10 Years of the Robben Island Guidelines and the Optional Protocol to the UN Convention against Torture (OPCAT) – a time for synergy

Background
In 2002 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. In the same year the Optional Protocol to the UN Convention against Torture (OPCAT) was adopted by the UN General Assembly. One of the key motivating factors for developing the RIG was to encourage support within the African region for the OPCAT and the concept of preventive visits to all places of detention it advocates. Therefore the origin of the RIG stems from the OPCAT and consequently there is a natural potential for synergy between the two instruments.

2012 marks the 10th anniversary of the adoption of these instruments by their respective bodies and therefore provides an excellent opportunity to reflect upon the relationship between the RIG and OPCAT. This paper aims to explore ways in which collaboration and cooperation between the mechanisms associated with the RIG and OPCAT can be strengthened.

1. Mechanisms with a direct role to play with the RIG and OPCAT
The OPCAT came into force in June 2006 and in December the same year the Subcommittee on the Prevention of Torture (SPT) was established in accordance with Article 2(1) of the OPCAT. The SPT is now comprised of 25 independent experts, including two members from Africa. The OPCAT also requires States Parties to put in place National Preventive Mechanisms (NPMs). To date, out of 42 African States who are a party to the UNCAT, there are 11 States who have ratified the OPCAT, four of whom have formally designated their NPM in accordance with Article 17 of the OPCAT. Nine other African States have signed but not yet ratified the OPCAT.

At the African Commission level, 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:

1 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), 32nd Session, Banjul, The Gambia, October 2002.
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 clearer that the mandate of the Committee was aligned with the prevention of torture in the region. The CPTA continues to function with the same mandate as the Follow-up Committee.

In addition to a specific committee whose mandate is expressly linked to the RIG, the African Commission has a Special Rapporteur on Prisons and Conditions of Detention (SRP), which also has a role to play in relation to the RIG, the OPCAT and the prevention of torture and other forms of ill-treatment generally in the region. 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’. 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;
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.

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3 Ibid, paras 3-5.
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.\(^4\)

- **The importance of the relationship between the RIG and OPCAT**

\(a\) **There is reference in the RIG themselves to OPCAT**

As part of ‘mechanisms for oversight’, states are required, under provision 43 of the RIG 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’.

Provisions 41 and 42 of the RIG 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 provision 43 of the RIG obviously now needs updating given the coming into force of OPCAT in 2006, this provides a clear role for the CPTA 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’.\(^5\)

\(b\) **The CPTA 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 other ill-treatment. The RIG provide some more detail as to how states can achieve this. The CPTA, by connection, therefore,


\(^5\) 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\(^{nd}\) Session, Banjul, The Gambia, October 2002.
has a remit to consider ways in which these provisions can be implemented, not least through ‘mechanisms of oversight’ but also training and education. Accordingly, there is the potential for the RIG and OPCAT to intersect on many different preventive measures.

c) 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’.

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

As more African States sign and ratify the OPCAT the SPT will need robust partners in the region. The CPTA, and the SRP, are ideally placed to play a vital role in promoting and assisting with the implementation of the OPCAT on the continent.

3. Observations on the current relationship between the CPTA, the Special Rapporteur and the SPT

Sharing of information and an understanding of relevant sensitivities is an important aspect of any potential relationship. The Follow-up Committee, SRP and SPT first met in April 2008 at a conference on OPCAT in Cape Town. At this meeting it was observed that there were a number of ways in which the African Commission and its mechanisms could 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.

Since then further meetings between the RIG Committee and the SPT have taken place, in particular in June 2009 the Chair of the RIG Committee participated in the SPT session in Geneva in order to discuss possible areas of cooperation, including information

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7 Ibid, p.6.
sharing and the implementation of joint activities. Following this meeting during a promotional mission to Benin in 2009 the Follow-up Committee was accompanied by one member of the SPT as a resource person. It is also understood that a focal person was appointed within the SPT to act as a liaison between the SPT and the CPTA, although, at the time of writing, it is understood that this appointment has not yet resulted in regular contact being maintained between the two bodies.

While there are a number of potential ways in which the SPT can work with the CPTA, SRP specifically and the African Commission generally in relation to visiting states, these also raise some challenges. One of these is confidentiality. There is no express reference in the terms of reference of either the CPTA or Special Rapporteur on confidentiality. In practice this has so far not been an issue for the CPTA, 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. Although, equally, the mandate of the CPTA is not that specific, not all reports on visits to states have been made public. Exactly why is not clear. 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 on joint missions for example 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 CPTA, and SRP, 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 been and could not be adopted by the CPTA or Special Rapporteur. A way around this may be to include members of the CPTA and the SRP on the roster of experts for the SPT. If this were the case very clear guidelines and terms of reference would need to be formulated and the exact role of the ‘expert’ identified to avoid a conflict of interests. It is encouraging that the SPT has now appointed focal points, including one for Africa, from among its members and the CPTA should consider further ways of engaging with this committee member.

A key aspect of any relationship between the African mechanisms and the SPT is that of complimentarity. 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.

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8 See SPT Third annual report, UN Doc. CAT/C/44/2, p.18, §67.
9 See Activity of the Chairperson of the Follow-up Committee of the Robben Island Guidelines presented to the 46th Ordinary Session of the African Commission, p.2.
4. The relationship between NPMs, the CPTA and other African Commission mechanisms

Looking more directly at the implementation of the OPCAT, the RIG make little reference to NPMs. This paper is not suggesting that the RIG be amended, but rather that the CPTA may choose to draft authoritative guidance to clarify or update some of the provisions in the RIG. For example, the CPTA could clarify that provisions 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.

Furthermore 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 African Commission has a well-established procedure for interacting with NHRIIs through its procedure of affiliated status.\(^\text{10}\) It is unfortunate that whilst 22 NHRIIs 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 under-utilised.\(^\text{11}\)

However, 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 NHRIIs will become NPMs and not all NPMs will be NHRIIs. It is not entirely clear from OPCAT to whom the NPM should report, if anybody, 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 and the SPT has directed comments and recommendations directly to NPMs, as well as setting out recommendations addressed specifically to them in its Guidelines on NPMs.\(^\text{12}\) 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

\(^{10}\) Resolution on Granting Affiliate Status to National Human Rights Institutions, 31 October 1998.
\(^{12}\) SPT, Guidelines on National Preventive Mechanisms, 9 December 2010, CAT/OP/12/5.
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 verifying the compliance of
NHRIs with 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’.13 So far few, if any, 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.

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

Conclusion and recommendations
The CPTA is the ideal body within the region to be urging and assisting States to sign,
ratify and implement the OPCAT, as well as the UNCAT for those States that have not
yet done so. As more African States consider ratifying and become States Parties it can
be assumed that the CPTA will continue to be an important actor within the region for
OPCAT activities and the bodies established in accordance with the OPCAT.

At the expert meeting organised by the APT in Dakar in April 2010 it was noted that
“active and strategic cooperation between the CPTA and the NPMs is indispensable”.14
The Dakar Plan of Action that was elaborated as a result of this conference contained a
provision which called for the creation of “an interface between the UN SPT and the
CPTA and NPMs, to exchange information, to conduct trainings, to convene workshops
and seminars, and to coordinate joint publications on torture prevention issues in
Africa.”15

The SPT has recently expanded its membership, in accordance with Article 5(1) of the
OPCAT, and at its 14th session has appointed another member to act as a focal point for
Africa as well as an NPM team for Africa. Accordingly, it is recommended that the CPTA

13 Resolution on Granting Affiliate Status.
15 See provision 8(c) Dakar Plan of Action : 8 Points for Prevention of Torture and Other Cruel, Inhuman and
Degrading Treatment or Punishment in Africa (Dakar Plan of Action), 28 April 2010, available at:
takes advantage of the institutional changes the SPT has recently introduced in order to sustain a constructive relationship with them. For example, the CPTA may find it useful to appoint one of its members to act as a focal point for the SPT and/or OPCAT.

It is also recommended that the CPTA, if it has not already done so, should agree guidelines for the exchange of information with the SPT. These guidelines should be published on the websites of both bodies in order to establish a transparent working practice.

Establishing clear terms of reference between the CPTA and SPT is also important in order to avoid any confusion or conflicts with respect to their roles in relation to the implementation of the OPCAT. For instance, in its work on the OPCAT the CPTA needs to ensure that it is not stepping into areas that are the preserve of the SPT, in particular the CPTA needs to be careful when working on the issue of the designation of NPMs, as the SPT has an express role under the OPCAT to provide advice directly to States Parties on the establishment of NPMs and to make recommendations and observations to States Parties in respect of NPMs. The SPT therefore has the primary role with respect to providing advice on the designation of NPMs. Developing terms of reference would therefore help to clarify the respective roles of each body in relation to the implementation of the OPCAT.

Bearing in mind the respective mandates and domain of the SPT and CPTA and the need to avoid possible conflicts, nevertheless as the primary torture prevention body within the region the CPTA naturally has a vital role to play in the implementation of the OPCAT in Africa and should be engaged with activities in the region that are aimed at encouraging States to sign, ratify and implement the OPCAT effectively.

Given the RIG was drafted prior to the adoption of the OPCAT and therefore a few of its provisions do not reflect the current state of play, and the RIG makes very little reference to NPMs, the CPTA could also prepare guidelines to clarify the relationship between the OPCAT and the RIG.

These clarifications should not be just limited to issues relating to NPMs. Rather than revising the actual text of the RIG, which may be time consuming and problematic, the development of guidelines or authoritative statements elaborating how these provisions are to be read in light of the entry into force of the RIG would be a pragmatic and useful solution. These would be invaluable tools for States and other national actors engaged on issues relating to the OPCAT and would enable the CPTA to establish a clear role for itself within the region on matters relating to the OPCAT.

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16 See Article 11 (b) of the OPCAT.
17 See provision 43 of the RIG.
18 See Relationship between the African Commission and OPCAT, supra, p.5.
19 See Relationship between the African Commission and OPCAT, supra, p.6.
20 See provisions 17, 40, 41 and 43 of the RIG.
Possible issues that would benefit from further elaboration include firstly the concept of prevention. This 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’. 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 on prisons and police cells. The CPTA is in an opportune position, given the breadth of its mandate and the scope of the RIG itself, to give guidance on what is meant by the concept of ‘places of deprivation of liberty’ within the African context.

In addition, 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 CPTA could clarify that paragraph 40 of the RIG includes reference, for example, to the need to encourage and facilitate visits by both international and national NGOs. NGOs can also facilitate the provision of complementary information to the NPM and SPT.

Lastly, the CPTA should establish a procedure, if it has not done so already, to enable it to receive information on the status of the implementation of the OPCAT and designation of NPMs. The CPTA should also explore the most effective means by which to disseminate this information in order to ensure that it reaches the widest possible audience.

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