CHAPTER 10

THE INCORPORATION OF THE THEMATIC RESOLUTIONS OF THE AFRICAN COMMISSION INTO THE DOMESTIC LAWS OF AFRICAN COUNTRIES

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Abstract

The African Commission on Human and Peoples' Rights has entrenched the practice of adopting resolutions during its ordinary and extraordinary sessions. Three categories of resolutions have emerged from this practice: thematic; country-specific; and administrative. This chapter examines the impact of the African Commission's thematic resolutions. While this category of resolutions may be put to great use and impact, a good number of the resolutions 'die' as soon as they are adopted. They simply do not gain traction. Other thematic resolutions have a once-in-a-lifetime impact or are quickly overtaken by political and other relevant developments. Only a few thematic resolutions take on a life of their own and stand the test of time. By analysing the extent to which three specific thematic resolutions have been incorporated into the domestic laws of African countries, this chapter provides insights into why some resolutions remain scraps of paper while others go on to become important and cherished normative instruments.

1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) rightly and justifiably regards itself as the 'premier' human rights treaty body in Africa.[1] Established in 1987 under the auspices of the Organisation of African Unity (OAU) – the predecessor to the present-day African Union (AU) – the 11-member quasi-judicial body is principally charged with the mandate of supervising state implementation of and

1 37th Activity Report of the African Commission on Human and Peoples' Rights, para 43. See also 'Impact of the African Charter on domestic human rights in Africa' http://www.achpr.org/instruments/achpr/impact-on-domestic-human-rights/ (accessed 9 September 2017).

compliance with the African Charter on Human and Peoples' Rights (African Charter).[2] This mandate translates into several interconnected and mutually-reinforcing functions and activities. These include the dissemination of the African Charter; examination of state party reports; the determination of inter-state and individual communications; undertaking country visits; issuing advisory opinions; and intervening in cases where the enjoyment of human rights is severely threatened.[3] These functions are more or less similar to those performed by the other regional and global quasi-judicial human rights treaty bodies.

Another key activity of the African Commission is the adoption of resolutions. It is an institutional practice that is now well entrenched and regarded as one of the African Commission's 'commendable innovativeness'.[4] At most of its sessions, the African Commission adopts resolutions, either addressing a thematic issue, the human rights situation in a specific country, or a particular procedural or administrative matter. Thus, three categories of resolutions have emerged from practice: thematic; country-specific; and administrative. Human rights activists and non-governmental organisations (NGOs) often spend a great deal of time and energy lobbying the African Commission to adopt specific resolutions. As of September 2017, the African Commission had adopted a total of 376 resolutions. On matters addressed, the resolutions are considered 'formal expressions of the Commission's opinion'.[5]

The resolutions are targeted towards a variety of actors, but states are the primary audience, and in this regard are expected to take specific actions in compliance with the standards or recommendations contained in the resolutions. However, the impact of the resolutions remains an issue of speculation. Little is known about the fate of the resolutions after they have been adopted. International human rights actors and NGOs usually greet the adoption of resolutions with excitement and celebration.[6] State parties, who are ultimately responsible for implementing the resolutions, hardly share in the excitement. Whilst it is relatively consistent in adopting resolutions, the African Commission has not established a mechanism for

2 OAU Doc CAB/LEG/67/3/Rev.5, adopted 27 June 1981, entered into force 21 October 1986.

3 See African Charter, arts 45-59 & 62.

4 Opening address by Catherine Dupe Atoki, Chairperson of the African Commission on Human and Peoples' Rights, delivered at the opening ceremony of the 52nd ordinary session of the African Commission, 9-22 October 2012, Yamoussoukro, Côte d'Ivoire.

5 As above.

6 See, eg, 'UN rights office hails adoption of Africa-led resolution on people with albinism' http://www.un.org/apps/news/story.asp?NewsID=46504#.VhS8GWcw_IU (accessed 9 September 2017); 'African Commission adopts landmark resolution on LGBT rights' http://www.ishr.ch/news/African-commission-adopts-landmark-resolution-lgbt-rights (accessed 9 September 2017); 'KHRC applauds African Commission resolutions from 56th ordinary session' http://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/346-khrc-applauds-african-commission-resolutions-from-56th-session.html (accessed 9 September 2017).

tracking and documenting their impact. As a result, it does not have concrete information at its disposal to demonstrate the value of the resolutions. Scholarly literature on the impact of the resolutions is equally lacking. As the African Commission celebrated its thirtieth anniversary in 2017 and entered its fourth decade of existence, it is imperative that the impact of its work is examined and appropriate lessons are drawn.

This chapter is an attempt to fill the above-mentioned gap in the literature. However, rather than documenting the impact of all three categories of the African Commission's resolutions, the chapter pursues a narrower and more manageable task. It examines the impact of the African Commission's thematic resolutions by analysing the incorporation of these resolutions into the domestic laws of African countries. Incorporation is a relatively good indicator of the impact of a thematic resolution as it denotes state acceptance and willingness to implement it in practice. The scope of the chapter is further narrowed down to only three thematic resolutions. These are the 1999 Resolution Urging States to Envisage a Moratorium on the Death Penalty as supplemented by the 2008 Resolution Calling on States to Observe the Moratorium on the Death Penalty; the 2002 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines); and the 2002 Declaration of Principles on Freedom of Expression in Africa.

In terms of the structure of the chapter, this introduction is followed by an overview of the role and structure of the African Commission's thematic resolutions in section 2. Section 3 examines the legal status and soft law character of the resolutions. Section 4 makes the case for the application of the concept of incorporation or domestication to the African Commission's thematic resolutions. It is important to make such a case as the concept of incorporation or domestication is traditionally associated with treaty law as opposed to soft law. Section 5 proceeds to analyse the available evidence on the incorporation of the three selected thematic resolutions into the domestic laws of African countries. Section 5 draws the analysis to a conclusion and filters out the important insights of the chapter.

2 Role and structure of thematic resolutions

The African Commission's thematic resolutions are similar to the General Comments of the UN human rights treaty-monitoring bodies. They reflect the thinking and interpretation of the African Commission on particular themes or substantive provisions of the African Charter. Although the

African Charter is progressive in certain respects,[7] it contains many vague and ambiguous provisions.[8] It is also replete with claw-back clauses.[9] These provisions are neither the products of oversight nor of poor drafting. They are a fruit of the era during which the African Charter was adopted. The African Charter was drafted and adopted at a time when the principle of non-interference in domestic affairs was, in the words of Viljoen, 'as firmly rooted in African soil as an unwavering baobab'.[10] The drafters of the Charter were conscious of this fact and, as such, they adopted a minimalist approach to ensure that the document received the blessing of states.

When the African Commission was inaugurated in 1987, it had before it a skeletal document that needed a new breath of life. By way of thematic resolutions, the African Commission has clarified the normative content of most of the rights guaranteed under the African Charter. In this sense, thematic resolutions are an attempt by the African Commission to elaborate in greater detail upon the substantive provisions of the African Charter. While their primary purpose is to clarify the normative content of the rights already guaranteed under the African Charter, there are several instances where the African Commission has used thematic resolutions to address new developments that were not envisioned at the time of adopting the African Charter. For instance, the African Commission has utilised thematic resolutions to express its opinion about the human rights implications of HIV,[11] climate change,[12] and illicit capital flight.[13] The normative effect of these resolutions is to expand the scope and reach of the African Charter.

There are also some thematic resolutions which neither clarify nor expand the African Charter. Instead, they are concerned with states' expression of commitment to human rights through the ratification of

7 Eg, the African Charter incorporates both civil and political rights and socio-economic rights. For a review of the major substantive provisions of the African Charter, see F Viljoen *International human rights law in Africa* (2012) 212-241.

8 E Bondzie-Simpson 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 643.

9 R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667.

10 Viljoen (n 7 above) 158.

11 Resolution on HIV/AIDS Pandemic – Threat against Human Rights and Humanity, ACHPR/Res.53(XXIX)01 adopted at the 29th ordinary session, Tripoli, Libya, 23 April-7 May 2001.

12 Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, ACHPR/Res.153(XLVI09 adopted at the 46th ordinary session, Banjul, The Gambia, 11-25 November 2009.

13 Resolution on Illicit Capital Flight from Africa, ACHPR/Res.236(LIII)2013 adopted at the 53rd ordinary session, Banjul, The Gambia, 9-23 April 2013.

treaties,[14] strengthening of institutional frameworks,[15] and implementation of recommendations directed at them by the African Commission.[16] Udombana offers a succinct summary of the role of thematic resolutions, when he states that they are

> consequential rules from the experiences of the Commission, elaborated to give practicality and eliminate confusion from the broad formulae sometimes offered by the African Charter. They express the direction in which the law is evolving in Africa. They also serve as useful guidelines to give operational effect to certain Charter provisions and, consequently, the expectations that can, with the benefit of clarity, be placed on the African Commission. The resolutions are of considerable value in better understanding the norms and implementation problems in the legal systems of African countries.[17]

As of September 2017, the African Commission had adopted a total of 126 thematic resolutions. These resolutions cover a wide variety of themes. In particular, the resolutions address at least the following 10 broad subjects: the justice system; elections and governance; discrimination and vulnerable groups; treaties and institutions; expression rights; socio-economic rights; the death penalty and torture; implementation; and conflict and terrorism.

The structure of thematic resolutions is fairly uniform. After enunciating in the Preamble the basis for adopting a specific resolution, the African Commission makes its pronouncement in the operative paragraphs. The titles of thematic resolutions, however, vary. A few thematic resolutions are titled as guidelines, principles or declarations. There appears to be no particular criterion for the use of these titles by the African Commission. In the tradition of the United Nations (UN), a 'declaration' is used when 'principles of great and lasting importance are being enunciated'.[18] For a long time, only the Universal Declaration of Human Rights (Universal Declaration) carried the title 'universal declaration'. Later, one other instrument was given the same title,[19] leading an expert tasked to assess the UN human rights system to speculate

14 See, eg, Resolution on the Ratification of the Additional Protocol on the Creation of an African Court on Human and Peoples' Rights, ACHPR/Res.29(XXIV)98 adopted at the 24th ordinary session, Banjul, The Gambia, 22-30 October 1998.

15 See, eg, Resolution on the Establishment of an Effective African Court on Human and Peoples' Rights, ACHPR/Res.76(XXXVII)05 adopted at the 37th ordinary session, Banjul, The Gambia, 27 April-11 May 2005.

16 See, eg, Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties, ACHPR/Res.97(XXXX)06 adopted at the 40th ordinary session, Banjul, The Gambia, 15-29 November 2006.

17 N Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 299 306.

18 UN Doc E/CN.4/L.610 (1962).

19 Universal Declaration on the Eradication of Hunger and Malnutrition, adopted on 16 November 1974 by the World Food Conference convened under General Assembly Resolution 3180 (XXVIII) of 17 December 1973 and endorsed by General Assembly Resolution 3348 (XXIX) of 17 December 1974.

as to 'whether sufficient consideration is being given to the choice of terms such as "universal declaration" and "declaration" rather than to alternatives that might accurately describe the content and significance of the instrument'.[20]

There is nothing concrete that suggests that the African Commission follows the practice of the UN. However, it is notable that only a handful of thematic resolutions are referred to as either 'guidelines', 'principles' or 'declaration'.[21] Most thematic resolutions that carry these titles are drafted in a series of workshops over a long period of time and by a wide range of stakeholders. This kind of procedure differs from the approach followed in drafting 'ordinary' thematic resolutions which originate from and are drafted by a small drafting committee during the short period of time available during the ordinary or extraordinary sessions of the African Commission.

3 Legal status of thematic resolutions

The African Commission's thematic resolutions fall under a category of human rights soft law which Shelton refers to as 'secondary soft law'. She defines secondary soft law as pronouncements of 'institutions whose existence and jurisdiction are derived from a treaty and who apply norms contained in the same treaty'.[22] The field of human rights is flooded with secondary soft law mainly because of the proliferation and prominent role of human rights treaty bodies both at the global and regional levels. Shelton cites the following as examples of secondary soft law: 'recommendations and general comments of international human rights supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other ad hoc bodies, and the resolutions of political organs of international organizations applying primary norms'.[23] According to Shelton's categorisation, the African Commission's resolutions are secondary soft law, as are its Concluding Observations, Recommendations and General Comments.

20 *Report of effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights*, A/44/668, 8 November 1989 (Philip Alston Report) 168-170.

21 Notable examples include Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 2002 (Robben Island Guidelines); Declaration of Principles on Freedom of Expression in Africa; Declaration on Economic, Social and Cultural Rights in Africa (Pretoria Declaration); Declaration on the Right to a Fair Trial, 1999 (Dakar Declaration); Principles and Guidelines on Economic, Social and Cultural Rights (Nairobi Guidelines); Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, 2014 (Luanda Guidelines); Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, 2015.

22 D Shelton 'Commentary and conclusions' in D Shelton (ed) *Commitment and compliance: The role of non-binding norms in the international legal system* (2000) 449 451.

23 As above.

Secondary soft law should be distinguished from 'primary soft law', another term introduced by Shelton. Primary soft law are 'normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization'.[24] At the global level, the most famous and oft-cited example of primary soft law is the Universal Declaration. In the African context, examples of primary soft law include the Grand Bay (Mauritius) Declaration and Plan of Action and the Kigali Declaration.

Conflicting viewpoints exist in literature on the binding effect of secondary soft law generated by human rights treaty bodies such as the African Commission. The position taken by many is that the outputs of these bodies are not legally binding, but that they do have some legal significance. As Rodley observes, 'the outcomes of the [UN human rights] committees' (Concluding Observations, General Comments and jurisprudence) are not per se legally binding, but they have real legal significance'.[25] This means that although the outputs of human rights treaty bodies are intrinsically recommendatory, they have a persuasive effect on their addressees as they are an authoritative interpretation of the relevant treaty. The International Court of Justice (ICJ) has thus relied on the Concluding Observations and case law of the UN Human Rights Committee to delineate certain state obligations.[26] These outputs may also reflect subsequent state practice within the meaning of article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT).[27] In other words, states acquiesce to an interpretation of a treaty advanced by a human rights treaty body when and if they do not object to that interpretation.[28]

Human rights treaty bodies tend to ascribe a binding status to some, if not all, of their outputs or secondary soft law. The UN Human Rights Committee, for instance, has long held that its final views regarding complaints against state parties to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) are binding. It consistently includes a paragraph in its final views emphasising that state

24 Shelton (n 22 above) 449-450.

25 N Rodley 'The role and impact of treaty bodies' in D Shelton (ed) *The handbook of international human rights law* (2013) 621 632. See also M O'Flaherty 'The Concluding Observations of United Nations human rights treaty bodies' (2006) 6 *Human Rights Law Review* 27 32-37; C Blake 'Normative instruments in international human rights law: Locating the general comment' Centre for Human Rights and Global Justice Working Paper No 17 (2008) 30.

26 *Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory* (2004) ICJ Reports 184; *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* (2010) ICJ Reports 639 para 77.

27 According to art 31(3)(b) of the VCLT, a treaty should be interpreted taking into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.

28 M Scheinin 'Characteristics of human rights norms' in C Krausse & M Scheinin (eds) *International protection of human rights: A textbook* (2009) 19 21. See also International Law Association *Final report of findings of the United Nations treaty bodies* (2004) 5.

parties are bound by its views and should give effect to them.[29] Several authors support the position taken by the Human Rights Committee, albeit with some reservations.[30] Like the UN Human Rights Committee, the African Commission asserts that its decisions on complaints are binding,[31] a view supported by several authors.[32] However, it does not make a similar argument in respect of resolutions. Instead, it relies on the authoritative interpretation argument to urge states to implement the resolutions. In particular, the African Commission recognises that its thematic resolutions provide authoritative interpretations of the provisions of the African Charter. The following statement of the African Commission's Special Rapporteur on Freedom of Expression and Access to Information is instructive:[33]

> Though not legally binding, states parties should have the political will to look beyond the non-binding nature of the Declaration [of Principles on Freedom of Expression] and have a broader recognition of the effectiveness of its principles which are meant to expand the content of article 9 of the African Charter. They should put in place strategies to implement the Declaration at the national level, while NGOs and other stakeholders should continue to raise awareness for a better understanding of the same.

The above statement is more strategic and pragmatic than arguing that the African Commission's thematic resolutions are legally binding. However, by suggesting that the implementation of resolutions depends almost entirely on states' political will, the statement ends up weakening the legal significance of the African Commission's resolutions. A stronger position would be to argue that resolutions invoke state obligations, albeit indirectly. Rodley makes a similar point in relation to the General Comments of the UN Human Rights Committee when he observes that

29 For further discussion, see F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law* 1 14-15.

30 J Davidson 'Intention and effect: The legal status of the final views of the Human Rights Committee' (2001) *New Zealand Law Review* 125; F Pocar 'Legal value of the Human Rights Committee's views' (1991-1992) *Canadian Human Rights Yearbook* 119.

31 See, eg, *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) paras 113 & 116. See also Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties, ACHPR/Res.97(XXXX)06 adopted at the 40th ordinary session, Banjul, The Gambia, 15-29 November 2006.

32 See, e.g., G Mukundi & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465 474.

33 Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa: Viewed in 25 years of the Commission, presented by Adv Pansy Tlakula, 52nd ordinary session, 9-22 October 2012, Yamoussoukro, Côte d'Ivoire, http://www.achpr.org/files/sessions/52nd/inter-act-reps/183/activity_report_sp_freedom_expression_eng.pdf (accessed 7 September 2017). See also *Hadi & Others v Sudan*, Communication 368/09, 54th ordinary session, 4 June 2014.

their legal impact is 'perforce less direct'.[34] Given that they are issued by a body established by treaty, the African Commission's thematic resolutions prompt obligations which states already have undertaken to perform by ratifying the treaty. The resolutions do not create new obligations; they fortify existing obligations. In particular, the resolutions prompt three specific obligations.

First, states have an obligation to implement the African Commission's resolutions because they have undertaken to give effect to the African Charter which establishes the African Commission. Article 1 of the African Charter provides that 'member states shall recognise the rights under the Charter and shall undertake to adopt legislative or other measures to give effect to them'. Commentators agree that the reference to 'other measures' in article 1 is sufficiently broad to include compliance with and implementation of the African Commission's recommendations.[35] The African Commission has on numerous occasions held that article 1 indeed imposes such an obligation.[36] This argument is usually applied to recommendations emanating from the complaints procedure, but it certainly applies also to the African Commission's resolutions.

Second, states are expected to implement thematic resolutions as they have an obligation to co-operate with the African Commission. The duty to co-operate is not expressly indicated in the African Charter. Nonetheless, the African Commission has held that by ratifying the African Charter, state parties have indicated their 'commitment to co-operate with the African Commission and to abide by all decisions it takes'.[37] A similar argument has been used to make the case for state co-operation with the UN Charter-based human rights mechanisms such as the defunct UN Commission on Human Rights (UNCHR) and the special procedures established by the UNCHR.[38]

Third, states have an obligation to implement the African Commission's thematic resolutions to the extent that these resolutions are considered to be AU decisions. Article 54 of the African Charter provides that the African Commission 'shall submit to each ordinary session of the Assembly of Heads of State and Government a report on its activities'.

34 Rodley (n 25 above) 639. See also R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 13: 'We would adopt the position that, rather than label the findings as binding/non-binding, we would consider them in terms of the range and variety of obligations that they may impose on states.'

35 Viljoen & Louw (n 29 above) 7; Mukundi & Ayinla (n 32 above).

36 See, eg, *International Pen & Others v Nigeria* (n 31 above) paras 113 &122.

37 *Democratic Republic of the Congo v Burundi* (2004) AHRLR 19 (ACHPR 2003) para 53. See also Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights, Doc.II/EX/ACHPR.

38 See T Kamminga 'The thematic procedures of the UN Commission on human rights' (1987) 34 *Netherlands International Law Review* 299 322; M Lempinen *The United Nations Commission on Human Rights and the different treatment of governments* (2005) 121.

Article 59(3) further provides that '[t]he report on the activities of the African Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government'. The role of considering the African Commission's activity reports has since been delegated to the AU Executive Council. Upon considering the African Commission's activity reports, the Executive Council takes a 'decision' adopting the report and authorising its publication. The attendant effect of this act of adoption is to convert the report of the African Commission into that of the Executive Council.[39] By adopting the African Commission's activity reports, the Executive Council assumes responsibility for their contents.[40] In other words, the African Commission's resolutions, by extension, become the Executive Council's decisions which states are duty bound under the AU Constitutive Act to implement or comply with.

4 Applying the concept of incorporation to thematic resolutions

The concept of incorporation or domestication is traditionally associated with treaty law. In this regard, almost all human rights treaties require state parties to put in place specific legislative or policy measures at the domestic level. It may thus be argued that the concept of incorporation does not tidily apply to soft law such as the African Commission's thematic resolutions. However, practice tells a different story. States occasionally undertake to and actually domesticate soft law.[41] Several thematic resolutions actually do contain a domestication requirement. To give one example, Guideline 44 of the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) provide that 'states shall adopt legislative, administrative, judicial and other measures to give effect to these guidelines'. Furthermore, the African Commission occasionally recommends to state parties to incorporate provisions of specific thematic resolutions into domestic law. For example, following a promotional visit to Uganda in 2013, the African Commission recommended that Uganda should

> develop a legal framework for the protection of human rights defenders in conformity with the UN Declaration on Human Rights Defenders 1998 and the Commission's Resolutions on Human Rights Defenders including

39 Viljoen & Louw (n 29 above) 10.

40 As above.

41 See International Conference on Great Lakes Region (ICGLR) Protocol on the Protection and Assistance to Internally Displaced Persons, art 6. Several countries in Africa, including Angola, Burundi, Kenya, Liberia, Sierra Leone, Sudan and Uganda, have enacted laws to domesticate the UN Guiding Principles on Internal Displacement. See C Beyani 'The politics of international law: Transformation of the Guiding Principles on Internal Displacement from soft law into hard law' (2008) 102 *American Society of International Law Proceedings* 194.

ACHPR/Resolution 69 (XXV) 04, ACHPR/Resolution 119 (XXXXII) 07, and ACHPR/Res. 196 (L) 11.[42]

Perhaps more importantly, the expectation that relevant provisions of the African Commission's thematic resolutions should be incorporated into domestic laws flows from the African Charter itself. According to the African Charter, the functions of the African Commission include 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms *upon which African governments may base their legislations* (*sic*)'.[43] This provision is the clearest statutory basis for the Commission's practice of adopting thematic resolutions. It specifically envisages that such resolutions will be the basis of the relevant national laws.

How then does one assess the incorporation of the African Commission's thematic resolutions into the domestic laws of African countries? Claiming that a thematic resolution has been incorporated into the domestic legal order requires one to draw a causal link between the resolution and the national law(s) in question. This would not be problematic in cases where explicit reference to the resolution is made in a national law or during the drafting history of such law. In the real world, explicit references to international human rights law in national laws are not very common. This is the case even in instances where the language in a national law is lifted *verbatim* from international human rights law. For this reason, it is imperative to look beyond explicit reference for evidence of incorporation. Other factors to consider include the content of national law and the drafting history.[44]

Another relatively good piece of evidence of incorporation is a state's acknowledgment, say before the African Commission, that it has adopted a law to give effect to a specific thematic resolution. However, this kind of acknowledgment is scarce and random. In any event, even when a state does acknowledge that its domestic law has been influenced by a thematic resolution, it is difficult to tell whether the acknowledgment is genuine or mere posturing. Apart from the challenge of comprehending state motivation, other methodological factors make it difficult to produce a comprehensive picture of the extent to which the African Commission's

42 Report of the Joint Promotion Mission to the Republic of Uganda, 25-30 August 2013, presented to the 55th ordinary session of the African Commission, 28 April-12 May 2015, Luanda, Angola 62.

43 African Charter, art 45(1)(b).

44 F Viljoen 'The impact and influence of the African regional human rights system on domestic law' in S Sheeran & N Rodley (eds) *Routledge handbook of international human rights law* (2013) 445 451-452, noting: 'Naturally, viewed from the domestic perspective, it does not matter what the source or inspiration of a law is; it only matters if it embodies human rights principles, or whether it is otherwise progressive. The influence of the [African] Charter should therefore not be restricted to instances of explicit reference.'

thematic resolutions have inspired the enactment or content of domestic laws.

First, the sheer number of the African Commission's thematic resolutions, 96 by the end of 2014, makes it difficult to trace the potential journey of each resolution into domestic law. It is equally challenging for states to keep pace with the rate of adoption of the resolutions. Second, the resolutions are addressed to all state parties to the African Charter. A survey of the relevant national laws of all these countries is almost impossible to undertake. Most laws and transcripts of parliamentary debates are not easily available, and it would take vast resources to conduct country-to-country reviews. Third, most thematic resolutions are not exemplars of meticulous drafting. The obligations they attempt to impose, the directives they issue, or the rights they articulate, are not couched in the clearest language. Fourth, domestic laws often are the result of multiple inspirations and the efforts of a multitude of local and international actors. Isolating the specific influence of the African Commission's thematic resolutions is an arduous task.

The above-mentioned challenges leave one with very few plausible methods of determining the extent of incorporation. One technique is to analyse the information provided to the African Commission by states, notably through the state reporting procedure. The African Commission's several sets of guidelines for state reporting require states to submit information demonstrating incorporation of the African Charter into domestic law.[45] Some thematic resolutions also demand this information. For instance, Guideline 47 of the Luanda Guidelines provide that '[s]tate parties to the African Charter, in their periodic reports … shall provide information on the extent to which national legislation, policy and administration pertaining to the use and conditions of arrest , police custody and pre-trial detention are consistent with these Guidelines'. Similarly, in operative paragraph 5 of Resolution 105 on the Prevention and Prohibition of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[46] the African Commission urges state parties to include information on 'the concrete measures that they are taking to implement and operationalise the Robben Island Guidelines' in their periodic reports.

45 According to the Guidelines for State Reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, state parties are required to provide 'an explanation as to whether the Protocol is directly applicable before national courts or if it has to be incorporated into domestic law'. The Commission's State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines) provides in para 2(a) that states should indicate 'whether the state party has adopted a national framework law, policies and strategies for the implementation of each right'.

46 ACHPR/Res.105 (XXXXI) 07.

Admittedly, the African Commission's state reporting procedure is not a perfect method of gathering information that one would need to make credible claims about incorporation. States hardly observe the reporting cycle. A number of countries, such as the Comoros, Equatorial Guinea, Eritrea, Guinea Bissau, São Tomé and Principe and Somalia, have never even submitted the initial report. More importantly, states do not consistently provide information on domestication of the African Charter, let alone of thematic resolutions. When they do, the information is sparse and generally subjective. It also does not help that the *modus operandi* adopted by the African Commission during the review of state party reports does not allow for the rigorous verification of information.[47]

For these reasons, caution must be taken when considering reliance upon information contained in state reports. In particular, the information provided by states must be cross-checked and the particular influence of thematic resolutions isolated. The potential to exaggerate impact is relatively high if state information is not verified. Quoting the state party reports of Zambia and Cameroon, Maikassoua, for instance, has claimed that these countries developed national policies on the fight against AIDS 'to comply' with the African Commission's Resolution on the HIV pandemic.[48] However, he fails not only to draw the causal link between the resolutions and the national policies, but also does not indicate whether there were other influences apart from the African Commission's resolution. This is true of his other claims and that the resolutions on fair trial and the Robben Island Guidelines influenced the enactment of laws relating to prisons in Egypt, Ethiopia and Kenya.[49]

Beyond the state reporting procedure, one may also analyse information gathered by the African Commission through such means as research and visits to state parties.[50] The African Commission, for example, maintains a torture prevention database that contains a list of national anti-torture laws.[51] By tracking the legislative process of the laws listed in the database, one may deduce whether the relevant thematic resolution has influenced the enactment or content of the listed laws. The African Commission's Special Rapporteur on Freedom of Expression and Access to Information in Africa (Special Rapporteur) also gathers data on

47 Viljoen (n 7 above) 359: 'The procedure adopted by the Commission is also hardly conducive to true dialogue. A series of questions is posed in quick succession by each of the 11 commissioners, followed by the response to some of these questions by an often-bewildered representative. The process is more akin to a series of critical statements, followed by a statement in defence of the report.'

48 R Maikassou 'Implementation of the African Charter on Human and Peoples' Rights by the states parties', paper presented at the 52nd ordinary session of the African Commission on Human and Peoples' Rights, 9-22 October 2012, Yamoussoukro, Côte d'Ivoire (on file with the author).

49 As above.

50 African Charter, art 45(1)(a).

51 See http://www.achpr.org/mechanisms/cpta/torture-db/ (accessed 9 September 2017).

the extent to which the Declaration of Principles on Freedom of Expression in Africa has been implemented at the domestic level.[52] In this context, the Special Rapporteur has since 2008 steered a research project which monitors progress in the adoption of access to information legislation.[53]

5 Evidence of incorporation: Three case studies

The analysis that follows focuses on thematic resolutions that specifically call on states to enact legislation or those for which there is a general consensus that effective implementation requires domestic legislation. In this regard, the analysis narrows down to resolutions on three specific themes, namely, the death penalty; torture; and freedom of expression and access to information. The law, with all its inadequacies, is regarded as the strongest means of abolishing the death penalty. According to Viljoen, '[in] so far as the law allows for the possibility of capital punishment, the law must also be the means for its abolition'.[54] Similarly, the existence of a legal framework for prohibition and punishment is considered a critical component of any torture prevention strategy.[55] Thus, under the Convention against Torture (CAT), state parties must make torture a specific offence punishable under criminal law.[56]

For reasons of research expediency, resolutions on the three themes were also selected as attempts are already in place at the systematic tracking of progress in enacting domestic legislation and collection of laws on these themes by not only the African Commission, as mentioned above, but also by other organisations. For instance, the International Federation

52 The Special Rapporteur is mandated not only to 'analyse national media legislation, policies and practice within member states, monitor their compliance with freedom of expression and access to information standards in general and the Declaration of Principles on Freedom of Expression in Africa in particular, and advise members accordingly', but to also 'submit reports at each ordinary session of the African Commission on the status of the enjoyment of the right to freedom of expression and access to information in Africa'. Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res.62 (XXXII) 02; Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom and Access to Information in Africa, ACHPR/Res.122(XXXII) 07.

53 Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, presented during the 43rd ordinary session of the African Commission, 7-22 May 2008, http://www.achpr.org/files/sessions/43rd/inter-act-reps/110/achpr43_specmec-fexp_actrep_2008_eng.pdf (accessed 9 September 2017). The research project is a collaborative initiative between the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the Centre for Human Rights, University of Pretoria, South Africa.

54 L Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) vii.

55 B Bernath *Preventing torture: An operational guide for national human rights institutions* (2010).

56 Committee against Torture, General Comment 2, Implementation of article 2 by States Parties, para 8.

of Action by Christians for the Abolition of Torture (FIACAT) tracks the progress in abolishing the death penalty in Africa. Similarly, the Association of Prevention of Torture (APT) maintains a database of relevant laws on torture, while the Centre for Human Rights at the University of Pretoria provides technical assistance to countries formulating access to information laws.

5.1 Death penalty resolutions

The African Charter provides that the right to life must be respected and not arbitrarily taken away.[57] The African Charter is silent on the question of the death penalty, which is an emotive and controversial issue in Africa. In response to demands by civil society organisations (CSOs), and to bring the African Charter in line with the international trend toward the abolition of the death penalty, the African Commission in 1999 adopted the Resolution Urging States to Envisage a Moratorium on the Death Penalty.[58] In the Resolution, the African Commission urged states to (i) ensure that persons accused of capital offences are afforded all the guarantees in the African Charter; (ii) apply the death penalty to the most serious crimes only; (iii) consider establishing a moratorium on executions; and (iv) reflect on the possibility of abolishing the death penalty. At its 37th ordinary session held in 2005, the African Commission established a Death Penalty Working Group to lead its work on this theme.[59]

In 2008, the African Commission renewed its 1999 appeal. It adopted another resolution on the death penalty: the Resolution Calling on States to Observe the Moratorium on the Death Penalty.[60] This time round, the African Commission went further and explicitly mentioned that states should observe a moratorium 'with a view to abolishing the death penalty'.[61] The African Commission was also more specific, requiring states to ensure that persons accused of capital offences are afforded 'all the guarantees of a fair trial included in the African Charter'.[62] The African Commission also urged states that had not yet ratified the Second Option Protocol to the International Covenant on Civil and Political Rights on the Abolition of the Death Penalty (ICCPR Optional Protocol) to do so.[63]

57 African Charter, art 4.
58 ACHPR/Res.42 (XXVI) 99 adopted at the 26th ordinary session, Kigali, Rwanda, 1-15 November 1999.
59 Resolution on the Operationalisation of the Working Group on Death Penalty, ACHPR/Res.79 (XXXVIII) 05 adopted at the 38th ordinary session, Banjul, The Gambia, 21 November-5 December 2005.
60 ACHPR/Res.136 (XXXXIV) 08 adopted at the 44th ordinary session, Abuja, Nigeria, 10-24 November 2008 (Resolution 136).
61 Resolution 136, operative para 2.
62 Resolution 136, operative para 1(b).
63 Resolution 136, operative para 3.

The litmus test for the African Commission's death penalty resolutions is the extent to which they have prompted and framed national debates, nudged states to observe a moratorium and, perhaps more importantly, inspired the enactment of national laws abolishing the death penalty. In proposing the adoption of the 2008 Resolution, the Death Penalty Working Group indicated that the number of countries applying the death penalty had reduced considerably.[64] The Working Group also says that the resolutions have influenced the attitudes of states.[65] A total of 17 African states have abolished the death penalty in law. Seven of these countries, Benin, Burundi, Côte d'Ivoire, Gabon, Rwanda, Senegal and Togo, did so after 1999. This research found that the African Commission's death penalty resolutions had a very limited influence on these countries. Speaking of the 1999 resolution, Curry observed that '[a]lthough the resolution was encouraging for death penalty abolitionists, its tentative language did little to influence government action'.[66]

One country in which there is an observable impact of the resolutions is Benin. In 2004, Benin initiated a national debate on the death penalty in direct response to the 1999 Resolution. In its second periodic report, Benin informed the African Commission as follows:[67]

> In a bid to implement the resolution of the African Commission on Human and Peoples' Rights and to give effect to the commitments made by Benin with respect to the right to life, the government has initiated a debate on whether to abolish or maintain the death penalty. In fact, the eighth session of the National Human Rights Consultative Council, held from 23 to 25 February 2004 in Cotonou, was the forum for such debate.

After a drawn-out period spanning approximately seven years, the Beninese National Assembly enacted a law in April 2011 mandating the executive to accede to the Optional Protocol.[68] The country acceded to the Optional Protocol in July 2012. It subsequently amended its laws to remove all references to the death penalty. Undoubtedly, the African Commission's twin resolutions on the death penalty inspired and framed the debate that ultimately led to Benin's accession to the ICCPR Optional Protocol and the abolishment of the death penalty.

64 Intersession Activity Report Presented by Commissioner Sylvie Zainabo Kayitesi, 44th ordinary session, Abuja, Nigeria, 10-24 November 2008.

65 Inter-session Activity Report of the Working Group on the Death Penalty and Extrajudicial Killings, Summary or Arbitrary Killings in Africa (April 2014-April 2015), presented by Commissioner Sylvie Zainabo Kayitesi during the 56th ordinary session of the African Commission on Human and Peoples' Rights, 21 April-7 May 2015, Banjul, The Gambia, para 53.

66 T Curry 'Cutting the hangman's noose: African initiatives to abolish the death penalty' http://www.wcl.american.edu/hrbrief/13/3curry.pdf (accessed 9 September 2017).

67 Periodic Report of the Republic of Benin on the Implementation of the Rights and Freedoms Enshrined in the African Charter on Human and Peoples' Rights (2008) 9, http://www.achpr.org/files/sessions/45th/state-reports/2nd-2000-2008/staterep2_benin_2008_eng.pdf (accessed 11 September 2017).

68 Act 2011-11 of 25 August 2011.

However, it would be misleading to claim that the resolutions operated in isolation. The successful abolition of the death penalty in Benin should also be attributed to the existence of 'a dynamic and active civil society' that organised itself into an abolition movement or network.[69] Benin-based CSOs partnered with international CSOs with observer status before the African Commission and a long history of working on death penalty issues to lobby for abolition.[70] The African Commission's resolutions on the death penalty (and those of the UN General Assembly)[71] were essential normative tools of advocacy. Country-based abolition movements may also be credited for the abolition of the death penalty in Togo and Niger. In these two countries, FIACAT organised training for its members on the subject of the death penalty, using the African Commission's death penalty resolutions as training tools. The FIACAT members then held advocacy meetings with state officials in their respective countries. In essence, therefore, the African Commission's death penalty resolutions indirectly influenced the enactment of laws abolishing the death penalty in both countries.

Overall, there is limited incorporation of the African Commission's death penalty resolutions into the domestic laws of African countries. This state of affairs is partly related to the strong views held on the question of the death penalty on the African continent. That many African countries are reluctant to abolish the death penalty became abundantly clear in 2015 when the AU Specialised Technical Committee on Legal Affairs neglected to discuss the African Commission's Draft Protocol on the Abolition of the Death Penalty.

5.2 Robben Island Guidelines

The Robben Island Guidelines (RIG) are officially referred to as the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa.[72] Adopted in 2002, these Guidelines are a culmination of a process conceived and driven by the Association for the Prevention of Torture

69 FIACAT *What strategies towards the abolition of the death penalty in West Africa? Report of the symposium in Dakar* (2012) 38.

70 The international NGOs included the International Federation of Action by Christians for the Abolition of Torture (FIACAT) and Amnesty International. The local CSOs included Action by Christians for the Abolition of Torture Benin (ACAT-Benin); Amnesty International-Benin; Women Lawyers Association in Benin (AFJB); Solidarity among the Children of Africa and the World (ESAM); Social Dimension (DS); and Association for the Struggle against Racism, Ethnocentrism and Regionalism (ALCRER).

71 Resolution 62/149 of 18 December 2007; Resolution 63/168 of December 2008; Resolution 65/206 of 21 December 2010.

72 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman, or Degrading Treatment or Punishment in Africa, ACHPR/Res.61 (XXXII) 02 adopted at the 32nd ordinary session, Banjul, The Gambia, 17-23 October 2002 (Robben Island Guidelines).

(APT), an international CSO based in Geneva, Switzerland, and with observer status before the African Commission. The RIG spells out the measures that states should take in order to effectively implement article 5 of the African Charter under which states are obligated to prohibit torture. The measures include the criminalisation of torture in law; the ratification of relevant international human rights treaties; the establishment of national prevention mechanisms; and the provision of procedural safeguards for persons deprived of their liberty. Parallel to adopting the Guidelines, the African Commission established a follow-up committee to promote and facilitate their domestic implementation. The follow-up committee changed its name in 2009 to the Committee for the Prevention of Torture in Africa (CPTA).[73]

Torture is a significant problem in Africa, and it is thought that the effectiveness of efforts to prevent and eradicate the practice is contingent on 'the existence of an adequate legal framework, *incorporating the RIG* and other relevant texts'.[74] The question then arises: To what extent are the Guidelines incorporated into domestic anti-torture laws? According to the African Commission, the RIG 'have established a solid basis upon which the CPTA has advised and advocated for the formulation of anti-torture policies, legislation and administrative rules across Africa'.[75]

As is set out below, this research found evidence of the impact of the RIG in Madagascar, South Africa and Uganda. The RIG played a role, albeit modest, in the enactment of the anti-torture laws in the three countries. In all the cases, the Guidelines were introduced by external actors into the discussions leading to the enactment of the laws: the APT in Madagascar; the national human rights institution and local CSOs in South Africa; and the African Commission, APT, and local CSOs in Uganda. Although it could not be established whether the Guidelines were referenced and discussed during debates in the respective parliaments, the content of the laws in the three countries largely conform to the dictates of the RIG. However, it must be mentioned that the laws also had other inspirations, and in particular from the UN Convention against Torture.[76] The complexity of isolating the specific influence of the Guidelines is

73 Resolution on the Change of Name of the 'Robben Island Guidelines Follow-up Committee' to the 'Committee for the Prevention of Torture in Africa' and the Reappointment of the Chairperson and Members of the Committee, ACHPR/Res.158 (XLVI) 09 adopted at the 46th ordinary session, Banjul, The Gambia, 11-25 November 2009.

74 J Niyizurugero & GP Lessene 'The Robben Island Guidelines: An essential tool for the prevention of torture in Africa' (2010) 6 *Essex Human Rights Review* 67 81.

75 African Commission on Human and Peoples' Rights 'Concept paper on the development of a general comment on article 5 of the African Charter on Human and Peoples' Rights (2015)' http://www.achpr.org/news/2015/05/d182 (accessed 9 September 2017).

76 The South African and the Ugandan laws specifically indicate that they were enacted with a view to domesticating the UN Convention against Torture.

underlined by the fact that the RIG provisions were borrowed from numerous international hard and soft law instruments.[77]

In Madagascar, the impact of the RIG is directly linked to the key role that the APT played in the drafting of the anti-torture law.[78] In particular, the APT conducted a drafting workshop during which key national actors, including representatives of parliament and the Ministry of Justice, considered a draft text of the law. The APT used the workshop to speak about the elements of an ideal anti-torture law and 'the usefulness of the Robben Island Guidelines for the prevention of torture in such a process on the drafting of an anti-torture legislation'.[79]

In South Africa, the national human rights institution and several local NGOs made reference to the RIG during public consultations on the Prevention and Combating of Torture of Persons Bill. The South African Human Rights Commission (SAHRC) included in its written submission, an entire section on the relevance of the RIG.[80] The SAHRC argued that on the question of prevention of torture, the Guidelines are particularly useful because in comparison to the CAT Optional Protocol, they are more specific on what preventive measures state parties should take. The Civil Society Prison Reform Initiative (CSPRI) also made reference to the RIG in its submission, which was endorsed by 15 other local NGOs and one international NGO (APT).[81] It cited Guideline 12 of the RIG in proposing that the law should specify that the gravity of the offence should be taken into account in sentencing individuals found guilty of torture.[82] The CSPRI also referenced the RIG to argue that the law should contain a provision imposing on the state a duty to provide redress, including compensation, to victims of torture or their families.

In the broader scheme of things, the attention given to the RIG in the drafting of the South African anti-torture law has been described as 'scant'.[83] Apart from the SAHRC and CSPRI, other stakeholders that

77 D Long & R Murray 'Ten years of the Robben Island Guidelines and prevention of torture in Africa: For what purpose?' (2012) 12 *African Human Rights Law Journal* 311 341.

78 Law No 8/2008 of 25 June 2008 on Torture and Other Cruel, Inhuman and Degrading Treatment.

79 'Madagascar: Drafting a national anti-torture law' http://www.apt.ch/en/news_on_prevention/madagascar-drafting-a-national-anti-torture-law/#.vfQzx51BvIU (accessed 9 September 2017).

80 'Prevention and combating of torture of persons Bill [B21-2012] submission to the Portfolio Committee on Justice and Constitutional Development, 31 July 2012', http://www.justice.gov.za/legislation/acts/2013-013.pdf (accessed 12 September 2015).

81 CSPRI 'Submissions on Combating of Torture of Persons Bill [B21 – 2012]' http://acjr.org.za/resource-centre/CSPRI_Torture_Bill_submissions-1082012.pdf (accessed 9 September 2017).

82 Guideline 12 reads: 'Those found guilty of having committed acts of torture shall be subject to appropriate sanctions that reflect the gravity of the offence, applied in accordance with relevant international standards.'

83 L Muntingh 'Guidelines and principles on imprisonment and the prevention of torture under the African Charter on Human and Peoples' Rights: How relevant are they for

made submissions on the Bill did not reference the RIG.[84] More importantly, the proposals to integrate certain provisions of the RIG (and those of the CAT) into legislation were not taken into account by the National Assembly. According to Muntingh, who keenly followed the legislative process:[85]

> What the legislature was evidently resistant to embark on was crafting legislation that is as comprehensive as possible in giving effect to the UNCAT and the RIG. A comprehensive approach was indeed what civil society organisations were arguing for … The approach of the legislature was to meet the minimum requirements, and the Act deals with the definition and criminalisation of torture, sentences to be imposed on perpetrators, establishing extra-territorial jurisdiction, *non-refoulement,* and the state's general responsibility to promote awareness of the prohibition of torture. Assessed against the UNCAT and the RIG, there are consequently notable obligations that could have been addressed in the Act but are not.

Muntingh concludes that in South Africa, as in other parts of the continent, 'the RIG has remained relatively obscure in the prison reform and torture prevention discourses'.[86]

In Uganda, the RIG played an instrumental role in guiding the drafting of the 2012 Prevention and Prohibition of Torture Act. Uganda indicated in its fifth periodic report to the African Commission that it was prompted to fast-track the enactment of the legislation by Commissioner Catherine Dupe Atoki, who at the material time was the Chairperson of the CPTA. The relevant part of the report reads as follows:[87]

> It should be recalled that Commissioner Catherine Dupe visited Uganda in October 2009 and emphasised the need to expedite the adoption of the Prevention and Prohibition of Torture Bill. I am now pleased to report that on April 26th 2012 Parliament of Uganda passed the Prohibition and Prevention of Torture Bill 2010. It was assented to by the President of the Republic of Uganda on 27th July and gazetted on September 18th 2012 and is now the Prevention and Prohibition of Torture Act.

As the primary objective of her visit was to 'promote the Robben Island Guidelines in Uganda',[88] it goes without saying that Commissioner Atoki used the Guidelines to launch her plea. The enactment of the anti-torture law in Uganda is also the fruit of concerted and joint efforts of three

South Africa?' (2013) 17 *Law Democracy and Development* 363 368.

84 See, eg, 'Lawyers for Human Rights submissions on the prevention and combating of torture of persons Bill: submitted on 31 July 2012', http://www.lhr.org.za/policy/lhr-submission-prevention-and-combating-torture-persons-bill-b21-2012 (accessed 9 September 2017).

85 Muntingh (n 83 above) 369.

86 Muntingh 369.

87 Fifth Periodic Report by the Government of the Republic of Uganda to the African Commission on Human and Peoples' Rights (2013) 15-16.

88 The Activity Report of the Chairperson of the Follow-up Committee of the Robben Island Guidelines, presented during the 46th ordinary session of the African

different actors: a member of parliament who tabled the Bill in the national assembly; the Uganda Human Rights Commission (UHRC) which published regular reports on the situation of torture in the country; and local CSOs that formed the Coalition Against Torture as far back as 2004.[89] The UHRC reviewed the draft law against the provisions of the RIG to ensure compatibility.[90]

5.3 Declaration of Principles on Freedom of Expression

The Declaration of Principles on Freedom of Expression in Africa (the Declaration) was adopted by the African Commission in 2002.[91] It is the result of a joint initiative between the African Commission and Article 19, an international CSO working on freedom of expression issues. The Declaration supplements the provisions of article 9 of the African Charter which guarantees the right to receive information and to express and disseminate opinions. The issues it addresses are diverse. These include conditions for restrictions on freedom of expression; the promotion of diversity; elements of appropriate public service broadcasters and regulatory bodies; and attacks on media practitioners. At its 36th ordinary session held in November 2004, the African Commission established the office of the Special Rapporteur on Freedom of Expression in Africa to, *inter alia*, 'analyse national media legislation, policies and practice within member states' and to monitor state compliance with the Declaration.[92] Commissioner Pansy Tlakula held the office for 12 years (2005-2017) and relinquished the office in November 2017 when her term as a commissioner came to an end.

A central aspect of the Declaration is the requirement that states enact legislation to give effect to access to information (ATI). Principle IV of the Declaration provides that 'the right to information shall be guaranteed by law', and proceeds to outline the principles which should be followed in enacting such a law. States are also obligated to amend secrecy laws and

Commission on Human and Peoples' Rights, http://www.achpr.org/files/sessions/46th/inter-act-reps/131/achpr46_specmec_rig_actrep_2009_eng.pdf (accessed 9 September 2017).

89 See 'The right to freedom from torture, cruel, inhuman or degrading treatment or punishment: Uganda's experience', presented by Wilfred Niwagaba, Member of Parliament Republic of Uganda' http://www.achpr.org/files/news/2012/08/d51/hon_niwagabas_presentation.ppt (accessed 11 September 2015).

90 Murray & Long (n 34 above) 77.

91 Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res.62 (XXXII) 02 adopted at the 32nd ordinary session, Banjul, The Gambia, 17-23 October 2002.

92 Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression in Africa, ACHPR/Res.71 (XXXVI) 04. The title and mandate of the Special Rapporteur was modified in 2007 to be 'Special Rapporteur on Freedom of Expression and Access to Information in Africa'. See Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, ACHPR/Res.122 (XXXXII) 07 adopted at the 36th ordinary session, Dakar, Senegal, 23 November-7 December 2004.

to ensure that their legislation relating to defamation conforms to certain minimum standards.[93] The extent to which the Declaration has been incorporated into domestic laws cannot be examined without taking into account an important recent development: the adoption by the African Commission in 2013 of the Model Law on Access to Information for Africa.

The Model Law, the first in the history of the African Commission, aims to guide states in translating their obligations under the African Charter and the Declaration into domestic legislation. It is a template that states are expected and encouraged to adapt whilst bearing in mind the provisions of their constitutions and the structure of their legal systems.[94] The Model Law was drafted over a period of two and a half years by a ten-member expert working group co-ordinated by the Centre for Human Rights, University of Pretoria, and under the overall leadership of the Special Rapporteur. It is also important to note that in June 2016, the African Commission embarked on a process of revising the Declaration to ensure that it duly reflects recent developments in the areas of freedom of expression and access to information.[95]

What then is the impact of the Declaration (and the Model Law)? The Special Rapporteur's regular assessment of the status of adoption of ATI legislation in Africa cumulatively reveals:

> In the years following the adoption of the Declaration of Principles of Freedom of Expression in Africa, there has been an increase in the number of African states taking steps to adopt legislation on access to information, especially in countries where the right is expressly recognised by the Constitution. In some instances, progress towards legislation has been made in countries where the provisions on freedom of information is subsumed under the right to freedom of expression and even in a few cases where no mention is made of such right.[96]

The African Commission adopted the Declaration at a time when only three countries on the continent, all from Southern Africa (Angola, South Africa and Zimbabwe) had access to information laws. A total of 17 more states have since joined the list of countries with access to information laws. These states are Côte d'Ivoire, Ethiopia, Guinea, Kenya, Liberia,

93 Principles IV(2) and XII(1). See also Resolution on Repealing Criminal Defamation Laws in Africa, ACHPR/Res.169 (XLVIII) 10 adopted at the 48th ordinary session, Banjul, The Gambia.

94 African Commission on Human and Peoples' Rights, Preface: Model Law on Access to Information for Africa (2013) 7-8.

95 Resolution to Revise the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res.350 (EXT.OS/XX) 2016 adopted at the 20th extraordinary session, Banjul, The Gambia, 9-18 June 2016.

96 Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, Adv Pansy Tlakula, presented to the 44th ordinary session of the African Commission on Human and Peoples' Rights, 10-24 November 2008, Abuja, Nigeria.

Malawi, Mozambique, Nigeria, Niger, Rwanda, Sierra Leone, Seychelles, South Sudan, Tanzania, Tunisia, Togo and Uganda. The Declaration initially experienced difficulties penetrating the domestic sphere. A paltry four states (Ethiopia, Guinea, Liberia and Uganda) enacted access to information laws between the adoption of the Declaration in October 2002 and the end of 2010, translating to an average of one access to information law in two years. The influence of the Declaration in the adoption of the laws in these four countries could not be established.

The pace of adoption of national laws accelerated with the initiation of the African Commission's project on a Model Law,[97] and in particular the development of the first draft of the Model Law in April 2011. In only four years, between 2011 and 2014, six states adopted access to information laws (Côte d'Ivoire, Mozambique, Nigeria, Niger, Rwanda and South Sudan). A review of these laws reveals that neither the Declaration nor the Model Law is explicitly referenced.[98] However, there are distinct similarities between the content of these laws and the provisions of the Model Law. In fact, there is near uniformity in the language and terminology used in recently-enacted access to information laws. This is in contrast to access to information laws enacted prior to the Model Law, the contents of which are quite diverse and, in some cases, outrightly incompatible with the African Charter.[99] In essence, the recent spread of access to information laws on the continent may largely be traced back to the Declaration and the Model Law. However, this does not negate the fact that recently-adopted access to information laws may have been inspired by sources other than the Model Law.

There is sufficient evidence to suggest that the Declaration and the Model Law played a significant role in fast-tracking the development of recent access to information laws, some of which had for many years been stuck in the legislative pipeline. Advocacy for the adoption of access to information laws is quite a struggle,[100] and the task would have been even more difficult in the absence of the Declaration and the Model Law. The Special Rapporteur has particularly used the two documents in her

97 Resolution on Securing the Effective Realisation of Access to Information in Africa, ACHPR/Res.167 (XLVIII) 10 adopted at the 48th ordinary session, Banjul, The Gambia, 10-24 November 2010.

98 Save for the Liberian access to information law, the rest of the laws do not even mention the African Charter.

99 In the case of *Scanlen & Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009), the African Commission found certain provisions of the Zimbabwean Access to Information and Protection of Privacy Act to be in violation of the African Charter.

100 See JV Hartshorn 'Can the model law on access to information for Africa fulfil expectations?' ECPR Conference on Regulatory Conference, Barcelona, Spain, 2014, http://reggov2014.ibei.org/bcn-14-papers/66-212.pdf (accessed 9 September 2017).

advocacy visits to state parties. She has made advocacy visits to Botswana, Ghana, Kenya, Malawi, Mauritius, Mozambique and Seychelles.[101]

More importantly, as an advocacy tool in the hands of the Special Rapporteur, the Model Law has directly influenced the content of access to information laws and Bills in several countries. It has become the Special Rapporteur's tool for advocating the speedy enactment of access to information laws where Bills had been pending for years (Ghana and Mozambique), or where a state party is embarking on drafting legislation (Mauritius, Malawi and Seychelles).[102] The Special Rapporteur has also used the Model Law as a benchmark to comment on and suggest language for proposed access to information laws in countries such as Malawi and Mozambique. In Seychelles, the Special Rapporteur, in collaboration with the Centre for Human Rights and the Seychelles Media Commission (SMC), organised a symposium on the right of access to information during which 'focused discussions were held on the proposed content of the ATI Bill, using the Model Law as a guide'.[103] A similar workshop took place in Mauritius in February 2016.[104] In July 2018, Seychelles adopted an access to information law, the contents of which drew heavily from the Model Law.

Interestingly, countries such as Ghana and Nigeria have relied on the Model Law despite the fact that it was still in draft form.[105] The Declaration was also relied upon by a coalition of CSOs in their submission to the Nigerian House of Representatives.[106] They listed the Declaration as one of the 'legal bases' for enacting an access to information law in Nigeria. In several other countries, including Botswana and Zambia, CSOs have also used the Model Law to influence the content of access to information Bills.[107]

101 See Activity Reports of the Special Rapporteur http://www.achpr.org/mechanisms/freedom-of-expression/ (accessed 21 September 2017).

102 Activity Report of Adv Pansy Tlakula, Special Rapporteur on Freedom of Expression and Access to Information in Africa, presented during the 56th ordinary session of the African Commission on Human and Peoples' Rights, paras 4-22.

103 'Symposium on the right of access to information in Seychelles' http://www.chr.up.za/index.php/centre-news-a-events-2015/1482-symposium-on-the-right-of-access-to-information-in-seychelles.html (accessed 9 September 2017).

104 'Workshop on the right to access to information held in Mauritius' http://www.chr.up.ac.za/index.php/ati-news.html (accessed 11 September 2017).

105 Interview with Lola Shyllon, Programme Manager, Centre for Human Rights, University of Pretoria, September 2015.

106 Memorandum on the Freedom of Information Bill, submitted to the House of Representatives by the Freedom of Information Coalition.

107 'Making progress on freedom of expression in Africa' http://www.opensocietyfoundations.org/voices/making-progress-freedom-information-africa (accessed 9 September 2017). See also Activity Report by Adv Pansy Tlakula as the Special Rapporteur on Freedom of Expression and Access to Information in Africa and member of African Commission on Human and Peoples' Rights, presented during the 54th ordinary session of the African Commission on Human and Peoples' Rights, 22 October-5 November 2013, Banjul, The Gambia, para 29.

6 Conclusion

The African Commission's database of thematic resolutions may be described as a quiver of normative arrows that can be put to great use and impact. In practice, a good number of the resolutions 'die' as soon as they are adopted as little is heard of them after adoption. They simply do not gain traction. Other resolutions have a once-in-a-lifetime impact and are rendered obsolete as soon as they have achieved their goals. Some resolutions are quickly overtaken by events. Only a few resolutions take on a life of their own and stand the test of time. By analysing the extent to which three specific thematic resolutions have been incorporated into the domestic laws of African countries, this chapter provides important insights into why some resolutions remain scraps of paper while others go on to become important and cherished normative documents. Two particular determinants of impact can be filtered out of the above analysis.

The first determinant is the relevance of a thematic resolution. The analysis reveals that a resolution is likely to have an impact when its relevance is clear, either because it fills a vacuum, introduces an entirely new issue, or covers an area where states have not made much progress. As the chapter illustrates, it is relatively easy to isolate the impact of the Declaration of Principles of Freedom of Expression (and the Model Law on Access to Information) as it addresses an emerging field clearly deserving of attention. In 2002, when the African Commission adopted the Declaration of Principles of Freedom of Expression, there were only four African states with legislation on access to information. The call in the Declaration for the enactment of access to information laws in domestic legal systems was distinct and relevant. The death penalty resolutions cover an area with little progress. However, the impact of the resolutions has been limited as they operated in a field dominated by UN General Assembly resolutions. The impact of the Robben Island Guidelines is equally constrained by the fact that the Guidelines do not fill any specific normative gap. The Guidelines borrow from and restate existing provisions contained in the UN Convention against Torture.

The second determinant is the presence and activism of NGOs in a country. This chapter finds that the three thematic resolutions have registered the most impact in countries where domestic NGOs, working individually or in collaboration with international NGOs, use them to lobby for the enactment of relevant domestic laws. The incorporation of the death penalty resolutions into the legal orders of Benin, Niger and Togo is directly linked to the presence and advocacy work of NGOs in these countries, and so is the incorporation of the Robben Island Guidelines into the anti-torture laws of Madagascar, South Africa and Uganda. Similarly, the enactment of access to information laws in countries such as Malawi, Nigeria, Mozambique and Seychelles may be

traced back to the collaborative work between the African Commission's Special Rapporteur and NGOs.

There are certainly more determinants of the impact of the thematic resolutions of the African Commission. This chapter has established the groundwork for further academic research in this area. Hopefully, it will also provoke critical reflection within the African Commission on the impact of its resolutions.