

**Relationship between the African Commission on Human and Peoples' Rights Robben Island Guidelines and the Optional Protocol to the UN Convention Against Torture (OPCAT)**

The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) (RIG) were adopted by the African Commission on Human and Peoples' Rights in 2002.<sup>1</sup> At the same time a Follow-Up Committee (RIG Committee) was established:

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

The Optional Protocol to the UN Convention Against Torture (OPCAT) was adopted in December 2002 and came into force in June 2006. The Subcommittee on the Prevention of Torture (SPT) as established by the OPCAT, was created in December 2006 and many governments are in the process of or have already designated their national preventive mechanism (NPM) under OPCAT.

The African Commission also has a Special Rapporteur on Prisons and Conditions of Detention. This Special Rapporteur was created in 1996 as a result of lobbying by the NGO, Penal Reform International. Although not defined at the outset, the terms of reference refer to the need to 'examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights'.<sup>2</sup> The Special Rapporteur's mandate therefore encompasses:

1. conducting an examination of the state of prisons and conditions of detention and making recommendations for their improvement;
2. advocating adherence to the African Charter and other relevant international human rights norms;
3. examining the national laws and making recommendations concerning their compliance with international norms;
4. at the request of the Commission, making recommendations on any communications filed with the Commission related to the subject-matter of the mandate;
5. proposing to States any urgent action which needs to be undertaken;

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<sup>1</sup> Resolution on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), 32<sup>nd</sup> Session, Banjul, The Gambia, October 2002.

<sup>2</sup> As set out in an appendix to the Report of the Special Rapporteur on Prisons and Conditions of Detention to the 21st Session of the African Commission on Human and Peoples' Rights, Tenth Activity Report 1996–1997, Annex VII, para. 2.

6. conducting studies into conditions which contribute to detentions and proposing preventative measures;
7. co-ordinating his activities with those of other Special Rapporteurs and working groups.<sup>3</sup>

The Special Rapporteurs have since then undertaken a number of visits to African countries and places of detention, a couple of which have been follow-up visits.<sup>4</sup>

It is important to consider the relationship between the RIG and OPCAT and between the RIG Committee and the NPMs and SPT under OPCAT for a number of reasons:

1. There is reference in the RIG themselves to OPCAT

As part of ‘mechanisms for oversight’, states are required, under paragraph 43 to:

‘Support the adoption of an Optional Protocol to the UNCAT to create an international visiting mechanism with the mandate to visit all places where people are deprived of their liberty by a State Party’.

Paragraphs 41 and 42 also provide that states should:

‘Establish, support and strengthen independent national institutions such as human rights commissions, ombudspersons and commissions of parliamentarians, with the mandate to conduct visits to all places of detention and to generally address the issue of the prevention of torture, cruel, inhuman and degrading treatment or punishment, guided by the UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights.

Encourage and facilitate visits by NGOs to places of detention’.

Although the section in the RIG obviously now needs updating given the coming into force of OPCAT, this provides a clear role for the RIG Committee in the context of OPCAT, its mandate being to ‘To develop and propose to the African Commission strategies to promote and implement the Robben Island Guidelines at the national and regional levels’ as well as to ‘promote and facilitate the implementation of the Robben Island Guidelines within Member States’.<sup>5</sup>

2. The RIG Committee has a role in relation to prevention of torture

The rationale for both the RIG and OPCAT is to prevent torture and other ill-treatment. Part II of the RIG provide a broad range of obligations for states in preventing torture. If one considers the preamble of OPCAT, there is also a reference to prevention there as inclusive of education, legislative, administrative, judicial and other measures. The OPCAT is set up as a way of preventing torture and ill treatment. The RIG provide some more detail as to how states can achieve this. The RIG Committee, by connection, therefore, has a remit to consider ways in which these provisions can be implemented, not least through ‘mechanisms of oversight’ but also

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<sup>3</sup> Ibid, paras 3-5.

<sup>4</sup> E.g. Mali: Prisons in Mali: Report of the Special Rapporteur on Prisons and Conditions of Detention, Report on a Visit 20–30 August 1997, by Professor E. V. O. Dankwa, Series IV, No. 2 (*Documents of the African Commission*, p. 625); Mali Prisons Revisited: Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, Report of a Visit 27 November to 8 December 1998, Series IV, No. 4.

<sup>5</sup> Resolution on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), 32<sup>nd</sup> Session, Banjul, The Gambia, October 2002.

training and education. Accordingly, there is the potential for the RIG and OPCAT to intersect on many different preventive measures.

3. The SPT has a role to cooperate with other bodies, as stated in OPCAT Article 11(c)

This provides that part of the mandate of the SPT is to:

‘Cooperate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment’.

4. There is increased potential for more links to be made between the SPT and the African Commission

This is especially the case with the RIG Committee and the Special Rapporteur on Prisons and Conditions of Detention.

### **The relationship between the RIG Committee and the African Commission’s Special Rapporteur on Prisons and Conditions of Detention in relation to torture prevention**

Although one might imagine this relationship to have been thought through fully, this does not appear to have been the case. When the RIG Committee was created, several years after the Special Rapporteur, there was little reference to the Special Rapporteur’s work within the RIG.<sup>6</sup> The RIG Committee has undertaken relatively little work since its inception due to lack of funding. The Special Rapporteur, however, has carried out a large number of visits to places of detention across the continent, although this has been significantly curtailed in recent years with the lack of funding being provided by the NGO, PRI. It would seem that the two procedures have adopted a different approach, not necessarily due to a strategic decision to do so, but more as a result of funding issues. The Special Rapporteur therefore has focused so far on carrying out visits to places of detention in African states, the RIG Committee to looking at broader promotional issues and how one might implement the Guidelines. With the increased funding from the AU to the African Commission and the opportunity now, therefore, for more work to be carried out by both mechanisms, there is a clear need for further discussion to be had between the two as to how their respective mandates can complement each other.

The RIG Committee has already started to undertake visits in African states to places of detention in order to consider implementation of the Guidelines. Although visits so far have been with the Special Rapporteur himself, it is important that the mandate and purpose of the visits are clear and that it does not undermine or duplicate the mandate of the Special Rapporteur on Prisons.

Although in practice the two have worked closely together, this has not yet been formalised. It would make sense, therefore, for the Special Rapporteur to sit as an observer on the RIG Committee meetings, or be included as a member of the Committee. The two mechanisms should also provide separate strategic plans which should be formalised with consultation with each other. Although the mandate of the RIG Committee is primarily promotional, it also has a role in implementing the RIG. At present it appears that it envisages this to be achieved through

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<sup>6</sup> Part I.B: ‘States should co-operate with the African Commission on Human and Peoples’ Rights and promote and support the work of the Special Rapporteur on prisons and conditions of detention in Africa...’.

the holding of seminars in states and visits to places of detention. The standards on which these visits are being made are the RIG, despite these not being legally binding per se (although many would argue some of the provisions embody existing international legal obligations). It is important that the RIG Committee is clear about the relationship between its visits to places of detention and states and how its mandate differs from and complements that of the Special Rapporteur.

### **The relationship between the RIG Committee, the Special Rapporteur and the SPT**

The RIG Committee and SPT met in April 2008 at a conference on OPCAT in Cape Town.<sup>7</sup> As Mumba Malila, the current Special Rapporteur, himself outlined at this event, there are a number of ways in which he and the African Commission can engage with the SPT:

1. Exploiting the good relationships the African Commission has with NHRIs in many states;
2. Making available the studies the African Commission has at its disposal;
3. Informing the SPT of various sensitivities that may be relevant in visiting prisons in Africa; and
4. Looking at the possibility of joint missions.<sup>8</sup>

The issue of NHRIs will be examined further below. Sharing of information and an understanding of relevant sensitivities is an important aspect of any potential relationship especially as the current SPT does not have any African members. As noted above, it is important that the RIG Committee and Special Rapporteur define their relationship in more detail as this has implications as to how each will interact with the SPT.

There are a number of potential ways in which the SPT can work with the African Commission in visiting states but these raise some challenges. One of these is confidentiality. There is no express reference in the terms of reference of either the RIG Committee or Special Rapporteur on confidentiality. In practice this has so far not been an issue for the RIG Committee, and the Special Rapporteur's reports on visits to places of detention, while giving governments and the authorities the opportunity to respond to the reports prior to their publication, have been published. In contrast the text of OPCAT is more prescriptive and the SPT has taken a more conservative approach to what remains confidential within the context of its relationships with NPMs, governments and on its visits. If the African mechanisms are to collaborate in this way with the SPT then further thought needs to be given to their respective views on confidentiality.

A further concern with respect to joint missions is the permission required to enter the state for a visit to take place. Mere ratification of OPCAT enables the SPT to visit the member state without the need for further permission. In contrast, the Special Rapporteur and RIG Committee require invitations from the state to visit. The concept of prevention so central to the OPCAT provides an opportunity for visits by the SPT without notice. The same approach has not

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<sup>7</sup> See OPCAT in the African Region: Challenges of Implementation, Summary and recommendations from Conference held 3-4 April 2008, Cape Town South Africa, <http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/africaconference2008report.pdf>.

<sup>8</sup> Ibid, p.6.

been and could not be adopted by the Special Rapporteur or the RIG Committee. A way around this may be to include the Special Rapporteur or member of the RIG Committee on the roster of experts for the SPT. If this were the case very clear guidelines and terms of reference need to be formulated and the exact role of the 'expert' identified to avoid a conflict of interests.

A key aspect of any relationship between the African mechanisms and the SPT is that of complementarity. Exactly what does each aim to achieve by collaborating with the other, particularly in terms of joint missions, and how might each avoid duplicating work that has already been carried out, needs further consideration between the three bodies.

### **The relationship between NPMs and the African Commission and its RIG Committee**

The African Commission has a well-established procedure for interacting with NHRIs through its procedure of affiliated status.<sup>9</sup> It is unfortunate that whilst 21 NHRIs have affiliated status, few make use of the privileges that it accords them and the relationship between the African Commission and this set of actors is still in its infancy.<sup>10</sup>

On the African continent, where discussions have been had about NPMs, these have often involved the NHRI as the potential NPM or at least the NHRI has been involved in discussions about implementation of OPCAT. The fact that the African Commission has this affiliated status relationship available gives considerable potential for it to interact with NPMs directly, where they are the NHRI, or at least to obtain relevant information from an important statutory or constitutional body in the country.

Caution needs to be exercised here however as not all NHRIs will become NPMs and not all NPMs will be NHRIs. It is not entirely clear from OPCAT to whom the NPM should report, if anyone, given the need for it to be independent. Article 11 of OPCAT provides for a relationship to be developed between the NPM and the SPT but it is not at all apparent whether the SPT should be trying to ensure the NPM acts appropriately or not. If the NPM is to be properly independent, as required by OPCAT and reference to the Paris Principles, then requiring the government to hold them to account is also not satisfactory. The use of the affiliated status procedure at the African Commission could have potential here to require the NHRI, if it is the NPM, to answer questions on its independence and other issues of relevance to OPCAT. Yet the African Commission will have to be careful that it is not treading on the toes of the SPT and that it is properly informed by the SPT and others as to the situation in the particular state. Given that the history of the African Commission working with the NHRIs under the affiliated status umbrella, or indeed in any other way, is not developed it is rather premature to consider the African Commission checking up on NHRIs in the context of OPCAT. If the relationship were to develop in a more sophisticated way in the future, then this could be something to consider. At present NHRIs with affiliated status are required to report to the African Commission every two years 'on its activities in the promotion and protection of the rights enshrined in the Charter'.<sup>11</sup> So far no NHRIs have done so and the African Commission has not been forceful in calling them to account. Requiring any reference at this stage to OPCAT in a report, even if it is likely to be produced, is likely to be rather glib and superficial. The African Commission should, however, be considering how it can best enhance its relationship with NHRIs and make full use of this important affiliated status process.

At present the RIG make little reference to NPMs. This paper is not suggesting that the RIG be amended wholesale, but rather that the RIG Committee may choose to draft a resolution

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<sup>9</sup> Resolution on Granting Affiliate Status to National Human Rights Institutions, 31 October 1998.

<sup>10</sup> See R. Murray, *The Role of National Human Rights Institutions at the International and Regional Levels. The Experience of Africa*, Hart Publishing, 2007.

<sup>11</sup> Resolution on Granting Affiliate Status.

or several resolutions for adoption by the African Commission which clarify or update some of the provisions in the RIG. For example, the RIG Committee would clarify that paras 17, 40 and 41 of the RIG relate to NPMs by expanding upon the current content and suggesting a system of regular, preventive visits to places of deprivation of liberty.

In addition, it is important that the RIG Committee are informed as to the status of the NPM and OPCAT process in African states. This can be ensured through involvement of the RIG Committee in work relating to OPCAT and by informal relationships between the SPT and the RIG Committee.

### **The substantive relationship between OPCAT and RIG**

The RIG, although not legally binding, reflect international standards to some extent in its provisions and the Guidelines were intended as a tool for implementation of such. Indeed, organisations like the APT are using the RIG in their work in states to assist in the implementation of, for example, CAT recommendations.<sup>12</sup>

The concept of prevention is central to both OPCAT and the RIG, the latter containing detailed provisions on how this can be implemented. OPCAT's preambular paragraph makes reference to prevention as inclusive of education, legislative, administrative, judicial and other measures. Yet the SPT, governments and NPMs are still grappling with what this means in practice. The RIG Committee, Special Rapporteur and the SPT could work together examining the concept of prevention not only in the context of OPCAT but more broadly.

Similarly, OPCAT extends to 'places where people are or may be deprived of their liberty'.<sup>13</sup> This is potentially very broad going beyond prisons and police cells to refugee centres, secure accommodation, mental health institutions and even bonded labour. The Special Rapporteur's mandate is equally broad on paper but in practice the visits have focused primarily to prisons and police cells. The RIG Committee is in an opportune position, given the breadth of its mandate and the scope of the RIG themselves, to give guidance on what is meant by the concept of 'places of deprivation of liberty' within the African context.

There are a number of additional ways in which the RIG Committee could provide further guidance on the incorporation of OPCAT into the RIG and the broader concepts underlying both. For example, the preamble of the RIG could include reference to the prohibition of torture as *ius cogens* and reference to OPCAT. Article 1 could also include OPCAT in terms of recommendations and the section on 'criminalization of torture' could include reference to jurisdiction and control in the light of OPCAT and the Committee Against Torture's General Comment No.2.<sup>14</sup> Lastly, paragraph 43 of RIG needs to be considered given that OPCAT is now adopted. The RIG Committee could give some clarification, among other things, to encourage states to establish OPCAT-compliant NPMs, support the work of the SPT, make SPT's reports public and contribute to the Special Fund under the OPCAT.

Lastly, the role of NGOs is key to both the implementation of OPCAT as well as the RIG. There have been concerns voiced by NGOs with respect to implementation of OPCAT that they may be sidelined if an NPM is established and they are not part of that mechanism. The fact that an NPM has been/will be established should not mean that NGOs are suddenly prohibited from carrying out their visits. The RIG Committee could clarify that paragraph 40 of the RIG includes reference, for example, to the need to encourage and facilitate visits by both international

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<sup>12</sup> For example, in Benin.

<sup>13</sup> Articles 1 and 4.

<sup>14</sup> Committee Against Torture, General Comment No.2, *Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP.1/Rev.4

and national NGOs. NGOs can also facilitate the provision of complementary information to the NPM and SPT.

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September 2008