

The Robben Island Guidelines: An essential tool for the prevention of torture in Africa

Jean-Baptiste Niyizurugero and Ghislain Patrick Lessène*

Abstract

The Robben Island Guidelines (RIG), the result of a collaboration between the African Commission on Human and Peoples' Rights and the Association for the Prevention of Torture, aim to provide a regional instrument for the prevention of torture and cruel, inhuman or degrading treatment in Africa. The RIG, adopting best practice from a number of existing instruments, provide for broad definitions of both torture and cruel, inhuman or degrading treatment; these definitions afford a strong basis for prosecuting those who violate the prohibition of torture and other ill-treatment. The RIG also include a number of detailed procedural safeguards that address the conditions that increase the likelihood of torture and other ill-treatment. However, effective implementation of the RIG is hampered by lack of awareness on the part of African States, law enforcement personnel and civil society about the RIG, as well as lack of legislation and policy at the domestic level that provides a suitable framework for implementation. Nonetheless, the RIG represent an important step forwards not only in preventing torture and other ill-treatment of those deprived of their liberty by African States, but also in encouraging a greater engagement with human rights issues, including via regional and global instruments, on the African continent.

1. Introduction

The African Union's Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, commonly called the Robben Island Guidelines (RIG),¹ are the fruit of active cooperation between the African Commission on Human and Peoples' Rights (ACHPR) and the Association for the Prevention of Torture (APT), an international non-governmental organisation based in Geneva. The APT initiated the RIG adoption process and is actively involved in promoting the RIG and monitoring their implementation. The RIG were formulated during a workshop jointly organised by the APT and

* Jean-Baptiste Niyizurugero is the APT Africa Programme Officer and Vice-Chair of the ACHPR's Follow-up Committee on the Implementation of the RIG. He is the initiator and one of the drafters of the RIG. Ghislain Patrick Lessène attends the Faculty of Law of the University of Geneva and teaches at the Geneva Centre for Education and Research in Humanitarian Action (CERAH).

¹ Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa: Robben Island Guidelines 2nd Edition (ACHPR and APT: The Gambia and Geneva, 2008). Available at <http://www.apr.ch/content/view/full/144/156/lang,en/>. Last accessed 15 January 2010.

the ACHPR from 12 to 14 February 2002 on Robben Island, the highly symbolic South African island where Nelson Mandela and other anti-apartheid activists were imprisoned for many years. The ACHPR formally adopted the RIG during its 32nd session, in October 2002. In July 2003, the African Union Summit of Heads of State and Government endorsed the RIG as a result of the adoption of the 16th report of the ACHPR.² The RIG contain three parts: the first is dedicated to banning torture; the second deals with the prevention of torture, the treatment of people deprived of their liberty by the state, and the role of civil society; the third focuses on responding to the needs of victims of torture and other ill-treatment.

By formally adopting the RIG, the ACHPR and the African Union have emphasised the universally recognised obligation for states to take effective steps to prevent torture and other ill-treatment. As with other human rights instruments, the effectiveness of the RIG is contingent on the measures and mechanisms in place for implementing the guidelines; not only it is vital for there to be an appropriate legal framework, but also an environment that is favourable to the promotion and implementation of the RIG.

How does this instrument contribute to the prevention of torture and the protection of people deprived of their liberty in Africa? What actions can be taken by States and NGOs to make the prevention of torture a reality in Africa? Answering these questions requires an analysis of the contribution made by the RIG to the prevention of torture on the African continent. This analysis concerns (i) the prescriptive aspects of the RIG, (ii) the RIG's institutional dimensions, and (iii) the elements necessary for their effective implementation.

2. The Prescriptive Aspect of the Robben Island Guidelines: Substantial Preventive Rules

The adoption of the RIG represents an important step forward in working to prevent torture, and to protect and guarantee the dignity of people deprived of their liberty, in Africa. The RIG demonstrate a structural approach to humanising the treatment of people deprived of their liberty: an approach that is based on the understanding that it is imperative (i) to prevent torture and other ill-treatment, (ii) to emphasise the universally recognised interdiction of torture by establishing new prohibitions, and (iii) to support victims.

2.1 *Emphasising the need to prevent torture and other ill-treatment*

The RIG belong to the category of 'soft' law. They were drafted at a time when the African political environment was not favourable for establishing a new binding convention: attempts to create one would have led to arduous and extremely long negotiations. However, as the RIG were adopted by the ACHPR, they can be regarded as representing a consensus of opinion and shared goals among African States. The initiative that established the RIG adopted a pragmatic and realistic approach that has received a favourable response, first of all from the ACHPR, which supported all the phases of the RIG's development and assisted in the informal consultations that facilitated the RIG's approval by the African Union. The RIG's non-binding character may be viewed as a potential hindrance to its implementation. Yet the RIG may be

² Sixteenth Annual Activity Report of the ACHPR 2002-2003. Available at http://www.achpr.org/english/activity_reports/activity16_en.pdf. Last accessed 15 January 2010.

rightly considered a pioneering instrument in the protection of people deprived of their liberty in Africa because, for the first time, the expressed focus is on the prevention of torture and other ill-treatment. This focus on prevention is seen in the emphasis on basic safeguards for people deprived of their liberty and the affirmative duty of States to respect those safeguards.

The RIG prescribe two types of basic safeguards for people deprived of their liberty: general procedural safeguards and specific safeguards for pre-trial detention.

2.2 *General procedural safeguards*

Article 20 of the RIG sets out general procedural safeguards. According to this provision

All people who are deprived of their liberty by public order or authorities should have that detention controlled by properly and legally constructed regulations. Such regulations should provide a number of basic safeguards, all of which shall apply from the moment when they are first deprived of their liberty. These include:

- a) The right that a relative or other appropriate third person is notified of the detention;
- b) The right to an independent medical examination;
- c) The right of access to a lawyer;
- d) Notification of the above rights in a language that the person deprived of his or her liberty understands[.]³

2.2.1 *Notification of a third party about the detention*

Providing notification of the detention to a relative or third person (and allowing those deprived of their liberty to inform a close relative or third person of the fact of their detention) is a crucial safeguard against torture and other ill-treatment⁴ and must be applied from the very start of the deprivation of liberty.⁵ Article 31 of the RIG provides that all detainees must be able to communicate with their family members and receive visits that are subject only to the usual security constraints. In the words of a former Secretary-General of the UN, notification of detention means ‘that detainees must be immediately able to inform their families of their detention and be assigned all reasonable facilities to be able to communicate with them and their friends and receive visits from them, subject only to restrictions for safety and good order of the

³ See RIG, p.14. See fn.1.

⁴ *Zegveld and Ephrem v. Erythrée*, Communication 250/2002, Seventeenth Activity Report, African Human Rights Law Reports (ACHPR 2002), para. 55 and 56.

⁵ Rodney Morgan and Malcolm Evans. *The CPT’s Standards on Police and Pre-trial Custody*, Brochure Number 5, APT, May 2002, p.15; and the African Union’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of May 2003, available at http://www.afrimap.org/english/images/treaty/ACHPR_Principles&Guidelines_FairTrial.pdf, Principle M(2)(a-f). See also International Convention for the Protection of All Persons from Enforced Disappearance, , adopted by the UN General Assembly, Resolution 71/177, 20 December 2006, not yet in force (for ratification status, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en), Article 17(d).

institution’.⁶ The right to notify family members or third persons includes informing that third-party of the place of detention.⁷

Facilitating the intervention of family members, lawyers and any other relevant individuals in the legal process on behalf of detainees is of particular importance because the risk of torture and other ill-treatment is higher when there is a lack of information about a detainee and his/her situation. After having communicated with detainees, families and friends can, for example, lodge appeals in their names against the detention order, choose lawyers for them or take other measures to help restore their liberty and protect them from the possibility of ill-treatment.

Third-party notification should usually take place immediately after the arrest of the person deprived of liberty, although a delay in notification may be allowed if the goal is to ‘protect the interests of justice’,⁸ on the condition that any delay is short. The European Committee for the Prevention of Torture (CPT) has deemed that a delay of 48 hours is the best possible compromise between investigatory needs and detainees’ interests.⁹ It is also necessary that the reasons for a request for a delay in notification is explained in sufficient detail. The delay must ‘be recorded in writing together with the reasons’¹⁰ and approved by the supervisor of the requesting authority.

2.2.2 Access to a lawyer

Article 31 of the RIG provides that all detainees must be able to contact legal advisors, and it must be possible for them to receive visits from those advisors.

Access to a lawyer, especially unlimited and confidential access, is one of the surest means of preventing torture and protecting the rights of those deprived of their liberty. The *raison d’être* of this safeguard is that its ‘existence will have a dissuasive effect on those who would be inclined to mistreat detainees; furthermore, a lawyer is well-positioned to take the necessary measures if, in fact, detainees are mistreated’.¹¹ Access to a lawyer extends to individuals in police custody who have not yet been charged with an offence, or who have been detained for

⁶ United Nations, Human rights in the administration of justice, Note by the Secretary-. General, UN Doc. E/AC.57/24, 22 April 1976, para. 10.

⁷ The right to notify members of the detained person’s family, or other appropriate persons of the detainee’s choice applies, also applies after each transfer from one place of detention to another: see Body of Principles for Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly, Resolution 43/173, 9 December 1988, Principle 16(1).

⁸ Morgan and Evans, p.15. See fn.5. The UN Special Rapporteur on Torture goes even further by recommending that ‘in all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours’. See the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, E/CN.4/2003/68, para. 26(g).

⁹ Morgan and Evans, p.16. See fn.5.

¹⁰ Morgan and Evans, p.16. See fn.5.

¹¹ CPT, Report to the Government of the Czech Republic on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Council of Europe, CPT Doc. CPT/ Inf (99) 7, para. 30.

questioning and who are not yet suspected of committing a criminal offence. This right applies from the start of police custody and throughout its duration.¹²

A restrictive interpretation of this principle limits access to qualified lawyers. This makes it possible for the authorities to impede contact with other individuals likely to provide legal assistance. In Africa, where lawyers are expensive and sometimes in insufficient supply, limiting access to qualified lawyers may mean refusing many people the right to legal assistance. Therefore, non-lawyers (law students, paralegals, appropriate NGOs, etc.) should be authorised to help detainees. However, in order to prevent charlatans or unqualified people from offering their services, authorised non-lawyers must fully identify themselves and the detained person must consent to a particular person providing legal assistance.

2.2.3 *Access to a doctor*

Access to a doctor is key part of Article 25 of the Universal Declaration of Human Rights, which states that ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.’ People deprived of their liberty depend on detaining authorities for all of their needs as they no longer control their own living conditions. Fulfilling this aspect of the Universal Declaration of Human Rights involves the right to be examined by a doctor of the detainee’s choice in addition to any examination conducted by a doctor designated by the detaining authorities.¹³ Medical examinations should take place in private and the results of all examinations should be recorded and made available to detainees and their lawyers; they should also be subject to the principle of confidentiality.¹⁴

2.3 *Specific safeguards for pre-trial custody*

All criminal justice systems provide for the possibility of individuals awaiting trial being temporarily detained at a police station or in a jail. Pre-trial detention may last for only a few days, but it is often several weeks long and, in practice, can sometimes last for years. During this period of detention, detainees are particularly vulnerable to torture and other ill-treatment. The RIG, in Articles 21 to 32, have established the following specific safeguards for people in pre-trial detention; the right to contact with family members and to contact with lawyers/legal advisors (discussed above) are also part of these safeguards.

2.3.1 *Information on the reasons for the detention*

The RIG recognise that persons who are arrested have the right to be informed of the reasons for their arrest as soon as possible. To fulfil that right, the information that arrested persons require

¹² See, notably, Report of the Committee Against Torture, Recommendations to the Czech Republic, UN Doc. A/56/44, para. 114(d) and Report of the Committee against Torture, Recommendations to the Netherlands, UN Doc. CAT/C/NET/CO/4, para. 6.

¹³ In addition, medical inspections should be regularly repeated and should be compulsory upon transfer to different place of detention. See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, E/CN.4/2003/68, para. 26(g).

¹⁴ Morgan and Evans, p. 18. See fn.5.

must meet at least three conditions: promptness, completeness and intelligibility. Promptness of provision of information is a cornerstone provision of the right to a fair trial. Moreover, it is inhumane to keep individuals in a state of ignorance about the reasons for their arrest and about their future. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa require that information is provided at the time of arrest. Completeness of the information concerns the reasons for an individual's arrest and the charges against him/her. This does not mean that all charges must be described in detail; rather, the arrested person must be informed of the substance of the charges. This principle ensures that people can challenge the lawfulness of their detention and mount a defence against the charges. The provision concerning intelligibility of the information requires that any information about the person's detention must be provided in a language that he or she can understand. This implies the use of language that is simple and accessible, as well as translation from one language to another.

2.3.2 *Bringing arrested individuals before a judicial authority*

All those deprived of their liberty must be 'brought promptly before a judicial authority, having the right to defend themselves or to be assisted by legal counsel, preferably of their own choice.'¹⁵ This principle ensures that a detainee can challenge the lawfulness of their arrest. It also allows detainees to inform a magistrate or judge of any ill-treatment. Being brought before a judicial authority must be automatic, unconditional, and speedy.¹⁶ However, 'promptly' is not synonymous with 'immediately' because, while being brought before a judicial authority must happen quickly, it does not have to be immediately after the deprivation of liberty.¹⁷ Thus 'promptly' is often synonymous with 'without undue delay.'¹⁸ The ACHPR has not yet pronounced on this issue, while the European Court of Human Rights (ECHR) has deemed that the current maximum length of detention before detainees are brought before a judicial authority should be approximately four days for sensitive matters of an exceptional nature¹⁹ and 24 hours, with the possibility of a single renewal, for other matters.²⁰ In authors' opinion, these positive developments should apply in Africa in the context of RIG implementation.

2.3.3 *Written records and recording of interrogations*

The RIG require that comprehensive written detention records of all interrogations are kept²¹ and that interrogations are subject to audio or video recording. These procedural safeguards reinforce the protection of those in pre-trial detention, while governing the conduct of the detaining authority and facilitating independent monitoring, to which the detaining authority is

¹⁵ RIG, Article 27. See fn.1.

¹⁶ *De Jong, Baljet and Van Den Brink v. the Netherlands*, Judgment of May 22 1984, European Court of Human Rights, Series A No. 77, p. 25.

¹⁷ R de Gouttes, 'Article 5(4)' in L-E Pettiti, E Decaux, P-H Imbert (ed.), *La convention européenne des droits de l'homme, Commentaire article par article* (Paris: Economica, 1999), p. 203 onwards.

¹⁸ International Covenant on Civil and Political Rights, adopted by the UN General Assembly, Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976, Article 9(3) and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, May 2003, Principle N(5)(a). See fn.5.

¹⁹ *Brogan et al v. United Kingdom*, Judgment of 29 November 1988, Series A No.145-B, European Court of Human Rights, p.61.

²⁰ Jean-François Renucci, *Droit européen des droits de l'homme* (Paris: LGDJ 2007), p.298- 299.

²¹ RIG, Article 30. See fn.1.

subject. Being aware of the variety of places where people are detained, the RIG drafters affirmed that written records must be kept in every place of detention and that the information contained in written records must be available to family members, lawyers, judicial authorities and competent institutions empowered to monitor places of detention.

2.4 *Positive obligations of African states*

Articles 33 to 37 of the RIG remind States parties of their positive obligations to protect the physical and moral integrity of detainees with regard to conditions of detention. The measures advocated require an obligation (i) to respect and implement relevant international and regional standards, and (ii) to protect every individual from ill-treatment. The obligation to respect international standards requires that the States positively regulate the enjoyment of detainees' recognised rights. To that end, it is appropriate to integrate the RIG and the UN Minimum Rules for the Treatment of Prisoners within national legislations.²² Notably, this requires a revision of texts that date from the pre-independence period in most African countries.

The obligation to protect involves, *inter alia*, the obligation to take measures for separating vulnerable groups and pre-trial detainees from already convicted individuals. Vulnerable groups include juveniles, who should always be separated from adult offenders; women, who should always be separated from male detainees; and children with their detained mothers, who should also be treated with proper care. Besides women and children, the following groups can also be classified as vulnerable: elderly people, people with disabilities, terminally-ill people (including those with HIV/AIDS), torture victims, substance abusers and foreign nationals.²³

The obligation to implement consists of improving conditions in places of detention. In fact, the place and manner in which people eat, sleep and perform their bodily functions has significant consequences for their physical and mental well-being. In principle, this means that detainees should not be housed under conditions that are not as good as those prevailing in their communities; instead, conditions should be as close as possible to those outside the place of detention.²⁴ The obligation to implement requires authorities to give greater political attention to the treatment of detainees through, for example, increased budgets for the justice system and for penal institutions, which must be equipped with the necessary financial, human and material resources to function effectively.

2.5 *The establishment of new prohibitions*

By expressly establishing provisions to criminalise torture, the RIG drafters affirmed the desire to end the recurring impunity of perpetrators of acts of torture. These provisions are meant to equip Africa with a regional instrument which (i) outlaws torture practices, (ii) ensures more

²² Standard Minimum Rules for the Treatment of Prisoners, adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1955, approved by the Economic and Social Council, Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Available at <http://www2.ohchr.org/english/law/treatmentprisoners.htm>. Last accessed 10 January 2010.

²³ Diénabo Ouatarara Diallo and Emmanuel Dankwa. 'Vulnerable Prisoners, their Conditions of Detention', International Seminar on Prison Conditions in Africa, Kampala, Uganda, 19-21 September 1996, p.94.

²⁴ Amanda Dissel, 'Commentary on the Kampala Declaration', International Seminar on Prison Conditions in Africa, Kampala, Uganda, 19-21 September 1996, p.110.

effective prevention through, for example, outlawing secret detention, and (iii) imposes an obligation for African States to levy sanctions against the perpetrators of torture .

2.5.1 *The criminalisation of torture*

To better understand the impact of criminalisation, it is necessary to discuss the nature of the prohibition of torture, and other ill-treatment, under international law.

The RIG refers to Article 1 of the 1984 UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT) to define torture. Under that article, torture is defined as

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[.]

Such a long and detailed definition is indispensable for providing a legal basis for the responsibility of public officials who resort to torture and, thus, for the sanctions that may be levied against them.

The African Charter on Human and Peoples' Rights (the African Charter), in Article 5,²⁵ prohibits torture and cruel, inhuman or degrading treatment without defining them. The ACPHR has dealt with several cases related to torture allegations, but, when it has concluded there has been violation of Article 5, it has often not made the distinction between lack of respect for the dignity of the detainee and a violation of the prohibition of cruel, inhuman or degrading punishment and treatment. According to the jurisprudence of the ACPHR,

Article 5 [of the African Charter] prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions that cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience[.]²⁶

In *Huri-Laws v. Nigeria*, the ACPHR concluded that treatment denounced as torture, or cruel, inhuman or degrading punishment or treatment, must meet a minimum level of seriousness, but it has not expressly determined what is required to meet this minimum threshold within the scope of African Charter prohibitions. Similarly, for the ECHR, all acts of torture or other ill-treatment

²⁵ 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man [*sic*] particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

²⁶ International Pen, Constitutional Rights Project, *Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v. Nigeria*, Communications 137/94, 139 /94, 154/96 and 161/97, Twelfth Activity Report, African Human Rights Law Reports 212 (ACHPR 1998), para. 78.

must meet a ‘minimum of seriousness’:²⁷ the assessment of seriousness considers the duration of the act, its physical and mental effects on the victim, and the victim’s gender, age and general health. However, in the *Greek case*, the ECHR established that the essential element of torture does not necessarily depend on the nature and seriousness of the act committed, but on the purpose for which the act was perpetrated. It concluded that

all acts of torture are expected to include inhuman and degrading treatment, and all inhuman treatment is expected to be degrading. The purpose of torture is to obtain information or revelations or even inflict punishment, and it generally constitutes an aggravated form of inhuman treatment. Punishment or treatment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.²⁸

Equally, *Selmouni v. France* was an important case in the assessment of torture as it allowed the ECHR to emphasise that torture comprises any act via which severe physical or mental suffering is intentionally inflicted on a person for a specific purpose.²⁹ For the ECHR,

besides the seriousness of [the] treatment, the concept of torture supposes an intentional aspect recognised in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which specifies that the term ‘torture’ means the intentional infliction of severe pain or suffering for the specific purposes of obtaining information, punishing or intimidating[.]³⁰

Therefore, to assess torture, three aspects must be considered: intensity of suffering, intention and purpose.

2.5.2 *The criminalisation of cruel, inhuman or degrading treatment or punishment*

As noted above, neither the African Charter, nor the UNCAT, provides a definition of ‘other cruel, inhuman or degrading treatment or punishment’. Jurisprudence from the UN and regional human rights bodies have argued that inhuman punishment and treatment constitutes acts or intentional omissions that cause severe physical or mental suffering. Such acts constitute a category that does not meet the seriousness threshold of torture and/or is not inflicted purposefully but which, nevertheless, remains prohibited. The broad category of ‘other ill-treatment’ is designed to provide the widest possible protection for persons deprived of their liberty from harmful acts or omissions by the authorities.

Degrading punishment or treatment is generally considered to include acts or omissions that humiliate or debase people, demonstrate a lack of respect towards them, injure their dignity, or engender deep feelings of inferiority in them that could break their moral or physical resistance

²⁷ *Case of Ireland v. the United Kingdom*, Judgment of 18 January 1978, European Court of Human Rights, Series A No 25, para. 162.

²⁸ *The Greek Case*, Report of 5 November 1969, Yearbook of the European Convention on Human Rights Volume 12, p.186.

²⁹ *Selmouni v. France*, Judgment of 28 July 1999, European Court of Human Rights, 29 European Human Rights Reports 403, para. 100.

³⁰ *Ilhan v. Turkey*, Application Number 22277/93, Judgment of 27 June 2000, European Court of Human Rights, 34 European Human Rights Reports 36, para. 85

and cause them serious physical or mental suffering. In fact, for a punishment to be ‘degrading’, the humiliation or debasement accompanying it must be at a specific level’.³¹ Assessment of the debasement or humiliation is relative and depends on the circumstances of the case, specifically on the nature and context of the punishment and the methods by which it is carried out.³² This raises the issue of whether the finding of a violation requires that there be an intention to humiliate or debase. In ECHR jurisprudence, the intention to humiliate or debase is assessed, but the absence of such an intention does not definitively exclude a finding of violation.³³ Therefore, for example, despite the absence of proof of an intention to humiliate or debase victims, brutality or other physical violence inflicted on detainees is prohibited.³⁴ Furthermore, physical conditions of detention that inflict a level of humiliation or debasement greater than that which a prison sentence usually carries are likely to fall under the RIG prohibitions if they are degrading in themselves (e.g. dirty cells, enforced nakedness, lack of hygiene). For the ACHPR, being subjected to detention in the course of which a light bulb was constantly on, or the use of sanitary facilities was withheld, would constitute inhuman and degrading treatment without amounting to torture.³⁵

In summary, the RIG’s criminalisation of torture and prohibition of other ill-treatment represents considerable progress in the protection of people deprived of their liberty in Africa, not least because it incorporates a broad range of prohibited acts and omissions.

2.5.3 *Prohibition of secret and incommunicado detention*

Articles 23 and 24 of the RIG prohibit secret detention and incommunicado detention³⁶ and urge States to modify their legislation accordingly. At the core of these articles is the issue of rejecting impunity of perpetrators of torture and also the lawless situation that prevails in some places of detention, especially those that are secret: sometimes these are places that the authorities do not even know exist. Those places of detention are often, as M. Othmani emphasises, ‘death camps where the inhabitants, absconded from the world, silently disappear’.³⁷ Secrecy around detention is manifested by the refusal to reveal the existence or location of a place where people are detained: detainees may be housed in a variety of places to impede others from finding them. However, prohibiting secret detention and incommunicado detention is only effective in combating torture, and protecting people deprived of their liberty, if investigations to identify and punish those responsible are conducted. The effectiveness of such a prohibition depends on, among other things, the adoption of clear and peremptory norms under which the authorities must establish and make available a list of all places of detention. This list must be transmitted to all monitoring agencies, which must, have free access to all these places of detention.

³¹ *Greek case*. See fn.28.

³² *Greek case*, para. 30 and 31. See fn.28.

³³ *V. v. United Kingdom*, Application Number 24888/94, Judgment of 16 December 1999, European Court of Human Rights Reports 32, para. 71.

³⁴ Frédéric Sudre, *Commentaire de la Convention européenne des droits de l’homme*, (Paris : Presses Universitaires de France, 2004), p.168.

³⁵ *John D. Ouko v. Kenya*, Communication 232 / 99, Fourteenth Activity Report, African Human Rights Law Reports 135 (ACHPR 2000).

³⁶ For more, see APT, *Incommunicado, Unacknowledged and Secret Detention under International Law*, 2 March 2006. Available at http://www.apr.ch/index2.php?option=com_docman&task=doc_view&gid=280&Itemid=59. Last accessed 15 January 2010.

³⁷ Ahmed Othmani, *Sortir de la prison* (Paris : Edition La Découverte, 2002), p. 100.

2.6 *Enshrinement of the absolute prohibition of acts of torture*

Torture and other ill-treatment are crimes under international law. The prohibition of torture is absolute. The RIG call for no exclusions to the absolute prohibition of torture and other ill-treatment, and for appropriate sanctions for violations of this prohibition. Articles 9 to 12 of the RIG hold that no circumstances whatsoever (even a state of war, a threat of war, domestic political instability, or an emergency situation) can be invoked as justification for torture or other ill-treatment.³⁸ Furthermore, traditional excuses, such as a state of necessity (e.g. to maintain public order) and orders from superiors, do not constitute justification for the state or for individuals to commit acts of torture.³⁹

With regard to criminal sanctions, applicable punishments depend on the qualification of the relevant acts under domestic law. It is crucial that national legislation considers torture and cruel, inhuman or degrading treatment to be independent offences, in light of their specificity, and that this be expressly stipulated in the criminal code. The Madagascar law of June 2008 on torture,⁴⁰ which was greatly inspired by the RIG and was drafted with APT support, not only criminalises torture, but also prohibits detention in non-official or secret locations. Under Article 5, the ‘detention of a person in any place other than those prescribed by law or regulation is prohibited’. Article 13 details what it means for a place to be ‘prescribed by law or regulation’: ‘detention of an arrested or convicted person in a facility or location that is not officially registered as a place for deprivation of liberty or in a secret location will be punishable by imprisonment of two to five years’. This law establishes the practice of torture, other ill-treatment, and detention in non-official locations as autonomous offences for the first time under African law. The text of this law is a useful example for other African States as regards the implementation of the RIG.

2.7 *Victims’ right to reparation*

The declaration of the fundamental principles of justice relating to victims of the crime of abuse of power was adopted by the United Nations General Assembly on 29 November 1985. On 16 December 2005, the General Assembly of the United Nations adopted a fundamental text entitled Basic principles and guidelines concerning the right to an appeal and reparation of victims of flagrant violations of international human rights and serious violations of international humanitarian law. The RIG recognise victims rights by suggesting that African States should offer adequate reparation for violations of basic rights.

The RIG recognise two modes of reparation: individual and general. Individual modes of reparation include restitution and compensation. Restitution is designed to restore the victim to

³⁸ RIG, Article 9, see fn.1; International Covenant on Civil and Political Rights, Article 4, see fn.18; Geneva Conventions of 12 August 1949, Common Article 3; Geneva Convention IV Relative to the Protection of Civilian Persons in the Time of War, 12 August 1949; Protocol Additional I to the Geneva Conventions of 1949, 8 June 1977, Article 75; Protocol Additional II to the Geneva Conventions of 1949, 8 June 1977 Article 6.

³⁹ RIG, Articles 10 and 11. See fn.1.

⁴⁰ Loi No 2008/2008 du 25 juin 2008 contre la torture et autres peines ou traitements cruels, inhumains ou dégradants de Madagascar.

the situation prevailing prior to the commission of acts of torture or other ill-treatment.⁴¹ However, it is often impossible to return victims to their previous situation as, for example, the pain cannot be ‘erased’. Other forms of reparation may be necessary to compensate for the victim’s pain and suffering, that of their family⁴² and the (financial and emotional) cost of the victim’s rehabilitation. The RIG stipulate that appropriate medical care must be provided for victims: this should include access to both medical rehabilitation and the means necessary for their reintegration into society.⁴³ Victims have a right to aid and should receive the necessary material, medical, psychological and social support.

Compensation is the most frequent, and often the most suitable, form of reparation in the African context in which the application of a comprehensive programme of restitution is difficult to achieve in practice. The RIG stipulate that ‘adequate compensation and support’ must be made.⁴⁴ The payment of compensation may be seen as covering all damages suffered by the victim that can be evaluated financially.

In general, victims have a threefold set of rights relating to recognition, support and reparation. These rights are intended to guarantee, on one hand, the dignity of the person and his/her human rights, and, on the other, to consolidate the place of the victim as a member of society. However, these rights will only be guaranteed if the victim is placed at the centre of judicial, psychological, social and political systems; to be effective, these systems must address issues of satisfaction and guarantees that torture (or other ill-treatment) will not be repeated. Satisfaction comprises a wide range of non-financial measures that can contribute to the long term objectives of reparation.⁴⁵ Public recognition of acts of torture and other ill-treatment constitute a central element of this notion. Indeed, for the victim, it is particularly difficult not to be believed, and/or to know that the events that occurred have been concealed and kept secret. The official revelation of torture (or other ill-treatment) can prove to be very effective in helping victims to recover some sense of identity and dignity. This can take the form of recognition of the violation by a political or judicial body, an expression of regret, a formal apology, a declaratory judgement, or any other appropriate action. However, care must be taken to avoid such revelations causing further damage or endangering victims or their families. Guarantees of non-repetition are justified by the obligation of States to remove the circumstances that could bring about the same violations. The guarantee of non-repetition requires that emphasis is placed on institutional reform and/or reinforcement of human rights regulations, including monitoring of places of detention and training of law enforcement officials. To this end, the promotion of, and compliance with, codes of conduct and international minimum rules are of a great importance.

⁴¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly, Resolution 60/147, 16 December 2005, Principle 19.

⁴² REDRESS, *Implementation of Victims’ Rights: Fundamental Principles and Guidelines Concerning the Right to an Appeal and Reparation of Victims* (London: REDRESS, March 2006), p.28.

⁴³ RIG, Articles 50(a) and (b) the Basic Principles, Principle 19. See fn.1 and fn.41 respectively.

⁴⁴ RIG, Article 50(c) and Basic Principles, Principle 20. See fn.1 and fn.41 respectively.

⁴⁵ Basic Principles, Principle 22. See fn.41.

3. Institutional Aspects of the RIG

To guarantee implementation of the RIG, the African Commission set up the Follow-up Committee on the Implementation of the RIG to promote the application of the RIG. Their mission also involves the Special Rapporteur on Prisons and Conditions of Detention in Africa and, indirectly, other thematic mechanisms of the ACHPR.

3.1 *The Follow-up Committee on the Implementation of the RIG*

According to the ACHPR's Resolution on the adoption of the RIG, the Robben Island Guidelines Follow-up Committee comprises the ACHPR, the APT, and African experts appointed by the Commission. It is currently made up of six members with recognised expertise in human rights, including lawyers with experience in the administration of justice and other aspects of combating torture.⁴⁶

The Follow-up Committee's mandate is (i) to organise, with the support of interested partners, seminars to disseminate the RIG to national and regional stakeholders, (ii) to develop, and propose to the ACHPR, strategies to promote and implement the RIG at the national and regional levels, (iii) to promote and facilitate the implementation of the RIG within Member States, and (iv) to make a progress report to the ACHPR at each ordinary session.⁴⁷ The Follow-up Committee held its first working session in February 2005;⁴⁸ during this session, it adopted a set of internal rules of procedure and formulated a plan of action to promote and implement the RIG.⁴⁹

One of the Follow-up Committee's major achievements is the establishment of a practice, during the ACHPR sessions, of systematically asking States Parties questions about the measures they have put in place to implement the RIG. In particular, when States submit their periodic reports (as per Article 62 of the African Charter), they are asked to specify the extent to which they have applied the RIG. In its final observations, the ACHPR highlights particularly effective measures taken by States to implement the RIG, and also invites Member States to work to improve particular aspects of implementation.

Activities to promote the RIG have focused on, and flourish in, fora and seminars in particular. For example, since 2004, the Follow-up Committee has led the working group on the prevention of torture within the forum of NGOs participating in ACHPR sessions. This forum regularly

⁴⁶ Dupe Atoki, Member of the ACHPR (Chairperson); Jean-Baptiste Niyizurugero, Programme Officer for Africa of the APT (Vice-Chairperson); Leila Zerrougui, Magistrate (member) and former Chairperson of the United Nations Working Group on Arbitrary Detention; Karen Mckenzie, former Executive Director of the Independent Complaints Directorate of South Africa (member); Mme Hannah Forster, Director of the African Centre for Democracy and Human Rights Studies (member), and Malick Sow, former Coordinator of the Senegalese Committee of Human Rights and current Vice Chairperson of the United Nations Working Group on Arbitrary Detention (member).

⁴⁷ See the ACHPR's Resolution on the adoption of the Robben Island Guidelines. Available at <http://www.apr.ch/content/view/144/156/lang,fr/>.

⁴⁸ The minutes of the meeting can be consulted at <http://www.apr.ch/region/africa/rig/ReportBristol2005.pdf>. Last accessed 15 January 2010.

⁴⁹ See Report of the First Working Session of the Follow Up Committee on the Implementation of the Robben Island Guidelines. Available at <http://www.apr.ch/region/africa/rig/ReportBristol2005.pdf>. Last accessed 15 January 2010.

makes recommendations, and proposes solutions to problems with implementing torture prevention practices. In relation to seminars, the Follow-up Committee organised a seminar for West African Chiefs of Police and of Prisons in July 2008 (in Abuja, Nigeria); this seminar discussed the role of these institutions in the promotion and implementation of the RIG. Subsequently, training on the RIG and prevention of torture was organised by the Liberia Police, in September 2008, with the technical assistance of the Follow-up Committee.

In order to promote good practice in the implementation of the RIG, and the prevention of torture in general, some countries have been identified as useful models for other African States.

In relation to studies and publications, a second edition of the RIG, as well as a Practical Guide on their implementation,⁵⁰ was jointly published in 2008 by the APT, the African Commission, and the Office of the United Nations High Commissioner on Human Rights; this publication was part of the framework of the celebration of 60th anniversary of the Universal Declaration of Human Rights.

3.2 *Special Rapporteur on Prisons and Conditions of Detention in Africa*

The mandate of the Special Rapporteur on Prisons and Conditions of Detention in Africa (Special Rapporteur) was established by the ACHPR in October 1996 to contribute to improving conditions of people deprived of their liberty. The Special Rapporteur's mandate focuses on examining the situation of people deprived of their liberty in prisons and other places of detention, including police cells.⁵¹ The mandate monitors detention conditions through visits to all places of detention. It also examines aspects of the penal system, including legal procedures, relating to the deprivation of liberty. The issue of torture and other ill-treatment is broadly present in the Special Rapporteur's mandate, as far as such abuses may be inflicted upon convicted prisoners or pre-trial detainees. In the framework of his mission, the Special Rapporteur is called upon to question states on measures undertaken to prevent torture and other ill-treatment and to encourage them to implement the RIG.

3.3 *Other special mechanisms*

In addition to the Follow-up Committee and the Special Rapporteur, the ACHPR has created a number of other relevant mechanisms.⁵² Although the prevention of torture is not central to the mandate of these mechanisms, when performing their missions they are also called upon to promote and disseminate the RIG and to support the work of the Follow-up Committee. The mechanisms responsible for the promotion of the implementation of the RIG suffer from a chronic lack of human and financial resources, which explains the poor visibility of their actions on the African continent. Often key actors such as NGOs, national human rights institutions and government officials have no knowledge of, or information on, the RIG. This is particularly

⁵⁰ It can be consulted on the APT website: <http://www.apr.ch/content/view/144/156/lang,fr/>.

⁵¹ Concerning the mandate of the Special Rapporteur, see http://www.achpr.org/francais/_info/index_prisons_fr.html. See also Frans Viljoen, "The Special Rapporteur on Prisons and Conditions of detention in Africa: Achievements and Possibilities", (2005) *Human Rights Quarterly* 27, pp.125-171.

⁵² Special Rapporteurs on the freedom of expression, human rights' defenders, the rights of women and indigenous peoples, etc. Their mandates can be found on the APT's website: www.achpr.org.

evident when there is no national mechanism to promote RIG implementation. There is a need for a forward-looking evaluation to identify practices and strategies that could help improve the implementation of the RIG on the African continent.

4. Elements for Effective Implementation of the RIG

The adoption of the RIG is an important step forwards in working to prevent torture in Africa. However, their effectiveness depends, to a large extent, on their incorporation into national legal system, as well as on the establishment of effective mechanisms to implement them and on the creation of an environment favourable to their dissemination and implementation.

4.1 *Incorporation of the RIG in national legislation and the creation of preventive mechanisms*

The effectiveness of efforts to prevent torture in Africa depends on the existence of an adequate legal framework, incorporating the RIG and other relevant texts. This entails penal reform, the adaptation of penitentiary legislation, and the creation or reinforcement of control mechanisms.

4.1.1 *The need for penal and penitentiary reform*

Bringing penal codes, and penal procedure codes, into line with international law is necessary to facilitate the implementation of the RIG in Africa. To this end, it is important to review these codes and, if necessary, to amend or produce new ones. In particular, as discussed above, these codes should establish the rules relating to pre-trial detention, basic safeguards, and procedures for authorising access to the various places of detention. Penal reform should be supplemented by reform of penitentiary systems.

Full implementation of the RIG would also entail a reform of the texts governing penitentiary systems in Africa. Penitentiary regulations should be revised and a means of monitoring penitentiary institutions set up. Relevant texts must also be altered to afford national mechanisms and international monitoring bodies access to all places of detention, rather than allowing individual institutions to permit or deny access. Such wide-ranging reforms require the collaboration of the political, civil and legal bodies to oversee the application of these regulations.⁵³

4.1.2 *Creation or reinforcement of national preventive mechanisms*

The implementation of the RIG also requires the establishment, at the national level, of mechanisms to provide internal and external control and monitoring of the application of the regulations governing places of detention. As regards internal monitoring, law enforcement institutions' personnel require better training and greater professionalism. Resolving this problem would entail basic and ongoing training on the RIG and other relevant instruments. In

⁵³ Mukwande Ngando (Dorcas), 'General Report', *Conférence panafricaine sur la réforme pénale et pénitentiaire en Afrique (Pan African Conference on Penal and Penitentiary Reform in Africa)*, September 2003, p.34

addition, closer follow-up, hierarchical control of police practices, and effective disciplinary sanctions should also be provided for and applied effectively. As regards external control, in the case of African States in particular, an effective system would involve ratification of the United Nations Optional Protocol to the UNCAT (OPCAT) and, consequently, putting in place one or more national torture prevention mechanisms.⁵⁴ Even outside the framework of the OPCAT, in each country, independent governmental and non-governmental entities should be able to access places of detention to prevent torture.⁵⁵

On a regional scale, it would be worth reviewing the mandate of the Follow-up Committee with regard to whether preventive visits to places of detention should be included. This would also provide an opportunity for considering the pros and cons of changing the Committee's name to Committee on Prevention of Torture in Africa⁵⁶ to improve the visibility of this mechanism and, consequently, to promote the implementation of the RIG more effectively.

4.1.3 The need for an environment favourable to the RIG

Full implementation of the RIG also depends on the creation of an environment that is conducive to dissemination and application of the Guidelines. Creating such an environment requires that appropriate policies be put in place; it is also dependent on civil organisations taking a major role in implementing the RIG. However, implementation of the RIG is mainly incumbent upon States. States should adopt a policy that aims to change the mentality both of the population and those responsible for applying the law. The essential element of this approach remains the promotion of a human rights culture. Indeed, incorporation of the RIG into the legal system is not sufficient to ensure protection of people deprived of their liberty. A good starting point for assuring these rights is increased awareness and understanding of them. It is important that African people know enough about these provisions to be in a position to demand and defend them. Ideally, efforts to raise awareness will lead to the introduction of school programmes at primary, secondary and higher education levels on human rights, including the RIG 'because the most serious limiting factor of the implementation of the rules, as in the case of all regulations concerning human rights, is their dissemination'.⁵⁷

4.1.4 Involvement of civil society organisations

Besides the governmental measures and initiatives described above, NGOs also have an important role to play in the implementation of the RIG. Two types of action could be considered by NGOs: lobbying and promoting the RIG. The emphasis should be on active and permanent lobbying of the competent authorities for incorporation of the RIG, and other relevant

⁵⁴ OPCAT, adopted by the UN General Assembly, UN Doc. A/RES/57/199, 18 December 2002, entered into force 22 June 2006, Article 18.

⁵⁵ For States Parties to the UNCAT, visits to places of detention by external organisations are a key aspect of the obligation to adopt preventive measures under Article 2(2): see also General Comment Number 2, Committee Against Torture, UN Doc. CAT/C/CG/2/CRP.1/Rev.4, 27 November 2007, para. 13.

⁵⁶ After the drafting of this article, the authors learnt that on the initiative of the APT, the ACHPR, during its 46th ordinary session (held in Banjul, Gambia, from 11 to 25 November 2009), adopted the Resolution on the change of name. For further information, including on current members, see <http://www.apt.ch/content/view/309/1/lang,fr/>.

⁵⁷ Rachel Murray, International Rules Relating to Prisons in Africa: Implementation and Measures to Ensure They Are Applied, *Bulletin d'information Afrique*, 12 March 2000.

instruments, into legal systems and practice. Popularisation of the RIG by NGOs would enable civil society to establish effective awareness-raising and educational policies oriented around the RIG. Monitoring and preventive work should be added to this promotional work. Visits by NGOs to places of detention contribute to the implementation of the RIG, as they make it possible to combat torture and other ill-treatment, and can lead to an improvement in conditions of detention if they are followed by reports containing appropriate recommendations. In addition, NGOs can make alternative reports to treaty bodies and other relevant mechanisms, including the ACHPR.

5. Conclusion

The RIG constitute an important step forwards in working to prevent torture and other cruel, inhuman or degrading treatment in Africa. This instrument, although only a series of guidelines, and therefore lacking, *a priori*, mandatory force, not only has the merit of being the work of ‘Africans themselves’ but, above all, is the manifestation of a process of changing mentality on the African continent and the start of an acceptance of the need for a proactive system to protect people deprived of their liberty.

The responsibility for crimes relating to torture (and other ill-treatment) in Africa is so dispersed that it is not only utopian but actually undesirable that it should be dealt with solely within the quasi-judicial framework of the ACHPR. There are grounds for hoping that the impetus for prevention, set in motion by the adoption of the RIG, will be continued through the effective implementation of the RIG at the national level by all stakeholders’, including states and civil society. Hopefully, the RIG will motivate African stakeholders to ensure that the promises contained in the Universal Declaration of the Human Rights, and other basic human rights texts, come to fruition to the benefit of all people in Africa.