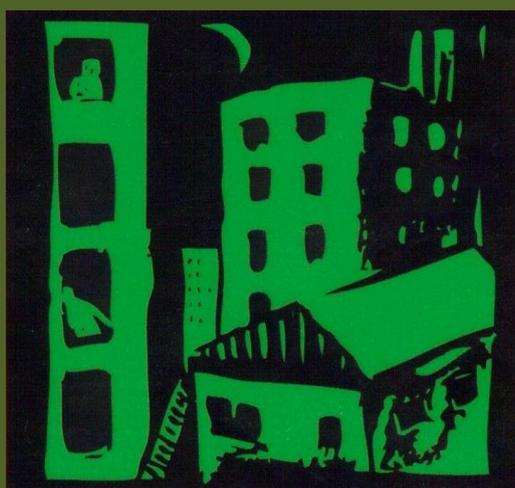


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Guidelines and principles on imprisonment and the prevention of torture under the African Charter on Human and Peoples' Rights – how relevant are they for South Africa?

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1 INTRODUCTION

It must be regarded as a peculiarity that the African Charter on Human and Peoples' Rights (the Charter) makes no specific mention of prisoners' rights and that these rights have to be inferred from an overall reading of the Charter, and in particular Articles 4-6.¹ The

¹ Art 4 which provides for the right to life; Art 5 which prohibits, *inter alia*, torture, cruel, inhuman or degrading punishment and treatment; and art 6 which provides for the right to liberty.

reasons for this lie in the history of the drafting of the Charter and the political context at the time² and will not be the focus of the discussion here. Other regional instruments are more specific, for example, the American Convention on Human Rights, state “[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”.³ With regard to the Charter it must therefore be concluded that prisoners’ rights are weakly defined and much room is left for interpretation.

There also does not exist in respect of Africa an instrument, such as the UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR) or the European Prison Rules⁴ that would operationalise normative law in a manner that is appropriate to the African context. An attempt in this regard was made in 2002 when the Conference of Eastern, Southern and Central African Heads of Correctional Services (CESCA) drafted an African Charter on Prisoners’ Rights. However, this draft appears not to have assumed any further status subsequently⁵ although it was planned that it would be adopted by the African Commission on Human and Peoples’ Rights (the Commission).⁶

This article will assess the relationship between the Commission and the South African prison reform debate with reference to:

- A general overview of South African prisoners’ rights litigation;
- The prevention and eradication of torture and other ill-treatment in South Africa and the Robben Island Guidelines;
- The right to liberty and the recently announced guidelines from the Commission on police and pre-trial detention; and
- State reporting to the Commission.

The article concludes with a number of observations regarding the relationship between the Commission and prison reform in South Africa.

2 OVERVIEW OF PRISONERS’ RIGHTS, LEGISLATION AND LITIGATION

It should at the outset be noted that, as far as could be established, South African courts have not drawn in a significant manner on decisions from the Commission or on the Charter in cases concerning prisoners’ rights. Where the courts have drawn on international instruments concerning prisoners’ rights, these have been fairly limited.

² Nmehielle VO *The African human rights system- its laws, practices, and institutions* (2001). See also Igweta R *The African Commission on Human and Peoples’ Rights and the promotion and protection of prisoners’ rights: An analysis* (2008) unpublished LLM thesis, University of the Western Cape.

³ Art 5(2) American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* 18 July 1978, *reprinted in Basic documents pertaining to human rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992) at 25.

⁴ Council of Europe - Committee of Ministers, Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules.

⁵ Dissel A “Rehabilitation and reintegration in African prisons’ in Sarkin J (ed) *Human Rights in African Prisons* (2008) at 160.

⁶ Art 6 of The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, http://www.achpr.org/english/declarations/declaration_ouagadougou_en.html (accessed 19 November 2009).

Examples in this regard are evidence obtained under torture,⁷ the right to life,⁸ and sentencing of children.⁹

In some regards the South African jurisprudence on prisoners' rights is well developed, dating back to a 1911 decision of the then Appellate Division (later Supreme Court of Appeal SCA) which established the *residuum* principle.¹⁰ The *residuum* principle has subsequently been confirmed in other decisions¹¹ and is thus well entrenched in South African prisoners' rights jurisprudence. The principle holds that imprisonment per se is not a justification for the further limitation of rights, save for those rights that must of necessity be curtailed in order to implement the sentence (or order) of the court.¹² The retention of this rights status is important to protect, as public opinion often bays for an erosion of this basic position. It has been demonstrated in respect of prisoners' right to vote, a right which forms an important, albeit symbolic, bulwark against the erosion of other rights held by prisoners.¹³ It has also been shown in post-1994 decisions, such as those dealing with the right to vote, that attempts by the executive to dilute the *residuum* principle have not been entertained by the Constitutional Court and other Superior Courts.

It is necessary to briefly note a number of key areas of litigation on prisoners' rights, as this will show where substantive areas of jurisprudence have developed, as well as where the gaps are. Political events after 1990 enabled the courts to have a more liberal view of prisoners' rights and this was later formalised in the interim Constitution (1993) and the final Constitution (1996). Solitary confinement was dealt with extensively in *Minister of Justice v Hofmeyr*¹⁴ which also dealt with a number of ancillary matters relating to the treatment of prisoners. The right to vote for prisoners was dealt with in two decisions, *August and Another v The Electoral Commission and Others*¹⁵ and *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Other*¹⁶ in both cases the Constitutional Court found in favour of prisoners' right to vote. Against the background of the Aids pandemic, *EN and Others v Government of the RSA*¹⁷ secured prisoners' right to access ARVs. Problems around parole and sentence administration resulted in a wave of court cases by prisoners

⁷ *Mthembu v S* [2008] ZASCA 51, citing the UNCAT and the CAT.

⁸ *S v Makwanyane and Another* 1995 (6) BCLR 665 citing the African Charter, the ECHR and the IACHR.

⁹ *S v B* 2006 (1) SACR 311 (SCA), citing the African Charter on the Rights and Welfare of the Child.

¹⁰ *Whittaker and Morant v. Roos and Bateman* 1912 AD 92.

¹¹ *Goldberg and Others v Minister of Prisons and Another* 1979(1) SA 14 (A), *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A), *Cassiem and Another v Commanding Officer, Victor Verster Prison, and Others* 1982(2) SA 547(C), *S v Makwanyane and Another* 1995 (6) BCLR 665.

¹² *Muntingh Prisons in the South African constitutional democracy* (2007) at 10.

¹³ *Muntingh L & Sloth-Nielsen J* "The ballot as a bulwark: Prisoners' right to vote in South Africa" in Ewald AC & Rottinghaus B (eds) *Criminal disenfranchisement in an international perspective* (2009) at 221-243.

¹⁴ 1993(3) SA 131 (A).

¹⁵ 1999(3) SA 1.

¹⁶ 2005(3) SA 280 (CC).

¹⁷ (2007) ((1) BCLR 84 (SAHC Durban 2006).

seeking clarification and certainty on the proportion of their sentences that must be served behind bars.¹⁸

The interim and final constitutions granted detailed rights to all arrested and detained prisoners, including sentenced prisoners.¹⁹ The Constitution furthermore protects, as a non-derogable right, the right to be free from torture and not to be treated or punished in a cruel, inhuman or degrading way.²⁰ The constitutional provisions were given operational force through the Correctional Services Act²¹ which sets out clear standards for conditions of detention and the treatment of prisoners.

It can therefore be concluded that the Constitution sets out detailed rights, the Correctional Services Act operationalises these through clear and user friendly legislation, and that case law is well developed in a number of areas. However, at the operational level there are numerous problems that have plagued the prison system for decades, predating political changes commencing in 1990. It is not necessary to describe the problem areas here in detail as it has been done elsewhere, but the following are noted. Allegations of assault by officials are recorded by the thousands every year, sexual violence is prevalent, corruption is widespread, and violence amongst prisoners remains common.²² Despite the rights contained in the Constitution and the clear standards set out in the Correctional Services Act, rights violations are regrettably common.

3 TWO KEY AREAS OF CONCERN

When assessing the state of prisoners' rights in South Africa, two issues are of particular importance. First, the prevention and eradication of torture remains problematic as indicated by the high number of assaults recorded each year. After nearly a decade of advocacy by a number of civil society organisations and pressure from the UN Committee against Torture (CAT), the Prevention and Combating of Torture of Persons Bill was tabled in Parliament in April 2012 and came into operation in July 2013 as Act

¹⁸ *S v Matolo en 'n Ander* 1998 (1) SACR 206 (O); *Mazibuko v Minister of Correctional Services and Others* 2007 (2) SACR 303 (T); *S v Madizela* 1992 (1) SACR 124 (N); *Van Gund v Minister of Correctional Services and Others* 2011 (1) SACR 16 (GNP); *Groenewald v Minister of Correctional Services and Others* 2011 (1) SACR 231 (GNP); *Motsemme v Minister of Correctional Services and Others* 2006 (2) SACR 277 (W); *Mans v Minister van Korrektiewe Dienste en Andere* 2009 (1) SACR 321 (W); *Lombaard v Minister of Correctional Services and Others and Two Similar Cases* 2009 (1) SACR 157 (T); *Combrink and Another v Minister of Correctional Services and Another* 2001 (3) SA 338 (D) 2001 (3); *S v Nkosi and Others* 2003 (1) SACR 91(SCA); *Saunders v Minister of Correctional Services and Others* (unreported) TPD case no. 14015/2000; *Mohammed v Minister of Correctional Services and Others* 2003 (6) SA 169 (SE); *Ngenya and Others v Minister of Correctional Services and Others* (unreported) WLD Case no. 29540\2003. *S v Segole*(1999) JOL 5349 (W); *Winckler and Others v Minister of Correctional Services* 2001 (1) SACR 532 (C); *S v Botha* 2006(2) SACR 110 (SCA); *S v Williams*; *S v Papier*2006 (2) SACR 101(C); *S v Pakane and Others* 2008(1) SACR 518 (SCA); *Lombaard v Minister of Correctional Services and Others and Two Similar Cases* 2009(1) SACR 157(T); *Stanfield v Minister of Correctional Services and Others* 2004 (4) SA 43 (C); *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA); *S v Sidyno* 2001 (2) SACR 613 (T).

¹⁹ S 35.

²⁰ S 12(1)(d-e).

²¹ Act 111 of 1998.

²² See Judicial Inspectorate of Correctional Services (JICS) annual reports.

13 of 2013. There are a number of weaknesses in the Act and these will be returned to later. Secondly, the right to liberty of accused persons is poorly protected in the current legislative framework²³ resulting in a large number of pre-trial detainees in prisons who stay there for a considerable period of time before their cases are adjudicated. Of the nearly 50,000 pre-trial detainees in custody as at end of February 2011, 48% had already been in custody for longer than three months. Moreover, nearly half of them will be released without their cases proceeding to trial.²⁴

The article discusses below these two areas of concern, reflecting on one existing soft law instrument (the Robben Island Guidelines), a planned set of guidelines for pre-trial detention and state reporting as another mechanism to strengthen interaction between domestic prison reform and the Commission.

4 THE ROBBEN ISLAND GUIDELINES

4.1 Overview²⁵

It is common cause that the Robben Island Guidelines (RIG)²⁶ is a non-binding or soft law instrument with the overarching aim of promoting compliance by African states with the United Nations Convention against Torture, UNCAT, a binding instrument. The relationship between the RIG and UNCAT is established at the outset in the Preamble to the RIG, which recalls the aim common to both instruments to prohibit and prevent torture and other ill-treatment. Subsequent provisions of the RIG expressly call upon states to ratify the UNCAT, to make declarations accepting the jurisdiction of the Committee against Torture (CAT), and to co-operate with the CAT and other relevant UN bodies.²⁷ Several substantive provisions of the RIG also have as their reference point specific Articles of the UNCAT.²⁸ In respect of several focal areas of the RIG, specific guidance is provided to give a clearer description of what compliance with the UNCAT would look like. In many regards, several guidelines in the RIG were developed out of experience, court decisions and research on torture and its prevention, as framed by the UNCAT and interpreted by the CAT.

The relationship between the RIG and the Optional Protocol to the Convention against Torture (OPCAT) is also historic; the RIG were developed initially to build support in the region for the concept of the prevention of torture advocated by the OPCAT. The prevention of torture and other ill-treatment is therefore central to the

²³ Criminal Procedure Act 51 of 1977. See also Ballard C "A statute of liberty? The right to bail and a case for legislative reform" (2012) 25(1) *SA Journal of Criminal Justice* 24.

²⁴ Karth V *Between a rock and a hard place: Bail decisions in three South African courts* (2008).

²⁵ This section is based on Muntingh L & Long D "The Committee for the Prevention of Torture in Africa (CPTA) as regional catalyst in the prevention of torture" Paper prepared for the 10 year anniversary of the Robben Island Guidelines, 21- 23 August 2012, Johannesburg, South Africa (2012).

²⁶ Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment In Africa, The African Commission on Human and Peoples' Rights, meeting at its 32nd ordinary session, held in Banjul, The Gambia, from 17 to 23 October 2002

²⁷ See RIG 1 (b) and 3.

²⁸ See RIG 4 and 6.

objectives of both the RIG and the OPCAT. Accordingly, there are a number of different opportunities where the RIG and OPCAT can intersect. In particular, the RIG calls on states to support the OPCAT and makes a number of specific references to the need for states to establish effective mechanisms of oversight. Consequently, the Committee for the Prevention of Torture in Africa (CPTA) has the potential to play a pivotal role in strengthening linkages with OPCAT activities and domestic oversight institutions within the region.

Unlike the UNCAT and the OPCAT, the RIG does not have a treaty monitoring body in the sense that the CAT monitors States parties' compliance with the UNCAT, and the Subcommittee on the Prevention of Torture, SPT oversees the implementation of the OPCAT. However, the CPTA (and its predecessor, the Follow-up Committee on the RIG) has a special relationship with the RIG as stipulated in its mandate, namely:

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

From this perspective the CPTA is in a rather unique position in the sense that it is a monitoring body overseeing a soft law instrument. It therefore has some features of a treaty monitoring body but does not monitor a treaty. This situation opens up a range of possible routes of engagement that the CPTA could have with African states on the prevention and eradication of torture. In addition, as the foremost body in the region working to combat torture and other ill-treatment, the CPTA has the potential to be the primary regional contact for the CAT and the SPT.

4.2 Prevention and Combating of Torture of Persons Bill

As noted above, Prevention and Combating of Torture of Persons Act came into force in 2013. The Bill tabled in Parliament already had a number of shortcomings, as was highlighted by a number of submissions from civil society organisations as well as the South African Human Rights Commission (SAHRC).²⁹ The Act ultimately incorporated few of the proposed changes emanating from the public hearings of 4 September 2012. It must also be acknowledged that the RIG received scant attention in the submissions made on the Bill and only two submissions (from the Civil Society Prison Reform Initiative (CSPRI) and the SAHRC referred to the RIG. In a general sense it can be

²⁹ The following organisations made submission on 4 September 2012: Centre for Constitutional Rights; Centre for Applied Legal Studies; National Youth Development Agency; Civil Society Prison Reform Initiative; Amnesty International; South African No Torture Consortium; Joint submission by Woman's Legal Centre, Sex Workers Education & Advocacy Taskforce, Sisonke, and South African Human Rights Commission. Available at <http://www.pmg.org.za/report/20120904-prevention-and-combating-torture-persons-bill-b21-2012-public-hearing> (restricted access) (accessed 23 December 2013).

concluded that the RIG has remained relatively obscure in the prison reform and torture prevention discourses. This is not a uniquely South African situation and appears to be the case across the continent, as was found in a recent study by the Human Rights Implementation Centre (University of Bristol).³⁰

What the legislature was evidently resistant to embark on was crafting legislation that is as comprehensive as possible in giving effect to the UNCAT and the RIG. A comprehensive approach was indeed what civil society organisations were arguing for: to see a piece of legislation that would deal, as far as it is possible through legislation, with the range of obligations imposed by the UNCAT on South Africa. The approach of the legislature was to meet the minimum requirements, and the Act deals with the definition and criminalisation of torture, sentences to be imposed on perpetrators, establishing extra-territorial jurisdiction, *non-refoulement*, and the state's general responsibility to promote awareness of the prohibition of torture. Assessed against the UNCAT and the RIG, there are consequently notable obligations that could have been addressed in the Act but are not. For example, the investigation of cases where there is reason to believe that torture had taken place,³¹ periodic reporting to the CAT, the review of policies and procedures on a regular basis, and redress to victims of torture, are not dealt with.

Ultimately it appears that South Africa has missed a golden opportunity to incorporate at least more of the objectives of the UNCAT and demonstrate that it is indeed serious about addressing torture. The Prevention and Combating of Torture of Persons Act was an opportunity for the RIG to inform the course of legislative drafting, but this opportunity was lost. As a starting point, it may indeed be useful if the Act recognised the RIG, even if it is a soft law instrument. This would have created the potential that courts, when interpreting the legislation, would take heed of the RIG, and it would reflect a general sense of purpose at the regional level in harmony with the Constitution. If South African courts are to rely on the RIG (and decisions from the Commission) to inform them, much more will need to be done by civil society and the CPTA itself to promote the RIG.

5 THE RIGHT TO LIBERTY

The Commission recently turned its attention to police and pre-trial detention, mandating the Special Rapporteur on Prisons and Conditions of Detention (Special Rapporteur) to develop guidelines in this regard that would support the rights to life, dignity, security, and a fair trial, as well as the independence of the judiciary.³² The

³⁰ Human Rights Implementation Centre, University of Bristol, Policy paper on the possible future role and activities of the Committee for the Prevention of Torture in Africa (CPTA) (2012).

³¹ With the exception of allegations against the police (which are investigated by Independent Police Investigative Directorate), all other cases are the responsibility of the police. The current regime for such investigations is highly unsatisfactory and is in desperate need of an overhaul.

³² Res. 228: Resolution on the need to develop guidelines on conditions of police custody and pre-trial detention in Africa, The African Commission on Human and Peoples' Rights (the Commission) meeting at its 52nd Ordinary Session, held from 9 to 22 October 2012 in Yamoussoukro, Cote d'Ivoire.

Commission's resolution further notes the authority of the Commission to develop such guidelines under Article 41(1)(b) of the Charter.³³ It describes the problems with pre-trial detention with frankness, referring to the current state of affairs as an "abusive recourse to pre-trial detention" and:

Recognising that arbitrary arrest, detention and conditions of police custody in many African countries are characterised by lack of accountability; poorly paid and under-resourced police; malfunctioning of the administration of justice, including the lack of independence of the judicial service system; the excessive and disproportionate use of force by the police; the lack of registration and monitoring systems for keeping track of police detention; systemic corruption and the lack of resources resulting in the absence of the rule of law.

While lengthy pre-trial detention is a long acknowledged problem in South Africa that has contributed significantly to prison overcrowding, the laws governing it have become perhaps more restrictive in recent years with regard to bail. While suspects must appear in court within 48 hours, there is no effective restriction on how long they can remain in prison awaiting trial thereafter. The accused may apply for bail at any time, but a new application will only receive serious consideration if new evidence is introduced.³⁴ The Criminal Procedure Act makes provision that a magistrate may hold an inquiry into undue delays in a matter, but this is not mandatory, after the accused has been in custody for a certain length of time.³⁵ The Correctional Matters Amendment Act³⁶ requires that a pre-trial detainee must be referred to a court by the Head of Prisons after he has been in custody for two years and then every six months thereafter. This provision,³⁷ even if it is not yet in operation, has two fundamental weaknesses. The first is that it is a mechanism created in the Correctional Services Act and not the Criminal Procedure Act; bail and custody are regulated by the latter and not the former. Secondly, when such a remand detainee is referred to a court, the legislation does not tell the court what to do with the case; the court may indeed postpone the matter for another few months.³⁸

Merely setting a time limit on how long a detainee can remain in custody may have the not so unanticipated result that detainees will be remanded in custody until this period has lapsed, after which they will be released, especially where they have committed less serious offences. In effect the process is the punishment. A better solution would be to create a process in law that establishes a mandatory review mechanism.³⁹

A system of mandatory review is a check on unnecessary delays and reduces, to some extent, the burden on the accused of finding "new facts" with which to present a

³³ Art 45(1)(b) of the Charter "to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation".

³⁴ Ballard C, Research report on remand detention in South Africa: an overview of the current law and proposals for reform (2012).

³⁵ S 342.

³⁶ 5 of 2011.

³⁷ S 49G.

³⁸ Civil Society Prison Reform Initiative Submission

³⁹ Muntingh L & Ballard C Comments on the Correctional Matters Amendment Act (2011).

fresh bail application. The intricacies and reasons for delays in the prosecution of cases is not the kind of knowledge that a detained accused can ascertain easily. Moreover, it is unlikely that an accused would be familiar with liberty jurisprudence to the extent that he or she will be able to argue in favour of the state demonstrating reasons, beyond those given at the initial bail hearing, justifying his or her continued detention. If, however, such facts *must* be brought before a court at specified intervals, the chance of the accused being detained further simply because he or she cannot get hold of information, will be reduced significantly. This, it is argued, accords better with section 35(1)(f) of the Constitution and the objectives “traditionally ascribed to the institution of bail, namely, to maximise personal liberty.”⁴⁰ It is also in accordance with the Constitution’s founding values of accountability, responsiveness and openness. As the European Court on Human Rights (ECHR) has made clear, a prosecuting authority cannot simply rely on formulaic reasons to justify the continued detention of a suspect – for example, postponing a case for “further investigation” without explaining what steps will be taken as part of the investigation.⁴¹ The actions of the state must be transparent and additional reasons must be supplied to the court should the state seek to argue in favour of continued detention.

The RIG proposed by the Commission should therefore encourage states to develop mandatory review mechanism to ensure that cases are not routinely postponed without proper evaluation as to the reasons for the postponement.

6 STATE REPORTING⁴²

Article 62 of the Charter requires that State parties submit to the Commission every two years “a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.” In order to guide and structure these reports, the Commission in 1989 adopted the “Guidelines for National Periodic Reports under the African Charter” (1989 Guidelines).⁴³ The 1989 Guidelines were, however, regarded as “too lengthy and complicated making compliance a matter of impossibility”.⁴⁴ The 1989 Guidelines also do not provide any specific guidance to states on how to report on the situation of prisoners, save for general guidelines in respect of reporting on the realisation of civil and political rights.⁴⁵ With this criticism levelled at it, it is therefore not surprising that the Commission adopted, less than ten years later, the 1998 “Guidelines for National Periodic Reports under the African Charter” (1998 Guidelines).⁴⁶ The 1998 Guidelines have effectively

⁴⁰ *S v Dlamini* 1999 (4) SA 623; 1999 (7) BCLR 771.

⁴¹ Ballard “*Research report*” (2012).

⁴² This section is based on Muntingh L “Improved monitoring and reporting to promote and protect the rights of prisoners under the African human rights system” *CSPRI Newsletter* No. 38 December 2009.

⁴³ Fifth Session held in Benghazi, Libya, 3-14 April 1989.

⁴⁴ Viljoen F *International human rights law in Africa* (2007) at 372.

⁴⁵ See “General guidelines regarding the form and contents of reports from states on civil and political rights” in Guidelines for National Periodic Reports under the African Charter. Reprinted in Heyns C (ed) *Human rights law in Africa* ((2004) Vol 1 at 508 – 509.

⁴⁶ 23rd Session held in Banjul, the Gambia, 20-29 April 1998.

rendered the old Guidelines redundant.⁴⁷ If the old Guidelines were criticised for being too lengthy and detailed, the opposite can be said of the 1998 Guidelines. The 1998 Guidelines have even been called “vacuous”.⁴⁸ The new Guidelines barely fill a page and are of such a broad and general nature that the original intention of a universal format⁴⁹ that would enable consistency and facilitate monitoring over time would be all but impossible. The 1998 Guidelines do not specifically mention prisoners or any other persons deprived of their liberty and merely require that states report on how the State party is implementing civil and political rights.⁵⁰ The 1998 Guidelines also require states to report on specific groups (women, children and the disabled) but again do not list prisoners or other persons deprived of their liberty as a vulnerable group.⁵¹

The overall impression is thus that even if it is accepted that the Charter is not precise in articulating prisoners’ rights, the 1989 and 1998 Guidelines have also not assisted in providing states with clearer guidance on how to report on the realisation of prisoners’ rights and conditions of detention in a particular country. The fundamental purpose of Initial and Periodic Reports submitted under Article 62 is to provide the Commission with an accurate description of the measures taken by states to implement the rights protected under the Charter, which would also include the challenges that the State party may encounter. It is this description, submitted through the Periodic Reports, which should guide the dialogue between the Commission and the State party. However, if the Periodic Report is of such a general and vague nature, it is less than likely that the Commission will be able to engage in meaningful and constructive dialogue with the State party.

If the aim of state reporting is to facilitate substantive dialogue between State parties and the Commission on the realisation of rights, and prisoners’ rights and conditions of detention in particular, the Periodic Reports should enable this. For this to happen it will be necessary for the Commission to provide states with clear and precise guidelines on what should be reported on.

In this regard the Commission should be guided by its resolutions and declarations, with specific reference to the Resolution on Prisons in Africa (1995)⁵²; the RIG (2002)⁵³ and the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal

⁴⁷ Heyns (2004) at 507. A third set of guidelines known as the “Dankwa document” also exists, but it has never been adopted by the Commission and are thus not dealt with here. See Viljoen (2007) at 372.

⁴⁸ Evans M *et al* “The reporting mechanism of the African Charter on Human and Peoples’ Rights” in Evans M & Murray M (eds) *The African Charter on Human and Peoples’ Rights: The system in practice 1986 – 2000* (2002) at 45.

⁴⁹ The 1989 Guidelines described it as follows: “The purpose of these guidelines is to ensure that the reports are made in a uniform manner, reduce the need for the Commission requesting additional information and for it to obtain a clearer picture of the situation in each state regarding the implementation of the rights, fundamental freedoms and duties of the Charter.” See para I(2).

⁵⁰ *Guidelines for National Periodic Reports under the African Charter* (1998) Guideline 4(a).

⁵¹ *Guidelines for National Periodic Reports under the African Charter* (1998) Guideline 5.

⁵² Adopted at the 17th Ordinary Session of the African Commission on Human and Peoples’ Rights, Lomé, Togo, ACHPR/Res.19 (XVII) 95.

⁵³ Adopted at the 32nd Ordinary Session of the African Commission on Human and Peoples’ Rights, Banjul, The Gambia, ACHPR/Res.61 (XXXII) 02.

Reforms in Africa (2003) (Ouagadougou Declaration).⁵⁴ The 1995 Resolution is clear on what the Commission regarded as the key areas for prison reform:

Concerned that the conditions of prisons and prisoners in many African countries are afflicted by severe inadequacies including high congestion, poor physical health and sanitary conditions; inadequate recreational, vocational and rehabilitation programmes, restricted contact with the outside world, large percentages of persons awaiting trial, among others.

The RIG focus on measures aimed at the prohibition and prevention of torture and other ill treatment and thus forms a critical component of protecting prisoners' rights, and Guidelines 33 to 44 focus specifically on improving conditions of detention. In an important development, the Ouagadougou Declaration not only identified the key problem areas, but also included a plan of action under the following headings:

- reducing the prison population;
- making African prisons more self-sufficient;
- promoting the reintegration of offenders into society;
- applying the rule of law in prison administration;
- encouraging best practice;
- promoting an African Charter on Prisoners' Rights; and
- looking towards the United Nations Charter on the Basic Rights of Prisoners.

While the Ouagadougou Declaration is not as comprehensive as some may want, it will nonetheless provide a legitimate and sensible structure for state reporting in respect of prisons and prison reform. Moreover, of the seven items listed above, it is in fact only the first five that would directly fall within the mandate of State parties, as the promotion of an African Charter on Prisoners' Rights and the UN driven Charter on the Basic Rights of Prisoners would more appropriately reside with the Commission. The Ouagadougou Declaration can furthermore be complimented by the RIG (33 – 44).

A particular challenge with regard to state reporting is the frequency thereof. There are few states compliant with the two-year reporting requirement.⁵⁵ If, however, all 53 State parties were to submit all their reports on time, the Commission would have to deal with at least 13 periodic reports at every session. Based on recent history, this is clearly not possible. In the last four sessions of the Commission, it dealt with between one (44th Session) and three (42nd, 43rd and 45th Sessions) Periodic Reports. The two-year reporting requirement is clearly not achievable by State parties and even if it was, the Commission would not have the capacity to deal with such a volume of reports. A four-year reporting cycle or even a five-year reporting cycle, similar to that which the UN treaty monitoring bodies use,⁵⁶ would be more achievable and more closely match

⁵⁴ Adopted at the 34th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, ACHPR/Res.64 (XXXIV) 03.

⁵⁵ See "Status On Submission of State Initial/Periodic Reports to the African Commission." Available at http://www.achpr.org/english/_info/statereport_considered_en.html (accessed 24 November 2009).

⁵⁶ Article 19 of the Convention against Torture requires a periodic report every four years and Article 44 of the Convention on the Rights of the Child requires a report every five years.

the capacity of the Commission. Changing this will require the amendment of Article 62 of the Charter.

More precise reporting guidelines, striking a balance between the 1989 and 1998 Guidelines, paying particular attention to the prevention of torture and prisoners' rights, would be a sensible starting point to ensure that states periodically report on what is done in respect of these two focal areas. This will give more meaning to the Charter and the RIG in the South African context.

7 THE REASONS FOR LIMITED IMPACT

The impact of the Charter and the RIG has been limited to date and this requires a brief assessment. As noted above, there is fairly well developed jurisprudence in a number of areas concerning prisoners' rights and the courts have since 1990 taken a liberal view of prisoners' rights. It has consequently not been necessary for South African prisoners to launch individual communications to the Commission or other treaty monitoring bodies. To date one individual communication has been submitted by a South African prisoner to the UN Human Rights Committee; the McCallum decision.⁵⁷

Torture and right to liberty cases (in a pre-trial detention context) launched by prisoners have not appeared before the South African courts, and more specifically before the Constitutional Court. One case before the Supreme Court of Appeal has dealt with torture and concerned evidence obtained under torture by the police from a witness was used in the conviction of the applicant.⁵⁸ In this matter the Court drew on the UNCAT and not the Charter or the RIG.

There are, however, a number of cases that South African prisoners have brought before the courts, claiming civil damages for a range of rights violations, such as, rape, assault, and other rights violations.⁵⁹ Since South Africa has a fairly well developed legal system, there are thus several opportunities to explore domestic remedies before matters can be referred to other international or regional institutions. Many of these matters are reportedly settled out of court, and if not, they remain civil cases and have little bearing on the development of human rights jurisprudence concerning prisoners.

Lastly, as noted by the University of Bristol study, the CPTA itself and the Commission more broadly have not been particularly active in promoting the RIG. Consequently few South African civil society organisations, government departments, National Human Rights Institutions and Members of Parliament are aware of the RIG.

8 OPPORTUNITIES

A number of opportunities have, however, emerged in recent years that will hopefully see a growing relevance of and support for the Charter and the RIG in the South African prison reform discourse.

⁵⁷ McCallum v South Africa Communication No.1818/2008, UN Doc CCPR/C/100/D/1818/2008.

⁵⁸ *Mthembu v S* [2008] ZASCA 51.

⁵⁹ Department of Correctional Services *Annual report 2011/12* (2012).

The first is that the European Union has made available considerable funding to support the promotion of the UNCAT and the RIG in six African States, one of which is South Africa. This project, the Article 5 Initiative, is aimed to develop Domestication and Implementation Packages (DIPs) that would facilitate the implementation and monitoring of obligations under the UNCAT. The European Union is similarly supporting a three year project, which commenced on 1 April 2012, through the Association for the Prevention of Torture (APT), to identify the key factors leading to a reduction in the risk of torture and other ill-treatment. Secondly, the CPTA has a new strategic plan that would see a more active role for it in promoting the RIG and interacting with civil society organisations. Thirdly, the new Special Rapporteur (Commissioner Med Kaggwa from Uganda) has shown himself to be an active player, as reflected by his inter-session activity reports. An increased profile and visibility of the Special Rapporteur will continue to draw attention to the range of problems experienced in African prisons. The previous visit by the then Special Rapporteur, Dr V Chirwa, was in 2004. Lastly, the Prevention and Combating of Torture of Persons Bill has not been finalised and there thus remains the opportunity to engage the legislature further and then draw particular attention to the RIG, something that was somewhat neglected in the public hearings of September 2012.

BIBLIOGRAPHY

Books and chapters in books

Nmehielle VO *The African human rights system- its laws, practices, and institutions* Hague: Martinus Nijhoff Publishers (2001)

Dissel A "Rehabilitation and reintegration in African prisons" in Sarkin J (ed) *Human Rights in African Prisons*, Cape Town: HSRC Press (2008)

Muntingh L *Prisons in the South African constitutional democracy* Johannesburg: Centre for the Study of Violence and Reconciliation (2007)

Muntingh L and Sloth-Nielsen J "The Ballot as a Bulwark: Prisoners' Right to Vote in South Africa" in Ewald AC & Rottinghaus B (eds) *Criminal disenfranchisement in an international perspective*, Cambridge: Cambridge University Press (2009)

Karth V 'Between a rock and a hard place' - Bail decisions in three South African courts, Cape Town: Open Society Foundation (South Africa) (2008)

Viljoen F *International Human Rights Law in Africa*. Oxford: Oxford University Press (2007)

Heyns C (ed) *Human Rights Law in Africa - Vol 1*. Leiden: Marthinus Nijhof Publishers (2004)

Evans M, Ige T and Murray R "The reporting mechanism of the African Charter on Human and Peoples' Rights" in Evans M and Murray M (eds) *The African Charter on Human and Peoples' Rights - The System in practice 1986 - 2000*, Cambridge: Cambridge University Press (2002)

Journal articles

Ballard C “A statute of liberty? The right to bail and case for legislative reform” (2012) 25(1) *SA Journal of Criminal Justice* 24

Muntingh L Improved monitoring and reporting to promote and protect the rights of prisoners under the African human rights system (2009) 38 *CSPRI Newsletter*

Reports, thesis and conference papers

Igweta R *The African Commission On Human and Peoples’ Rights and the Promotion and Protection of Prisoners’ Rights: An Analysis*, Unpublished LLM Thesis, University of the Western Cape (2008)

Muntingh L and Long D (2012) *The Committee for the Prevention of Torture in Africa (CPTA) as regional catalyst in the prevention of torture*, Paper prepared for the 10 year Anniversary of the Robben Island Guidelines, 21- 23 August 2012, Johannesburg, South Africa

Human Rights Implementation Centre (2012) *Policy paper on the possible future role and activities of the Committee for the Prevention of Torture in Africa (CPTA)*, Bristol: University of Bristol.

Ballard C *Research report on remand detention in South Africa: an overview of the current law and proposals for reform* Bellville: Community Law Centre (2012)

Policies and legislation

Criminal Procedure Act (South Africa)

Council of Europe - Committee of Ministers, Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules

American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)

The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, http://www.achpr.org/english/declarations/declaration_ouagadougou_en.html
Accessed 19 November 2009

Muntingh L and Ballard C (2011) Comments on the Correctional Matters Amendment Act

Cases

Mthembu v S [2008] ZASCA 51

S v Makwanyane 1995 6 BCLR 665

S v Dlamini 1999 (4) SA 623; 1999 (7) BCLR 771

Whittaker and Morant v. Roos and Bateman 1912 AD 92

Goldberg v Minister of Prisons 1979(1) SA 14

Minister of Justice v Hofmeyr 1993 (3) SA 131 (A)

Cassiem and Another v Commanding Officer, Victor Verster Prison, and Others 1982(2) SA 547(C)