandate holder. On a superficial level, the fact that there may be a blurring of distinctions between missions and activities undertaken in the name of the SRP and those carried out under the auspices of the CPTA may appear to be inconsequential. However, the mandates of the SRP and CPTA do have important and deliberate distinctions at the operational level, which may lead to confusion and unfair expectations as to what can be achieved by the mandate holder of these Special Mechanisms at any one time.

For instance, as noted above, the SRP is mandated expressly to carry out a range of activities that are traditionally associated with Special Rapporteurs, such as carrying out visits to countries and investigating and responding to complaints. The SRP’s mandate, therefore, has a more overtly investigatory, complaints driven and potentially castigatory approach than the CPTA’s mandate. The SRP is also required to ‘conduct studies into conditions or situations contributing to human rights violations of prisoners’ (ACHPR, 1997, p. 21), although in practice this has been a neglected part of the mandate.

The CPTA on the other hand has inherited the ‘promotional’ mandate elaborated for the Follow-up Committee and is not expressly mandated to undertake these more traditional activities assigned to the SRP. At first glance, the CPTA’s mandate may therefore appear to be “weaker” than the SRP’s mandate. It would certainly appear to be less well defined. However, the mandate of the CPTA is influenced by the concept of “prevention”, which has emerged in recent years as a dominant approach within anti-torture initiatives. A preventive approach is characterised by the idea of intervening before a violation has taken place, by establishing constructive dialogue with stakeholders in order to address the root causes of torture and other ill-treatment before they occur or reoccur.⁸ Therefore, a preventive approach is focused more on sustained cooperation than the finding of fault.

While, the wearing of two hats at the same time may in fact enable the SRP and Chair of the CPTA to more easily follow-up on cases at the national level through a mission, there is a concern that the different approaches of the mandates of the SRP and CPTA may lead to confusion with those who come into contact with the mandate holder of these two Special Mechanisms. A situation could easily occur whereby Commissioner Atoki, as the SRP, may receive and respond to urgent actions or communications alleging violations within a particular country and then have to “swop” this quasi-judicial, adversarial role for a more cooperative approach through a visit as Chair of the CPTA to the country concerned. Individuals in this instance may feel less willing to speak openly with the CPTA if they fear that their identity or the information they provide may be disclosed at some later stage as part of a decision on a communication or urgent appeal.

A further practical challenge that cannot be ignored is the sheer workload involved in carrying out these mandates, a problem accentuated by the lack of research and support capacity available to the Special Mechanisms. To have one person responsible for both mandates with little support may indeed reduce both to a state of inertia.

4.3 A need to define the scope of both mandates

Persons deprived of their liberty are particularly at risk of being subjected to torture and other ill-treatment and therefore there will be common issues between these two Special Mechanisms. Furthermore, if both mandates are interpreted in an expansive way i.e. with the SRP looking at the criminal justice system as a whole and the CPTA looking at the prevention of torture in its widest sense, a greater convergence will naturally occur as it is difficult, and perhaps unnecessary, to define where good prison management begins and torture prevention ends and vice versa.

For instance, as noted above, although successive SRPs have concentrated on prisons, the SRP’s mandate is not restricted to prisons only but covers all places of detention and has been described as an “expansive mandate, reaching beyond the ‘how’ of detention to include ‘why’.” (VILJOEN, 2005, p. 132). Indeed, the method of work of the SRP contains an express provision that the SRP “[...]shall conduct studies into conditions or situations contributing to human rights violations of prisons [sic] deprived of their liberty and recommend preventive measures [...]” (ACHPR, 1997, p. 21). Thus, not only is the SRP mandated to investigate and try and secure improvements in the conditions of detention and treatment of persons deprived of

their liberty (the “how” of detention) but the SRP can, and should conduct research and consider whether reforms are required within the criminal justice system as a whole (the “why” of detention) in order to prevent abusive practices.

Similarly, torture prevention in its broadest sense requires a range of complementary measures to be taken in order to tackle practices and behaviour which, if left unchecked, could develop into torture or other ill-treatment. Therefore, torture prevention in the broadest sense may encompass proposals for reforms within the criminal justice system that will strengthen the protection of people deprived of their liberty. For example, overcrowding is the biggest problem facing prisons throughout the world. Overcrowding creates poor conditions of detention, which can itself amount to ill-treatment and a violation of, *inter alia*, Article 5 of the African Charter. The overuse of pre-trial detention, has contributed to this overcrowding crisis. Therefore, it would certainly be within the mandate of the CPTA to make recommendations aimed at reducing pre-trial detention and overcrowding, issues that would normally be considered to be a traditional concern of the SRP.

As a result of this potential overlap, governments, institutions, and individuals may not now understand the need for two Special Mechanisms that are mandated to look at the rights of persons deprived of their liberty. This potential for confusion between the roles of the two mechanisms may be particularly acute because, as discussed above, the lines of division and the relationship between these two mandates have not been transparent since the establishment of the Follow-up Committee in 2004. However, it is in this respect that perhaps having one individual assigned as the SRP and Chair of the CPTA may be beneficial, as it may avoid unnecessary duplication and has the potential to facilitate the development of a more cohesive and systematic message being taken by the different mechanisms on the same issue. There is also the potential that Commissioner Atoki, through her experience as the holder of both mandates, may be able to develop clearer and sustainable distinctions in the duties and working methods of these two Special Mechanisms.

Yet, while there is a potential for synergy between the two mandates and identifiable areas where their activities and interest may converge, equally so it is also clear that their mandates remain distinct, and currently neither one of these Special Mechanisms can, single-handedly, cover the full scope of both mandates. It has to be acknowledged that the SRP’s focus on prisons and conditions of detention covers a much broader range of issues than the prevention of torture and other ill-treatment. This much is evident from the substance addressed in the Kampala Declaration on Prison Conditions in Africa, which the SRP was initially and specifically mandated to promote (ACHPR, 1997, p. 22). Furthermore, the SRP, unlike the CPTA, has an explicit power to conduct visits to places of detention in order to consider a broad range of issues concerning the deprivation of liberty that do not touch upon Article 5 of the African Charter, such as the provision of work, educational facilities, recreational activities and so on. Whereas, the CPTA has a specialised mandate to promote and facilitate the implementation of measures aimed at the prevention of torture and other ill-treatment in Africa.

Accordingly, it is proposed that without a substantial review and amendment of their respective mandates, both Special Mechanisms need to be maintained in order to cover the broad spectrum of issues and level of expertise demanded by their respective mandates.

5 A need for reform of the Special Mechanisms procedure as a whole

The doubling-up of the mandate holder of the SRP and Chair of the CPTA also highlights a problem with the African Commission's Special Mechanisms procedure as a whole. Historically, Commissioners have been appointed as Special Rapporteurs and as Chairs of working groups on thematic issues; however they do not always possess the necessary expertise in the mandate to which they are appointed and, in addition, Commissioners serve part-time and have an onerous amount of work and duties to conduct in this capacity. Therefore the time they can spend on activities, such as the Special Mechanisms, can be limited. This problem has also been compounded by a lack of funding, staff and research capacity within the African Commission. Notwithstanding the obvious commitment of the various Commissioners to their Special Mechanism mandates and their achievements over the years, it is proposed that it is time to revise this practice and consider alternative procedures based on the experience of other human rights mechanisms.

The first Special Mechanism to be established by the African Commission was the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions in Africa (1994). The establishment of this Special Rapporteur position was instigated by Amnesty International who proposed the idea during its statement at the 14th Ordinary Session of the African Commission, held in Addis Ababa in 1993 (HARRINGTON, 2001, p. 251). During discussions on the appointment of this Special Rapporteur the issue as to whether an individual should be appointed who was not a member of the African Commission was raised. At the time, Commissioner Umozurike has been noted as expressing the view that an external expert should be appointed because a Commissioner would not be able to undertake regular travel, as required by the Special Rapporteur mandate, due to the workload of the African Commission (HARRINGTON, 2001, p. 252-253). However, his opinion did not prevail and the majority of Commissioners preferred to appoint someone to this position from within their own ranks. It was recorded at the time that the reasons behind this decision were that many of the Commissioners considered that appointing "an outside person was not within the competence of the Commission; that in essence outsiders could not be trusted; and that paying an outside consultant would be expensive. Such a course of action would also imply that commissioners were not competent" (HARRINGTON, 2001, p. 252-253). Consequently, Commissioner Ben Salem was duly appointed to take up the position of Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions in Africa (ACHPR, 1994, §26, p.188).

It is interesting to note that at the time of the appointment of the first SRP, which was only the second Special Rapporteurship to be established, the issue of appointing external experts was raised again when PRI proposed that candidates for the position should be considered from outside the African Commission, and they submitted the names of 6 external experts (VILJOEN, 2005, p. 129). However, the African Commission followed the precedent established by the appointment of the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions in Africa, and appointed the then Vice-Chair of the African Commission, Commissioner Danka, as the first SRP in

1996. With this appointment the practice of selecting Special Rapporteurs from within the ranks of Commissioners appears to have established practice. As noted earlier, at the time of writing, the African Commission has 11 Special Mechanisms (4 Special Rapporteurs; 6 thematic working groups; and 1 Working Group on Specific Issues) and the majority of Commissioners are involved in more than one Special Mechanism.⁹

Over the years, the NGO Forum, which meets prior to the Ordinary Sessions of the African Commission, has called for more Special Mechanisms to be established to focus on a particular human rights issue. The Special Mechanisms procedure is particularly popular with NGOs because it has proved to be an effective way, and arguably the only way, for NGOs to ensure that a particular issue that they are promoting has a sustained profile within the activities of the African Commission. Experience has demonstrated that resolutions on a thematic issue that are not assigned to a Special Mechanism tend to have a short ‘shelf life’ and lack any momentum for further action. The Special Mechanisms procedure has therefore developed as a way to ‘operationalise’ thematic resolutions of the African Commission.

It is proposed that this proliferation of Special Mechanisms and the continued practice of appointing Commissioners to be Special Rapporteurs and Chairpersons of thematic working groups is not sustainable, nor is it the most effective and desirable means to fill these specialised positions. Over the years, the African Commission has been chronically underfunded and a persistent complaint from the Commissioners has been that the Special Mechanisms have consistently lacked the necessary resources in terms of funding, staff, and research capacity to carry out their mandates effectively. Clearly, in order to meet the ever increasing demands being placed upon the Special Mechanisms the procedures and practices governing these mechanisms needs to be reviewed.

The African Commission has tried to address some of the problems facing the Special Mechanisms outlined above. In 2002, the African Commission commenced a review of the use of the Special Rapporteur mechanism because it “was not very successful” (ACHPR, 2004, §32). Consequently, a review was undertaken in order to consider ways in which these types of mechanisms could be strengthened. During this period of review, the African Commission imposed a moratorium on the establishment of Special Rapporteurs and the African Commission decided to appoint focal persons as a “stop gap measure” for projects that were already underway until the review had been concluded (ACHPR, 2004, §32). It was during this time that the Resolution on the RIG was presented for adoption with a request for a Committee rather than a Special Rapporteur.

One of the consequences of this review was the establishment of thematic working groups. While the working groups that have been established are all chaired by a Commissioner, they have enabled external experts to be directly involved in the African Commission machinery. The CPTA, and formerly the Follow-up Committee, is an example of such a working group and its membership is comprised of Commissioners and representatives from civil society. However, working groups can be much more resource heavy than a Special Rapporteur position because they naturally require more funding and coordination to bring the members together in meetings and on missions to countries.

Notwithstanding, this recent review of the African Commission’s Special Rapporteur procedure and the establishment of thematic working groups, it is

proposed that the continued practice of appointing Commissioners as Special Rapporteurs is flawed and unsustainable. It is proposed that in order to ensure that the mandate holders of the various Special Mechanisms possess the necessary expertise required to carry out their particular mandate, and to address the practical problems faced by increasing demands for these Special Mechanisms, lessons can be drawn from the experience of the UN Special Procedures.

The term “UN Special Procedures” is the name given to the range of UN mechanisms that have been established to address specific thematic or country issues. Special procedures are either an individual (called a “Special Rapporteur”, “Special Representative of the Secretary-General” or “Independent Expert”) or a working group usually composed of five members (one from each region of the world).

The UN Special Procedure system was originally established under the UN Human Rights Commission in the 1980s and subsequently assumed by the UN Human Rights Council in 2006. Currently, there are 31 thematic and 8 country UN Special Procedure mandates. The UN Special Procedures receive funding and administrative, research and logistical support to enable them to carry out their mandates from the Office of High Commissioner for Human Rights (OHCHR).

The UN Special Procedures typically have mandates to examine, monitor, advise and publicly report on human rights situations in specific countries or territories or on specific thematic concerns. Various activities are undertaken by the UN Special Procedures including fact-finding missions to countries, responding to individual complaints, conducting studies, and engaging in general promotional activities.¹⁰ Over the years, the UN Special Procedures have proven to be an invaluable resource for monitoring compliance with human rights obligations and developing a greater understanding of international human rights law.

One of the main differences between the UN Special Procedures and the Special Mechanisms of the African Commission is that unlike the African Commission, which as noted earlier has routinely appointed its own Commissioners to hold Special Mechanism mandates, the UN Special Procedures have traditionally been filled by appointing external experts rather than UN staff to these positions.

The UN Special Procedure positions are established and maintained through the adoption of inter-governmental resolutions by the UN Human Rights Council and the UN General Assembly. The method of appointing UN Special Procedures and their mandate is determined by these resolutions. Those UN Special Procedures who are to serve as “representatives of the UN Secretary-General” are selected by the UN Secretary-General, while other Special Procedures are appointed by the Chairperson of the Human Rights Council, after consultations with UN member States. Accordingly, the process for establishing and appointing UN Special Procedures could be perceived as a potentially much more political process than the appointment of Special Mechanisms of the African Commission, and this could raise concerns regarding the objectivity and independence of the UN mandate-holders. However, in practice the UN Special Procedures system has a proven track-record of functioning in an independent manner free from any partisanship.

The appointment of external experts to UN Special Procedure mandates has the benefit of potentially appointing individuals who have a demonstrated

expertise in the particular issue attached to a Special Procedure mandate. While, this is not to bring into question the undeniable commitment of the Commissioners of the African Commission to their respective Special Mechanism mandates, undoubtedly the UN appointment system for the Special Procedures has enabled a more “tailor-made” process to be adopted, so that the greatest effort is made to select an individual for a Special Procedure position who has the necessary and most appropriate expertise for that particular mandate.

It is interesting to note here that the Inter-American Commission on Human Rights (IACHR) has been gradually moving towards an appointment procedure for its Special Rapporteurs that will enable more external experts to be involved with these mandates. Originally, initial appointments for Special Rapporteurs by the IACHR were mainly made from the pool of Commission Members. However, Follow-up appointments have involved both Commission Members and independent experts. In 2006, the IACHR adopted procedural rules for the appointment of Special Rapporteurs which states that “[o]nce the Commission learns that a special rapporteur post will become vacant, the Commission shall organize a public competition and announce it widely, in order to secure the highest number of applications to the post” (IACHR, 2006). It has therefore officially opened the procedure up to applications from outside the Commission.¹¹

Similarly to the Special Mechanisms of the African Commission, the UN Special Procedures have been victims of their own popularity and have suffered from an ever increasing workload while struggling with under-resourcing for many years. Accordingly, in June 2006 a review of the UN Special Procedures system was commenced in order to consider ways to enhance the effectiveness of these mechanisms. This review has helped to identify a number of practices that could be of benefit to the Special Mechanisms of the African Commission.

The result of this review was the adoption by the UN Human Rights Council of a resolution entitled “Institution-building of the United Nations Human Rights Council,” (Resolution 5/1), which included provisions on the selection of mandate holders and the review of all Special Procedure mandates. In accordance with Resolution 5/1, when selecting and appointing individuals to Special Procedure positions, the following general criteria must be considered (UNITED NATIONS, 2007, §39):

- a) Expertise;
- b) Experience in the field of the mandate;
- c) Independence;
- d) Impartiality;
- e) Personal integrity; and
- f) Objectivity.

The process for appointing UN Special Procedures is stated as being driven by the aim of ensuring that eligible candidates are highly qualified individuals who possess established competence, relevant expertise and extensive professional experience in the field of human rights (UNITED NATIONS, 2007, §41).

In accordance with Resolution 5/1 the following entities may nominate candidates as Special Procedures mandate holders (UNITED NATIONS, 2007, §42):

- a) Governments;
- b) Regional Groups operating within the United Nations human rights system;
- c) International organizations or their offices (e.g. the Office of the High Commissioner for Human Rights);
- d) Non-governmental organizations;
- e) Other human rights bodies; and
- f) Individual nominations.

Furthermore, it is particularly interesting to note that the UN Special Procedure process is expressly governed by the “the principle of non-accumulation of human rights functions” (UNITED NATIONS, 2007, §44), which prevents the same individual from holding more than one Special Procedure mandate at the same time. This principle aims to strengthen the efficacy and effectiveness of the Special Procedures by ensuring that one person does not have to divide their time between mandates. In addition, Resolution 5/1 expressly excludes individuals holding decision-making positions in Government or in any other organization or entity, which may give rise to a conflict of interest, from being appointed to a Special Procedure position (UNITED NATIONS, 2007, §46). This provision is a necessary safeguard to protect the actual and perceived independence of the UN Special Procedures. These two provisions have a particular resonance for the African Commission’s approach to its Special Mechanisms, which currently allows Commissioners to hold positions as Special Rapporteurs and Chairpersons of thematic working group at the same time, and Commissioners may also hold positions in government and even political office while holding a Special Mechanism mandate.

As well as benefitting from having experts matched to a particular mandate and safeguards in place to protect the independence of these mechanisms, the fact that the mandate holders of the UN Special Procedures are external experts has also enabled them to be creative when responding to similar problems experienced by the African Commission, such as a lack of institutional support for the mandates; a lack of funding; and a lack of research and logistical support. Many of the mandate holders of the UN Special Procedures have drawn upon external resources to bolster those provided to them by the OHCHR. For example, the current UN Special Rapporteur on Torture, (SRT) Professor Manfred Nowak, as a director of the Ludwig Boltzmann Institute of Human Rights (BIM), Austria, has been able to receive research support from this Institute for his SRT mandate. The BIM has a specific project to provide support to the mandate of the SRT. Under this project, a team at the BIM help the SRT to respond to complaints from torture victims, their families and NGOs on a daily basis, and they assist the SRT in preparing for and following up on fact-finding missions to countries.¹² This arrangement has allowed the SRT considerable flexibility in exercising his mandate, conducting research into thematic issues relevant to his mandate, and strengthening his independent status.

Furthermore, the practice of having external independent experts designated to a particular UN Special Procedure also ensures that there is a separation at the institutional level between the fact-finding and advocacy functions of UN Special Procedures and the quasi-judicial functions of the treaty bodies. However, the current practice of the African

Commission to designate Commissioners to be the Special Rapporteurs does not enable this type of institutional separation between the functions of the Special Rapporteurs, and the consideration of individual communications by the African Commission (MURRAY, 2008, p. 209-210). For example, as a Commissioner the SRP will participate in the quasi-judicial functions of the African Commission when it considers individual communications. During the consideration of these complaints a situation could easily arise whereby the observations made by the SRP during a mission may be recounted and discussed notwithstanding that the mission reports of the SRP have consistently lacked the necessary stringency, consistency and thoroughness required to represent evidence for the determination of a individual complaint (MURRAY, 2008, p. 209-210). It is therefore proposed that the only way that some institutional separation between the functions of the Special Rapporteurs and the quasi-judicial functions of the African Commission can be assured is to appoint external experts to the Special Rapporteur positions.

6 Conclusion

The Special Mechanisms procedure of the African Commission has, over the years, undoubtedly raised the profile of many human rights issues and is a core function of the African Commission's protective mandate. While the appointment of the Chair of the CPTA as the SRP has the potential to facilitate a stronger and more cohesive approach to these mandates, it does also pose some particular challenges for this dual mandate holder. Since 2004, when a Special Mechanism with a torture prevention mandate was first established, the relationship and interaction between this Committee and the SRP mandate has been ambiguous and confusing. Accordingly, as a first step, it is crucial that the terms of reference of the CPTA is elaborated in full and the dual mandate holder sets out clearly how the CPTA and SRP will work together, to what extent their mandates and responsibilities will be distinguished from each other, and when they overlap how this will be resolved. Furthermore, at the end of Commissioner Atoki's tenure as Chairperson of the CPTA and SRP in 2011, a thorough review of this experimental doubling-up of these mandates should be undertaken in consultation with a broad range of stakeholders to examine whether it has been beneficial or whether alternative approaches to these mandates must be considered for the future.

The doubling-up of the mandates of the Chair of the CPTA and the SRP has also highlighted more general concerns with the current practice of appointing Commissioners of the African Commission as Special Rapporteurs. Notwithstanding the notable commitment of the Commissioners to their respective Special Mechanism mandates, the system has struggled to cope with the demands placed upon the mandate holders and is in urgent need of a thorough review. The Special Mechanisms remain restricted by a lack of capacity and resources. The success of the Special Mechanisms will by and large be dependent on the depth and scope of capacity to support the mandates. This must be addressed and innovative funding models should be investigated as a matter of urgency.

It is interesting to note that at the 47th Ordinary Session of the African Commission in May 2010, the Centre for Human Rights and Human Rights Development Initiative (HRDI) called for the establishment of a Special Rapporteur on HIV/AIDS and for an external independent expert to be appointed into this position rather than one of the

Commissioners. In the end, the African Commission decided to follow its more recent practice of creating working groups or committees rather than Special Rapporteurs, and consequently decided to establish a Committee on the Protection of People Living with HIV and Those at Risk and Vulnerable to and Affected by HIV (ACHPR, 2010). Thus it would appear that the African Commission is currently reluctant to establish new Special Rapporteur positions and to appoint external experts into these positions, and instead favours the establishment of working groups and committees comprised of Commissioners and civil society representatives or other external experts. While the working groups and committees established by the African Commission do enable external experts to be directly involved with the Special Mechanisms alongside the Commissioners, this does inevitably have staffing and funding implications for these bodies at a time when the Special Mechanisms as a whole struggle with a lack of capacity and funding.

In relation to the Special Rapporteurs that the African Commission has already created, it is proposed that the only way that these mandate holders can be truly effective is by abandoning the previous custom of appointing Commissioners as Special Rapporteurs and instead to adopt similar practices followed by the UN Special Procedures system and to appoint external, independent experts through a transparent and inclusive appointment process.

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NOTES

1. PRI secured funding from the Norwegian Agency for Development (NORAD) for their project entitled "Prison conditions in Africa, establishment of the position of Special Rapporteur.
2. See for example the UN Special Rapporteur on Torture Report 'Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention' (UNITED NATIONS, 2010a) and the Joint Study on Secret Detention by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism and the Special Rapporteur on Torture (UNITED NATIONS, 2010b).
3. At its 35th Ordinary Session (May to June 2004), the African Commission also designated the following individuals as the first members of the Follow-up Committee:
 1. Commissioner Ms. Sanji Monageng: elected as Chair;
 2. Mr. Jean-Baptiste Niyizurugero: APT Programme Officer for Africa; elected as Vice-Chair;
 3. Ms. Hannah Forster: African Centre for Democracy and Human Rights Studies (ACDHRS);
 4. Ms. Leila Zerrougui: Magistrate and Professor of Law at the National Institute of Magistracy in Algiers and Chairperson of the United Nations Working Group on Arbitrary Detention;
 5. Ms. Karen McKenzie: Director of the Independent Complaints Directorate of South Africa;
 6. Mr. Malick Sow: Executive Secretary of the Senegalese Committee of Human Rights.
4. The School of Law at the University of Bristol hosted the first and second meeting of the Follow-up Committee because it has a strong background in research into the African human rights system and Professor Malcolm Evans, Professor of law at Bristol University, was a member of the core drafting group that elaborated the Robben Island Guidelines in February 2002.
5. These three countries are not named in the activity report.
6. The CPTA is composed of the following members:
 1. Commissioner Dupe Atoki: re-elected as Chair of the CPTA
 2. Mr. Jean-Baptiste Niyizurugero: re-elected as Vice-Chair of the CPTA
 3. Commissioner Musa Ngary Bitaye
 4. Mr. Malick Sow
 5. Ms. Hannah Forster.
7. The prime rationale behind the development of the RIG, which was initiated by the Association for the Prevention of Torture (APT), was to devise an instrument that would encourage political support within Africa for the concept of torture prevention generally, and the then draft Optional Protocol to the UN Convention against Torture, specifically.
8. The Special Rapporteur on Torture is clear on this issue: "The most important method of preventing torture is to replace the paradigm of opacity by the paradigm of transparency by subjecting all places of detention to independent outside monitoring and scrutiny. A system of regular visits to places of detention by independent monitoring bodies constitutes the most innovative and effective means to prevent torture and to generate timely and adequate responses to allegations of abuse and ill-treatment by law enforcement officials." (UNITED NATIONS, 2010a, para. 157).
9. For a list of the current mandates held by the Commissioners of the African Commission see: <http://www.achpr.org/english/List%20of%20Commissioners/list_updated-2010.pdf>.
10. More details on the UN Special Procedures can be obtained at: <<http://www2.ohchr.org/english/bodies/chr/special/index.htm>>.
11. See Press Release of the Inter-American Commission on Human Rights, on the establishment procedural rules for the appointment of Special Rapporteurs (IACHR, 2006). For more information on the different Rapporteurships, see <<http://www.cidh.oas.org/relatorias.eng.htm>>. Last accessed on 2 February 2011. Furthermore, in its Inter-session Report to the 37th Ordinary Session of the ACHPR, the Special Rapporteur on Freedom of Expression in Africa states that "[i]t is necessary here to clarify the status of the OAS Special Rapporteur on freedom of expression. The Special Rapporteur is not a Commissioner of the Inter-American Commission. His office is an independent office which reports to the Commission. It is autonomous with its own staff and budget." (ACHPR, 2007, p. 3).
12. More information on the support provided by the Ludwig Boltzmann Institute for Human Rights to the UN Special Rapporteur on Torture can be found at the following address: <<http://bim.lbg.ac.at/en/human-dignity-and-public-security/support-un-special-rapporteur-torture>>.

RESUMO

Este artigo estuda as consequências decorrentes da decisão recente da Comissão Africana dos Direitos Humanos e dos Povos (Comissão Africana) de nomear, para o cargo de Relator Especial sobre Prisões e Condições de Detenção (REP), a Presidente do Comitê para Prevenção da Tortura na África (CPTA). O presente artigo analisa os mandatos desses dois Mecanismos Especiais e considera o potencial conflito gerado pela cumulação de dois mandatos por um mesmo Comissário. O artigo, em seguida, avalia se a prática atual da Comissão Africana de nomear Comissários para o cargo de Relator Especial é capaz de oferecer a expertise e o dinamismo necessários para desempenhar efetivamente essas funções e satisfazer as demandas pela criação de novos mecanismos. Por fim, este artigo sugere que algumas lições podem ser extraídas da recente revisão dos Procedimentos Especiais da ONU no intuito de revisar os procedimentos dos Mecanismos Especiais da Comissão Africana.

PALAVRAS-CHAVE

Tortura – Prisão – Comissão Africana para os Direitos do Homem e dos Povos

RESUMEN

El presente artículo analiza las implicancias que surgen de la reciente decisión de la Comisión Africana de Derechos Humanos y de los Pueblos (Comisión Africana) de designar al Presidente del Comité para la Prevención de la Tortura en África (CPTA) como Relator Especial sobre Prisiones y Condiciones de Detención (REP). Se examinan los mandatos de estos mecanismos especiales y se considera el impacto que podría tener el hecho de que un mismo Comisionado deba desempeñar ambos mandatos al mismo tiempo. Luego se considera si la actual práctica de la Comisión Africana de designar a miembros de la Comisión como Relatores Especiales puede brindar el nivel de conocimientos especializados y acción necesarios para un funcionamiento efectivo y satisfacer las crecientes demandas de nuevos mecanismos. Por último, el artículo sugiere que pueden extraerse lecciones del último examen de los Procedimientos Especiales de Naciones Unidas a fin de reformar los mecanismos especiales de la Comisión Africana.

PALABRAS CLAVE

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