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Centre for Human Rights
Faculty of Law

PRESS STATEMENT

CENTRE FOR HUMAN RIGHTS CALLS ON AFRICAN COMMISSION TO FOCUS ON INTERSEX PERSONS' RIGHTS, PROTECTION AND IMPLEMENTATION

**STATEMENT BY NGO WITH OBSERVER STATUS:
CENTRE FOR HUMAN RIGHTS, FACULTY OF LAW, UNIVERSITY OF PRETORIA**

*60th session of the African Commission on Human and Peoples' Rights
11 May 2017, Niamey, Niger*

Chairperson, Commissioners, participants,

CHAIRPERSON

The Centre for Human Rights notes that this is the last full session over which you, Chairperson, would preside. We recognise your calm wisdom and efficient professionalism in service of human rights on the continent, in your capacity as Commissioner, Special Rapporteur on Freedom of Expression and Access to Information in Africa, and as Chairperson of the Commission.

INTERSEX PERSONS

The Centre draws the Commission's attention of the plight of intersex persons. Intersex persons are born with natural sex characteristics that do not fit typical binary notions of male or female bodies. Among the most serious violations intersex persons suffer – also in African states, as recent cases in Kenya demonstrate – are coerced and uninformed genital normalising surgeries on minors; infanticide;

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lack of appropriate legal recognition and civil status, and discrimination. *We call on the Commission to consider the ways in which it may best engage with advancing the rights of this neglected group of persons as part of its promotional mandate.*

COMPLAINTS MANDATE

The Centre further notes with concern the de-prioritisation, over time, of the Commission's protective mandate. While the Commission must be congratulated for the vigorous exercise of its **promotional mandate**, in particular through its **Special Mechanisms and standard-setting**, protecting rights remains at the heart of the Commission's mandate to improve the human rights situation in Africa.

On the one hand, the Commission should be commended for addressing human rights violations of immediate and urgent concern, by adopting **provisional measures** at the seizure stage (before considering the admissibility of communications); and by issuing **urgent appeals**.

On the other hand, the regular **communications procedure**, which remains one of the Commission's core functions, seems to have suffered neglect. In the five years between 2012 and 2016, the Commission on average decided **8 merits** decisions annually. In its last **three** sessions (including the Extraordinary Session earlier this year), the Commission only took **one** merits decision. In the 2016 calendar year, the Commission took merits decisions in **8 Communications**, down from a total of **12 merits decisions in 2015**.

Considering that there are some **199 communications** pending before the Commission, the inescapable conclusion is that the delay in finalising cases is continuously being exacerbated, thus diminishing the prospects of timely redress for victims of violations.

IMPLEMENTATION

Third: In all instances of protective matters being taken, pervasive non-implementation by states threatens to reduce protective measures to **empty gestures**. (This also emerges from the work on the Human Rights Law Implementation Project (HRLIP), in which the Centre collaborates with the Universities of Bristol, Essex, Middlesex.)

Of the **twelve urgent appeals**, listed in the Commission's last (2016) Activity Report, only **two** were met by a government explanation, or acknowledgement. The unanswered ten were directed against Burundi, Ethiopia, the Gambia, Liberia, South Sudan, Tanzania and Zimbabwe.

In the same Activity Report, the Commission notes that **none of the eight provisional measures** has been implemented.

Botswana

One of the most striking is the case of Patrick Gabaakanye (*Communication 600/16 Patrick Gabaakanye [represented by Dingake Law Partners, DITSHWANELO and REPRIEVE] v Botswana*), in which the Commission issued provisional measures on 24 Feb 2016, requesting the State to stay Gabaakanye's execution. This complaint was filed in January 2016, highlighting that Patrick was at imminent risk of execution. Following the complaint, the Commission wrote to Botswana's President requesting him to ensure that "the Government of the Republic of Botswana adopts provisional Measures to stay the execution of Mr Patrick Gabaakanye". However, on 25 May 2016, Botswana executed Patrick in violation of the Commission's provisional measures.

This striking disregard for the Commission's decision is aggravated, because it is part of a pattern of conduct, in that Botswana's conduct in 2016 mirrors its previous action in 2001 (*Interights and Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003)), when it executed Sonja Bosch, despite a similar provisional measures being directed to it.

With regard to the **complaints mandate**, the Commission unfortunately does not provide systematic data, but indications are that non-implementation is equally prevalent. In its most recent Activity Report, the Commission mentioned one case in which it was informed about state non-compliance.

Zimbabwe

This is the case of Gabriel Shumba (*Communication 288/2004 Gabriel Shumba v Zimbabwe*, decided in May 2012, 51st Ordinary Session of the Commission) in which the Commission in 2012 found that the Government of Zimbabwe had violated article 5 of the African Charter (freedom from torture), and requested the Government to: "(1) pay adequate compensation to the victim for the torture and trauma caused; (2) undertake an inquiry and investigation in order to bring those who perpetrated the violations to justice; (3) report on the implementation of these recommendations within three months from the date of notification" (paragraph 194 of the decision of the African Commission).

We commend the Commission for highlighting Zimbabwe's non-compliance with these recommendations in its 2016 Activity Report. However, to date, the Government of Zimbabwe has, as far as we are aware, not implemented these recommendations nor reported to the Commission as requested.

We invite the government of Zimbabwe, to commit itself to the implementation of this remedial order. In the case that this would not happen in the immediate future, the Commission is urged to invite the Government and the Complainant to an implementation hearing.

Eritrea

Many instances of non-implementation are of long standing. Their victims risk becoming forgotten. A prime example are two major Commission decisions against Eritrea. In September 2001, as a result of a crackdown, a group of politicians, and journalists critical of Government policies, were detained and tortured; some were disappeared. In 2003 and 2007 (*Zegveld and Another v Eritrea* (2003) AHRLR 84 (ACHPR 2003); *Article 19 v Eritrea* 2007 AHRLR 73 (ACHPR 2007)), the Commission took two decisions, in each instance urging the government to release the detainees, that have not yet been implemented — after some 15 years; and despite subsequent resolutions by the Commission, again and again calling on the government to abide by these decisions, the recommendations remain unimplemented.

Cameroon

The dire situation in Cameroon reflects the failure of the state to abide by the Commission's decision in the *Gunme case* (*Gunme and Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009)), in which the Commission called on the Government of Cameroon to 'stop the transfer of accused persons from the Anglophone provinces for trial in the Francophone provinces (para 215(2)). In flagrant disregard of this recommendation, suspects were transferred from the Anglophone to the Francophone part of the country for trial, thus fuelling further resentment.

RECOMMENDATIONS

We therefore urge **states** to implement the Commission's decisions against them.

We further urge the **Commission** to:

- Direct its Secretariat to prioritise the communications procedure in its internal operations; and dedicate a significant number of days to this part of its mandate at each of its sessions;
- Further develop its practice of holding implementation hearings in cases of clear non-compliance by states;

- Develop and keep updated a complete systematic database on the status of implementation of all communications; to provide a report thereon during every public session, as required by Rule 112(7) of its Rules of Procedure; and to make this database public on its web site;
- In its Activity Report, draw the attention of the Executive Council (and Assembly) to specific instances of non-compliance, and in cases of **persistent or recurring non-compliance** call on the Assembly to consider imposing sanctions on these states for their non-compliance. Article 23(2) of the AU Constitutive Act provides that the AU Assembly may impose sanctions on any state that 'fails to comply with AU decisions and policies'. It is difficult to imagine more appropriate cases for invoking article than in instances where states flagrantly and consistently disregard the decisions of the AU's primary human rights body, performing its mandate under a AU human rights treaty ratified by the states concerned.

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