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Ten years of the Robben Island Guidelines and prevention of torture in Africa: For what purpose?

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Summary

In 2002 the African Commission on Human and Peoples' Rights adopted a resolution containing the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines). This is the first instrument adopted by the African Commission focused solely on preventing torture and other forms of ill-treatment. Ten years on, the article aims to examine the background to the adoption of the Robben Island Guidelines in order to explore the motives behind their development and to identify reasons for their subsequent lack of impact. The article will demonstrate that the context and institutional setting within which the Robben Island Guidelines were developed have had an impact on their level of implementation. The article arises out of a four-year research project, funded by the Arts and Humanities Research Council in the United Kingdom, which is examining the implementation of soft law through an analysis of the use of the Robben Island Guidelines in practice. Through an analysis of this one document, the article hopes to offer some lessons for the drafting, use and relevance of other soft law documents in human rights law.

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1 Introduction

In 2002 the African Commission on Human and Peoples' Rights (African Commission) adopted a resolution containing the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines or RIG). The RIG were the result of a three-day expert workshop that took place between 11 and 14 February 2002 in Cape Town and on Robben Island, South Africa. The RIG contain a series of provisions concerned with the prohibition and prevention of torture and other ill-treatment and responding to the needs of victims. It is the first instrument adopted by the African Commission focused solely on preventing torture and other forms of ill-treatment. With the adoption of the RIG, the African Commission, unusually for a non-binding document, also resolved to establish a committee to, among other things, develop strategies and 'promote and facilitate the implementation' of the RIG.[1]

At the tenth anniversary of the RIG, the aim of this article is to explore the background to their adoption in order to shed some light on their intended purpose. It will track the drafting process, examining the reasons for their development and subsequent adoption by the African Commission. It will demonstrate that the context and institutional setting within which this particular piece of soft law has developed have had an impact on their level of implementation. It will argue that, in order for such a document to have a use beyond its adoption, a coherent strategy needs to be considered when the document is being drafted as to how it will be employed and what purpose it is to serve. In the context of the RIG, we will argue that there was a lack of clarity on whether the RIG were planned as a policy tool to achieve ratification of an international instrument, or as a device for strategic development at the regional level, or whether they were intended as a practical tool for training and advocacy at the national level. As a result, the subsequent use of the RIG has been disappointing, both within and outside of the African Commission. Through an analysis of this one document, the article hopes, therefore, to offer some lessons for the drafting, use and relevance of other soft law documents in human rights law.

1 ACHPR Res 61 (XXXII) 02 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) 2008, http://www.achpr.org/instruments/robben-island-guidelines-2008/ (accessed 31 October 2012).

2 Where did the idea for a specific instrument on the prohibition and prevention of torture and other ill-treatment in Africa come from?

Torture and cruel, inhuman or degrading punishment and treatment (other ill-treatment)[2] are prohibited under article 5 of the African Charter on Human and Peoples' Rights (African Charter).

The African Commission has been the main body mandated to monitor state parties' compliance with their obligations under the African Charter. The African Commission has established a number of procedures by which it carries out its mandate, namely, the consideration of periodic state reports;[3] the examination of individual and inter-state communications;[4] promotional and fact-finding missions to states; and the creation of special mechanisms (Special Rapporteurs; working groups or committees) for specific issues. Over the years, numerous alleged violations of article 5 have been considered by the African Commission under these procedures and mechanisms. Notwithstanding these activities, towards the end of the 1990s there was a call from an international non-governmental organisation (NGO), the Association for the Prevention of Torture (APT), for the African Commission to develop a more strategic approach to tackling torture and other ill-treatment, in particular by establishing some form of special mechanism with the mandate to work on torture prevention and to consider developing a specific instrument concerned with the prohibition and prevention of torture and other ill-treatment in Africa.

At the 27th ordinary session of the African Commission held between 27 April and 8 May 2000, the APT issued a statement and submitted a position paper outlining the reasons for the prevalence of torture and other ill-treatment in Africa and called upon the African Commission to address the question of torture prevention, including by the establishment of an 'inter-African Committee or Special Commissioner' and considering the development of an African declaration on the prevention of torture.[5]

This call for an African declaration and special mechanism on torture prevention was made to address concerns that the African Commission lacked 'a coherent strategy towards the prohibition and prevention of torture and other ill-treatment in Africa'.[6]

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2 In this article torture and other forms of cruel, inhuman and degrading treatment or punishment will be referred to as torture and other ill-treatment.

3 Art 62 African Charter.

4 Arts 47-59 African Charter.

5 Position Paper of the APT submitted to the 27th ordinary session of the African Commission (2000), copy filed with the Human Rights Implementation Centre, University of Bristol.

6 As above.

There would appear to be some merit in this criticism of the African Commission's approach to the prevention of torture. For instance, while states had traditionally included information on measures taken to comply with article 5 in their periodic reports, these lacked detail and tended to focus almost exclusively on the extent to which the prohibition of torture had been enacted in the Constitution or other legislation and did not include information on the prevalence of these forms of abuse and efforts to address any problems at the national level. In addition, under the individual communications procedure, the African Commission's decisions in relation to alleged article 5 violations were at times inconsistent or unnecessarily restrictive.[7]

As well as strengthening the regional approach to torture, the APT were also particularly keen to ensure that the issue of the prevention of torture and other ill-treatment was placed firmly on the agenda of the African Commission at this time because of events happening at the international level.

Since its establishment in 1977, and particularly during the 1980s and 1990s, the APT was heavily involved with negotiations at the United Nations (UN) to develop an Optional Protocol to the UN Convention against Torture (OPCAT), which would establish a new treaty body to visit places of detention and make recommendations aimed at the prevention of torture and other ill-treatment. It was in the context of these negotiations that the APT considered lobbying the African Commission to develop an instrument on torture prevention in Africa.

It was believed by the APT that developing a 'home-grown' instrument to provide a focus on the prevention of torture and other ill-treatment would assist with the process of building political consensus in Africa around the concept of the prevention of torture and other ill-treatment.[8] Not only would this assist regional efforts to tackle torture and other ill-treatment, but this could also be used as a political leverage at the international level to encourage African states to support the draft OPCAT by demonstrating that the concept of preventive visits to places of detention had broad regional support and was not an idea imposed by the international or European communities.

As well as developing an instrument that could be used to promote the concept of torture prevention within Africa, the creation of a new special mechanism was also central to the APT's regional strategy to raise the profile of torture prevention within the African Commission. This strategy was driven, on the one hand, by the emerging use of special mechanisms as a means for NGOs to try and keep their issues 'alive' and placing them at the heart of the work of the African

7 See J Mujuzi 'An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 423 434-435.

8 As above.

Commission, and, on the other hand, it may have been a strategic decision to ensure that even without a text for the OPCAT being adopted at the UN, there would at least be a body established at the regional level that was mandated to work on torture prevention.

Since 1994 and the establishment of the special mechanism system by the African Commission, the creation of Special Rapporteurs was seen by NGOs as a useful way in which their particular issues and agenda could receive a certain prominence within the African Commission.[9] It was a clear strategy of the APT from the start to push for a new special mechanism with a specific torture prevention mandate, rather than calling for the Special Rapporteur on Prisons to develop a more coherent torture prevention strategy within this existing mandate.

This is instructive of the importance felt by NGOs on having a special mechanism established specifically to raise the profile of a particular human right. Thus, while successive Special Rapporteurs had considered issues relating to torture and other ill-treatment while carrying out their mandate, albeit in an inconsistent manner,[10] it was perhaps felt by the APT that issues relating to torture prevention could be 'lost' within the broader mandate of the Special Rapporteur on Prisons and the best chance of raising the profile of their issue within the African Commission was through the establishment of a new special mechanism that was clearly identified with the prevention of torture and other ill-treatment.

In addition, the strategy of creating a regional body mandated to prevent torture had already been successfully deployed by the APT in Europe in the 1980s when negotiations on OPCAT were on hold. During this hiatus in the OPCAT negotiations, the APT were instrumental in the process that led to the Parliamentary Assembly of the Council of Europe adopting the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1987.[11] This Convention established the European Committee for the Prevention of Torture (CPT), an expert body mandated to carry out visits where people are deprived of their liberty by a public authority within state parties and to make recommendations to the authorities aimed at preventing torture and other forms of ill-treatment.[12] While the intention of the APT may not have been to replicate exactly the CPT in Africa, the establishment of regional bodies to act as a focal point for torture prevention activities was regarded as an effective

9 See J Harrington 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 251; R Murray 'The Special Rapporteurs in the African system' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice 1986-2006* (2008) 373-374.

10 See Murray (n 9 above) 208.

11 The European Convention on the Prevention of Torture came into force in 1989.

12 For more information on the CPT, see http://cpt.coe.int/en/ (accessed 31 October 2012).

strategy by the APT and was one of the main reasons behind the call for a special mechanism on torture prevention to be created by the African Commission.

Interestingly, the language used in this position paper concerning the creation of a special mechanism indicates that this body can be established independently from an instrument on torture prevention and that the two were not necessarily dependent on the other, notwithstanding that the APT states that a committee could monitor the implementation of a declaration. In fact, the language is slightly stronger in relation to the creation of a new special mechanism as the APT asks the African Commission expressly to establish one, whereas they ask the African Commission to 'examine the appropriateness of developing a declaration'.[13] However, in the end the RIG became a means by which a special mechanism could be established.

However, following the adoption of the RIG and the creation of a special mechanism to monitor their implementation, unlike the Special Rapporteur on Prisons and Conditions of Detention in Africa, who did receive, for a period of time, direct external assistance to carry out its mandate, the APT did not provide financial support to the Follow-Up Committee on the RIG from the outset. Linked to this strategic decision was an event that had not been foreseen during the drafting of the RIG in 2002, namely, that in the same year that the RIG were drafted, a final text of OPCAT was finally adopted by the UN General Assembly. The adoption of OPCAT inevitably meant that the APT had to change its overall strategy and move its resources in order to respond to the creation of this new international instrument. These events and the strategic decisions that followed have had a direct impact on the purpose and effectiveness of the Committee that was established and the RIG.

3 Momentum gathers for an instrument on torture prevention in Africa

At the 28th ordinary session of the African Commission, held between 23 October and 6 November 2000, the APT stated that they could organise jointly with the African Commission a workshop to develop a plan of action on the prevention of torture.[14]

Following this call, in January 2001 the Secretary of the African Commission informed the APT that the African Commission was in favour of the proposal to organise a workshop to draft an instrument on the prevention of torture and asked the APT to proceed with

13 Position paper of the APT (n 5 above).

14 Oral statement made by Mr Jean-Baptiste Niyizurugero at the 28th ordinary session of the African Commission, 23 October-6 November 2000, copy filed with the Human Rights Implementation Centre, University of Bristol.

the idea. Subsequently, the APT undertook a series of consultations with commissioners of the African Commission to consider the most appropriate way to move forward with the idea and what form such an instrument should take. During these consultations it was decided that it would not be appropriate to develop a binding instrument such as a convention for the prevention of torture in Africa for a number of pragmatic reasons. First, such an undertaking would be a lengthy process. Second, even if a convention was agreed upon and adopted, ratifications could take many years to obtain, particularly as many African states had not ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Third, with the negotiations on OPCAT proving to be controversial and difficult, it was seen as too much of an undertaking for the APT to commence negotiations on a binding treaty at the regional level at the same time as lobbying at the international level.[15] Accordingly, bearing in mind article 2 of CAT, which obliges each state party to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture', it was agreed to develop some sort of 'guiding' or non-binding instrument on the prevention of torture and other ill-treatment in Africa.

The reasoning behind this decision is illustrative of some of the key reasons for the development of soft law that have been identified by commentators. As Shelton notes, the soft law form may be used 'when there are concerns about the possibility of non-compliance either because of domestic political opposition, lack of ability of capacity to comply, uncertainty about whether compliance can be measured, or disagreement with aspects of the proposed norm'.[16] It has also been noted that soft law can allow for more active participation of non-state actors and can be adopted or amended more rapidly because it is non-binding.[17]

At the 29th ordinary session of the African Commission, held between 23 April and 7 May 2001, the APT presented a confidential draft position paper to the African Commission which outlined details of the expert workshop. The plan of action to be drafted was to 'contain concrete proposals, measures and mechanisms to ensure improved prevention',[18] and would be presented for possible adoption by the African Commission and the Organisation of African Unity (OAU).[19]

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15 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

16 D Shelton 'Law, non-law and the problem of soft law' in D Shelton (ed) *Commitment and compliance. The role of non-binding norms in the international legal system* (2000) 12.

17 Shelton (n 16 above) 13.

18 Oral Statement made by the APT at the 29th ordinary session of the African Commission.

19 As above.

On the basis of article 45 of the African Charter, which mandates the African Commission to, *inter alia*, formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights, the APT were of the firm belief that no matter what form the plan of action or instrument took, in order for it to have political legitimacy within Africa, the African Commission must be involved with the drafting process and the final product should be adopted by the Commission.[20] It was considered that this would ensure that the instrument was perceived as an instrument of the African Commission and not that of an international NGO or something imposed from an external process. As noted earlier, this was part of the APT's overall regional strategy to create an instrument that could be considered to be 'home-grown', as it was believed that this would increase the chances that such an instrument would be used by the African Commission and gain greater acceptance from states.

The African Commission was now committed to moving ahead with the proposal and, during the 30th ordinary session of the Commission, held between 13 and 27 October 2001, the commissioners met with the APT in private in order to discuss the final details of the workshop.[21] It was decided that the workshop would be held in South Africa in February 2002 and that all or part of the workshop would take place on Robben Island. Robben Island was suggested as a venue for the workshop because it was believed that the final instrument could benefit from the symbolism attached to the island.[22]

The workshop to draft the Robben Island Guidelines was held between 12 and 14 February 2002 and brought together 27 individuals, including representatives from the African Commission, the European CPT, the International Committee of the Red Cross (ICRC), national police services and civil society organisations, the majority of whom were from the region.[23] Prior to the workshop, the participants were

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20 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

21 As above.

22 n 20 above.

23 The participants were Mr Andrew Chigovera, commissioner of the African Commission and Attorney-General of Zimbabwe; Mr Barney Pityana, commissioner of the African Commission; Mr Germaine Baricako, Secretary to the Africa Commission; Mrs Fiona Adolu, Legal Officer to the African Commission; Prof Renate Kicker, professor at the University of Graz, Austria and member of the European Committee for the Prevention of Torture; Mr Jody Kollapen, Deputy Chairperson of the South African Human Rights Commission; Mrs Antoinette Brink, South African Police Services; Mr Ephrem Gasasira, member of the Brussels Bar; Mrs Misie Mosarwa, Legal Officer for the Botswana Police Service; Prof Malcolm Evans, professor at the University of Bristol, UK; Mr Mabassa Fall, International Federation for Human Rights (based in Senegal); Mrs Karen McKensie, executive director of the Independent Complaints Directorate of South Africa; Mr Shadrack Mahlangu, officer at the Independent Complaints Directorate in South Africa; Mr Tommy Tshabalala, officer at the Independent Complaints Directorate of South Africa; Mrs Hannah Forster, executive director for the African Centre for Democracy and Human Rights Studies (based in The Gambia); Mr Guy Aurenche, International

informed that the purpose of the workshop was to draft a 'plan of action' to prevent torture and other ill-treatment and the expected plan of action would contain regional and national measures for the prevention of torture relating to three main themes:[24]

(i) legal measures (normative framework);
(ii) control measures (control mechanisms); and
(iii) training and empowerment.

The workshop was run over three days with an ambitious schedule to draft a 'plan of action' within this short space of time. Consequently, in order to facilitate the drafting process, the APT had previously prepared an initial outline of an instrument to be amended as necessary to reflect the discussions of the workshop.[25] This preliminary document was entitled 'Ideas and Principles for Possible Inclusion in the Draft Robben Island Plan of Action'. In the introduction it was stated that[26]

> the Plan of Action will not only provide guidelines and serve as a tool for states, thereto meet their obligations on prohibition [*sic*] and prevention of torture, but it will also serve as an indicator by all actors concerned, helping them to act effectively for the prevention of torture.

In fact, this preliminary document does not resemble a 'plan of action' with precise and measurable steps to be taken by states and other actors to prevent torture and other ill-treatment. The document is quite long and contains 63 provisions derived from existing instruments relating to the treatment of persons deprived of their liberty, including CAT; the UN Standard Minimum Rules for the Treatment of Prisoners (UN SMR); the UN Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment; the European Prison Rules; and 'standards' elaborated by the European CPT through their recommendations to countries following a visit. Interestingly, the document did not make a reference to existing regional instruments

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Federation of Action by Christians for the Abolition of Torture (FIACAT) (based in France); Dr Tertius Geldenhuys, South African Police Services; Mrs Henrietta Didgu, legal officer of the Economic Community of West Africa States (based in Nigeria); Mr Patrick Zahnd, International Committee of the Red Cross (based in South Africa); Father Michael Lapsley, Institute for Healing and Memories (based in South Africa); Prof Shabbir Wadee, Department of Forensic Medicine at Stellenbosch University (based in South Africa); Mrs Shelia Keetharuth, Amnesty International (based in Mauritius); Mr Vincent Saldanha, Legal Resources Centre (based in South Africa); Mr Honore Tougouri, President of the African Penitentiary Association (based in Burkina Faso); Mr Marco Mona, President of the APT (based in Switzerland); Mr Jean-Baptiste Niyizurugero, APT Africa Programme Officer (based in Switzerland); and Ms Debra Long, APT Programme Advisor (based in Switzerland).

24 Letter to Prof Malcolm Evans dated 13 November 2002 [*sic*], copy filed with the Human Rights Implementation Centre, University of Bristol.

25 APT *Ideas and principles for possible inclusion in the Draft Robben Island Plan of Action*, filed with the Human Rights Implementation Centre, University of Bristol.

26 As above.

relevant to the prevention of torture and other ill-treatment in Africa, such as the Kampala Declaration on Prison Conditions in Africa.[27] One of the reasons for this is that the original drafters of the preliminary document were more familiar with the relevant UN and European instruments relating to the treatment of persons deprived of their liberty and conditions of detention,[28] and the UN instruments, in particular, were regarded as useful because of their level of detail and broad acceptance by the international community.

This preliminary document was not shared with all of the workshop participants as it was felt by the APT that it would be counter-productive to present a draft document for discussion as this might be perceived as presenting a document as a *fait accompli*, whereas the APT wanted the final product to be seen as emanating from the participants of the workshop and not from a single international NGO. It was believed by the APT that this would help to ensure that the final instrument was regarded as an African-owned instrument that reflected African concerns. Therefore, this preliminary document was only shared with a few members of the workshop who were selected by the APT to form a core drafting group, which met at the end of each day to amend the preliminary draft to reflect the focus of discussions.[29] Accordingly, the majority of the drafting process was not in fact done during the plenary sessions of the workshop, but actually carried out by this core drafting group of seven individuals. Furthermore, while some of the wording of this preliminary document was altered over the course of the workshop, the overall approach and format of this document was to have a significant impact on the final content and structure of the RIG.

The workshop was co-chaired by Commissioner Andrew Chigovera (then Attorney-General of Zimbabwe) and Mr Marco Mona (President of the APT). The first day of the workshop was taken up with presentations from some of the participants of the workshop, focusing on four broad themes: legal measures; control measures; rehabilitation and reparation; and training and empowerment to prevent torture

27 This was drafted between 21 and 26 September 1996 at an expert workshop organised by Penal Reform International, the African Commission, the Uganda Prison Services, the International Committee of the Red Cross, the Foundation for Human Rights Initiative and the Observatorie International des Prisons. See http://www.penalreform.org/files/rep-1996-kampala-declaration-en.pdf (accessed 31 October 2012).

28 The preliminary draft was prepared by Mr Niyizurugero, APT Africa Programme Officer and Ms Long, APT Programme Advisor.

29 The members of this core drafting team were Mrs Adolu, legal officer to the African Commission; Mr Baricako, Secretary to the African Commission; Prof Evans, Bristol University; Mrs Forster, Executive Director of the African Centre for Democracy and Human Rights Studies, The Gambia; Prof Kicker, member of the European Committee for the Prevention of Torture, Austria; Ms Long; and Mr Niyizurugero.

and other ill-treatment.[30] At the end of the first day, the core drafting group met to discuss and amend the preliminary document.

On the morning of the second day, more presentations were made to the plenary, while two members of the core drafting group finalised in private the draft document to be shared with the other participants.[31]

On the afternoon of the second day of the workshop, the document from the core drafting group was presented for discussion to the participants of the workshop. There were some provisions within the first draft that proved to be divisive among the workshop, namely, the inclusion of a reference to the abolition of the death penalty, recognition of judicial corporal punishment as a form of torture and other ill-treatment, a call for the exercise of universal jurisdiction over acts of torture, and no immunity from prosecution for former heads of state for acts of torture.

On the third day, the workshop was moved to Robben Island. In the end, the discussions on the last day proved to be less contentious than the previous day, partly because the core drafters had managed to address some of the issues with carefully-crafted language. Accordingly, during this last day a further revised text was presented by the core drafting group and a final text was adopted by all the participants.

It can be seen from the above that during the workshop there was a heavy focus on presentations and the actual main drafting of the RIG took place within the core drafting group. This is instructive because, as noted earlier, the aim of the process was to produce a 'home-grown' instrument and one of the merits of the RIG has often been described as being the fact that it is 'the work of Africans themselves'.[32] However, in fact three of the seven members of the core drafting group were European,[33] and two of the three primary drafters were European.[34] Yet, as noted earlier, the APT were always of the opinion that in order for the RIG to have political legitimacy within the region and therefore to be used and useful within the region, it was important for the instrument to be perceived as emanating from a process that could be regarded as an African initiative. Thus it was not necessarily who was involved with the actual wording of the instrument that was important, but rather the fact that an instrument would emanate from a workshop which the African Commission had co-chaired. This

30 For further details of the presentations, see APT 'Preventing torture in Africa: Proceedings of a joint APT-ACHPR Workshop, Robben Island, South Africa' 12-14 February 2002, APT, Geneva 2003.

31 The two members of the core drafting group who finalised the draft document were Prof Evans and Ms Long.

32 See J-B Niyizurugero & GP Lissène 'The Robben Island Guidelines: An essential tool for the prevention of torture in Africa' (2010) 6 *Essex Human Rights Review* 113.

33 Namely, Prof Kicker (Austria), Prof Evans and Ms Long (both from the UK).

34 The primary drafters were Prof Evans, Mr Niyizurugero and Ms Long.

strategy enabled the African Commission to be directly associated with the end product of the workshop, which it was hoped would smooth the way for the final document to be adopted by the African Commission.

4 Key issues that arose during the workshop

As noted earlier, there were some issues that arose during the workshop that proved to be contentious and divisive, while a few issues were stressed as being particularly pertinent when addressing torture and other ill-treatment in Africa.

Even though one of the main initial motivations behind the drafting of the RIG was to develop a regional instrument that could help to promote the concept of visits to places of detention as a means to prevent torture and in turn be used to garner political support for OPCAT within the region, in fact very little discussion took place on these issues during the workshop and the final document contains only a few generic provisions that are concerned with OPCAT and preventive visits to places of detention. It is proposed that this is indicative of the fact that the purpose of the drafting process was, either deliberately or inadvertently, beginning to change and the RIG were becoming less linked to events occurring at the international level and to a certain extent taking on a 'life of their own'. This is further evidenced by the preliminary document that the APT drew up as a basis for the discussions, which contained only three generic references to establishing and supporting visiting mechanisms.[35] Some of the possible reasons for this are, firstly, that in 2001 there was a change in leadership at the APT, which inevitably brought with it a change in their overall strategy. Secondly, the negotiations on OPCAT were at a crucial stage and to some extent events at the regional level had to take second place in the APT's activities and strategy at that time. Thirdly, as noted above, the working document that the core drafting group revised on the basis of the discussions did not focus on preventive visits but was a much broader document dealing with different aspects of the prohibition and prevention of torture. This inevitably shaped the overall discussions and the final text. Accordingly, the issues that received most debate were concerned more with substantive issues of torture prevention rather than with OPCAT or visiting mechanisms.

4.1 Death penalty

Looking first at issues that were contentious, the preliminary document prepared by the APT, which served as starting point for the

35 *Ideas and principles* (n 25 above) 5.

discussions, contained a reference to the abolition of the death penalty. Under the general heading 'Prohibition and sanctions of torture in national legislation' addressed to governments, the document states as follows, '[t]ake steps to abolish the death penalty, and where it is still applied it shall be performed in conformity with recognised international standards'.[36] A reference to the abolition of the death penalty remained in the working draft presented to the participants on the second day of the workshop. This draft had a more concise reference and stated '[t]ake steps to abolish the death penalty where it is still applied'.[37]

This provision was debated heavily during the plenary session. A few participants believed that this went too far and did not reflect the status of international law on the issue, which allows states to impose the death penalty under certain circumstances and with specific restrictions.[38] However, many participants, particularly from civil society organisations, felt strongly that the document should make a reference to abolishing the death penalty as this was a pressing issue in the region where many states still retained capital punishment for certain crimes. In the end, a pragmatic decision was taken by the core drafters to exclude a reference to the abolition of the death penalty, because it was believed that it would be unpalatable to many states and would be unlikely to receive the broad support of the African Commission, which would reduce the chances that the document would be adopted by this body. Unfortunately, this discussion marked the beginning of some tension among the workshop participants and frustrated many of the participants who disagreed with the decision.[39]

4.2 Corporal punishment

Another issue that caused perhaps even more disagreement than the issue of the death penalty among the participants related to corporal punishment. The first working draft presented to the group stated simply '[a]bolish all forms of judicial corporal punishment'.[40] A few members of the group were of the opinion that there was insufficient recognition under international law that judicial corporal punishment fell within the scope of the prohibition of torture and other ill-treatment. A long debate took place about the existence of a large body of jurisprudence and expert opinion at the international,

36 *Ideas and principles* (n 25 above) 1.

37 As above.

38 See art 6 ICCPR.

39 Since the adoption of the Robben Island Guidelines in 2002, the African Commission's position on the application of the death penalty has been clarified, in particular with the adoption of a Resolution in 2008 calling for a moratorium on the death penalty, Resolution 136, and the establishment of a Working Group on the Death Penalty in 2005.

40 *Ideas and principles* (n 25 above) 1.

regional and national levels, which recognised that forms of corporal punishment amounted to torture and other cruel, inhuman or degrading punishment. For example, the definition of torture under article 1 of CAT has been interpreted by the UN Committee against Torture, the UN Special Rapporteur on Torture and other experts and commentators on international human rights law as extending to forms of corporal punishment.[41] In the end, the RIG does not include an express reference to the prohibition of corporal punishment. However, a compromise was reached by making reference to states ensuring that 'acts that fall within the definition of torture, based on article 1 of the UN Convention against Torture, are offences within their national legal systems'.[42] Therefore, it was felt by the core drafting group that this reference to article 1 of CAT would be a pragmatic way to ensure that acts of corporal punishment would in fact be covered by the RIG, albeit in an indirect way, because of the interpretation of article 1 of CAT by the Committee against Torture and other experts to cover acts of judicial corporal punishment.[43]

4.3 Universal jurisdiction

Another issue which caused great tension within the working group was the inclusion of a reference to states exercising universal jurisdiction over acts of torture. One participant in particular was strongly opposed to this reference. It had not been anticipated that this would be a controversial issue by the APT and the core drafting group because universal jurisdiction over acts of torture is recognised within the provisions of CAT.[44] However, it was clear that in order to achieve consensus on a text, a compromise would have to be made. Thus it was decided within the core drafting group that the express reference to universal jurisdiction would be deleted and, instead, article 5(2) of CAT, which provides that state parties shall take all measures necessary to exercise universal jurisdiction over acts of torture, would be expressly mentioned. Accordingly, a provision was inserted into the RIG which states that '[n]ational courts should have jurisdictional

41 See Committee against Torture Concluding Observations on Saudi Arabia, UN Doc CAT/C/CR/28/5, 2000 para 8(b); Committee against Torture Concluding Observations on South Africa, UN Doc CAT/C/ZAF/10/1, 2006 para 25; Report of the UN Special Rapporteur on Torture, UN Doc e/cn.4/1997/7, 10 January 1997.

42 See provision 4 of the Robben Island Guidelines.

43 Since the adoption of the Robben Island Guidelines, the African Commission has also determined that 'there is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state-sponsored torture under the [African] Charter and contrary to the very nature of this human rights treaty.' See *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003) para 42.

44 See art 5 of CAT.

competence to hear cases of allegations of torture in accordance with article 5(2) of the UN Convention against Torture'.[45]

4.4 Immunity

Linked to the issue of universal jurisdiction over acts of torture, a further highly-contentious aspect of the text was whether there should be a provision that ensures that former heads of state cannot rely on immunity from prosecution for acts of torture. The inclusion of a provision reflecting this position was strongly opposed by at least one participant, whereas others were equally certain that the text should take a strong position against immunity. This debate took place within the context of emerging jurisprudence from other jurisdictions, in particular the 1999 decision of the House of Lords in the United Kingdom regarding the case brought against the former Chilean head of state, Augusto Pinochet, wherein the House of Lords held, *inter alia*, that former heads of state could not rely upon immunity for certain crimes against humanity, including torture.[46] The statutes of the International Criminal Tribunal for Rwanda and the tribunal for the former Yugoslavia, as well as the Rome Statute of the International Criminal Court, were also used to demonstrate an emerging opinion that former heads of state could not rely upon immunity from prosecution for acts of torture.[47]

This debate may also have been triggered by a prominent case brought before the International Court of Justice (ICJ) by the Democratic Republic of the Congo (DRC) against Belgium, which was being considered at the same time as the RIG workshop. This case involved an international arrest warrant issued against the incumbent Minister of Foreign Affairs of the DRC.[48] This case had received a lot of attention both within the region and internationally and no doubt had an impact on the views of some of the participants in the working group.

The deadlock on this issue was overcome by including a provision within the RIG, which calls upon states to[49]

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45 See provision 6 of the Robben Island Guidelines.

46 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2001] 1 AC 61; *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [No 3] [2001] 1 AC 147 (Pinochet [No 3]).

47 See Statute of the International Criminal Tribunal for the Former Yugoslavia UN Doc S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda UN Doc S/RES/955 (1994); and Rome Statute of the International Criminal Court, A/CONF 183/9 (1994).

48 Arrest Warrant of 11 April 2000 (*DRC v Belgium*) (Merits), 14 February 2002, http://www.icj-cij.org 23 September 2002, para 54.

49 Provision 16(b) of the Robben Island Guidelines. Universal jurisdiction and immunity remain controversial issues within Africa in light of the number of decisions being handed down by the International Criminal Court against individuals from Africa.

ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as possible under international law.

4.5 Definition of torture

The final issue that stimulated a lot of debate was whether the document should include a definition of torture and, if so, whether the definition contained in article 1 of CAT[50] should be used or whether another definition should be considered. The majority of participants maintained that it was better to avoid elaborating a definition because it could lead to conflicting definitions and confusion. It was therefore agreed to include an express reference to article 1 of CAT, which contains an internationally-recognised definition of the crime of torture.[51]

4.6 Access to family members

As noted earlier, there were also a few provisions that were not contentious but are notable because they were highlighted as being particularly relevant to combating torture and other ill-treatment in Africa. The first of these provisions was the need to include an express reference to ensuring that people deprived of their liberty have access to family members as soon as possible after their detention. This was stressed as being an essential provision because in many African states, detainees rely heavily, and in some instances exclusively, on family members to provide them with food and clothing while in detention. The final provision requires that states should '[e]nsure that all persons deprived of their liberty have access to legal and medical services and assistance and have the right to be visited by and correspond with family members'.[52]

4.7 Prohibition on the use, production and trade of equipment

A further issue that was regarded as particularly important to include was a reference to prohibiting the use, production and trade of

50 Art 1(1) of CAT reads as follows: 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

51 See provision 4 of the Robben Island Guidelines.

52 See provision 31 of the Robben Island Guidelines.

equipment for the infliction of torture or other ill-treatment. This was seen as a crucial element because many African states import or use policing and security equipment that is either designed to inflict or is used in such a manner that it inflicts suffering. Examples of such forms of equipment are means of restraints such as fixed wall restraints; metal leg cuffs; metal thumb cuffs; 'belly chains'; as well as electric shock devices.

A reference to adopting 'national legislation prohibiting the use, production and trade of equipment designed to inflict torture or ill-treatment' had already been included in the preliminary draft prepared by the APT and had been influenced by the Guidelines on EU Policy towards Third Countries on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[53] as well as the 2001 UN General Assembly Resolution on Torture.[54] This language was altered slightly during the drafting process and the final text included the following provision:[55]

> States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends.

5 Final text

The final text adopted was entitled Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines). The RIG contain 50 provisions divided into three main parts dealing with the prohibition of torture, the prevention of torture, and responding to the needs of victims. As noted earlier, in the end the final product does not resemble a 'plan of action', as originally proposed by the APT, detailing 'concrete measures and policies' aimed at the prevention of torture.[56] Instead, the RIG are a compilation of standards and principles mainly derived from other existing international hard and soft law instruments; some of the provisions are worded very precisely while others are expressed in more general and broad terms.

Accordingly, the RIG are illustrative of the 'infinite variety' of soft law.[57] The RIG are a 'patchwork' of provisions that straddle some of the broad categories of and purposes for developing soft law that

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53 See Guidelines on EU Policy towards Third Countries on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the Council of the European Union on 9 April 2001.

54 See UN Doc A/RES/56/143 3 para 11.

55 See provision 14 of the Robben Island Guidelines.

56 See *Ideas and principles* (n 25 above).

57 See R Baxter 'International law in her infinite variety' (1980) 29 *International and Comparative Law Quarterly* 549-566.

many commentators have identified.[58] For example, it has been noted that soft law can be used as a tool to elaborate on obligations found in binding instruments and indeed many provisions of the RIG do elaborate on the general prohibition on torture and other ill-treatment found in article 5 of the African Charter.[59] However, some of the provisions of the RIG are not specific enough to fully satisfy this purpose and have themselves required further elaboration.[60]

In addition, as Shelton notes, some soft law can have normative content,[61] and indeed, some of the provisions of the RIG contain what can be considered to be 'hard law' obligations, many of which are derived from existing international treaties, in particular CAT and the International Covenant on Civil and Political Rights (ICCPR).[62] Yet, numerous provisions of the RIG mirror or reference other international soft law instruments and commitments and do not appear to be intended to have normative effect but are more promotional in character.[63]

This multifaceted nature of the RIG, however, raises a problem in that *prima facie* it can be difficult to pinpoint the exact purpose of the RIG. It is suggested that this is one reason for the lack of impact of the RIG to date within the region.

Looking in more detail at the provisions of the RIG, as noted above, they are divided into three sections. The first part looks at measures aimed at the prohibition of torture. This section contains 19 provisions dealing with issues relating to the ratification of regional and international instruments; promoting and supporting co-operation with international mechanisms, the criminalisation of torture, *non-refoulement*, combating impunity, and complaints and investigation procedures. Nine out of these 19 provisions either restate or paraphrase obligations already contained in CAT.[64]

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58 See A Boyle 'Some reflections on the relationship between treaties and soft law' (1999) 48 *International and Comparative Law Quarterly* 901-909.

59 See eg provisions 4-15 of the Robben Island Guidelines which are derived from CAT and ICCPR.

60 See eg provisions 33 and 34 of the Robben Island Guidelines. Guidelines were published by the APT, the East Africa Regional Office of the Office of High Commissioner for Human Rights and the African Commission in order to provide a commentary on the provisions and how they could be implemented at the national level. See *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: A practical guide for implementation* (2008) http://www.achpr.org/english/_info/index_RIG_Under_en.htm (accessed 31 October 2012).

61 See Shelton (n 16 above) 2.

62 See eg provision 4 of the Robben Island Guidelines which provides: 'States should ensure that acts, which fall within the definition of torture, based on article 1 of the UN Convention against Torture, are offences within their national legal systems.'

63 See eg provision 42 which provides that states should 'encourage and facilitate visits by NGOs to places of detention'.

64 See provisions 4, 6, 7, 9, 11, 12, 15, 18 & 19 of the Robben Island Guidelines.

Other provisions within this section contain more general language calling on states to ratify relevant treaties or to co-operate with the African Commission and UN bodies.[65]

The second section is the largest and contains 28 provisions aimed at the prevention of torture. Once again, some of these provisions either restate or are influenced by obligations found in other treaties such as CAT and ICCPR.[66]

Other provisions within this section make an express reference to existing international soft law instruments which set out minimum standards and safeguards relating to the treatment of persons deprived of their liberty and calls on states to ensure that any measures taken are either in conformity with these instruments or are guided by them.

In addition, the origins of some of the provisions can also be traced back to other forms of soft law such as General Comments and decisions made by the UN treaty bodies, in particular the UN Human Rights Committee (HRC), or opinions expressed by the UN Special Rapporteur on Torture. For example, provision 24 prohibits the use of incommunicado detention. While international standards do not expressly prohibit incommunicado detention in all circumstances, restrictions are placed upon its use and the HRC has stated in its General Comment 20 that 'prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment'.[67] The Special Rapporteur on Torture has also called for incommunicado detention to be prohibited.[68]

The final section of the RIG looks at responding to the needs of victims and contains only three provisions. The first provision considers issues relating to the safety of alleged victims of torture and other ill-treatment, as well as witnesses, those conducting investigations, other human rights defenders and families. This provision was included in the preliminary draft prepared by the APT and was influenced by article 13 of CAT, as well as the practice of the UN Special Procedures, the European Committee for the Prevention of Torture and the ICRC.

The second provision within this section recalls the obligation for states to offer reparation to victims of torture and other ill-treatment and their dependants. This provision reflects article 14 of CAT.

Finally, the RIG end with a provision which recognises that families and communities which have been affected by torture and other ill-treatment can also be considered victims. This provision, and particularly the inclusion of 'communities' within the category of

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65 See provisions 1, 2 & 3 of the Robben Island Guidelines.

66 See provisions 20, 25, 26, 27, 29, 31, 32, 35 & 36 of the Robben Island Guidelines.

67 See Human Rights Committee, General Comment 20, UN Doc HRI/GEN/1/Rev.6 (2003) para 11.

68 See Report of the Special Rapporteur on Torture, UN Doc E/CN.4/1995/434 para 926(d).

possible victims of torture and other ill-treatment, reflects discussions in the workshop concerning the impact of acts of violence on the wider community both from the perspective of obtaining adequate justice for victims of violence and the punishment and re-integration of perpetrators.[69]

It can be seen from the above that many of the provisions of the RIG can be traced directly back to obligations contained in international treaties or standards contained in existing international soft law instruments, as well as General Comments and decisions made by UN treaty bodies and the Special Rapporteur on Torture. As such, aside from their title, the provisions of the RIG are not in themselves readily identifiable with the region. For example, they do not draw on African instruments or jurisprudence but on UN documents, and in a few instances on instruments from other regions,[70] and apart from the odd provision on the involvement of families which may reflect the African reality, and those on the death penalty and immunity which reflect African states' reluctance to accept these issues, it is hard to identify an 'African' approach or indeed one which differs significantly from the international instruments upon which it heavily draws.

One of the reasons for this is that the international standards that have been developed to protect people deprived of their liberty are universal in nature and it was not the intention of the APT, or the majority of the participants of the workshop, to develop new standards for Africa, which may have raised controversial issues relating to cultural relativity and may have resulted in weaker standards than those provided for in the international instruments. However, to some extent it might be the safeguards that have been left out or obliquely referenced that are perhaps most striking and indicative of the context within which they were elaborated and concepts which were considered difficult to obtain consensus on within the region. For example, as noted above, a reference to the abolition of the death penalty had to be deleted and references to judicial corporal punishment, universal jurisdiction, and head of state immunity were very contentious and compromise language had to be found for these issues.

The RIG have been described as 'representing a consensus of opinion and shared goals among African states '.[71] Yet, states were not involved in the process that led to their drafting nor to their adoption by the African Commission. Thus, this claim stems solely from the endorsement of the RIG in 2003 by the African Union Assembly of

69 See eg Father Lapsley 'Measures required on rehabilitation and reparation. The case of South Africa' in 'Preventing torture in Africa' (n 30 above) 131-138; and the opening speech to the workshop on the Robben Island Guidelines by Dr P Maduna in 'Preventing torture in Africa' (n 30 above) 51-56.

70 See provision 14 of the Robben Island Guidelines which closely mirrors language used in the Guidelines on EU Policy towards Third Countries on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (n 53 above).

71 See Niyizurugero & Lissène (n 32 above) 93.

Heads of State and Government when they approved the Activity Report of the African Commission, which contained the Resolution on the RIG.[72] Notwithstanding the lack of engagement with states, the RIG are expressly intended to modify state behaviour. Thus, *prima facie,* the RIG could be regarded as falling within a category of soft law instruments that have been described as 'controversial claimants' to international soft law status, namely, those instruments that do not emanate either directly or indirectly from states, but which are nevertheless intended to modify transnational behaviour.[73]

However, the claim to soft law status by the RIG has not in practice been controversial and it would appear that the adoption of the RIG by the African Commission has, as intended by the APT, given the RIG a certain political legitimacy, at least within the regional human rights system, so that the RIG are regarded by the African Commission and perceived by others as being a soft law instrument of the African Commission. Unfortunately, this 'ownership' over the RIG has not so far resulted in the African Commission usefully deploying the RIG within their activities.

6 Adoption of the RIG by the African Commission

At the end of the drafting workshop, the participants agreed upon and adopted a statement which made a number of recommendations directed towards the African Commission. This statement recommended that the African Commission took the following action:[74]

(i) adopt a resolution endorsing the Robben Island Guidelines;
(ii) consider organising an orientation seminar with the support of other interested organisations to explain and present the Robben Island Guidelines to national and regional stakeholders;
(iii) include on its agenda an item on the issue of torture in order to reflect strategies for its prohibition and prevention;
(iv) consider including the issue of torture in the mandates of its Special Rapporteurs as well as incorporating torture on the checklist of commissioners during their promotional missions; and
(v) raise awareness of the Robben Island Guidelines in order to complement the work of other stakeholders.

This statement and the RIG were presented and discussed at the NGO Forum held prior to the 31st ordinary session of the African Commission in May 2002. The NGO Forum supported the final output of the workshop and submitted a draft resolution to the African Commission,

72 See African Union Decision Assembly/AU/Dec.11 (II).

73 C Chinkin 'Normative development in the international legal system' in Shelton (n 16 above) 29.

74 See 'Preventing torture in Africa' (n 30 above) 171.

recommending that they endorse the RIG during their 31st ordinary session. While there was broad support among the commissioners for the RIG, the resolution to adopt the RIG was presented at a time when there was an internal debate within the African Commission concerning the means by which the obligations contained within the African Charter should be developed and elaborated.[75] Some commissioners considered that the commitments contained within the African Charter should be elaborated by developing protocols to the Charter instead of resolutions adopted by the African Commission, as had been the practice up until that time.[76] Consequently, consideration of the RIG, along with other similar processes concerning freedom of expression and fair trials, was postponed until the next scheduled ordinary session of the African Commission in November 2002.[77]

In order to garner support for the RIG during this hiatus in the adoption process and to apply pressure on the African Commission to adopt them, the APT took part in an international seminar on torture, organised by the International Federation of Christians Against Torture (FIACAT), in July 2002 in Dakar, Senegal. One of the recommendations arising out of this international seminar was a call for the African Commission to adopt the RIG at their 32nd ordinary session.[78]

Accordingly, the APT submitted a draft resolution endorsing the RIG to the African Commission at their 32nd ordinary session, held between 17 and 23 October 2002. This time the African Commission approved the resolution and adopted the RIG.[79]

The aim of this resolution was not only to ensure that there was political support from the African Commission for the RIG, but it also set out the intention to create a special mechanism in the form of a Follow-Up Committee for the RIG comprising representatives of the African Commission, the APT and any other prominent African experts as the Commission may determine.[80] The resolution also set out the mandate for the Follow-Up Committee, namely, that it was to organise seminars to disseminate the RIG, to develop and propose strategies to the African Commission on the promotion and implementation of the RIG, and to promote and facilitate the implementation of the RIG within member states.[81] In addition, the resolution called upon the Special Rapporteurs and members of the African Commission to

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75 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

76 As above.

77 As above.

78 See the final declaration of the international seminar on torture 'Working together for an end to torture in Africa' http://www.fiacat.org/en/spip.php?article217 (accessed 31 October 2012).

79 See Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (n 1 above).

80 As above.

81 As above.

widely disseminate the RIG, encouraged state parties to the African Charter to consider the RIG in their periodic reports to the African Commission, and invited NGOs and other relevant actors to widely disseminate and utilise the RIG in the course of their work.[82]

The proposal to establish a Follow-Up Committee is an interesting aspect of the resolution because, as discussed earlier, in its statement to the African Commission in 2000 the APT had called upon the Commission to establish some form of special mechanism to consider the prevention of torture and other ill-treatment. Thus, the RIG became the hook by which this could be achieved by calling for a committee to be established to promote them and to monitor their implementation.

Some of the participants of the workshop believed at the time of the workshop that the instrument to be drafted should either directly establish or pave the way for the establishment of a monitoring body within the African Commission along similar lines to the European Committee for the Prevention of Torture.[83] (As noted earlier, the APT had been instrumental in the adoption of the European Convention on the Prevention of Torture and the establishment of the CPT as part of their regional strategy on CAT.)[84] However, there is no evidence to suggest that the APT had ever intended to establish an African version of the European CPT. In the end, the establishment of a Follow-Up Committee was not discussed at length during the drafting workshop due to the pressures of time and the difficulty in obtaining agreement on the content of the final output of the workshop. Nevertheless, the APT were of the opinion that any instrument arising out of the drafting workshop would require some kind of follow-up body in order to ensure that the instrument would not 'be forgotten about'.[85]

The decision to establish a committee on the RIG instead of a Special Rapporteur was an unusual one at that time. Previously, the position of Special Rapporteur had been the common form of special mechanism to consider thematic issues. However, the endorsement of the RIG took place at the same time as the use of the Special Rapporteur system of the African Commission was under review because it was considered by the Commission that this type of mechanism had not been very successful.[86] While this review was being conducted, the African Commission decided to appoint focal persons as a 'stop-gap measure' for projects that were already underway until the review

82 As above.

83 Interview with Prof Renate Kicker, 9 March 2009; interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

84 For more details on the role played by the APT in the establishment of the CPTA, see *The Optional Protocol to the UN Convention against Torture: A manual for prevention* (2004) 35-36.

85 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

86 See 17th Annual Report of the African Commission on Human and Peoples' Rights, 2003-2004, para 32.

had been concluded.[87] This moratorium on establishing Special Rapporteurs may have led the APT and commissioners involved with the RIG to consider establishing an alternative mechanism by which to monitor the implementation of the RIG. The decision to create a Follow-Up Committee also had a further potential advantage over a Special Rapporteur mechanism, in that it enabled more individuals, including the APT, to be directly involved with activities to take the RIG forward under the auspices of the African Commission, which in turn had the potential to provide additional resources and guidance for activities on the RIG. In practice, however, this extra support did not materialise.

Following the adoption of this resolution and the corresponding endorsement of the RIG by the African Commission at its 32nd ordinary session, no further official action was taken to establish the Follow-Up Committee until the 33rd ordinary session of the African Commission, held in May 2003. At this session, the African Commission requested the Secretariat of the Commission to circulate amongst all the commissioners a list of nominees for election as members of the Follow-Up Committee. It was anticipated that the Follow-Up Committee would be established at the 34th ordinary session of the African Commission in November 2003.[88] Proposals for possible candidates were to be submitted to the Secretariat of the African Commission. In practice, the list of names of candidates for the Follow-Up Committee was compiled by the Secretariat of the African Commission in consultation with the APT and other key members of the drafting workshop.

Pending the anticipated establishment of the Follow-Up Committee, it was decided to appoint the Vice-Chairperson of the African Commission, Commissioner Jainaba Johm, and Commissioner Andrew Chigovera to act as focal persons and undertake activities aimed at implementing the resolution and disseminating the RIG. Their mandate covered the six-month inter-sessional period between the 33rd and 34th ordinary sessions of the African Commission.[89]

During this interim period, in order to take advantage of the momentum created by the adoption of the RIG, the APT, in collaboration with the African Commission, decided to officially launch the RIG in a parallel event during the African Assembly of Heads of State and Government meeting in July 2003 in Maputo, Mozambique. This was seen as a good opportunity to publicise and build political support for the RIG as an 'African-owned' instrument to prevent torture and continue to apply pressure to establish a special mechanism for the

87 As above.

88 African Commission *Report on the Consultative Meeting on the Implementation of the Robben Island Guidelines* held from 8-9 December 2003, Ouagadougou, Burkina Faso, African Union, 2.

89 As above.

RIG within the African Commission.[90] The official launch of the RIG at the African Assembly of Heads of State and Government summit took place on 11 July 2003 in Maputo, Mozambique.

At the 34th ordinary session of the African Commission, held in November 2003, the Commission was unable to establish the Follow-Up Committee as expected because it was taking longer than anticipated to get the list of possible candidates completed and agreed upon.[91] Accordingly, it was decided to nominate Commissioner Sanji Monageng as the focal person within the African Commission to undertake activities to promote and implement the RIG until the next session of the African Commission which was due to take place in May 2004.[92]

However, the APT had already submitted a proposal to the African Commission prior to the 34th ordinary session to hold a consultative meeting in December 2003 in anticipation that the Follow-Up Committee would have been established. The idea behind this consultative meeting was to provide what would have been the newly-established Follow-Up Committee with a forum to draw up a strategy and plan of action for its future work. While the process to establish a Follow-Up Committee was delayed, the African Commission nevertheless decided to continue with this consultative meeting on the understanding that the outcome of such a meeting would be conveyed to the members of the Follow-Up Committee when elected.[93] The consultative meeting was organised jointly by the APT and the African Commission and took place in Ouagadougou, Burkina Faso, from 8 to 9 December 2003. The consultative meeting brought together a small number of experts from the African Commission and civil society to discuss these objectives.[94]

The final outcome of this meeting was the elaboration of a series of recommendations (commonly known as the Ouagadougou Recommendations) aimed at assisting the national implementation of the RIG. This document is quite detailed and sets out a general comment on each of the provisions of the RIG, followed by a series of questions that could be used by various actors to ascertain the extent to which each provision has been complied with at the national level, and lastly a set of recommendations for action by states, the African

90 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

91 As above.

92 *Report on the Consultative Meeting on the Implementation of the Robben Island Guidelines* (n 88 above) 3.

93 As above.

94 The participants included Commissioner Sanji Monageng; Leila Zerrougoui, Chairperson of the UN Working Group on Arbitrary Detention; Vincent Zakane, representative of the Ministry for the Promotion of Human Rights of Burkina Faso; Honore Tougouri, representative of the Association Penitentaire Africaine (APA); Malick Sow, co-ordinator of the Senegalese Human Rights Commission; and Jean-Baptiste Niyizurugero, Africa Programme Officer for the APT.

Commission and civil society.[95] Unfortunately, this document has not been widely disseminated notwithstanding its obvious value to those working on issues relating to the prevention of torture and other ill-treatment and remains a largely-unknown document. However, in 2008, the APT secured funding to use the output of this Ouagadougou meeting to develop a practical guide on the implementation of the RIG.[96]

At its 35th ordinary session, held between 21 May and 4 June 2004, the African Commission finally agreed upon the establishment of the Follow-Up Committee on the implementation of the RIG and designated the first members of the Follow-Up Committee.[97] In accordance with the 2002 resolution for the adoption of the RIG, the Follow-Up Committee was assigned the following mandate:[98]

- 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; and
- to make a progress report to the African Commission at each ordinary session.

The first meeting of the Follow-Up Committee did not take place until 18 and 19 February 2005 and was funded and hosted by the School of Law at the University of Bristol. At this first working session of the Follow-Up Committee, the members adopted their internal rules and procedures and sought to interpret and elaborate their mandate by developing another programme of activities that the Follow-Up Committee would undertake. At this meeting, the members set out a number of ways in which the Follow-Up Committee would engage

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95 *Report on the Consultative Meeting on the Implementation of the Robben Island Guidelines* (n 88 above), Annex 1.

96 J-B Niyizurugero & GP Lessène *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: A practical guide for implementation* (2008).

97 The first members were Commissioner Ms Sanji Monageng, elected Chairperson of the Follow-Up Committee; Mr Jean-Baptiste Niyizurugero, elected Vice-Chairperson of the Follow-up Committee – Programme Officer for Africa, APT; Mrs Hannah Forster, African Centre for Democracy and Human Rights Studies (ACDHRS); Mrs Leila Zerrougui, Magistrate and Professor of Law at the National Institute of Magistracy in Algiers and Chairperson of the United Nations Working Group on Arbitrary Detention; Advocate Ms Karen McKenzie, Director of the Independent Complaints Directorate of South Africa; and Mr Malick Sow, Executive Secretary of the Senegalese Committee of Human Rights.

98 See Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (n 1 above).

with states, NGOs, national human rights institutions, and UN bodies and agencies.

The main programme of activities to be used by the Follow-Up Committee to facilitate its efforts in reaching its objective of promoting the RIG and their implementation was described as follows:[99]

- organising seminars, campaigns and training sessions in countries to promote the Robben Island Guidelines and to ensure their dissemination;
- publishing position papers and articles relating to the Guidelines;
- identifying pilot countries and pilot projects for case studies;
- organising activities in pilot countries in order to stimulate and initiate national plans of action for implementation of the Robben Island Guidelines;
- conducting studies and research on issues relating to themes developed in the Robben Island Guidelines in order to develop strategies to promote the implementation of the Robben Island Guidelines at national and regional levels and producing policy documents for adoption by the African Commission; and
- publication and dissemination of the Ouagadougou Recommendations.

Despite the elaboration of this comprehensive programme of activities and strategy for its work, in practice, between 2005 and 2008 the Follow-Up Committee did not implement this plan. There were a number of reasons for this. First, there was a general lack of funds provided for all the special mechanisms of the African Commission.[100] Secondly, the legal officer of the African Commission assigned to the Follow-Up Committee left her position and for a period of time there was no staff assigned to the Follow-Up Committee.[101] Lastly, with the adoption of OPCAT by the UN General Assembly in 2002, the APT's priorities and regional strategy changed in order to focus on a global ratification campaign on OPCAT.[102] In November 2007, Commissioner Dupe Atoki, a lawyer from Nigeria, was elected as Chairperson of the Follow-Up Committee and in April 2008, the University of Bristol facilitated a second meeting of the Follow-Up Committee, which took place in Cape Town, South Africa. The purpose of this second meeting was to review the progress of the Follow-Up Committee so far, and to draw up another plan of action for the promotion, dissemination and implementation of the RIG. The Chairperson of the Follow-Up Committee reported to the 43rd ordinary session of the African Commission in May 2008 that at this second meeting, three countries

99 *Report of the First Working Session of the Follow-up Committee on the Implementation of the Robben Island Guidelines 7.*

100 Interview with Mr Jean-Baptiste Niyizurugero, 10 November 2009.

101 As above.

102 As above.

had been identified for pilot activities (although the names of these countries were not shared in this report), and that it had been decided to arrange another meeting of the Follow-Up Committee to be held in Nigeria.[103] Consequently, in July 2008, using additional funding given to the African Commission by the African Union, the Follow-Up Committee undertook its first official in-country activity when it held a sub-regional training and sensitisation workshop in Nigeria for heads of police and prisons within West African states.[104] Unfortunately, no report has been prepared of this workshop so its findings are unknown.

Between 2008 and 2009, the Follow-Up Committee carried out a few promotional missions. The first was to Liberia between 4 and 6 September 2008; the second was to Uganda between 25 and 27 October 2009;[105] and a third was carried out to Benin between 21 and 23 October 2009.[106] Unfortunately, no mission reports have been prepared and therefore the only information available on these missions is contained in the inter-sessional activity reports presented by the Chairperson of the Committee. From these reports it is clear, first of all, that the visits were very short, on average three days. They also all involved a one or two-day workshop to promote the RIG among government officials, police and prison personnel and, in respect of Uganda and Benin, also NGOs.

In November 2009, a resolution was adopted to change the name of the Follow-Up Committee to the Committee for the Prevention of Torture in Africa (CPTA), in order to address the ambiguity in the previous title and ensure that the special mechanism was clearly identifiable as having a mandate to look at the prevention of torture in Africa. Following the adoption of this resolution, four of the members of the Follow-Up Committee were re-appointed as members of the CPTA and one commissioner was newly appointed to join the CPTA.[107]

As well as having almost exactly the same members as the Follow-Up Committee, the CPTA has also inherited the same mandate which, as outlined above, is stated in rather general terms and combines a mixture of activities aimed at promotion and advocacy. Accordingly,

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103 See Report of Activities by Commissioner Dupe Atoki, 2008 1-2 http://www.AfricanCommission.org/english/Commissioner%27s%20Activity/43rd%20OS/Special%20Rapporteurs/robben%20Island%20Guidelines.pdf (accessed 31 October 2012).

104 See Report of Activities by Commissioner Dupe Atoki delivered at the 43rd ordinary session of the African Commission 2.

105 See Activity Report of the Chairperson of the Follow-up Committee of the Robben Island Guidelines, delivered at the 46th ordinary session of the African Commission 1-2.

106 As above.

107 Commissioner Musa Ngary Bitaye was appointed as a member of the newly-named CPTA but has since retired as a commissioner. The members of the CPTA as at October 2012 are Commissioner Dupe Atoki, Chairperson; Mr Jean-Baptiste Niyizurugero, Vice-Chairperson; Mr Malick Sow, re-appointed as a member; and Ms Hannah Forster, re-appointed as a member.

the change is in name only and the CPTA continues to work within the scope of the mandate established for the Follow-Up Committee.

Unfortunately, similarly to its predecessor, the CPTA has also, at the time of writing, largely failed to carry out much of its mandate as articulated in the 2002 resolution.

It was anticipated that creating a special mechanism to promote and monitor the implementation of the RIG would provide the necessary focal point within the African Commission through which such a strategy could be developed. However, preliminary findings from our research indicate that there has been little use of the RIG, not only within African states but, more importantly for the purposes of this article, by the African Commission itself and the AU. There has been little reference in the state reporting procedure either by commissioners or states to the RIG, and limited reference in promotional and protective missions by commissioners. Only three individual communications publicly available since the adoption of the RIG refer to them expressly,[108] yet there have been over 60 individual communications submitted to the African Commission since 2002 that involve aspects of torture and other ill-treatment.

Two of the communications that do reference the RIG do so only once as evidence of the African Commission's stance on amnesty laws.[109] However, the most recent case, that of *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, which was decided by the Commission in 2011, contains more references to the RIG and in a more substantive way. In this communication, the RIG is used by the complainants as evidence of the absolute prohibition of torture and other ill-treatment and states' obligation to prevent these forms of abuse under international human rights law.[110] The RIG is also referenced in this case by the African Commission itself during its analysis of the merits. The Commission uses the RIG as a reference for the types of safeguards to be afforded detainees,[111] in particular the right of access to a lawyer,[112] and the right to be brought promptly before a judicial officer.[113]

While these limited cases are not enough to demonstrate an evolution in the way in which the RIG will be used both by complainants and the African Commission itself within the communications procedure,

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108 See *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 208; *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire* (2008) AHRLR 62 (ACHPR 2008) para 96; and Communication 334/06 *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, 2011, paras 109, 112, 174, 179 & 184.

109 See *Zimbabwe Human Rights NGO Forum* (n 108 above) para 208; and *Mouvement Ivoirien* (n 108 above) para 96.

110 See *Egyptian Initiative* (n 108 above) paras 109 & 112.

111 *Egyptian Initiative* (n 108 above) para 174.

112 *Egyptian Initiative* (n 108 above) para 179.

113 *Egyptian Initiative* (n 108 above) para 184.

the substantive use of the RIG in the Egyptian case is instructive for future communications and demonstrates the potential for the RIG to be used as an additional advocacy tool within this procedure.

In addition, although it can be argued that having the Committee has ensured that torture remains a constant item on the agenda of the African Commission at each session, and having a named figurehead for torture ensures that questions are asked during the state reporting as the Special Rapporteur and commissioners on the Committee usually are expected to take the lead on questions relating to their specific remits. On the other hand, it is likely that questions would have been posed on torture anyway and there is no indication that the questions that are asked during state reporting, for example, are any more nuanced or detailed than they would have been had there been no Committee or Guidelines.

Overall, our research findings indicate that there has been a failure on the part of the African Commission to use the RIG within its various procedures to develop a coherent message on the prevention of torture and other ill-treatment, and secondly a failure on the part of the Follow-Up Committee and now the CPTA to implement their mandate effectively.

7 Lessons that can be drawn from the experience of the Robben Island Guidelines

Overall, the history of the drafting of the RIG provides some useful lessons, not only for those seeking to develop soft law at the African Commission level, but also more generally in order to ensure that documents adopted at the regional and international levels maintain some relevance and purpose beyond their texts being finalised.

7.1 The need for a clear purpose and strategic approach

As noted earlier, while the initial idea to develop some form of regional document on the prevention of torture in Africa was partly aimed at garnering regional support for CAT and the concept of preventive visits it promotes, there is only a limited reference to visits to places of detention and CAT within the text of the RIG.

The fact that the RIG do not *prima facie* appear to be a piece of soft law designed to promote CAT or preventive visits is not in itself a concern. It could be argued that the broader focus of the RIG makes them potentially more widely applicable than if they focused more on preventive visits to places of detention. However, what is problematic is that the purpose of the RIG and how best to use them appear to have been unclear during the drafting process and subsequently at the regional level.

The institutional setting through which soft law can be developed and/or promoted has been observed as being a factor that can affect compliance.[114] As Shelton notes, institutions and mechanisms may foster compliance through judicial or quasi-judicial rulings and that 'supervisory mechanisms are crucial, especially in subject areas where the norm is accompanied by strong incentives not to comply'.[115]

Thus, the institutional setting of the RIG has an important part to play in the perceived status of the RIG and their implementation within the region. Unfortunately, the experience of the RIG exposes a major weakness at the institutional level, namely, that the African Commission has not created its own practice for strategic development, nor does it systematically use instruments it adopts or take responsibility for special mechanisms it establishes.[116]

7.2 Content has an impact upon implementation

Linked to the issues of purpose and strategy discussed above, the provisions of the RIG cover a wide variety of issues relating to the prohibition and prevention of torture and other ill-treatment that could be useful for a range of national and regional actors. Yet, many of their provisions are drawn from existing international hard and soft law instruments and their 'added value' as a piece of soft law has been questioned because it is unclear what extra the RIG can 'bring to the table'.[117]

The RIG have been promoted as having value because they emanate from the region.[118] However, our research findings indicate that this has not in fact translated into the RIG being used any more than international hard and soft law instruments by the African Commission, states and civil society organisations. Therefore, in practice it is arguable that the importance of the 'African heritage' of the RIG has been overstated and instead, perhaps what is more crucial as a factor in the level of implementation, or lack thereof, is the content of the RIG. Furthermore, neither is it possible to identify any link between the adoption of the RIG and the instances of torture across the region, or indeed to measure whether torture has increased or diminished since their adoption.

One of the reasons for developing soft law has been identified as to fill a gap within hard law instruments.[119] The RIG would certainly

114 Shelton (n 16 above) 14.

115 Shelton (n 16 above) 15.

116 Murray (n 9 above) 374-375.

117 See *Report of a workshop for East African national human rights institutions on the implementation of torture prevention standards*, University of Bristol 18-19 October 2010 http://www.bristol.ac.uk/law/research/centres-themes/ihrsp/documents/eastafricareport.pdf (accessed 31 October 2012).

118 Niyizurugero & Lissène (n 32 above) 113.

119 Chinkin (n 73 above) 30.

appear to fit into this category and its provisions can be regarded as elaborating measures to implement the general prohibition of torture and other ill-treatment contained in article 5 of the African Charter, even if that was not its original intended purpose. However, the RIG can only be seen as filling a gap within the regional context as many of its provisions, as described in section 3 above, can be found in other international hard law instruments such as CAT and ICCPR, as well as international soft law instruments such as the UN Standard Minimum Rules for the Treatment of Prisoners.

Furthermore, some of the provisions of the RIG are not as specific as those contained in these international instruments. For example, provision 34 of the RIG makes a general statement that states should '[t]ake steps to improve conditions in places of detention, which do not conform to international standards',[120] whereas the UN SMR, for example, specifically set out the steps that should be taken to ensure that conditions of detention are humane. Accordingly, the RIG has been perceived by some civil society actors as less useful to their work, and they would prefer to use the more detailed hard and soft law instruments from the international context rather than less specific provisions from the region.[121] As Shelton notes, 'ambiguity and open-endedness can limit efforts to secure compliance'.[122]

7.3 Support at the institutional level

As observed above, the institutional setting through which soft law is developed and promoted can be a factor in the overall level of compliance.[123] The RIG are unusual among soft law instruments within international human rights law in that a specific mechanism was established in order to 'follow up' on them and to suggest strategies to assist with their implementation.

While the creation of a special mechanism has at least enabled the APT, and others, a formal body through which torture prevention issues could be raised, in practice, to date, despite holding approximately six strategic meetings between 2005 and 2011 where programmes of activities have been developed, these plans have largely failed to translate into concrete action. Any activities that have been undertaken have been broadly promotional in their focus, thus the more functional aspect of the Committee's mandate, namely, 'to develop and propose strategies to the African Commission to prevent torture and other ill-treatment at the national and regional levels', has not been implemented. This is unfortunate as it is arguably this part of the mandate of the Committee which has the potential to have the

120 See provision 34 of the Robben Island Guidelines.

121 *Report of East African Workshop* (n 117 above) 19-20.

122 Shelton (n 16 above) 14.

123 Shelton (n 16 above) 15.

greatest impact by providing the African Commission, and others, with authoritative guidance and policies for strategies on the prevention of torture and other ill-treatment in Africa.

Successive Chairpersons of the Follow-Up Committee have identified a lack of funding as the reason for this inability to carry out the mandate fully.[124] This is not unusual, and a lack of resources is a common complaint from the special mechanisms of the African Commission and the African Commission in general.[125] Part of the reason for this is that for many years the African Commission did not establish a specific budget for the special mechanisms to 'tap into' in order to carry out their activities.[126] This then changed with an increase in funding from the AU leading to the Follow-Up Committee carrying out its first in-country activity in 2008.

Other Special Rapporteurs and working groups at the African Commission have functioned effectively because funding and impetus have been provided by the NGO who initiated the establishment of the special procedure in the first place. After the adoption of the RIG in 2002, the APT took the strategic decision not to provide funds directly to the Follow-Up Committee. One of the reasons for this was that the APT had seen the impact of the dependence of the mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa on the support it received from Penal Reform International, so that when Penal Reform International were no longer in a position to provide financial and other assistance, the Special Rapporteur was unable to be as active as before. In light of this experience, the APT were of the opinion that the Follow-Up Committee should not be reliant on their financial support to function and that the African Commission needed to take on the responsibility of supporting the special mechanism.

Yet, the initial success of the Special Rapporteur on Prisons has been widely acknowledged as resulting from the support the mandate received from Penal Reform International. This support had not only enabled missions to countries to be carried out and reports to be published, but had also provided a source of strategic development for the mandate.[127] This level of activity had been in stark contrast with the first Special Rapporteur position to be created, the Special Rapporteur on Extra-Judicial Executions, which had not received external support and had been beset with problems from the start.[128]

Thus, at the time of the establishment of the Follow-Up Committee, which was only the fourth special mechanism to be established, there was no precedent within the history of the African Commission for

124 See 19th Activity Report (2005) para 46 & 20th Activity Report (2006) para 39.

125 See eg 13th Activity Report 1999-2000 paras 28 & 29.

126 Murray (n 9 above) 375.

127 F Viljoen 'Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and possibilities' (2005) 27 *Human Rights Quarterly* 135.

128 Harrington (n 9 above) 255-256.

special mechanisms to function effectively without external support. Furthermore, it is likely that there was an expectation, based on previous experience with the Special Rapporteur on Prisons, that the APT would provide support to that body, particularly as the 2002 resolution which calls for the establishment of the Follow-Up Committee specifically names the APT as being a member of the Committee.[129] It is not unreasonable therefore to suppose that the African Commission was expecting the APT to provide the necessary resources and strategic support to this special mechanism, and was itself either unable or unwilling to provide adequate support to the Follow-Up Committee.

However, as well as wanting the Follow-Up Committee to be independent from the APT and fully 'owned' by the African Commission, there was also a pressing pragmatic reason for the APT's decision not to provide assistance directly to the Follow-Up Committee, namely, that it could not afford to do so as it had to put its resources into a global ratification campaign for CAT.

Therefore, the support the APT has given to the Follow-Up Committee and the Committee for the Prevention of Torture in Africa has been *ad hoc* and limited to activities such as the arrangement of meetings and assistance in publishing documents. In 2010 the APT took the decision that the CPTA needed more support in order to function and they were able to secure funding to pay a monthly stipend for an intern to be based at the African Commission to provide support to the legal officer for the CPTA, to co-ordinate CPTA activities, and to assist with event planning and field projects; as well as a range of other administrative matters. However, in the middle of 2012, the APT withdrew its funding of this internship.

Without assistance from an NGO or other body, the Follow-Up Committee and the CPTA have struggled to implement their mandates fully. However, it is unwarranted to lay the blame on the APT for this failure. The African Commission had agreed to the development of an instrument on torture prevention, had agreed to co-chair the drafting workshop, had adopted the RIG and established a special mechanism to promote their implementation. Thus, while the idea for this strategy on torture prevention was not their own, the African Commission had stood alongside the APT in the process. The failure to subsequently embrace the instrument they adopted and the special mechanism they created is symptomatic of a general over-reliance of the African Commission on NGOs for the strategic development and effective functioning of their special mechanisms.

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129 See Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (n 1 above).

8 Conclusion

It can be seen from the above that the RIG are interesting as an example of soft law and a number of factors have had a crucial impact on the lack of implementation of the RIG, demonstrating that it is a combination of factors which determine the extent to which instruments will be utilised, regardless of their binding or non-binding status.[130]

One of the problems with the RIG is that their purpose was never particularly clear from the outset and, on the face of it, the RIG appear to serve different roles and different actors. The context and process within which soft law instruments are developed have been identified as vital factors that affect the level of compliance.[131] While the RIG would appear to fill a gap within a binding instrument, that is, the African Charter, which is one of the key reasons for elaborating soft law instruments, it has been observed that the RIG do not have 'added value' for civil society actors working to tackle the prevention of torture because they either mirror existing international instruments, or they lack the necessary level of detail to make them a useful interpretive text to article 5 of the African Charter.[132]

Unfortunately, the institutional setting within which the RIG are placed, that is, the African Commission, has a poor record of using both binding and non-binding instruments systematically and strategically.

While the African Commission's close relationship with NGOs is unique among existing human rights bodies and has been instrumental in many of its successes,[133] it is unfortunate that the African Commission does not have its own policy of strategic development and often appears to abdicate 'responsibility for the operation' of its special mechanisms to NGOs.[134] Consequently, the roles and responsibilities of NGOs and the African Commission can become blurred.[135] This leaves the special mechanisms in a vulnerable position, as NGOs' priorities and levels of funding can change from year to year.[136] Unfortunately, the experience of the RIG has been no exception. While the APT instigated their development, they wanted the African Commission to assume responsibility for them. However, the African Commission has not done so effectively and has demonstrated that it is unable or unwilling to take on this role. Consequently, without an NGO assuming responsibility and providing assistance that would have enabled the special mechanism

130 Shelton (n 16 above) 13-17.

131 Shelton (n 16 above) 14.

132 See *Report of East African Workshop* (n 117 above) 19-20.

133 Murray (n 9 above) 95-96.

134 Murray (n 9 above) 374.

135 As above.

136 Murray (n 9 above) 377.

to be more effective, the RIG and their special mechanism have so far failed to fulfil their potential to be used by the African Commission as a means to develop an effective strategy on the prevention of torture and other ill-treatment in Africa.

Yet, despite the lack of awareness and use of the RIG, it can still play an important role in the region in a variety of ways. Firstly, there is a symbolic relevance for the RIG as an African document focusing specifically on the prevention of torture and other ill-treatment in the region. This has a potential important practical application beyond mere symbolism. The RIG can be particularly useful as an advocacy tool by a range of stakeholders working in states that are resistant to embrace instruments emanating from outside of the African region.

Furthermore, as an 'umbrella' document bringing together key international standards relevant to the prohibition and prevention of torture and other ill-treatment, the RIG have an obvious use in training and advocacy, and as a blueprint for developing national action plans to combat these forms of abuse.[137]

However, the future visibility of the RIG and its impact depend on the role and future activities of the CPTA. Further thought therefore needs to be given as to how to bolster the capacity of the CPTA and its impact within the region.[138] The Johannesburg Declaration and Plan of Action on the Prevention and Criminalisation of Torture in Africa, which was adopted by participants of a commemorative seminar that was held in Johannesburg to mark the tenth anniversary of the adoption of the RIG on 23 August 2012, sets out a number of activities and objectives for the CPTA, which to a certain extent provides some clarity regarding the purpose and future activities of the CPTA.[139]

Many of the provisions of this Declaration directly concerning the CPTA relate to the CPTA's relationship with other vital stakeholders in combating torture and other ill-treatment in the region. This Declaration also envisages an advisory role for the CPTA and calls on the Committee to provide advice and technical support to national actors on the criminalisation of torture, the compensation of victims, implementation of the RIG, the ratification of OPCAT and to support National Preventive Mechanisms. The Declaration also calls on the CPTA to develop model legislation on the criminalisation of torture in collaboration with its partners.[140]

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137 University of Bristol, Summary report of an expert seminar on the strategic use of soft law human rights documents, Bristol, 4 July 2012 11, http://www.bristol.ac.uk/law/research/centres-themes/ihrsp/events.html (accessed 31 October 2012).

138 n 137 above, 10.

139 See The Johannesburg Declaration and Plan of Action on the Prevention and Criminalisation of Torture, http://www.apt.ch/content/files/region/RIG+10%20Seminar%20Outcome%20Document. pdf (accessed 31 October 2012).

140 n 139 above, 5-6.

However, while the Declaration is to be welcomed, many of its provisions concerning the CPTA mirror previous plans of actions that have been developed for the CPTA and its predecessor, the Follow-Up Committee, in particular the 2005 Plan of Action for the Follow-Up Committee.[141] Therefore further thought needs to be given as to how exactly the CPTA can concretely implement the Declaration and its overall mandate in order to provide the leadership on torture prevention that is needed at the regional and national levels in order to effectively combat torture and other ill-treatment in the region.

141 *Report of the first working session of the Follow-up Committee on the implementation of the Robben Island Guidelines* (n 99 above).