OPCAT in the African Region: Challenges of Implementation

Summary and recommendations from Conference held 3-4 April 2008, Cape Town South Africa

A two day conference was held from 3-4 April 2008 in Cape Town South Africa to examine the Optional Protocol to the UN Convention Against Torture in the African Region. It was organised by the University of Bristol OPCAT project in collaboration with the South African Human Rights Commission, the African Commission on Human and Peoples' Rights and its Robben Island Guidelines Follow-Up Committee (RIG Committee) and Special Rapporteur on Prisons and Conditions of Detention of the African Commission, the UN Subcommittee for the Prevention of Torture (SPT), the Centre for the Study of Violence and Reconciliation and the APT. It saw the participation of nearly 90 individuals from governments, national human rights institutions, potential and existing NPMs and civil society organisations from across the continent, as well as representatives from the SPT, RIG Committee, African Commission on Human and Peoples' Rights, UN OHCHR and academics. For a list of participants see Annex I.

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The conference was arranged into plenary sessions on the morning of the first day and the afternoon of the final day. Workshops on standards (including Robben Island Guidelines) and visiting and coordination were held at other times to enable more meaningful discussions of these issues. A copy of the agenda is found in Annex II.

In the day preceding the conference, members of the RIG Committee and the SPT met separately and in camera to discuss their own agendas. They also then met together on Robben Island as a symbolic way in which to formalise their relationship. During the conference, the Coordinating Committee of African National Human Rights Institutions also took the opportunity to arrange a meeting for members of African National Human Rights Institutions.

This report attempts to summarise the discussions that took place during this two day event and to present practical suggestions and recommendations that arose. It is divided into a number of thematic areas, based on the focus of debates.

1. The need for awareness raising of OPCAT

It was noted that very few states had ratified or signed OPCAT in the Africa region: only 5 and 8 respectively: Benin, Liberia, Mali, Mauritius and Senegal had ratified; Burkina Faso, Ghana, Guinea, South Africa, Togo, Gabon, Madagascar and Sierra Leone had signed. There was a general lack of awareness of the content of OPCAT even among those within governments and relevant national bodies and particularly in the public. It was therefore still important that OPCAT be widely publicised.

There was also a lack of political will to implement OPCAT as well as a general attitude to torture which presented significant challenges. There was a belief that for many in Africa prison was seen as preferable to alternative forms of punishment and that harsh treatment in prisons was appropriate. This was particularly the case in post conflict situations where the view of prisoners by the general public may not be very positive. Some governments were also secretive in relation to prisons and the problems of secret places of detention and illegal sites of detention were also prevalent. It could be difficult for the national visiting bodies to identify where these were. Some commented that the focus of the discussions on OPCAT tended to look at prisons rather than include also these other places of detention such as detention of minors, refugee camps, etc.

An additional barrier to a proper discussion of the OPCAT in many states is the fact that although torture was prohibited by the constitution in various African countries, there was no domestic law to criminalise it.

There was a general recognition that torture was deeply rooted and widespread in the African continent. Yet states denied such was taking place. There was a need for education, advocacy and awareness raising as well as for training of judges and others on torture issues. As to whose responsibility this was, some felt it was for the national human rights commissions to do. Others called for international assistance.

In addition, there was also a recognition of the specific context in Africa. Firstly, in the post conflict scenario one must bear in mind the difficulties that a visiting body may encounter: for example, how do you visit a prison when there are no roads and bridges in the country? This relates both to the practical operation of the NPM but also has bearings on the standards that may be applied by any visiting body.

Secondly, the scope of places of deprivation of liberty needs also to be considered in the African context. For example, participants raised the issue of 'suspected witches camps' (e.g. in Ghana) and the need to have NHRIs aboard the OPCAT system who know the specifics of the country and have managed to gain access to such places. Again, this also had implications for what standards should apply in those contexts.

Even once ratification of OPCAT is achieved, however, some warned that implementation would not necessarily follow. Some national human rights institutions who had visiting powers mentioned that their effectiveness in getting the government to implement their recommendations was limited. Feedback on recommendations made by the NPM was also raised as an issue and various suggestions were made as to how this could be improved including the requirement that a time limit for reaction by the government should be given.

Lack of funding was raised as a consistent reason for failure to implement RIG and other standards, yet others questioned this. However, it was also noted that the African Commission had just received a considerable increase in its budget from the AU which may assist the RIG and Special Rapporteur in their work. Similarly, many NHRIs have found innovative ways of how to approach issues, for example, through instituting awards for the best policeman, best prison and best prison guard (Kenya) which worked well as an incentive to promote better attitudes and encourage the authorities to be innovative about the ways they use their limited resources.

Problems in getting countries to ratify included: a statement by the governments that they intended to do so, but it being a question of time or that they wanted perfection before committing to the Protocol. The challenge in such instances is to ensure that the necessary work to achieve this perfection is actually taking place and taking place in consultation with the relevant stakeholders.

The SPT expressed their wish to be involved with states where the government had yet to ratify but were considering the issue and faced a number of challenges.

2. NPMs

OPCAT provides a number of possibilities for states in selecting their NPM: to create a new body, to choose an existing one which has the necessary powers and resources; or to select an existing body or bodies which may require some amendment to its powers or resources. States would need to evaluate the extent to which their existing bodies conformed to OPCAT requirements, but this should be done through an open and transparent process in consultation with civil society. The examples of Paraguay and Senegal and Benin were raised as examples of good practice, unlike that of Mali which was rather rushed resulting in a lack of solid legal basis.

Many emphasised that NPMs were at the heart of the OPCAT system and prevention, as international and regional bodies could not eradicate torture alone. Yet many raised questions about who exactly should be the NPM, especially in countries where there are a number of bodies with the potential to be so, some with broader mandates (e.g. South African Human Rights Commission), some with narrower ones. If a group of bodies were chosen, then questions arose as to how they should work together, who should report and to whom, and who should maintain contact with the SPT. What was essential, was that these needed to be effective bodies. In some countries where many had looked to the national human rights commission to spearhead the OPCAT process and stand as the NPM, there was a reluctance on the part of the national human rights commission to do so given the additional work this would require may not be matched by extra resources. The use of the national human rights commission as the NPM may, however, raise problems if that commission needs to have a positive relationship with, for example, the police or others, and currently does not have this.

Examples were provided of where the NPM had been selected but was not perfect (e.g. Mali, under the Ministry of Justice so compromising its independence and appointment of one person by ministers). In Benin the process of choosing the NPM had been rather long and a new body would be the model adopted for the NPM, established through legislation, as the existing bodies were not strong enough.

Some feedback was given on the SPT's first official visit to Mauritius at the end of 2007. A number of prisons had been visited as well as other places of detention and after an allegation of torture and complaints on the condition of detention, the Mauritius authorities decided to close one high security prison for renovations. The country was still awaiting for the SPT's report on the visit and it was hoped that this would also provide the authorities with some guidance on the NPM. The current NPM which was set up prior to the visit of the SPT is only a temporary body and is composed 7 members: 2 members of the national Human Rights Commission, 2 members from the Attorney General's Office, the Police Chief Medical Examiner, 1 representative from the Ombudsman's Office and 2 representatives from the NGOs. The visit of the SPT had also prompted a public debate about the standards in which prisoners were kept. The SPT also said that in general terms after a visit to a state it was essential that the report of the visit was published and that there were no repercussions against those to whom the SPT spoke.

Some brief mention was made of the requirement regarding annual reports of NPMs in Article 23 of OPCAT. The SPT said that it was not necessary to send the report to the SPT but that the reports must be publicised and if not, the SPT will ask why. The reports also needed to be preventive and there should be a methodology that reflected this, i.e. some indication that visits have taken place. The aim is to identify gaps and deficiencies in order to

assist in making improvements. The SPT would not base its view simply on one report but look elsewhere for information on the NPM as well. It was also explained that when, for example, a national human rights institution is designated as an NPM, it is not necessary to produce a whole separate report. It would suffice to have a separate NPM chapter in the annual report of the institution as long as it reflects the work of the NPM, its preventive mandate and methodology.

3. Role of NGOs

The role and importance of the involvement of civil society in implementation of OPCAT and awareness raising was stressed throughout. It was also discussed how NGOs could be formally part of the NPM or what their role should be. Various examples were given, including formal involvement of NGOs (e.g. s.5 committee South African Human Rights Commission),[1] being part of the team and process of selecting the NPM (Benin) or as individuals being able to put themselves forward as members of the NPM. In Mauritius, for example, the National Human Rights Commission initiated the process of setting up the temporary NPM, which now operates under the aegis of the Human Rights Commission and has two NGO representatives.

Some raised the concern that if NGOs were part of the actual NPM then this may jeopardise their independence. It would depend on the specific country as to whether this might work or not, but others stressed the ability of NGOs to walk out of the room if they wanted to and to make criticism where necessary.

4. Standards and cultural relativism and soft-law

There were a diversity of standards developed at the African level and a sense of ownership over the standards in the African context was considered important.

Article 5 of the African Charter on Human and Peoples' Rights (ACHPR) sets out the obligation to prevent torture and this is picked up on by the RIG which set out further obligations for states. There was a recognition that prevention required a broader approach than protection. Prevention also required a holistic approach that looked at the social and political context of the state. Yet some felt that this was not a task for the SPT to do, although it did need to appreciate the context of the country which it visited. Some noted that the focus on prevention may be a challenge for visiting bodies if they had to deal with complaints or were faced with such in the course of their visits. Others suggested the use of an investigation mandate if that were available may help in such situations.

The RIG were African standards for Africans and many commended their content. However, there was considerable concern that the RIG had remained on paper only and there was a great need for them to be publicised more widely. The Kampala Declaration was also an important tool, as were the reports of the Special Rapporteur on Prisons and Conditions of Detention of the African Commission. The RIG were considered a 'one-stop shop' for torture

[1] A s.5 Committee is a committee, as set up under s.5 of the Human Rights Commission Act 1994. This provides: 'The Commission may establish one or more committees consisting of one or more members of the Commission designated by the Commission and one or more other persons, if any, whom the Commission may appoint for that purpose and for the period determined by it'. There is a s.5 committee established to examine the criminalization of torture as required by the CAT, promote the ratification of the OPCAT and analyse the possibilities of establishing or designating a NPM for South Africa.

and states, as well as the African Commission and civil society were responsible for their implementation.

All these African standards then had to be placed within the context of international standards: CAT, the ICCPR and ICESCR, as well as the UN Minimum Standards. Some mentioned the need for national prison regulations and the role of the NPM in developing such standards. Often it was difficult to identify what the national standards were in particular countries and the UN could perhaps fulfil this role. It was also mentioned that the role of the SPT may not be to give definitions of what amounted to torture or other abuse, but simply to describe the situation.

Some concerns were raised about consistency between the standards and whether all rules could be applied to all places at the same time. Although the absolute nature of the prohibition of torture was underlined, a discussion did take place on how this applied in reality. Some recognised that there were different cultural expectations, for example, with respect to the number of people in cells, whether cells should be shared or single-occupancy and that in such situations it may help to ask the prisoners themselves. There was a need to establish what was acceptable locally. But this approach concerned others who felt that certain treatment should never be acceptable and that there needed to be a move away from cultural relativism towards expectations that could be enforced gradually and a focus on priorities. The approach of the European CPT, for example, with respect to its standards and recommendations to specific states was also discussed and the need for multidisciplinarity was underlined. In this regard, it was observed that there is a need to differentiate between standards and the recommendations of the visiting bodies. It is important to realize that the recommendations made by national preventive mechanisms, national human rights institutions or the SPT are not necessarily the same thing as their standards. It may be in this regard important to note that while there is a set of general universal standards, the main issue is how to tailor them to a specific national context.

Many noted that the problem was not about the lack of standards, but how to promote them, ensure dialogue with authorities and enforceability in terms of implementation of standards. But there had not been a particularly proactive approach to implementing the RIG standards and what was needed now was promotion and development of a plan of action for the RIG Committee.

The value of soft-law in this area was considered and some comparisons were drawn with the Inter-American system whereby it was noted that states there had accepted soft-law standards as being part of domestic law.

5. The need for coordination and avoidance of duplication of efforts

The conference examined the list of institutions at the international and regional level which had some visiting mandate in the African continent. These included the Special Rapporteur on Prisons and Conditions of Detention of the African Commission on Human and Peoples' Rights, Special Rapporteurs (including the Special Rapporteur on Torture) and working groups of the UN, the Committee Against Torture and now the SPT.

The African Commission itself has a number of mechanisms to enable torture and OPCAT related issues to be introduced and these should be exploited. These included discussions at the sessions themselves, the state reporting and communication mechanisms. The fact that NHRIs had affiliated status before the African Commission, but yet none were up to date with their obligations to produce a report to the African Commission, was also mentioned. There was an obligation on the African Commission and RIG Committee to promote ratification of OPCAT.

NPMs were at the heart of this system of prevention and as Silvia Casale, chair of the SPT, put it, if the system is to work there must be an 'interlocking, not duplication' of efforts. She stressed the need for OPCAT to start even if it were not perfect. NPMs were part of the process and the SPT had published some preliminary guidelines to assist states in this task (see Annex III).

Various members of the UN SPT and African Commission suggested practical ways in which there could be coordination and collaboration between them. Dupe Atoki, the Chair of the RIG Committee suggested her Committee could collaborate with the SPT in terms of training, representation of the RIG Committee at UN meetings, research and studies, with the African Commission monitoring the situation on the ground.

The Special Rapporteur on Prisons and Conditions of Detention, Mumba Malila, set out a number of practical ways in which his office and the African Commission in general could collaborate with the SPT. These included:

- Exploiting the good relationships the African Commission has with NHRIs in many states
- Making available the studies it has at its disposal
- Informing the SPT of various sensitivities that may be relevant in visiting prisons in Africa

It was also suggested by others that some collaboration could take place between the RIG Committee and SPT with respect to visits. The idea of joint visits did not seem to be a possibility from the perspective of the SPT due to confidentiality, although they could share information and avoid visits to the same place.

Although the relationship between the NPMs and SPT was an important one, the SPT were hampered by lack of budget at present. Whether they could visit a place together was also raised but not resolved. The SPT stated that they wanted to have a relationship with the NPM that went beyond just meeting them on SPT visits to the country, but to build a dialogue with them and coordinate information.

It was also stressed that there needed to be collaboration between the RIG Committee and NPMs. In this respect, provisions 41, 42 and 43 are relevant to OPCAT,[2] but needed further development.

The idea of confidentiality received brief mention, noting that this impacted on the ability of the SPT and others to work with the state as a partner, not to condemn them.

Some brief discussion was held on the African Court on Human and Peoples' Rights and the possibility that this provided for more teeth to enforce various standards. However, others noted that given only two states permitted individuals and NGOs to access the Court directly how it was going to operate in practice was debatable.

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[2] These read: States should: …

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

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

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

6. Mechanisms of visits available

Some spoke of the opportunity of a number of existing visiting mechanisms that existed at the national level across the continent, which included national human rights institutions, prison inspectorates and visiting judges. In particular, the role of many national human rights institutions in visiting places of detention was highlighted. But there was a great need for international advice and assistance in relation tot these bodies and their applicability to OPCAT.

Of the five states that had ratified, only Mali had designated its NPM, although temporary arrangements were in place in Mauritius. In other countries the trend, if one can call it that, is therefore to look at national human rights institutions as undertaking the NPM role or at least having a central role to play in ratification of OPCAT and designation of the NPM.

An African regional secretariat of national human rights institutions had been created and could play a role in strengthening implementation of RIG and OPCAT and indeed, some NHRIs had done so (for example, Mauritius national human rights commission had contributed to the ratification campaign of OPCAT).

Reference was made to the Paris Principles as a useful, if out of date, standard for these types of bodies, whether they be NHRIs or NPMs. Something stronger needed to be provided and the work of the International Coordinating Committee of NHRIs (ICC) was noted in this respect. It was important, however, that the SPT also outline what independence was in the context of NPMs and OPCAT. Independence, however, should not mean that the NPM would not have dialogue with other institutions but to collaborate with them.

In some countries where visiting mechanisms were already available, it was noted that the benefit of ratification of OPCAT would be that it would provide a legislative framework for the visits to take place and enable more powers or resources to be provided to the relevant existing bodies. However, some of the visiting mechanisms that existed in countries were seen to work well, others were seen as inadequate, perhaps because of limited capacity or expertise.

7. Recommendations and follow-up

Overall, there is a clear need to elaborate an integrated system of prevention, through the use of UN, regional and national bodies. There cannot be dependence on the NPM alone to fulfil the preventive mandate. This integrated system requires, among other things, greater coordination between the different bodies:

(a) between the SPT and the RIG Committee:
    i. the need to ensure on-going dialogue that would keep the SPT informed of regional developments, issues or topics that needed to be addressed by the SPT in its visits to African states and in its relationships with African NPMs.
    ii. Representation of the RIG Committee at UN meetings
    iii. Research and studies

(b) between the SPT and Special Rapporteur on Prisons and Conditions of Detention of the ACHPR. Practical suggestions made included:
    i. the need to ensure on-going dialogue that would keep the SPT informed of regional developments, issues or topics that needed to be

addressed by the SPT in its visits to African states and in its relationships with African NPMs.

ii. Avoidance of duplication of visiting the same places twice
iii. Exploiting the good relationships the African Commission has with NHRIs in many states
iv. Making available the studies the African Commission has at its disposal to the SPT
v. The Special Rapporteur informing the SPT of various sensitivities that may be relevant in visiting prisons in Africa.

(c) between the SPT and NPMs:
    i. In this context it may be useful for the SPT to produce practical guidance on the relationship between the two.
    ii. To build upon the SPT's preliminary guidelines and the need to take NPM establishment as a process, rather than as a final result

(d) between the SPT and other international bodies. In this context it was noted that the University of Bristol OPCAT team is producing a website which will track visiting bodies under the UN and regional systems across all countries. It was also suggested that the different visiting bodies should coordinate their activities with regard to the use of applicable standards.

(e) Between the African Charter institutions (RIG Committee and the Special Rapporteur) and NHRIs:
    i. In this context it was suggested that NHRIs and the African Charter institutions could improve the sharing of their reports in particular with regard to the issue of torture.
    ii. Greater involvement of NHRIs at the sessions of the African Commission.
    iii. Better record of submission and use of reports that NHRIs are required to submit to the African Commission as a result of being granted affiliated status to raise awareness of OPCAT.

The RIG Committee should develop a plan of action in relation to implementation of OPCAT, including relevant policy papers.

The RIG Committee should itself start to interact with NPMs.

A programme of visits planned between the different international and regional bodies should be established and shared between organisations.

The African Coordinating Committee of African National Human Rights Institutions could look further into the issue of NPMs in the African context and give some more detailed guidance. This should be done in conjunction with the International Coordinating Committee of NHRIs (ICC) and its Sub-Committee on Accreditation. There should be further consideration of the relationship between the criteria adopted by this Sub-Committee in accrediting NHRIs and OPCAT criteria for NPMs. The NI Unit at the UN could also look into more detail at the OPCAT NPM process and how this impacts on their work.

Civil society organisations such as the APT, FIACAT, RCT should share experiences with other states within Africa and continue working with the SPT, ACHPR and NHRIs towards promoting and implementing OPCAT.

The need to raise awareness of OPCAT is key to many African countries, even those that have ratified. This should be placed within the broader context of examining public and government attitudes to torture and prisoners in particular.

Any NPM or visiting body should also consider the context of the situation in the country at the same time as recognising the absolute nature of the prohibition of torture.

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