CHAPTER 16

PROTECTING THE HUMAN RIGHTS
OF PEOPLE WITH MENTAL HEALTH
DISABILITIES IN AFRICAN PRISONS

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INTRODUCTION

Persons with mental illnesses often face unique difficulties in ensuring respect for their basic human rights, both in the community and in mental institutions. There is growing international recognition of this fact and a consensus across the criminal justice spectrum that something has gone painfully wrong: "the nation's [US] jails and prisons have become mental health facilities—a role for which they are singularly ill-equipped" (Fellner and Abramsky 2004). It has been argued that the mentally ill are victims of two failed public policies: the failure of public officials to ensure an effective mental health system, and an overly ambitious criminal justice system that tends to send people to prison even for low-level, non-violent crimes.

This chapter addresses some of the human rights issues related to having mentally ill persons in prisons. This topic covers three broad areas in which people are categorized:

(1) mentally disabled persons who have been convicted of a criminal offence;
(2) mentally disabled persons on remand who have been charged with a criminal offence; and
(3) mentally disabled persons on remand who have not been charged with any criminal offence.
Here I am concerned primarily with the third category, though I also make brief references to the other two categories when necessary. People grouped in the third category are commonly referred to as “civil lunatics,” while the others are referred to as “criminal lunatics.”

The practice of imprisoning mentally disabled persons raises critical questions. The rationale for imprisonment comes into question. Such practices also challenge both the human rights posture and the quality of health care delivery of the state in question. Our main focus here is the former, but the issue itself calls into question the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Aside from questioning the macrolevel concept of imprisonment, the practice of imprisoning mentally ill people also raises microlevel administrative issues, such as access to fair trials, and protection against torture, inhumane or degrading treatment, and arbitrary detention.

When considering the question of criminal lunatics we are mainly concerned with the issue of a fair trial and the fairness/effectiveness of the review procedure(s) where applicable. With civil lunatics the key issue is arbitrary detention. The issue of torture or inhumane and degrading treatment becomes relevant when we consider the conditions of treatment in detention.

MENTALLY DISABLED PERSONS AND THE CRIMINAL JUSTICE SYSTEM

In most African countries mentally disabled people are detained in or commuted to prisons. This section highlights the cases of Nigeria and The Gambia, and compares them with the system in the United Kingdom. The fact that the legal systems of these African countries are modelled on the English common-law system presents the opportunity for a structural comparison of conditions in each context. European human rights case law on this issue may also provide some guidance for our look at this issue within the African human rights system. In Nigeria civil
lunatics are often detained at the insistence of family members, with the support of the police. It has been alleged that these families are unable to pay for the treatment of these persons in psychiatric hospitals or, for other reasons, do not wish to send their family members to a psychiatric hospital. There are several issues here about the treatment of mentally disabled persons within the criminal justice system.

**Procedures for Detention**
The first issue relates to the procedure for detaining mentally disabled people in prisons. The process seems to be plagued by arbitrariness and a lack of due process. For instance, one of the prisoners detained as a civil lunatic in Enugu prison in Nigeria informed me that her husband had requested her detention in the prison because he wanted to marry another woman. The prison officers confirmed that the husband did marry another woman and that his first wife clearly suffered from postpartum disorder, which occurs usually after childbirth. She had suffered three previous episodes, which had been treated in a psychiatric hospital, and during the most recent episode her husband had decided to have her detained in prison instead. She was in prison with her newly born child when I met her. Prison staff noted that her husband had never visited her in prison. Another prisoner, a young man, reported that he was detained in prison only because his uncle wanted to sell the land of his deceased father and clearly wanted him out of the way. While these reports have not been fully investigated, they raise serious issues regarding the unlawfulness and arbitrariness of the arrest and detention process.

Article 9 of the ICCPR provides that no one shall be subjected to arbitrary arrest or detention. Section 32(1) of the Constitution of Nigeria reads thus: "Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with the procedure permitted by law.... In the case of a person suffering from infection or contagious disease, persons of unsound mind,
persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community." In justifying its position on the imprisonment of mentally ill persons the government argues that this exception should apply to "people of unsound mind who are categorized as threats to the peace and coexistence of society." It also argues that there are safeguards against abuse of the process, because, as was held in Obolo v. Commission of Police, it is the duty of the person arresting or exercising public authority to restrict the liberty of the citizen to show that his actions are in accordance with the laws of the land. This has proven to be an inadequate safeguard. There seems to be wide discretion in police practice and there is no external oversight mechanism to supervise these powers. Also, what is the implication of the phrase "in accordance with the procedure permitted by law"? Does the fact that there is a provision in legislation or regulations against such practices make the detention of mentally ill persons in prisons "lawful"? How difficult is it to establish that arrest and detention were arbitrary? As established in the European case of Winterwerp v. Netherlands (1979), the deprivation of liberty must not only be described as "lawful" if it is prescribed by the municipal law but also must be lawful in a conventional sense. Detention may be "arbitrary" even if properly motivated if it is not proportionate to the attainment of the purpose of Article 5.1, which is similar in substance to Article 9 of the ICCPR stated above. The African Commission seems to echo this. Article 6 of the African Charter, which prohibits arbitrary arrest and detention, states that "every individual shall have the right to liberty and 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." The position of the African Commission is that mere mention of the phrase "except for reasons and conditions previously laid down" in Article 6 does not imply that any domestic law may justify the deprivation of such persons' freedom, and neither can a state party to the African Charter shelve this responsibility by recourse to this limitation.
Domestic laws must conform to internationally established norms and standards. On the issue of whether the detention of persons believed to be mentally ill or disabled falls within the ambit of Article 6 of the African Charter, the commission stated that there are no violations of human rights in cases where mentally ill persons are detained in prisons. This, it argued, is because Article 6 was not intended to cater to situations where persons in need of medical assistance become institutionalized. This position is highly contestable. First, if the persons are detained in prison, how can such an institution aid in progressing their best interests or the best interests of society? Second, this position is too simple in its assumption that the process of institutionalizing persons in need of help is sufficiently met through criminal justice institutions. The persons responsible for such acts and the place/procedure of such institutionalization should be subject to the test of "arbitrariness," much as they are subject to such tests in cases where the prisoner is not mentally disabled.

Conditions of Detention
The second issue relates to the conditions of detention/imprisonment of mentally disabled persons. Most of them sleep on bare floors in the prison or on torn mattresses and blankets, a situation also common to other prisoners, especially those on remand, because of overcrowding and lack of adequate resources. There is also no clear segregation between the civil lunatics and the criminal lunatics, or between juveniles and adults, or between convicted and remanded. Those with babies have no special units. The guiding principles that decide where a prisoner is warehoused seem to be manageability and availability of cells. These principles clearly violate the international human rights provisions relating to the treatment of prisoners and persons in detention. Article 8 of the ICCPR states that "the different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment."
The conditions of detention above raise concerns about violations of the rights to protection of every person from torture and cruel, inhumane, and degrading treatment. Article 7 of the Nigerian Constitution provides that "every individual is entitled to respect for the dignity of his person and accordingly... no person shall be subjected to torture or to inhuman or degrading treatment." In addition, Nigeria recently ratified the Convention against Torture. The African Charter prohibits torture and cruel, inhumane, or degrading punishment and treatment. Article 5 states that "every individual shall have the right to the respect of the dignity inherent in human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited."

In Media Rights Agenda v. Nigeria the African Commission held that the phrase "cruel, inhuman or degrading punishment and treatment" is to be interpreted to extend to the widest possible protection against abuses, whether physical or mental. Also, the commission held that exposing victims to "personal suffering and indignity" can take many forms. In Purohit and Moore v. The Gambia, a recent case on the Lunacy Detention Act (LDA) of The Gambia, the commission drew inspiration from Principle 1(2) of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care, which requires that "all persons with mental illness, or who are being treated as such, shall be treated with humanity and respect for the inherent dignity of the human person."

The Review Process
The third issue relates to the lack of independent review procedures for assessing cases in which mentally ill persons are being detained in prisons. This lack of external review leads to a violation of the fair trial procedures and the principles of natural justice. There is no Mental Health Review Tribunal or a similar body with powers to release patients detained in the African countries under study. There is also no effective statutory
instrument(s) for ensuring due process and fair trial procedures in the handling of these cases. Therefore, there are no national safeguards for protecting these persons against unjust and arbitrary detention.

In the United Kingdom there are some safeguards. An application can be made to detain a person in hospital for up to six months upon the written recommendation of two registered medical practitioners.\(^ {14} \) Restricted patients are entitled to apply for a review of their cases once every twelve months, and the home secretary has the discretion to refer a case of a restricted patient for hearing at any time he or she thinks fit.\(^ {15} \) He or she is also obliged to do this if the patient has not requested a review for three consecutive years.\(^ {16} \) Mandatory up-to-date medical reports from the patient's responsible medical officer, and other reports from sources such as social workers, psychologists, and independent psychiatrists, as well as the home secretary's statement, are required for every case under review.\(^ {17} \) Patients are also entitled to receive a copy of every document relevant to their applications.\(^ {18} \) In assessing eligibility for discharge for non-restricted and civil patients consideration is given to presence/lack of continuing mental disorder of a degree requiring detention in hospital for medical treatment or detention for their own health/safety or the protection of others.\(^ {19} \) In these cases the tribunal also has the general discretion to discharge the patients in any case, unlike with restricted patients, for whom there is the lack of such general discretion to discharge.

While the above can arguably be described as "safeguards," some of the provisions and practices have been criticized. In a general sense the independent tribunals in the United Kingdom continue to place mentally disabled persons in disempowered positions. While in Nigeria mentally disabled prisoners are at the total mercy of the prison service, mentally disabled persons in the United Kingdom are subject to the total discretion of mental health institutions.

In \textit{X v. United Kingdom}\(^ {20} \) the tribunals' inability to authorize the discharge of restricted patients (as was the case under the
1959 Mental Health Act) was challenged. It was found that such practices were in violation of the European Convention on Human Rights (ECHR). In attempting to address such restrictions and unethical practices the United Kingdom implemented the 1983 Act. Another case worth noting is *R. v. Mental Health Review Tribunal, North and East London Region, Secretary of State ex parte H.*, where the Court of Appeal made a declaration of incompatibility with the ECHR in respect of sections 72 and 73 of the 1983 Act. The decision of the court stated that the compulsory detention of a patient cannot be implemented unless it can reliably be shown that the patient was suffering from mental disorder(s) unwarranted and contrary to Articles 5(1) and 5(4) of the ECHR. These articles relate to provisions on arbitrary detention. In 1998 an expert committee was commissioned to assess how the mental health legislation can reflect a balance between the protection of the rights of individual patients and the need to ensure public safety (Department of Health 1999a, 1999b, 2000; also see the Dangerous Severe Personality Disorder [DSPD] Order). Some of the new proposals include the extension of the tribunals’ function to confirm compulsory treatment orders, and the renewal and review of such orders (Holloway and Grounds 2003).

Regarding the quality and procedural content of the review by a court, the Strasbourg jurisprudence has established that a court-like body sitting in quasi-judicial capacity will satisfy the requirement of Article 5.4 of the ECHR (Padfield, Liebling, and Arnold 1990, 105). The key requirements are as follows.

1. An oral hearing must be provided.
2. The detainee has the right to call witnesses, examine them, and cross-examine them.
3. The detainee must have adequate time and facilities to prepare his or her case.
4. The review of remedy should be exercised at reasonable intervals, and the decision must be taken speedily by the reviewer.
The hearings do not necessarily have to be conducted in public. The entitlement of persons with mental illness to be treated as such and to be heard and represented by counsel in determinations affecting their lives, livelihood, liberty, property, or status, is particularly recognized in Principles 16, 17, and 18 of the UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Care.

Following provisions in the UK system of institutionalization of persons with mental illnesses, the African Commission implemented Purohit, Article 7(1) of the African Charter. This article necessitates that, in circumstances where persons are to be detained, they should be presented at the least with the opportunity to challenge the matter of their detention before the competent jurisdictions that should have ruled on their detention. On this basis the commission held that The Gambia Lunacy Detention Act violates Article 7(1)(a) and (c). This is because the Act does not contain any provisions for the review or appeal of an order of detention, for any remedy for detention made in error, for any wrong diagnosis or treatment, or for the legal right to challenge the two separate medical certificates that constitute the legal basis of detention. While such revisions and policies attempt to deal with the unethical detention of mentally ill persons inside prisons, the problems in Nigeria and the United Kingdom illustrate that this human rights violation is not being addressed in either the bureaucratic systems of the United Kingdom or the criminal justice procedures of Nigeria.

Treatment of Mentally Ill Persons in Prison

The fourth issue is the quality of treatment received by mentally ill patients in prison. In Nigeria, often these patients receive no psychiatric treatment. Sometimes they are locked up in solitary cells and in chains if violent. Even when medications are prescribed, few or no funds are made available to purchase the medications. There are often no psychiatrists working inside the prisons. In Enugu prison two psychiatric nurses from the Federal Neuropsychiatric Hospital Enugu are usually posted to the female prison unit (to attend to the female prisoners) and the
male asylum section respectively. At the federal neuropsychiatric hospital in Calabar staff sometimes arranged community outreach programmes to the prisons. These arrangements were made at the discretion of the hospitals. While these efforts are highly innovative and commendable, such ad hoc arrangements are far from satisfactory. The government needs to take more positive steps in providing a comprehensive system that guarantees due process, as well as access to high standards of both physical and mental health, in line with its international human rights obligations. The United Nations has affirmed that all incarcerated persons with mental illness “should receive the best available mental health care.”

It has been rightly argued that “society has no right to detain patients for the purposes of treatment if the resources for that treatment are inadequate” (Holloway and Grounds 2003, 146).

It is important to note that in the case of *Estelle v. Gamble* the US Supreme Court ruled that medical care or the lack thereof is unconstitutional (under the Eighth Amendment) when it involves the “unnecessary and wanton infliction of pain,” and extends to the “deliberate indifference to serious medical needs of prisoners, including the treatment of mental illness.” However, substandard quality of care, negligence, or malpractice does not suffice to establish a violation under the Eighth Amendment.

As held in *Farmer v. Brennan,* officials can be found to be deliberately indifferent based not on what they should have known but on what they actually know. This preference for subjective criteria rather than an objective test (constructive knowledge) is certainly very limiting. It does not provide adequate safeguards for addressing violations of the rights of the mentally ill. Interestingly, Article 16(1) of the African Charter also provides for the right to enjoy the “best attainable state of physical and mental health,” and Article 16(2) calls for state parties to take necessary measures to protect the health of their people and ensure that they receive medical attention when they are sick. Article 18(4) of the African Charter stipulates that the aged and disabled have the right to special measures of protection in keeping with their physical or moral needs.
The questions therefore are, first, why should the state keep mentally disabled persons in prison and, second, why does the state continually fail to provide adequate treatment for these persons? Such actions violate UNSMR Rule 62, which states that medical services of the institution shall seek to detect and treat any physical or mental illnesses or defects that may hamper a prisoner's rehabilitation as well as provide all necessary medical, surgical, and psychiatric services to achieve this end. It cannot be argued that the restrictive wording of this rule offers justification for the problems faced by mentally ill persons in prisons. The provision of such services cannot be hinged on only the ability to lead to "rehabilitation" of the prisoners. This could not have been the intention of the drafters of such legislation, especially when we consider other provisions of the UNSMR.

Sections 22(1), 82(1), and 82(2) of the UNSMR are worth noting. Section 22(1) states that there should be in every prison at least one qualified medical officer who is knowledgeable in psychiatry and that the institution's medical services should be organized in close relationship to the general health administration of the community or nation. Section 82 reads:

(1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.
(2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.

Will the argument of lack of resources suffice? The African Commission has this to say:

It is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of their rights. Therefore, having due regard to this depressing
but real state of affairs, the African Commission would like to read into Article 16 the obligation on the part of the State party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realized in all its aspects without discrimination of any kind.29

In a recent publication by Human Rights Watch (Fellner and Abramsky 2004, 1) on the treatment of mentally ill persons it was reported that at least one in six prisoners in the United States is mentally ill—well over 300,000 men and women. The report also stated that there are three times as many mentally ill persons in US prisons as in the country’s mental hospitals. American prisoners include people suffering from schizophrenia, bipolar disorder, and major depression, among other illnesses.

This situation in the United States suggests that the problem of imprisoning mentally ill people is influenced more by policy-related matters and societal attitudes than by economic or resource considerations. In addition, it becomes clear that the unethical practice of imprisoning mentally ill persons is not limited to Africa, but is an international issue linked to the use of imprisonment as a means of dealing with social problems and the lack of adequate resources made available to the general populations of many countries. While the assessment of policies and amendments to policies, and the presentation of institutional structural arrangements that imprison mentally ill persons, have been highlighted in this chapter, the use of institutionalization of mentally ill persons (whether in prison or psychiatric hospital) must cease to be the only response available for dealing with the problems mentally ill persons face.

REMEDIES FOR REDRESS OF VIOLATIONS

Domestic Remedies: National Courts
The ability to exhaust all local remedies is a primary consideration in accessing admissibility of cases before regional
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and international human rights mechanisms. Article 56(5) of the African Charter states that communications received by the commission shall be considered if they "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged." Article 2 of the First Optional Protocol to the ICCPR restates a similar position. What if the domestic remedies are inadequate, ineffective, inaccessible, unfair, biased, or unduly prolonged? On this issue the African Commission rejected the Gambia government's argument that complainants could seek remedies by bringing actions in tort for false imprisonment or negligence. The commission also questioned the fact that no legal assistance is available to vulnerable groups in prison to enable them to access the legal procedures of the country. It therefore submits that the remedies should be both realistic and effective for the category of people under consideration.

Article 1 of the ICCPR First Optional Protocol states that no communication shall be received by the UN Human Rights Committee (HRC) if it concerns a state party to the ICCPR that is not a party to the protocol. The status of ratification on principal UN human rights treaties indicates that thirty-three out of fifty-four African countries have ratified this protocol, while fifty-two countries have signed/ratified the ICCPR. Those that have ratified both the ICCPR and the Optional Protocol are Algeria, Angola, Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, Congo, Cote d'Ivoire, the Democratic Republic of Congo, Equatorial Guinea, Guinea-Bissau, The Gambia, Ghana, Guinea, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Niger, Senegal, Sierra Leone, Somalia, Togo, Uganda, and Zambia. Four countries—Djibouti, Cape Verde, Namibia, and South Africa—have ratified both the ICCPR and Protocols 1 and 2. Sixteen countries have ratified the ICCPR but not the protocols. They are Botswana, Burundi, Egypt, Eritrea, Ethiopia, Gabon, Kenya, Liberia, Morocco, Mozambique, Nigeria, Rwanda, Sudan, Tunisia, Tanzania, and Zimbabwe. Two countries, Mauritania and Swaziland, have not ratified even the ICCPR. Therefore, in total about eighteen African countries are not able to access the
HRC. This number includes Nigeria, one of the countries under review in this chapter.

Although most African countries have ratified the major UN and regional human rights treaties, very few have taken further steps by domesticating the provisions of these treaties (Heyns and Vijloon 2001, 483). It is thus more difficult to rely on rights guaranteed in treaties before national courts. In a review of nineteen national court cases from seven African countries (South Africa, Zimbabwe, Namibia, Tanzania, Mauritius, Uganda, and Nigeria) it was observed that reference was made to the work of only three UN human rights treaty bodies: the Human Rights Committee, the Committee on Economic, Social, and Cultural Rights, and the Committee on Rights of the Child.\textsuperscript{34} While most of these countries are within the southern region of the continent and mainly of Commonwealth jurisdiction, caution should be exercised in not overgeneralizing these observations. Some national courts may refer to the findings of the HRC but reach different conclusions.\textsuperscript{35} At other times they rely on a dissenting opinion of one of the HRC members to give a ruling.\textsuperscript{36} Sometimes different outcomes are reached even while relying on the same HRC findings.\textsuperscript{37} Sometimes a worse outcome is reached. An example is \textit{Mbushuu},\textsuperscript{38} in which the High Court of Tanzania, relying on the HRC in \textit{Randolph Barrett and Clyde Sutcliffe v. Jamaica},\textsuperscript{39} not only ruled that the death penalty was constitutional, but also went ahead to quash the sentences of life imprisonment imposed by the High Court in favour of death sentences.\textsuperscript{40} Judging from the above, one can conclude that the outcome of national courts relying on international human rights jurisprudence is unpredictable.

The illusion of institutionalized human rights as universal and objective is apparent in these cases. One national court stated that, while “they can derive assistance from public international law and foreign case law, \textit{they} are in no way bound to follow it.”\textsuperscript{41} In these cases it becomes clear that a colonial approach to dealing with human rights violations in colonial institutions in Africa is not only problematic but also ineffective. While prisons were brought to Nigeria by the British, and while Nigeria
continues to be influenced by UK policies in the treatment of prisoners and the implementation of policies to address problems with the detention of mentally ill persons, it is apparent from the study of outcomes of international policy implementations that the bureaucratic and institutional systems of control are not functioning in Africa. In addition, a comparative assessment of the imprisonment of mentally ill persons in the United States suggests that the human rights issues that mentally ill persons face in Africa are not a problem of "African governance" but a problem of imprisonment institutions and the overreliance on such institutions for social control.

African Regional Human Rights Protection Mechanisms

The African Charter on Human and Peoples' Rights (the African Charter)\textsuperscript{42} has been ratified by fifty-four member states of the African Union (AU).\textsuperscript{43} Article 6 of the charter is similar in substance to Article 9 of the UDHR and Article 9(1) of the ICCPR,\textsuperscript{44} which prohibit arbitrary arrest and detention. Article 7(1) of the African Charter provides for fair hearings in line with Articles 9(2), 9(3), and 9(4) of the ICCPR.\textsuperscript{45} However, there is no comparable provision in the African Charter to Article 9(5) of the ICCPR,\textsuperscript{46} which provides for enforceable rights to compensation for victims of unlawful arrest or detention. Article 2(3a) of the ICCPR requires the state to ensure that any person whose rights protected under the covenant are violated has an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. What, then, is the effect of the lack of provision for compensation? No doubt it limits the scope of remedies available to those whose rights have been violated in the manner highlighted above.

In the most recent case involving the rights of mentally ill persons decided by the African Commission (Purohit) three recommendations were made by the commission after it found The Gambia in violation of Articles 2, 3, 5, 7(1)(a) and (c), 13(1), 16, and 18(4) of the African Charter. These recommendations are listed below.
1. The government of The Gambia should repeal as soon as possible the Lunacy Detention Act (LDA), and replace it with a new legislative regime for mental health that is compatible with the African Charter on Human and Peoples’ Rights and international standards and norms for the protection of mentally ill or disabled persons.

2. Pending (1), the government of The Gambia should create an expert body to review the cases of all persons detained under the LDA, and make appropriate recommendations for their treatment and release.

3. The government of The Gambia should provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia.

Is it possible that in the future the commission will expand its recommendations in this area to include compensation for victims? There is evidence that the African Commission tends to rely to some extent on the provisions of treaties from both the United Nations and regional jurisdictions. In *Media Rights Agenda v. Nigeria* the commission stated that, “notwithstanding the fact that neither the African Charter nor the Commission’s Resolution on the Right to Recourse Procedure and Fair Trial contain[s] any express provision for the right to public trial, the Commission is empowered by articles 60 and 61 to draw inspiration from international law on human rights to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine” (emphasis added).⁷⁷ For example, in the above case the commission referred to General Comment No. 13 of the UN Human Rights Committee on the right to a fair trial and to Article 14 of the convention in the interpretation of the phrase “fair hearing.” In *Legal Resources Foundation v. Zambia*⁷⁸ Comment No. 18 of the HRC was relied upon in defining what constitutes “non-discrimination.”

Beyond the issue of treatment of complaints, another mechanism available to the commission is a fact-finding mission.
Article 58 of the charter empowers the commission to draw special cases relating to serious or massive violations of human and peoples' rights to the attention of the Assembly of Heads of State and Government of the OAU (now the AU), which "may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendation." Some have criticized this article on the basis that the ability of the commission to act on complaints from non-state actors is dependent on prior authorization by the Assembly of Heads of State and Government of the AU. Also, critics of these policies argue that, even when the commission acts, its actions are limited only to carrying out in-depth studies. While policies and bureaucratic practices in Africa are expanding to implement an external body to examine human rights violations, the capacity to act on such violations is trumped by the power that the state affords to its institutions of control. This situation is similar to what occurs in Europe and the United States. Following in the footsteps of colonial governance, African states are working to implement international laws and tribunals that are "accepted" by the West, and in doing so are falling into similar traps and bureaucratic failings.

**International Mechanisms for Addressing Issues**

Beyond the treaty provisions and instances mentioned above, other mechanisms are available within the international human rights sphere: fact-finding missions, a special rapporteur, and the establishment of the UN Working Group on Arbitrary Detention. On the issue of acts being in compliance with national/domestic laws, the working group has clearly stated that its mandate covers every case of deprivation of liberty if it is inconsistent with both domestic legislation and international standards. These include the UDHR and other relevant international instruments accepted by the state in question. The working group also emphatically stated that it is necessary that the act is inconsistent with one of these criteria for it to fall within its jurisdiction. Thus, even if the act is in compliance with domestic legislation, the working
group can still address it if it is in violation of an international standard. The working group's classification of cases under arbitrary detention is also worth noting, especially in view of the decision of the African Commission in *Purohit*. The challenge is how these efforts can be coordinated to complement each other in order to provide greater safeguards for mentally disabled persons. The African Commission is working to provide a working environment in which powers external to specific state institutions are able, not only to assess and study human rights violations of mentally ill persons held in prisons, but also to address the problem in manners that significantly and positively impact the lives of vulnerable populations in prison.

**CONCLUSION**

The international and regional human rights mechanisms dealing with the issue of mentally disabled persons in prison are comprehensive. Case law jurisprudence is quite progressive too. However, there is a need to provide more avenues for accessing and effectively utilizing the regional and international human rights mechanisms by national courts. These provisions will go a long way toward providing "effective domestic remedies" as well as internal oversight mechanisms of the process.

Provisions for compensation should be seen as a viable remedy for survivors of such violations. Other domestic human rights protection and promotional mechanisms should be utilized in addressing the problem of mentally disabled persons held by the justice system. These protections should fall within the jurisdiction of national human rights institutions, non-governmental organizations, and professional bodies such as the bar associations and the medical associations. The conditions of detention should be seen as raising, not just the question of the right to health, and the prohibition of torture or cruel and inhumane treatment, but also the right to a fair trial or a fair hearing, and the prohibition of arbitrary arrest and detention. A collaborative effort between the different sectors of the human
rights community needs to be implemented in an African manner, one that shares responsibilities for violations and the power to ratify these problems.

As a first step there is a need to carry out a pilot project aimed at decongesting Nigerian prisons (and other African prisons) of mentally disabled persons: the civil lunatic and the criminal lunatic. The project should involve a multisectoral/dimensional approach, including the following:

1. the release of prisoners labelled “civil lunatics” and “criminal lunatics”;
2. the transfer/management of such persons to proper treatment centres (psychiatric hospitals, African NGO houses that implement communal care of mentally ill people);
3. raising the awareness of criminal justice agents, policy-makers, and the general public to help address the stigma that mentally ill persons face; and
4. legislative advocacy to ensure that such violations cease and to prohibit them from occurring in the future.

All projects and amendments should work with and for the families and communities of mentally disabled people. Rehabilitation techniques, campaigns for human rights and equal access to liberty and high quality of life, and general resource management that provides for people with special needs are all natural components of many African societies. In a continent where community and governance are intimately linked, the problems that mentally ill persons face today can be dealt with in a manner that is relevant to our society and thus effective for those involved. While this chapter has focused heavily on the international legal components associated with the problems that mentally ill persons face in African prisons, it is essential to emphasize that, while knowledge of the international regulations that deal with human rights violations of mentally ill persons is essential to understanding the policy-related methods needed
to deal with existing problems, this knowledge in itself is not sufficient to address the problems that institutions of control impose upon vulnerable populations. The legal knowledge presented in this chapter is meant to provide a resource upon which those interested in fighting for the rights of mentally ill persons held in prisons can build. The real struggle does not exist in policy development. It exists in the implementation of human rights and in the abolition of circumstances that place mentally ill people in prison.

NOTES

1 This is the categorization noted in prison records and statistics in Nigeria.
3 Article 10 of the Universal Declaration of Human Rights (UDHR).
4 Article 5 of UDHR; Article 7 of the International Covenant on Civil and Political Rights (ICCPR).
5 Article 9 of ICCPR and Article 9 of UDHR.
6 Which holds all people who are not mentally disabled and are charged with or convicted of criminal offences.
7 Along with those of a large number of other African countries that are former colonies of the United Kingdom.
9 Communication No. 241/2001 para 64.
10 See Article 8 of the United Nations Standard Minimum Rule for the Treatment of Prisoners (UNSMR).
11 It was ratified on June 28, 2001, and came into force on July 28, 2001.
12 Communication No. 224/98.
14 Section 3(3) of the Mental Health Act, 1983.
15 Section 71(1), ibid.
16 Section 71(2), ibid.
17 Rule 6, Mental Health Review Tribunal Rules, 1963.
18 Rule 12, ibid.
19 Section 72(1)(b) of the Mental Health Act, 1983.
22 This is in complete violation of Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provides that medical care and treatment shall be provided free of charge.
23 See Rule 49(1) of UNSMR.
24 Prison Standing Order of the Federal Republic of Nigeria No. 423 provides for the removal of insane prisoners to mental hospitals. Unfortunately this provision is rarely used.
25 Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (MI Principles), adopted by the UN General Assembly in 1991 (see Principle 20).
26 In the case of the United Kingdom, see section 72(1)(b)(i) of the Mental Health Act, 1983, which obliges mental health review tribunals to discharge patients who are no longer suffering from a mental disorder of a nature or degree warranting detention in hospital for treatment, even if they remain “dangerous.”
29 Communication No. 241/2001 para 84.
30 See also Article 35 of the ECHR, which gives a time limit of six months from the date on which the final decision was reached in domestic court within which communication should be sent to the European Court of Human Rights.
32 The Gambia has the Poor Persons Defence (Capital Charge) Act, which provides legal aid only to persons charged with capital offences.
33 Poor people mainly picked up from the streets.
34 See www.abo.fi/instut/imr/lla-articles/louw.doc.
35 See the Supreme Court of Zimbabwe and the Constitutional Court of South Africa on the crime of sodomy as decided by the HRC in Toonen v. Australia, Communication No. 488/1992.
36 See the Zimbabwean court in S. v. Banana, 2000(3) SA 885 (ZS).


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