Human Rights Implementation Centre

Summary report of an expert seminar on the strategic use of soft law human rights documents

Bristol

4 July 2012

Background

On 4 July 2012 the Human Rights Implementation Centre of the University of Bristol held an expert seminar in Bristol to consider the strategic use of soft law human rights documents. This event took place within the final year of a research project, funded by the Arts and Humanities Research Council, which is examining the role of non-binding 'soft-law' documents in the development of international human rights law. The "Implementation of Human Rights Standards" project (IHRS project) is considering how so called 'soft law' human rights documents are used in practice and it is anticipated that this research project will contribute to a better understanding as to how these types of documents impact upon the development of international human rights law.

The aim of the seminar was to enable the IHRS project team an initial opportunity to present their findings from the four year project and to explore further the use and follow up of specific types of soft law documents, namely treaty body findings, by various actors. The specific documents discussed included the following:

- Decisions on individual communications
- Concluding observations on state reports
- General comments
- Resolutions
- Guidelines/Best Principles

Participants of the seminar included representatives from academia, UN treaty bodies, national human rights institutions and civil society organisations.

Summary of discussions

Session one: Overview of IHRS project findings

At the outset the IHRS project team gave a brief overview of the aims of the project. It was emphasised that the IHRS project is using one soft law document, namely the '*Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines*)' (RIG) adopted by the African Commission on Human and Peoples' Rights in 2002, as a lens through which to examining how soft law documents are used in practice. It was stressed that the focus of the project was on the *use* of the RIG, and soft

law documents generally, rather than *compliance*, although it was acknowledged that issues relating to compliance may have been looked at impliedly.

RIG were the brainchild of an international NGO, the APT, who subsequently lobbied the African Commission to commit to developing a regional soft law document on the prevention of torture and other ill-treatment in Africa. The motivating factor behind the development of a set of guidelines on the prevention of torture and other ill-treatment in Africa was to garner support within the region for the Optional Protocol to the UN Convention against Torture (OPCAT) and the concept of the prevention of torture and other ill-treatment through visits to places of detention advocated by the OPCAT. RIG were the result of an workshop held in South Africa in February 2002 and they were subsequently adopted by the African Commission in October 2002. At the same time as adopting the RIG the African Commission committed to establishing a new Special Mechanism expressly to promote and facilitate the implementation of the RIG. The 'Follow-Up Committee' on the RIG was established in 2004 with the mandate to:

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

In 2009 the African Commission decided to change the name of the Follow-up Committee to the 'Committee for the Prevention of Torture in Africa' (CPTA) in order to make it clear that the mandate of the Committee was aligned with the prevention of torture in the region.

It was noted that the IHRS project research involved looking at the contexts in which RIG were referred to, by whom, and what was the perceived binding or otherwise nature of them. In addition it was explained that in the course of the research a number of other types of soft law documents such as concluding observations, resolutions and decisions on individual communications where considered and this led the IHRS project team look at what forms of follow up there should be to treaty body findings in general.

The research methodology involved a review of all relevant documents of the African Commission, AU and UN since the adoption of the RIG in 2002, in order to see where and how the RIG have been referenced; a series of semi-structured interviews have been undertaken; and a number of seminars and workshops have been held on related themes. It was also noted that an informal advisory group had been established to consider broader issues around 'soft law' documents.

From this research the IHRS project team were able to draw the following broad observations:

a) There is limited use of RIG at the national and regional levels. Where the RIG are being used this is not consistently or extensively.

b) There is a failure of the African Commission itself to reference RIG, and other documents, in detail a consistent and substantive way. This has an impact in terms of how seriously others perceive the African Commission to view the RIG.
c) The use of RIG by other AU organs is extremely limited.
d) The use of RIG by UN bodies is apparent, but again this is not consistent or particularly detailed.
e) There is very limited awareness of the existence of RIG and the Committee for the Prevention of Torture in Africa (CPTA).
f) It does not seem to matter whether a document is binding or otherwise, instead the influencing factor appears to be more the context in which it is being used. For example, there would appear to be a preference to use binding standards in the first instance in litigation but the normative status of a document is less important in advocacy and training.
g) In practice there would appear to be a preference to use UN documents (treaties, and other documents such as the UN Standard Minimum Rules) rather than African documents despite rhetoric that regional instruments may carry more legitimacy in the region.

It was noted that while the use of RIG was limited it had been used by some stakeholders in training activities and advocacy at the national level such as in the drafting of legislation criminalising torture. However where RIG had been used it was noted that this had not been in isolation but as one of a number of documents.

In relation to soft law documents generally, the research findings suggest that the consequent use of soft law, how it is perceived and whether it has any impact on the ground depends on a range of factors such as the context in which it is drafted; the purpose for its development; and how much support and visibility it has at the time of drafting. It was noted that "ownership" over soft law documents was an important factor in their subsequent use and impact. It was observed that sometimes in order to be perceived as "relevant" or "useful" soft law needs to find a niche or fill gaps. Linked to this the level of detail of a soft law document would appear to have an impact on its perceived usefulness. Lastly, when a document is adopted, particularly if the document is in the form of a resolution or guidelines, there is a need for a clear purpose and strategy for its application afterwards.

In the discussions that followed the issue of "ownership" was highlighted for particular attention. It was observed that the African Commission has a poor record of taking "ownership" over soft law documents it has adopted. While efforts had been made by the NGO behind the idea of developing RIG, the APT, who had consulted with the African Commission at all times throughout the process and had ensured that the workshop established to draft RIG was co-chaired by the African Commission, unfortunately this did not result in subsequent "buy-in" or ownership over the RIG at the institutional level. It was noted that without an NGO providing strategic guidance and resources to the African Commission on a particular theme the African Commission is unlikely to take ownership itself.

In relation to RIG specifically a number of factors were discussed that have hindered its subsequent impact. First, the original purpose of RIG was to garner support within the region for the OPCAT. At the time of the drafting of RIG no-one expected the OPCAT to be adopted the same year. Early in 2002, the UN negotiations on the OPCAT appeared to have stalled. Yet only a month after the

drafting of RIG a text of the OPCAT was successfully adopted by the UN Human Rights Commission. Consequently the political purpose underlying RIG was lost almost from the outset. In the years that have followed a clear purpose for RIG has not yet been redefined by the African Commission, APT or other civil society organisation.

Linked to this it was suggested that if the original aim of RIG was for it to be used as leverage in respect of the OPCAT rather than a tool to be implemented by the African Commission, perhaps criticism of the African Commission for failing to take ownership over RIG is unfair. However, it was noted that the African Commission did adopt RIG and have established a Committee with the mandate to promote and implement RIG, therefore a space for ownership of RIG has been created at the regional level but this has failed to translate into action in practice.

It was also noted that we need to be clear what is meant by "ownership" and who should exercise it. It was suggested that greater ownership may not necessarily translate into soft law being more effective. An example of the guidelines on the right to food was given. In this instance States took "ownership" over the process but that led to the guidelines being watered down. Therefore one of the key aspects is not ownership on its own but what is the purpose. It was suggested that there needs to be a clear strategy in place when drafting soft law as sometimes a stronger document with the potential for greater impact may be achieved by not having "everyone round the table" at the beginning.

Linked to the issue of the purpose of soft law generally and RIG specifically, it was suggested that soft law often has added value when it fills a gap in international law. In relation to RIG it was noted that there are many instruments dealing with the prohibition and prevention of torture and other ill-treatment and it was unclear what the added value of RIG was in such as crowded space. The importance of the perceived value added by soft law had been borne out by the IHRS project findings, which indicate that stakeholders make strategic choices when using human rights documents and some interviewees stated to the IHRS project team that other soft law documents such as the UN Standard Minimum Rules and Istanbul Protocol, were more detailed and therefore more useful than RIG. Perhaps surprisingly the fact that RIG was the only instrument at the regional level focused solely on torture did not translate into RIG being used more than documents emanating from outside of the region. In fact, as noted above, a preference to use international standards had been observed.

Session two: The use of soft law human rights documents in practice

The second session explored the use of soft law human rights documents in practice drawing upon the varied practical experience of the participants. The discussions focused around the following broad themes:

- The use of soft law in practice at the national, regional and international levels.
- Motivating factors for the development of soft law.
- The use of soft law in rights mobilisation.
- The use of soft law in post-conflict situations.

Looking first at the use of soft law documents in practice it was noted that treaty body findings can be used at the national level in order to bring different people together to raise awareness of an

issue. An example from Northern Ireland was given where the process of bringing people together around the CERD led in practice to the creation of coalition building at the national level on this issue. Thus, while it was stressed that a clear purpose for the development of soft law was required, a common theme throughout these discussions was that there could often be unintentional consequences of soft law. It was also stressed that it is often difficult for human rights advocates to assess at the outset the most likely impact or intended outcome of a document.

The preliminary findings of the IHRC project team that the use of soft law documents within national litigation was more limited were supported by the practical experience of the participants. For those participants involved in litigation it was noted that at the national level judges often did not make use of international standards. The main reasons given for this finding was that many domestic judges were unaware of international standards or where they were aware they were sceptical of the relevance of standards emanating from outside the national context. This was not necessarily the case for litigating before the African Commission where organisations would be more likely to use a variety of documents.

Within the process of litigation at the African Commission level it was noted that while one might have expected the use of international standards to be greater than at the national level, in practice their use by the African Commission was sporadic and ad hoc. It was noted that unless NGOs referred to soft law, or other standards, in their communications it was unlikely that the African Commission would itself make reference to such standards in their decisions. It was noted that in terms of litigation at the African Commission "what they are given is what they give out". Therefore the onus was upon NGOs and NHRIs using standards at this regional level in order to strengthen the communications and any subsequent decision.

In addition it was emphasised that NHRIs have a pivotal role to play in applying soft law at the national level. The example of the reports produced by the Northern Ireland Human Rights Commission was given as a good example of the practical and pragmatic use of soft law documents. It was observed that these reports are packed full of soft law standards, which are there to inform their advice to governments.

It was noted that in practice stakeholders "cherry picked" which soft law and other documents to use in different contexts. Thus well informed and dynamic NGOs, NHRIs and other organisations used whichever documents were necessary to strengthen their arguments and further their cause. In this respect it was noted that soft law was often used to help clarify issues and provide a level of detail perhaps not found in international or national documents. It was observed that the strategic use of soft law documents in this way was "almost a craft" and organisations had to be strategic and nuanced in their approach to the use of documents because everything is context specific.

Linked to the actual use of soft law documents, the discussions also considered the motivating factors behind the development of soft law. It was stated that often you can't find one cause for the development of soft law but rather a range of driving factors. It was noted that soft law is often developed in order to fill gaps in international law. Sometimes soft law is used when a particular constituency have "an axe to grind or want others to grind". Thus, sometimes soft law is developed in order to create a wave of interest in the topic being advocated by a particular group or groups and

it was stressed that soft law could be a way to garner support early on for a particular issue. It was also noted that General Comments adopted by treaty bodies can be extremely important and informative for 'unpacking' and expanding upon the content of various rights.

However, it was also noted that the motivation for the development of soft law is often not located in one organisation and the importance of having a clear strategy to develop ownership around soft law was stressed. An example was given from East Africa involving policing issues. Here it was stressed that in civil society discussions with the East African Community (EAC) it became clear that there was a need for harmonisation of standards relating to the police, for example around salaries, and thus this became the motivation for EAC engagement with the development of common codes of practice for the police in that region.

It was also stressed that sometimes the ease of developing soft law is dependent on the human rights issue. The Bangkok Rules on women in detention was given as an example of a piece of soft law with which was perhaps easier to get a range of stakeholders engaged because it was regarded as a "soft issue" or non-controversial. In contrast, torture is often regarded as a difficult human rights issue to engage a range of constituencies around because of the dichotomy between the stigma attached to the recognition that the practice goes on in a country, and the continued widespread and implicit use of torture and other forms of ill-treatment as an everyday part of policing and criminal investigations.

Linked to this was the role of soft law in rights mobilisation. It was emphasised that the key issues being discussed are the pragmatics of rights mobilisation i.e. how do we mobilise rights to get them implemented; what makes successful conditions for rights mobilisation?

Within these discussions it was observed that the historical context within which soft law documents are developed is an important issue and sometimes soft law has been successful because the timing has been right for mobilisation i.e. there had been a "moment" which had been exploited successfully. It was stressed that while there may be a "moment" which drives the development of soft law, this is not necessarily the end of it and there can be other "moments" or unintended consequences of soft law. The key factor would seem to be whether people are strategic in their use and recognise "moments" as they arise subsequently. For example it was noted that while some international actors had been strategic in their engagement on human rights, and other issues, following the recent Arab Spring, there had not been strategic human rights engagement at the regional level.

Thus it was noted that the impact of soft law can be different at different points within the historical context of a country. The use of soft law within post-conflict situations was discussed as an example. It was noted that in post-conflict processes soft law documents can be extremely useful in lifting discussions out of difficult political dynamics. In Northern Ireland for example in the process of drafting a Bill of Rights, it was noted that there was an openness to use a variety of documents whatever their normative status. A range of documents, including soft law documents, were used in order to prevent the Bill of Rights falling below UK and international standards and those involved with moving the process forward looked for any type of documents, binding or otherwise, which were the result of a process of consideration and discussion.

Similarly in South Africa it was observed that the post-conflict setting provided a period of powerful development of law and norms, which stakeholders are still drawing on, and in Afghanistan the UN Basic Principles on the role of lawyers was used to get "buy-in" at the national level. In this context it was stressed that some soft law has very specific ownership and in post-conflict situations soft law can be used to ensure processes are moved forward.

Overall it was noted that success in relation to the development and application of soft law in practice was often dependent on the existence of a well resourced NGO or NHRI and the degree to which "ownership" is exercised.

Session three: Monitoring of treaty body findings

The last session focused on the role of treaty bodies themselves in following up on their findings and explored opportunities for and limitations to the use and application of treaty body findings. In order to provide some framework for the discussions a number of broad observations from the IHRS project were highlighted namely:

- Follow up and implementation can be confused as one in the same but they are distinct.
- Treaty bodies have said that expectations on them are too high. They are expected not just to follow up but to "enforce" but they don't have the powers or resources to do so.
- Follow up procedures of treaty bodies are often "incidental" to main activities but they should be more integrated so they are not just an "after thought".
- The level of detail of concluding observations, recommendations, and decisions can have an impact on follow up and implementation.
- The audience can be limited and findings need to be disseminated more widely. Key factors that can limit dissemination of treaty body findings at the national level have been identified as restricted access to and knowledge of treaty bodies, and language.
- There should be greater cooperation and coordination between treaty bodies to avoid contradictory findings.

It was agreed that one of the key difficulties facing international and regional bodies was a lack of resources. For example it was observed that many of the UN Special Procedures do not have a specific budget and only limited staff and research support. Similarly the Special Mechanisms of the African Commission frequently highlight a lack of resources as a major obstacle to their work. Thus it was observed that members of treaty bodies are unpaid and accordingly there must be realistic expectations about what they can and cannot achieve.

It was noted that the recent OHCHR Report on Strengthening UN Treaty Bodies highlights the need for treaty bodies to work more closely with each other, in particular at the national level. However it was noted that there are institutional limitations with the process for strengthening UN treaty bodies, which appears to advocate what States are likely to agree to, rather than what might have a positive impact.

It was noted that at the treaty body level all the energy and momentum goes into getting things to the treaty body and less time is spent on the findings of the treaty body. This was observed not just from a State perspective but also from civil society. It was stressed that stakeholders need to focus more on the national level and efforts to bring treaty body findings home. In particular it was noted that NHRIs, NGOs and the treaty bodies themselves needed to encourage more dissemination of the findings of treaty bodies.

Linked to this the reliance of bodies on active and effective NGOs, and NHRIs was also highlighted. Thus where there was a weak civil society in a country the process of follow up was more limited. Accordingly it was stressed that efforts must be focused on building a nexus between treaty bodies' work and national activities. In this respect it was noted that at the national level efforts sometimes "reinvent the wheel". It was suggested that treaty bodies could help to build continuity. Similarly, civil society organisations had a role to play in "selling" treaty body findings at the national level, for example by organising regular meetings to raise awareness and to consider follow up at the national level. A further suggestion was for treaty body findings to be used in civil society funding proposals as a way to strengthen the proposals and at the same time raise awareness of the findings.

Linked to this it was observed that there was a general trend to say that NHRIs have a crucial role to play in follow up to treaty body findings at the national level. While this was regarded as having some merit it was also stressed that there should be caution exercised when considering NHRIs in follow up processes because the independence and effectiveness of NHRIs varies immensely. Caution was also expressed in relation to NHRIs' role in follow up at the national level because they have a broad mandate which they had to carry out often with limited resources.

However where there is a robust NHRI it was agreed that this could be of great benefit for national follow up to treaty body findings. Yet it was noted that treaty bodies needed to consider how to improve dissemination of their findings as sometimes their findings, particularly concluding observations, never get seen by NHRIs or NGOs. Similarly NHRIs also needed to be strategic in their use of treaty body findings at the national level. This required NHRIs to be well resourced, independent and competent.

Equally it was noted that where there were National Preventive Mechanisms designated under OPCAT or Article 33(2) independent frameworks established under the Convention on the Rights of Persons with Disabilities these too had an important role to play in follow up at the national level. In order to assist this it was noted that there needed to be strong cooperation between the national bodies and their respective international treaty bodies. In relation to the OPCAT, it was noted that the SPT is strengthening its cooperation and contact with NPMs.

The importance of coordination and cooperation between treaty bodies, government departments, NHRIs and civil society organisations was a clear message from the discussions. The example of the Group of Experts on Darfur was shared as a demonstration of the long term nature of follow up and how it can spread across institutions. The recommendations from the Group of Experts could be divided into short, mid and long term actions. In the short-term the recommendation was to set up an NHRI. This recommendation was made in 2007 but it wasn't until 2011 that the NHRI was established. During this time there were discussions about who was going to do the follow up and how. Thus it was stressed that often follow up required a whole range of different actors to be involved for a period of time.

Following on from this it was noted that many States seem to be engaged with finding solutions as to how best to follow up on recommendations emanating from the UPR. Once again NGO action has assisted the process of follow up as the UPR.info database is an excellent NGO resource to assist follow up to UPR recommendations. Some States are also discussing follow up with NGOs and NHRIs and the examples of the UK, Ethiopia and Egypt were highlighted. However these activities have raised an important issue of who should set the priorities for follow up on recommendations? With so many recommendations begin made priorities need to be set but in some instances this has caused tension between the State authorities and civil society who want to set different priorities.

It was noted that in some instances the capacity of civil society organisations may also hinder their ability to effectively follow up on treaty body findings. The example of South Africa was given where it was noted it can be difficult to get CSOs to work together and where there was a lack of capacity in the State to know what to do.

Thus, it was observed that there can be a number of barriers to reporting to treaty bodies and follow up. In particular it was noted that there is sometimes a lack of information as to when to send things to treaty bodies and when treaty bodies will be adopting a decision or other finding.

In terms of implementation rather than follow up at the national level, it was noted that States bear the responsibility for implementing treaty body findings, yet there was often an over-reliance on NGOs and NHRIs to take this forward at the national level. It was also emphasised that there can be a lack of coordination and collaboration across government departments. Thus States need to consider what mechanisms they need to put in place to follow up and implement treaty body findings and how best to disseminate them. For example some States have established focal points or cross-party committees to consider and disseminate treaty body findings.

The role that regional political bodies or other stakeholders can play in relation to follow up on treaty body findings was also raised. It was noted that in Europe there was a sophisticated procedure in place to follow up judgements of the European Court through the Committee of Ministers (CoM). It was noted that this does place political pressure on States to follow up on judgements. However it was observed that in practice it was difficult for NGOs and NHRIs to get access to the CoM and it was noted that while it was important to have a political mechanism involved, the more political a mechanism is the more closed it is likely to be.

In the African region it was noted that there is little, if any, engagement with AU organs in the follow up to findings of the African Commission. It was noted that there would appear to be under-utilised political platforms within the AU to engage with matters of follow up on findings of the African Commission.

Lastly the role of other stakeholders in follow up to treaty body findings such as parliamentarians and lawyers was highlighted. It was noted that law societies can be very useful in countries where there is little human rights awareness at the governmental, parliamentary and civil society levels. Therefore bar associations and other legal professional bodies can play a role in national follow up on treaty body findings.

Similarly, parliamentarians have an important role to play in follow up and implementation of treaty body findings but their potential is often untapped due to a lack of awareness. Some States have

parliamentary human rights committees and these can be very useful entry points for follow up activities. A positive example was given of the parliamentary committee in Zimbabwe, which has been a useful entry point for discussing the criminalisation of torture and domestication of UNCAT. Likewise, in the UK the Joint Committee on Human Rights plays a central role in follow up and implementation of treaty body findings.

Conclusions and recommendations:

From the discussions a number of broad observations could be made.

1. ***Ownership:*** First the issue of "ownership" was regarded as an important factor in the subsequent use of a soft law document. In relation to this it was observed that the issue of who has "ownership" can be key not only to the subsequent use of a soft law document but also its content. Thus a note of caution was raised over who should have "ownership" in order to avoid parties intent on watering down the content from exercising ownership over its development. Thus a careful balancing act often had to be achieved between inclusiveness to encourage "buy-in" and "protection" over the content of the soft law document. Thus it was regarded that issues of ownership need to be considered and a clear strategy in place at the outset of the development of soft law documents.
2. ***Unintended consequences:*** Linked to this, while having a clear purpose at the outset of developing soft law was regarded as important, nevertheless soft law development could also have unintentional consequences and stakeholders should be ready to seize the "moment".
3. ***Raise above domestic politics:*** It was also observed that international standards and soft law documents can be useful in raising debates out of entrenched domestic political debates. This was particularly pertinent in conflict and post-conflict situations.
4. ***Greater attention needed to follow-up:*** In relation to follow up to treaty body findings it was observed that often too much attention is paid to the submission of reports or communications before treaty bodies and too little at the national implementation and use of their findings. It was recommended that all stakeholders develop strategies on follow up at the beginning of the engagement with treaty bodies.
5. ***Respective roles of civil society and state:*** It was also observed that where there is a strong civil society and/or NHRI this greatly enhances the extent to which treaty body findings are followed up at the national level. While NGOs and NHRIs do have an important role to play with respect to follow up, it was stressed that States bear the primary responsibility and should put in place effective national follow up procedures and mechanisms. In particular States should consider ways in which to improve the dissemination of treaty body findings at the national level and cooperation between government departments.

In conclusion it was also noted that the seminar discussions and the IHRS project raised a number of important questions as to the future for RIG and the role of the CPTA specifically. Participants reiterated that despite some of the lack of awareness and use of the RIG, it still played an important

role in a variety of ways. Firstly, there is a symbolic relevance for the RIG as an African document which means that it is not obsolete. As it brings together key international standards it has a use in training and advocacy and as a starting point for framing a national plan. However, its subsequent visibility depends on the role of the CPTA. Further thought therefore needs to be given to how to bolster the capacity of the CPTA and broadening its membership. It was suggested that a focus on the CPTA developing substantive standards which interpreted the various provisions of the RIG may be helpful. The CPTA should also consider how it would engage further to ensure effective collaboration and no duplication with the Special Rapporteur on Prisons now that these two mandates are again distinct. Finally, further thought should also be given to how the CPTA could engage with OPCAT, with the NPMs and with the SPT.

2012 marked the 10th anniversary of the adoption of RIG and offered an opportune time to address some of the challenges facing RIG, CPTA and torture prevention within the region.

IHRS Project Team

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