The African Commission on Human and Peoples’ Rights: A Last Resort for Wrongfully Detained or Deported Immigrants and Asylum Seekers in Africa

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Esmaila Connateh was one of an estimated 126,247 foreigners deported from Angola as a part of Operação Brilhante in 2004. No arrest warrants were issued, nor reason given for the arrests. Their official documents were confiscated and those who could not pay demands from their captors were often severely beaten. Property was confiscated or left behind. Most were held for weeks, some even for months, in detention camps that had been used to house animals and remained filled with animal excrement. There was no medical attention, little food and poor sanitation. In one camp, five-hundred detainees were provided with two buckets to use for personal hygiene in a “bathroom,” which was not separated from sleeping or eating quarters. No one was afforded access to the court system to challenge their arrests, detention or conditions of confinement.

Without any viable alternative forum to address these blatant human rights violations, the Institute for Human Rights and Development in Africa filed a complaint with the African Commission on Human and Peoples’ Rights on behalf of Mr. Connateh and others similarly situated. The Commission was established by the African Charter on Human and Peoples’ Rights and was created to address violations of the rights set out in the Charter. Since 1986, the Commission has ruled on almost two hundred cases. Many have been dismissed for failure to exhaust local remedies, some have found there is no evidence of human rights violations, and many others have led to “recommendations” – non-binding decisions calling on the offending states to resolve the human rights violations.

Filing a Complaint

Filing a complaint is a relatively straightforward process. The Commission merely requires that the party or someone acting on behalf of the party, submit a communication, detailing the alleged violations of the rights set out in the Charter. The Commission then determines where prima facie violations of the Charter exist. If that determination is made in favor of the complainant, the Commission is “seized” of the complaint and will allow additional time for the complainant to submit information on admissibility of the complaint.

Admissibility

While Article 56 of the Charter lists seven elements that must be met, two are most frequently argued. The first is whether the matter was submitted in a timely fashion. While other human regional rights courts have a six month restriction, the Charter does not have a specific limitation period and Commission has only denied a complaint for timeliness on two occasions where the

* An abbreviated version of this article was published in Forced Migration Review, v. 44 (Sept. 2013).
1 As recounted by the complainant in 292/04: Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) / Angola, at ¶¶ 3-7. The decisions discussed in this article, as well as all other decisions of the Commission, can be obtained via the African Human Rights Case Law Analyser, available at http://caselaw.ihrda.org/acmhpr/.
complainant waited over two years to seek redress from the Commission. 305/05: ARTICLE 19 and Others v Zimbabwe, at ¶ 91; 310/05: Darfur Relief and Documentation Centre / Sudan, at ¶ 75.

More challenging for complainants is whether state options have been exhausted. Generally speaking, exhaustion is not required where “[a]ny local remedy which is found to be, as a practical matter, unavailable or ineffective.” 71/92: Recontre Africaine pour la Defense des Droits de l’Homme (RADDHO) / Zambia, at ¶ 11. In the context of deportations, this may arise because the state actively and intentionally denies the complainant the ability to argue his or her case in the court system and refused to adhere to the court decisions that were made. 294/04: Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) / Zimbabwe, at ¶¶ 52, 54. Similarly, “[t]he mass nature of the arrests, the fact that victims were kept in detention prior to their expulsions, and the speed with which the expulsions were carried out” can prevent complainants from having an “opportunity to establish the illegality of these actions in the courts.” Id. at 14. Scope can also play a role, where the “vast and varied scope of the violations alleged and the large number of individuals involved” make redress in the local courts impossible. 27/89-46/91-49/91-99/93: Organization mondiale contre la torture, Association internationale des juristes democrats, Commission international des juristes, Union interafricaine des droits de l’Homme / Rwanda, at ¶ 18. Importantly, if the respondent government “alleges that local remedies have not been exhausted, the government then has the burden of demonstrating the existence of such remedies.” 71/92, at ¶ 12.

Substantive Violations

Once it is determined that the complaint is admissible, the Commission provides the complainant and the state opportunity to submit argument and evidence regarding the substantive violations. Two articles of the African Charter are particularly relevant to the issue of detention and forced migration and violation of those articles provides the substantive basis for seeking redress before the Commission. Article 6 addresses detention issues:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 12 is concerned with freedom of movement and residence. It provides:

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Esmaila Connateh's case provides an excellent example of how detention and deportation in violation of Articles 6 and 12 have been addressed by the Commission. After recounting the facts above, and setting out the contentions of the parties, the Commission weighed the alleged violations of the Charter, reaching a decision on the merits as to each. With regard to Article 6 the Commission opined: "The prohibition of arbitrary detention includes prohibition of indefinite detention and arrests and detention 'based on ethnic grounds alone.'" 292/04, at ¶ 54. As there was no evidence that "victims were shown a warrant or any other document relating to the charges under which the arrest were being carried out," the arrests and detentions were arbitrary, and Angola was in violation of Article 6 of the Charter. Id. at 55. In other cases addressing arbitrary arrest and detention, the Commission has made it clear that "[a]rbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law." 275/03 : Article 19/Eritrea, at ¶ 92; see also, 279/03-296/05 : Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan, at ¶ 147. In short, the Commission recognizes that the laws of a particular country may themselves be unreasonable, and, as such, the Commission will look beyond local statutes to determine the propriety of an arrest.

The Commission also found that Angola’s conduct resulted in violations of Article 12(4) and (5). The Commission determined: "Although African States may expel non-nationals from their territories, the measure that they take in such circumstances should not be taken at the detriment of the enjoyment of human rights, and that while the Charter does not bar a State’s right to deport non-nationals per se, it does require deportations to take place in a manner consistent with the due process of law." 292/04, at ¶ 63. “Very clearly, the situation as presented by the Complainant did not afford those expelled due process of law for protection of the rights that have been alleged to be violated by the Respondent State and that they were not allowed access to the remedies under domestic law to at least challenge, if not reverse, their expulsion.” Id. at ¶ 65. With regard to mass deportations, the Commission elaborated:

The African Commission has ruled that “mass expulsion was a special threat to human rights,” adding that a government action specially directed at specific national, racial, ethnic or religious groups is generally qualified as discriminatory in the sense that, none of its characteristics has any legal basis or could constitute a source of particular incapacity. Similarly, the African Commission, held that: “African States in general and the Republic of Angola in particular are faced with many challenges, mainly economic. In the face of such difficulties, States often resort to radical measures aimed at protecting their nationals and their economies from non-nationals. Whatever the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights. Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations, “constitute special violation of human rights.” Id. at ¶ 68 (citations omitted).

A similar situation was brought before the Commission in the mass deportation case against Zambia. There, over five hundred West Africans were expelled over a two day period, accused of being in the country illegally. “Prior to their expulsion, most of the individuals had been subject to administrative detention for more than 2 months. The deportees lost all the material possessions they had in Zambia, and many were also separated from their Zambian families.” 71/92, at ¶ 1. After hearing Zambia’s arguments, the Commission noted: "It is true that the African Charter does not bar deportations per se, but Zambia’s right to expel individuals does not justify the manner in
which it does so.” *Id.* at ¶ 23. “The facts of this communication show that West Africans were arrested and assembled over time, with a view to their eventual expulsion. The deportees were kept in a camp during this time, not even an ordinary prison, and it was impossible for them to contact their lawyers.” The Commission ultimately found: “[t]he mass deportation of the individuals in question here, including their arbitrary detention and deprivation of the right to have their cause heard, constitute a flagrant violation of the Charter.” *Id.* at 31.

A number of other cases finding violations of Article 12 provide additional support for complainants facing similar circumstances, including:

- 313/05 : Kenneth Good / Republic of Botswana (South African professor expelled for criticizing the presidential succession, without being afforded an opportunity to plead his case before the courts).
- 294/04 : Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum / Zimbabwe (American journalist was expelled after writing an article critical of the government despite multiple High Court orders permitting his continued stay).
- 249/02 : Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea / Guinea (Sierra Leonean refugees subject to harassment, deportations, looting, stealing, beatings, rapes, arbitrary arrests and assassinations, and eventually forcing refugees to return to war country).
- 159/96 : Union interafricaine des droits de l’Homme, Federation international des ligues des droits de l’Homme, RADDHO, Organisation nationale des droits de l’Homme au Senegal and Association malienne des droits de l’Homme / Angola (Focusing on the numerous other rights, such as right to property, work, education, family, which were violated by mass deportations).

*Draft Pretrial Detention Guidelines*

In addition to hearing complaints related to the violations of the Charter, the Commission, under the auspices of the Special Rapporteur on Prisons and Conditions of Detention, has been working to further address pretrial detention issues. The Draft Guidelines on the Use and Conditions of Pre Trial Detention in Africa – Discussion Document⁴ acknowledge the significant problems throughout the African continent with regard to pretrial detention. The Draft Document notes that approximately 35% of the African prison population is composed of pretrial detainees (and up to 90% in certain countries). That figure does not include detainees held in secret or non-gazetted

places of detention or those held in detention without charges, as is the case with many subject to deportation. The Draft Document further acknowledges that conditions for pretrial detainees frequently fail to meet international and regional minimum standards. They may remain in custody for many years, without having been convicted of any offense and are particularly susceptible to torture and other treatment. Such detainees contribute to prison overcrowding, which in turn stress prison resources, resulting in further infringement on basic human rights. Moreover, pretrial detention disproportionately impacts the most vulnerable and marginalized.

The Draft Document fails, however, to specifically address administrative detention, a mechanism often employed in deportation cases. Nonetheless, the guidelines reflect developing regional thought on pretrial detention, useful for discussion in current cases, and may ultimately become formally adopted standards, binding on signatory countries.

Final Thoughts

Winning a case before the Commission often has the feel of a hollow victory. The Commission decisions are termed “recommendations” for a reason. While states occasionally implement the decisions, more often they are simply ignored. The Angola situation is the perfect example. Not only did the Angolan government ignore the Commission’s findings, but it subsequently repeated the offense, forcibly expelling large numbers of immigrants. However, this does not mean that the Commission option should be ignored. The recommendations provide non-governmental organizations and other states with substantial opportunity to pressure the offending state to comply with human rights norms. They also provide some level of precedential value for future Commission decisions, while contributing to the ever growing body of international human rights law. While seemingly only lofty ideals today, the human rights norms espoused by the Commission, through its case law and various guidelines, may well become the enforceable principles of tomorrow. The alternative simply is not acceptable; failure to at least attempt to recognize these rights will only ensure they are ignored in the future.