



The Optional Protocol to the UNCAT: Preventive Mechanisms and Standards

Conference Report

Report on the First Annual Conference on the
Implementation of the Optional Protocol to the UN
Convention Against Torture (OPCAT)

Law School, University of Bristol

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Very special thanks are due to all the conference speakers and participants who made the Conference a true success, turning it into an event where opinions and views were freely exchanged and new ideas synthesized.

At last, but by no means the least, we thank all the helpers and note-takers of the Conference whose assistance was crucial in ensuring the smooth running of the event.

Rachel Murray

Malcolm Evans

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Introduction: Conference Background and Aims

The following report contains the proceedings from the First Annual Conference on the Implementation of the Optional Protocol to the UN Convention Against Torture (hereinafter: OPCAT) organised by the Law School of the University of Bristol. The Conference, entitled 'The Optional Protocol to the UNCAT: Preventive mechanisms and Standards' took place on 19- 20 April, 2007, in Bristol, United Kingdom. The Conference was aimed at practitioners and academics involved in the area of torture and ill-treatment prevention.

The OPCAT came into force on 22 June 2006 and as of April 2007 there were 34 states parties to it. The aim of the OPCAT is to ensure torture prevention through the establishment of a continuous dialogue between national authorities, and national and international bodies vested with the powers to visit various places of detention. The OPCAT establishes a Sub-Committee to the Committee against Torture (hereinafter: SPT), which will conduct regular visits to state parties and engage in a dialogue with the state authorities with aim of torture prevention.

In addition, OPCAT requires the states parties to designate or establish one or several independent National Preventive Mechanisms (hereinafter: NPMs) for the prevention of torture at the domestic level. Similarly to the functions of the SPT, the NPMs must have the requisite authority to visit places of detention and make recommendations to governments on measures of torture prevention. Such a double-tier system of torture prevention is considered to be a rather innovative mechanism for an international treaty and thus the OPCAT represents a new step forwards in the fight against torture and ill-treatment.

However, the recent entry into force of the OPCAT, the elections of the members of the SPT in December 2006, and the various stages of implementation among the states parties raises a number of questions. The aim of the Conference was to address three of these.

Firstly, there is the issue of applicable standards. The SPT will start its activities in 2007 and is expected to draft its own rules of procedure. In this task the SPT will have to look for methods of work in dealing with the implementation of its main function, namely, visiting the places of detention, engaging in a dialogue with national authorities and making recommendations. Likewise the NPMs, which will have to be operational one year after the entry into force of the OPCAT or of its ratification or accession, will face the issue of applicable standards. This leads to a variety of questions, like, is there a need to develop new general standards tailored for the specific tasks of the SPT and the NPMs?

Can such standards be derived from the existing bodies of principles under international law or the practice of established international monitoring mechanisms? Are these standards sufficient to guide the work of the new international and national mechanisms?

Secondly, the Conference discussed the issues concerning the interface between the various international human rights procedures and the OPCAT. There are bodies at the regional level, which already are engaged in the prevention of torture by carrying out visits to places of detention. The European Committee on the Prevention of Torture (hereinafter: CPT), for example, has ample experience in this regard. Similarly, at the international level, the United Nations (UN) Special Rapporteur on torture also visits countries and engages in dialogue with national authorities with a view towards preventing torture and ill-treatment in places of detention. How would these existing regional and international mechanisms dealing with roughly the same issues interface with the OPCAT, the SPT and NPMs? Which avenues of cooperation can be envisaged between the international mechanisms and the new bodies? How can the overlap in functions be steered to strengthen the cooperation and dialogue between international human rights procedures and the OPCAT bodies?

Thirdly and finally, the Conference focused on the practical application of the OPCAT to a number of places of detention that are or should be covered by the protocol. Article 4 of the OPCAT states that the system of visits envisaged in the protocol should cover all places of detention. The places of detention that will get the most attention, of course, will be prisons and police centres. However, the system of visits envisaged in the OPACT ought to cover places such as centres of detention for (illegal) aliens and refugees, psychiatric institutions and other places in which people are held back against their will for medical reasons, and places of military detention. What are the particular problems and challenges posed by carrying out periodic visits to these 'non-traditional' places of detention? What factors should be taken into account by the visiting bodies when making analytical visits to such places of detention? What standards should be applied?

The Conference successfully addressed the three central issues raised by the organisers by generating learned and open discussion on these matters and allowing for the examination of theoretical as well as practical issues. Dr Silvia Casale, Chairperson of the SPT, observed that the Conference was 'a unique gathering of experts in preventive monitoring of deprivation of liberty and provide[d] an immensely important opportunity for those of us engaged in carrying out preventive monitoring'.

1 Plenary Sessions

19th April, 2007

Opening of the Conference by Prof Rod Morgan.

Summary:

About a decade ago, when Prof Morgan wrote a book on the practice of the CPT, he was of the opinion that everything has been said on the subject matter of torture. There seemed to be a clear consensus that torture cannot be justified under any circumstances and an absolute prohibition of such practices was established. Now, however, with certain regret Prof Morgan sees the necessity to return to the very same issues. He noted that as far back as in 1874 Victor Hugo declared that torture had been eradicated but was very wrong because the practice had never died out. This has been due to both totalitarian states but equally to democratic ones. However Prof Morgan also noted signs of progress and agreement, most notably the OPCAT, through which states recognize the need to flush out torture by all possible means. Nonetheless, returning to the field and writing about torture leaves a feeling of depression.

Prof Morgan turned to the examination of the utilitarian arguments used in favour of torture and referred to an article by Jeremy Bentham, who was unconvinced that torture should never be used, basing his argument on utilitarian grounds. According to Bentham, torture was permissible if the dangers were high and ought to be applied under certain conditions:

- Need good proof that it was within the powers of the prisoners to do what was being asked of them.
- Where there was an urgency of time and need.
- The harm to be averted was very serious.
- The severity of the torture must be proportionate to the harm to be averted.
- Must be regulated and limited by the law.

Prof Morgan then turned to the examination of documents produced by the current US Administration and the US President also encouraging the use of torture on utilitarian grounds. Prof Morgan also mentioned the work of Alan Dershowitz concerning the use of 'torture warrants' when the utilitarian argument is advanced.

Therefore, noting all these recent developments when the practice of torture was not unequivocally condemned, emphasizing the climate where the Time Magazine had recently published an article suggesting the need to consider the use of torture again, Prof Morgan welcomed the initiative of the Conference as an important one and underlined the necessity to engage and consider the practical issues of the applicable standards and rules.

Opening of the Conference by Prof Malcolm D. Evans

Summary:

Prof Evans started by giving some background information about the research project on the implementation of OPCAT in the remits of which this Conference was organised. Thanks were expressed to the AHRC for the support provided to the project.

Turning to the issues of OPCAT, Prof Evans expressed certain surprise at the enthusiasm of states in acceding and ratifying the instrument, which brought it into force some years earlier than predicted. This changing scenario had, however, impacted upon the focus of the project which meant that there was need to adapt quickly and respond to the emerging needs. This was one of the main rationales behind organising the Conference.

Prof Evans examined OPCAT as a unique international instrument in that it presupposes a two-tier system of torture prevention: the establishment of the SPT at the international level and the designation or creation of the NPMs at the national level. This arrangement opens up new questions about relationships and inter-relationships between the international and national level of torture prevention at both the theoretical and practical level. Similarly, it raises questions about standards, which ones, and how these should be applied or will be applied, as well as the issue of their appropriateness. The point of the conference is to initiate and facilitate the discussions on these matters.

Prof Evans then turned to the general debate about torture and the climate surrounding the situation where the possibility of using torture is mentioned as a viable one, and noted that this debate can be won. There cannot be denial of the absolute prohibition of torture. However if this debate is to be won, it will be done so at a price. There are real ongoing debates about the utilitarian argument; there are difficulties surrounding the arguments about 'good' torture, torture exercised in defence of the values of our societies, and 'bad' torture, the rest of the practices. There are certainly issues surrounding the thresholds: what is torture or inhuman or degrading treatment? And what are the legal tools surrounding the debate in terms of bringing and defending cases?

Prof Evans welcomed the arrival of OPCAT in 2002 as timely, but noted that the instrument is a tool to an end, not a means to an end itself. The end is to secure the prevention of torture and the function of OPCAT is the achievement of that goal. On this latter note, Prof Evans reflected on the other twin track system envisaged in the OPCAT: the visiting of places of detention and the establishment of dialogue with the authorities. He noted that visiting alone may not be sufficient and prevention should be seen not just as techniques but as an entire approach. Thus visiting would be a part of that holistic approach and therefore there is necessity to refine the methodology.

Finally Prof Evans turned to the ruling of the International Court of Justice (hereinafter: ICJ) in February 2007 concerning the *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The ICJ, in establishing state responsibility, founded its decision on the argument that the Genocide Convention puts upon states parties an obligation to prevent, which was failed in that particular case. This is a very innovative way of establishing state responsibility and Prof Evans noted that the ICJ specifically mentioned UNCAT as an example of other international treaties where such an obligation to prevent is contained. Thus even though there is no extensive jurisprudence on the obligation to prevent, this obligation has been established in this landmark decision. Consequently, this judgment opens up a wholly new area for states in understanding what their obligations are, and an entirely new idea of prevention. Prevention is thus no longer just a case of internal affairs of each individual state but may entail state responsibility on the international arena.

Opening of the Conference by Prof Rachel Murray

Summary:

Prof Murray turned to the further issue of the implementation of OPCAT: the NPMs. What should an NPM look like? How effective should it be? What criteria should be used in its establishment? Prof Murray discussed the matter of the OPCAT criteria for NPM and the Paris Principles and noted that these may pose a tension for the NPM and cause potential problems. It was remarked that it can be tempting to use the Paris Principles and criteria of OPCAT to sort of 'tick boxes', use these as sort of a checklist in the process of establishing NPM. Clearly, states are looking for models or benchmarks as they look to create these bodies, but ticking boxes will not produce an effective body. Other important issues, like the social and political context of the each particular country, the mandate of the NPM and its funding, and how it is perceived by the various stake

holders must be taken into account. Therefore Prof Murray stated that states must have a balanced, nuanced approach in establishing or designating NPMs.

Nevertheless the need to provide countries with some guidance in this process was acknowledged. However, Prof Murray underlined that this guidance must be flexible, one that recognises the other relevant factors including the other bodies already in operation and indeed the social and political factors that prevail in each country. It was noted that this complicates the task of the SPT, but to have one definitive, prescriptive list is impossible.

Prof Murray then examined the relationship between the SPT and NPMs. This was recognised as an important aspect and should be seen as a part of a process and an ongoing relationship between the SPT and NPMs – a process of ongoing discussions. In this context an issue may arise on the extent to which the SPT can pronounce on the appropriateness of an NPM. It was suggested that the designation of the NPM need not be permanent but may be a temporary measure, which allows developing the relationships, and then the SPT visits to a state party would be seen not just as visits to places of detention but as visits also to develop these relationships.

Prof Murray then turned to the specific issue of independence of the NPM, a criterion stressed by both the OPCAT and the Paris Principles but noted that the concept needs unpacking – ‘independence’ certainly means autonomy from the government, but how should this play out in terms of funding, operation, appointments etc. The Paris Principles although adding some elements, do not capture the subtleties of the relationship between the government and an NPM. NPMs will inevitably be related to the government, they need to have the respect of the government while still having the role of a watchdog. Therefore there is a need for further reflection and a more sophisticated approach to what constitutes an NPM and where it is placed. This latter point has caused difficulty at both the national and international level – are they part of the state structure or are they non-state actors? There is a balance between independence and ‘officialness’ and this is an issue for the SPT. Prof Murray suggested a distinction which can be made between those issues that may be within the control of the government such as appointments etc. and those that are not such as the daily operations.

Finally, regarding independence, an NPM must also be free from the control of other NGOs and stakeholders, but this is not debated in the Paris Principles or elsewhere. Of course, there is the equally important need to build the relationships as there is often suspicion in civil society of these types of bodies and that needs to be recognised.

Presentation: Dr Silvia Casale

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/casale.doc>

Presentation: Ms Claudine Haenni-Dale

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/haenni.doc>

Presentation: Mr Jens Faekel

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/faekel.doc>

Presentation: Mr John Kissane

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/kissane.doc>

Presentation: Prof Lovell Fernandez

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/fernandez.doc>

Discussion, Questions and Observations:

The discussions during the first plenary session centred on the issues concerning the establishment and functioning of NPMs. First of all, it was observed that the features of NPMs in each state party will be different and thus each NPM will represent a unique structure. Turning to the functioning of NPMs and issues of independence, it was remarked that independence needs to be a cultural feature rather than simply a legal requirement. Independence was described as a state of mind and the difficulty may arise as to how to determine its presence from outside. It was noted that the constitutions of some countries project high level of independence, whereas in others this may be called in question, if the legal text per se is examined. It was thus noted that when the issue of independence is examined, it is of outmost importance to take note of

the realities on ground. In other words, warnings were issued that 'tick-box' approach may lead to developing somewhat artificial standards of ascertaining the independent nature of the body in question, which may indeed look like an independent body yet be known locally not to be. Therefore the role of local NGOs and civil society was underlined: contacts with local and international NGOs could allow to pin-point apparent deficiencies in and ascertain the true independence of the NPM.

The issue of diversity of NPMs was raised and concern was expressed over those states parties which intend to designate a number of bodies as their respective NPMs. It was noted that in these situations possibly huge problems of trying to draw together the different practices of these bodies and trying to distil all the information to present it in one form will be difficult.

The aspect of setting up an NPM was discussed and the need for transparency of this process, which would involve public debate and include the key stakeholders, was emphasized. Examples from many countries were presented where the governments have invited NGOs and the civil society at large to participate in the debate about the setting up of NPM. The importance of such a transparent process lies not in announcing the process to be open, but in the perception of the key stakeholders that it is indeed transparent. Thus the discussions underlined the necessity to look 'beyond appearances'. To this end it was also noted that the 'deadline' for establishment of NPMs, namely, 22 June 2007, should not be taken by states parties to mean that the debate surrounding the establishment of NPM should be cut short or rushed in a way that could jeopardise the perception of its future independence and/or credibility. It was likewise noted that not only civil society should be informed and involved in the process; also branches of the executive as well as legislature should be aware of the process.

As another central issue of the discussions, the problem of reporting emerged. First of all the rationale behind the reports that NPMs would be submitting to their respective governments was discussed. It was noted that there is an expectation that an NPM would be robust in the independence of its approach towards reporting, and robust in seeking the compliance and cooperation of the institutions. Thus the annual report that the NPM is required to produce with the national authority that designated it must be factual, comprehensive and useful. It was suggested that the report could be important to show an NPM is independent, effective and carrying out its mandate. In other words, these reports could serve as certain indications of the robustness of NPM's

independence and to this end, producing 'tick-box' criteria would be counterproductive.

Secondly, the necessity of identifying the key issues that are to be addressed in these reports, something like a template of key issues was posed. However, it was observed that coming up with a prescriptive list would be pre-emptive at this stage and the need for dialogue on the matter was recognised. It was noted that if these reports would be transmitted to the SPT, the body would be faced with large amounts of paperwork, so the question is pertinent. The reports should be there to help and not to burden the SPT or NPMs. The 'usual' problem of the various mechanisms was mentioned: many exist, but very few are effective and this will be something that the SPT will be faced with too.

However, the rationale behind the reporting provision in Article 23 of OPCAT was examined and it was noted that Article 23 was written in to try and preserve the public nature of national reports. But the article does not say anything of the necessity for an NPM to produce a report which is then to be submitted to the SPT. The intention of the drafters was not to establish a reporting obligation on the NPM, which would be totally impractical, would impose too much work on both the NPM and the SPT and potentially could be counter productive. The rationale behind Article 23 was to preserve the NPM's independence, credibility, and to be in line with the Paris Principles. Nevertheless, difficulties remain over how detailed these reports need to be and potential problem of processing the huge range of material by the NPMs and SPT.

Plenary Session: 20th April 2007

Report by the Dr Silvia Casale on the work on Workshop I on 19 April

Dr Casale noted in her report the difficulty arising when states choose to designate already existing bodies as their respective NPMs. There are few such examples at the moment and indications that many more are going to be designated. There is a particular trend to appoint Ombudsmen's offices who have their primary focus as a complaints body, but are increasingly taking on the role of monitoring, which creates a challenge and potential difficulties.

Turning to the issues of standards, Dr Casale reported that there was a general consensus in the workshop that in theory there is no lack of standards. However the practical fieldwork has entailed a need to identify basic levels of provision for the dignity of persons deprived of their liberty, minimum standards of protection, minimum standards for health and sanitation issues etc. The implications are for custodial detention and beyond.

Finally Dr Casale mentioned the tension between the universality and specificity of standard setting– the more universal the less specific a standard will be. Therefore she underlined the necessity to take a holistic approach to these matters.

Report by the Dr Leon Wessels on the work on Workshop I on 20 April

Dr Wessels underlined in his report the importance of effective judicial system in the torture prevention. It was noted that without it, the prevention work will have little prospect of success.

Dr Wessels also emphasised the problem of a tremendous growth of the prison population around the world and the challenges and difficulties that this poses. He noted that this problem, as well as the way authorities of various countries responds to it, must be acknowledged in the torture prevention work.

Furthermore, some perhaps simple but extremely important observations were made: proper training of staff, need for public debate, confidentiality, the need to resist the temptation to target individuals but to target the systemic problems, and that NPMs must be home grown and not 'cut-and-paste' jobs. To this latter point, Dr Wessels contrasted the presentations of the Guatemalan and Costa Rican Ombudsmen, which showed each of them respond to different realities prevalent in their respective countries.

Dr Wessels concluded by highlighting one major question that was not addressed in the detail, but which raises major ethical issues: what to do when in the course of a preventive visit one stumbles across a major crime?

Report by the Mr Mumba Malila on the work on Workshop II on 19 April

Mr Malila noted in his report that while there is little dispute about the need for the SPT to cooperate with other regional and international monitoring bodies, the question is how and what form that cooperation should take. There is an absolute need to identify the special mechanisms and bodies at the international and regional level relevant to the mandate of the SPT and to identify the precise ways of how this cooperation could work. This prompts the need for clear rules of procedure to avoid duplication as this is of outmost importance if any of the bodies are going to maintain credibility. Such cooperation must be structured to involve the sharing of information. However, precisely how and what information is to be shared may require further reflection as does the issue of confidentiality.

Mr Malila's report stressed that there is need to ensure that the SPT does not bring about contradictions and duplications. Is it necessary for bodies to

change rules of procedure to accommodate the SPT? This may turn out to be somewhat controversial since the question could be posed as to why the SPT does not accommodate the mandates of others. The work of the SPT and other bodies should be complimentary and not contradictory. To this end, the SPT must take care not to disregard the standards of existing bodies. The SPT should strive to build on these standards and also use UN norms to build on this point.

Report by the Ms Claudine Haeni-Dale on the work on Workshop II on 20 April

In her report, Ms Claudine Haeni-Dale concentrated on the issues discussed concerning Article 11 (1) of OPCAT – in the minds of its drafters cooperation goes further than what is being discussed. The cooperation between the various UN bodies and also with those outside the UN system should take place when missions are being prepared and also during the missions. There could be even further cooperation in post-mission, in reporting, and in follow up.

The issue of confidentiality can pose a certain practical difficulty. Some bodies may be bound by confidentiality in their mission whereas the same may not apply to the others. Therefore such questions as what is confidential and what is not, at what point does something become confidential and for what purpose must be considered when making arrangements between various bodies for the purposes of cooperation.

When turning to the issue of standards, which some of the participants observed was the wrong debate, Ms Haeni-Dale reported an inherent tension in starting a new mechanism and not being able to cast everything in stone straight away. The need for the SPT to develop its own rules of procedure as soon as possible, keeping in mind the lack of a common framework of prevention (something that has not yet been agreed upon), was underlined.

Report by the Mr Andreas Mavrommatis on the work on Workshop III on 19 April

Mr Mavrommatis expressed his surprise at how little attention was devoted to the CAT and reminded that the SPT and CAT do share the same substantive law, namely, the Convention Against Torture. This should be taken into account and the expertise of CAT should not be disregarded. He underlined the importance of cooperation and coexistence of the two bodies.

Mr Mavrommatis praised the quality of the presentations and centred his report on the issue of whether the OPCAT is limited by the definition of torture. He also once again reiterated that the prohibition of torture is absolute, and thus

noted that in the current context of the war on terror of utmost importance are such phenomena as extraordinary renditions and diplomatic assurances. The clash between the attempts to combat terrorism and maintaining respect for human rights was emphasized.

Report by the Dr Jonathan Beynon on the work on Workshop III on 20 April

Since the discussion in workshop III during the second day of the conference dealt with the issues concerning non-traditional places of detention and the medical and psychiatric institutions specifically, Dr Beynon started his report by emphasizing the role of the medical documentation in the course of torture prevention. This is of utmost importance also when allegations of abuse are made against the staff of the institution. It was thus suggested that medical examination should be carried out both upon the arrival of a person to a prison, and upon the departure. This related to research carried out through medical examinations done in Spanish prisons – this research showed poor training, record keeping, bias, and lack of clarity about standards. Some broad conclusions were made that also related to the CPT experience:

- Availability of training for medical staff.
- the principles and practices of the Istanbul Protocol should be made known to the staff.
- Institutions should have a protocol that must be followed in the event of any suspicion or allegations of torture.
- Any examination following such allegations should involve a thorough assessment of both the mental and physical state of the person, and include conclusions as to the compatibility of the psychological and physical findings with these allegations.

The role of institutions in documenting these issues was mentioned – vulnerability to bias and threats, especially in the situations when the medical staff is employed by the very same institution against which allegations of ill-treatment are made. Thus the importance of independence of medical staff from the system was underlined.

Turning to the specifics of psychiatric institutions, Dr Beynon's report emphasized that when planning visits to psychiatric institutions, social welfare places must be included among these, especially since the OPCAT provides a mandate to visit any institutions regardless of whether placement there is voluntary or not. To this end it was noted that, in situations where there is no

psychiatrist available, NPMs can still make visits to these types of institutions, but with other health staff (preferably a doctor) in the team – simple common sense can and should be used. However, the need for specialists for issues concerning the appropriate use of medication or other therapies, as well as other specificities of such institutions were noted and thus importance of having specialists on the visiting team was underlined.

Turning to the specifics of treatment, the use of medication in psychiatric hospitals can be carried out at the cost of other therapies which are more time intensive, such as individual or group therapy. Similarly restraints, both physical and chemical, have the potential for abuse but are of course sometimes needed. Therefore these aspects should be duly recorded and monitored.

Dr Beynon reported the discussion around the UN Convention on Disabilities, which prescribes the participation of disabled persons in the decisions concerning themselves and suggested that similar approach could be used in the remit of OPCAT, which allows for the use of experts. Thus former patients, for example, could be invited to join visits as 'experts'.

The difficulty posed by confidentially issues was raised: allegations of ill-treatment can be communicated to the doctor or can be simply visible during the examination of a patient, but the patient may be unwilling to speak about these or make official statements. Also the right of NPMs or the SPT in accessing medical records in places of detention was discussed. In some states, such as Georgia, access will only be granted with consent of the patient. In order to fulfil their mandate, visiting mechanisms should have access to all files including medical information but in some countries the national laws on confidentiality of medical information may pose problems.

Discussion, Questions and Observations:

The discussion started with the issue of extraordinary renditions. It was once again reiterated by participants that the OPCAT does provide an added safeguard to these types of situations. Bearing in mind the wide definition of 'places of detention' provided for in Article 4 (2) of the OPCAT, the SPT and NPMs are entitled to examine also such places as ports and planes. It was specifically underlined that on the matter of diplomatic assurances, these should never be relied upon whenever there is evidence of systematic torture as this would affect the obligations of a state party to the CAT. The only instance when such

diplomatic assurances can be used would be a case where assurances of fair trial are requested in the absence of extradition treaty.

Similarly to the issue of extraordinary renditions, the issue of extraterritorial processing was raised whereby people are subjected to off-shore processing and detention facilities. The need for access to these facilities was emphasized.

The discussion proceeded on the inconsistency of language used in Articles 14(c) and 20(c) of the OPCAT: Article 14 (c) gives *unrestricted* access to SPT to all the places of detention (emphasis added) whereas the mirror Article 20 (c) does not contain such wording in relation to the NPM. It was observed that during the actual drafting process, there was no consensus on this issue. States did not want to reopen the whole debate as to what eventual "reasonable" limitations could be so the adjective *unrestricted* was purposely dropped for the NPMs. However, the participants of the Conference observed that this difference in language should not make any difference in practice and that both SPT and NPMs are to be granted full access without any limitations whatsoever. In practical terms it was noted that NPMs can and should develop the ability to visit in an unrestricted fashion once the fear is eased that they will not be there everyday, and the potential apprehension that their presence could mean undue interference with the work of the institution. It was particularly stressed that some places of detention may actually fear such constant presence.

Furthermore, the meaning of Article 4 (1) of the OPCAT was scrutinised as it provides that states parties must allow visits to any place of detention that is in their 'jurisdiction and control'. It was questioned whether there could be situations when an access is denied because the state has no control or jurisdiction over a certain place of detention. However, since the French version of the OPCAT text uses 'or' not 'and', it was argued that the more human rights friendly version should be followed in practice. It was observed that the CPT in practice relies on the concept of official jurisdiction of a state. Turning to the time of drafting the OPCAT, it was noted that the drafters were careful to maintain the division of work between the CAT and SPT: since the SPT is concerned with the prevention of torture, there would be little use in making recommendations to a state party on the matter if it lacks either jurisdiction or control.

The problem of detaining people due to contagious diseases was raised- the example of a new form of drug resistant tuberculosis which for most resource poor countries is almost impossible to treat was put forward. In some countries there have been suggestions for the need to forcefully detain those affected as a

public health measure so as to ensure isolation and/or treatment. This is another atypical scenario that must be taken into account in the framework of visits under OPCAT.

Finally the discussion turned to NPMs and it was observed that there is need to use 'home-grown' standards to achieve an NPM that is both culturally and politically relevant, while still taking account of the huge range of international standards available with regard to the treatment of persons deprived of their liberty, such as the Standard Minimum Rules, the European Prison Rules, the Kampala Declaration on Prison Conditions in Africa, and the principles for the protection of prisoners currently being drafted in the Inter-American System. The NPM must be an institution which is culturally and politically relevant to the country in question, but it must also take cue for standards from the international fora.

2 Workshop Sessions

Workshop I

Standard setting and National Preventive Mechanisms

19 April, 2007

Presentation by Dr Jonathan Beynon

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/beynon.doc>

Presentation by Dr Leon Wessels

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/wessels.doc>

Discussion, Questions and Observations:

The issue of universality of standards was raised first of all. There was the feeling that an absolutely universal standard will be difficult to achieve. It was noted that the SPT will be faced with huge cultural, economic and social diversities, which go way beyond those encountered by any of the existing mechanisms. Therefore, when the NPMs must make a choice about the applicable standards, the ultimate test will be how well they apply these standards in practice. It was observed that NPMs will face a certain difficulty in deciding about applicable standards and therefore it was noted that the SPT should assume a more authoritative role. It was suggested that while OPCAT does not require NPMs to submit reports to the SPT, this could be helpful in assisting NPMs to 'find their ground'. There was an expectation expressed that NPMs will be asking for some sort of minimum standards that might be expected of mechanisms.

As a starting point for the discussion and to bring in some comparative perspective on the issue of standards, it was observed that attention should be paid to the Convention for Economic, Cultural and Social Rights and the philosophy that applies there. It was noted that in that context the Committee on Economic, Social and Cultural Rights has adopted the 'core minimum content' approach, and it is from there that states are expected to advance. However, it is necessary to establish first what that core minimum content is. Some bodies will

be able to do that, others will not. Certain core standards are self-evident, such as freedom from ill-treatment, the right to life, the minimum time for access to fresh air etc, but defining and 'enforcing' absolute standards for issues such as the amount of space per detainee, what constitutes adequate lighting etc would be more difficult. The example of South Africa was brought up in this regard. The South African Court has taken the view that it cannot force the issue on core minimum content and rather views it as a budgetary matter, that is, one belonging to the government. It was further observed that from what had been said about standards during the presentations, it is clear that one aspect relates to expertise. Two other areas where standards, or an indication are needed, relate to independence – what is the minimum level of that? – and effectiveness.

The discussion turned to the possible sources of standards or principles. It was argued that the starting point for any state should be respect for international human rights. It does not matter if these rights are written or not, they should be a guideline to lead us into something else that is accepted by the international community. Thus the immediate source for possible standards or principles is what we have already internationally. It was suggested that developing principles of human rights is an ongoing process of analysis and development, and the Protocol provides the opportunity to enter into this debate. It was also suggested that we should not worry about immediately achieving a long list of principles because these need to develop incrementally in each region. So one should be more operative with regard to the cooperation of the different bodies and most importantly, open up prisons to civil scrutiny and NGOs.

With regard to the role of the SPT in establishing standards, one of the participants noted that the issue of standards is adequately captured by OPCAT in article 19 and relating to the SPT, in article 11. It would appear that principles can emanate from the SPT and need not be mandatory.

The need for dissemination of information and training of national and local bodies in monitoring places of detention, the rights of detainees and the duties of detention staff, including health staff, was raised by the audience. In many of the conflict areas in which the ICRC operates it organises training for prison staff on the rights of detainees, using the principles of humanitarian and human rights law, including the Standard Minimum Rules (SMR) and, for example, training doctors on the Istanbul Protocol for the documentation of torture, and the ethical dilemmas of practicing medicine in places of detention. The APT is also active in providing training in both conflict and non-conflict countries on monitoring places of detention, prevention of torture etc. In many

contexts the principles of the SMR, and other such standards are not widely known, but the fact that people have not heard of SMR does not mean they do not subscribe to those principles. There is however the problem that the SMR are the basic principles: they are so general and they need further clarification. The detail is something that will be developed through practice, as happened with the CPT experience. On that note, it was observed that the European Prison Rules were revised recently and there is an acceptance regionally that those are the applicable standards. In any event, the SMR are the baseline from which one cannot go below. These could be used also by NPMs.

The question was brought up on the necessity to differentiate between two different types of standards: one dealing with what one should be looking for in places of detention; and another which look at the standards NPM themselves should meet. It was suggested that the discussion on the latter is more about modalities and that these issues should be further clarified. It was also discussed that the challenge is to effectively apply standards. The example of the South African Human Rights Commission was brought up in that it tries to apply international standards, something that the vast majority of NHRIs do not do well. However, it was observed that the NPM must be 'home grown', and it should develop its own standards. The people have to own it.

At this point, the discussion shifted to the role of the SPT in its interaction with the NPM. There was a need to clarify what the SPT would do if it is not satisfied with a report it receives from a NPM. How would the SPT be able to monitor the reporting, and how would the experience of the ECPT help in this regard? Although the SPT members that were present during this workshop could not give a direct answer to this, it was suggested that the regional experience is not necessarily directly transferable. It will only work in those states in which it has been used and is not necessarily applicable to new states. The CPT is not a report receiving body, but it is part of a new generation of treaty bodies which is more empirical. In the European experience a large amount of information is collected, and the CPT receives reports from a wide number of sources such as NGOs. The CPT's approach is to go to countries and examine the situation on the basis of information received, and then triangulate that information to get a bigger picture of what is really wrong with the judicial system, the prosecutorial system, etc. It has as its basis, cooperative dialogue. This is one way of working that works with European states, but it was questioned whether this will work or not in the context of the OPCAT.

It was pointed out, however, that confidential dialogue also works. In this context it was mentioned that you can look someone in the eye and say 'let's accept what has happened, then find out *why* it happened and move on from there.' There may be situations where it might be necessary to be quite direct, but because it is confidential then that is okay. In any case, dialogue is very important. However, for dialogue to work in the context of the SPT, it has to know what resources are available to it. In this regard, it was mentioned that it is still not clear which resources the SPT will actually have: they will probably be much less than those available to the CPT. This means that the SPT will have to be creative about exercising its mandate and looking for resources. This is going to be complex.

The workshop also discussed the relationship between NPMs and the SPT. One of the participants asked how far the NPM can rely on the SPT if the dialogue between the government and the NPM does not go as well as expected. It became clear that whatever an international body can do from time to time in terms of scrutiny cannot be equal to what a NPM can achieve if it is properly focused in its activities. A situation in which a government does not cooperate with the NPM would result in non-fulfilment of the state's obligations under the OPCAT. It is assumed, on the basis of the state's signature, that there is cooperation. There are ways to deal with a situation of non-cooperation. The public shaming factor should not be underestimated. Although the SPT is bound by confidentiality in its dealings with the government, other bodies can notice perfectly well who is not abiding by the OPCAT, and in this they have an important contributory task by making this public. In addition it was observed that although states are not perfect, some do make progress, and any positive advance should be highlighted to encourage a sort of competitiveness between states to improve on their human rights records.

In this regard, another participant observed that everything will stand or fall with Article 18(4). It is not necessary for all parties involved to part as friends at the end. They need only have respect for one another. That is the essence of independence. The South African Human Rights Commission, for example, can also operate on the basis of confidentiality that had to be scrutinised by the public. The art of it lies in that it never discloses. People have to trust that. If one does not apportion blame to an individual but instead focuses on the systemic problem, it will be easier to get the cooperation of the individual.

Again it was highlighted that the conceptualisation of what OPCAT envisages is 'constructive dialogue' between the NPM and the government. The

dialogue should be two-way. This dialogue should also include a discussion of standards to be applied. In some cases, human rights bodies have already established certain standards with regard to bodily harm. Standards relating to conditions of detention may be more difficult to achieve. There are core standards and legal standards such as the SMR, which may be the departing point for negotiating what can be achieved or improved over time through constructive dialogue. A potential problem is that each side could be waiting for the other to be more specific. Also, because of the differences in legal regimes or because of differences regionally, the standards or the specific obligations states have agreed to might be higher in one of these other contexts. States may have already agreed to standards that exceed the UN standards.

With regard to the SPT's role envisaged in Article 11(b)(iii) of the OPCAT it was commented that the SPT might have to be drawn into giving technical assistance. However, it was observed that it might be more a case of the SPT facilitating links between the NPM and persons/groups or other national or regional organisations who can give technical assistance in the context in question. A comparison was made with the ICRC, which is starting in some contexts to act in a more technical assistance/ developmental approach with detaining authorities to improve the overall conditions of detention. Similarly, it may be the case that the SPT will be drawn into, for example, recommending training. However, it is not as if it is necessary for the SPT to start from nothing. The UNDP has targeted the next 10 years to reinforce technical assistance in various areas. It was suggested that the SPT could combine efforts with these other programmes.

It was pointed out that Article 26 OPCAT mentions a special fund to help finance the implementation of the recommendations made by the Subcommittee on Prevention after a visit to a State Party, as well as education programmes of the national preventive mechanisms. This provision apparently inspired some states to ratify the protocol. Although it is not entirely clear how this special fund will function, it may create the expectation that the SPT will be able to provide assistance. It was suggested that education programmes under the special fund might be useful, or that it could be interesting to see if the special fund could be used for the training of NPMs. It is also possible to look to a broader range of funders. It was pointed out, however, that states are going to show reluctance to fund something going on at the national level in other states.

One of the conclusions of the first day of the workshop was that establishing creative dialogue between NPM and the SPT is a primary objective, and there would have to be some congruence. The discussion regarding standards began to take a more developmental approach. The history of the CPT provides one lesson. Standards have been developed but the core were embodied in all countries that knew that the CPT was coming and they all paid close attention to the early reports. The threat of an ad hoc visit is as important as the visits themselves. It was felt that a minimum core approach to standards could be an important place to start.

20 April, 2007

Presentation by Mr Alejandro Rodriguez

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/rodriguez.doc>

Presentation by Ms Mel James

Abstract

Discussion, Questions and Observations:

In the light of the presentations, one of the first issues discussed during the workshop was the relationship between the NPMs and other bodies of society. The main focus of attention is usually the relationship between the SPT and the NPM. However, less attention has been paid to the relationship with other bodies that are not part of the NPM, such as other groups from civil society. There is nothing in the OPCAT that prevents the SPT to engage in dialogue with NGOs. Can such a dialogue also be established with other bodies, such as quasi-official bodies established by law or statutory bodies, which for whatever reason are not part of the NPM? There is a potential difficulty here that needs to be addressed since the dialogue should also be extended to other bodies that may be more relevant than the NPM.

It was argued that from the point of view of the international monitoring body, everyone working in the relevant field is an interlocutor and a potential source of important information, whether it is the NPM, NGOs, or professional bodies such as bar associations. These could also be lawyers who have a presence in places of detention such as police stations. Even though they are case

oriented and their work is not about prevention they are obviously interesting source of information. If the international body demonstrates an inclusive approach, listening to the views about what is going on in the custodial situation in order to get the best possible prevention for ill treatment, that may be an encouragement, both expressly articulated but also by the example of that working method, in getting the NPM to become more inclusive in their approach as well. This might be part of the recommendations that the international mechanism can usefully make. The objective is to prevent ill treatment and one should not to be too territorial about that.

Another issue raised was who should approve the designation of the NPM. It was observed that it is important to have a public debate before the designation. In Georgia, for example, every relevant actor one could think of was brought into the discussion about the NPM. This level of involvement could guarantee their inclusion or at least facilitate dialogue with them. They are now grappling with the question of who approves who sits on the NPM. It would appear that at this stage the Georgian process is going to lean towards designating the Ombudsman.

The discussion then turned towards the appropriateness of designating national ombudsmen as NPMs. In Guatemala, for example, there is a political problem in concerning the relationship between NGOs and the Ombudsman. It would appear that the Ombudsman is not accepted by civil society so they cannot coordinate their work. The Guatemalan Ombudsman, however, is trying to solve this problem by signing agreements with the association of public defenders and other institutes and NGOs and the institute of comparative studies to enhance the oversight process. A combination of these bodies could become the NPM, although it is not yet certain what would happen as there is still a lot of resistance to ratify the OPCAT in Guatemala. In addition, a potential problem with regard to the designation process in that country would be what should happen if the Ombudsman is not accepted? A possible solution for the Guatemalan problem could be the designation of two separate mechanisms, the Ombudsman and NGOs that would carry out the NPM tasks. This, however, would not resolve the problem of coordinating activities with NGOs. In addition, this may be a model that might not work elsewhere.

At this point, the Chair of the workshop, Mr. Wessels, decided in agreement with the other participants in the workshop to give the floor to two Ombudsmen representatives who wanted to share the experiences of their respective institutions with the audience in the light of the OPCAT.

Ad hoc presentation by Ms. Kathya Rodriguez

Some of the points Ms Rodriguez made highlighted the differences between Ombudsman's Offices. In Costa Rica the Ombudsman's Office was established in 1993 and has carried out visits to places of detention. She believes the mechanism of regular visits works very well. It has helped to change radically the way authorities deal with daily problems facing places of detention. The Ombudsman's Office of Costa Rica is a Parliamentary body. There was no problem in Costa Rica with the ratification of OPCAT, the country does not have the same problems Guatemala has. The executive recognized that the long experience of the Ombudsman's Office with regard to visiting places of detention could be useful to fulfil the OPCAT obligations. It was temporarily designated NPM by an executive decision. NGOs did not participate in that decision. Ms Rodriguez observed that NGOs working in prisons in the region are not concerned with human rights necessarily. Ms Rodriguez noted, however that, the Ombudsman Office needs now to work more closely with NGOs.

Since the Ombudsman's Office has been designated as a temporary NPM it faces a new challenge. Even though the Office has around ten years of experience visiting places of detention, it is a very important moment to review some of its experiences and practices and try to update them more according to international standards. The Ombudsman derives his authority from the law, although it is not a constitutional office. The respectful and moral authority the Ombudsman possesses forces the authorities to implement his recommendations. The government implements a high percentage of these recommendations. This is one of the reasons the executive branch designated the Ombudsman as NPM. It is respected and it is successful. Its recommendations are generally fulfilled.

Most of Ombudsman's Office work consists of receiving individual complaints. They receive around 400 complaints a year related to detentions, police abuse or conditions inside prisons. Most of these complaints revolve around health care issues in places of detention in particular about specialized medical services such as dentistry and cardiology. Ms. Rodriguez observed that some of these services were taken care of by the Ministry of Justice inside places of detention instead of a specialized agency. The Ombudsman's Office has recommended that the Ministry of Justice should review its agreement with the national institution in charge of social security and health issues to improve the quality of health services in prisons, since they believe that the standard of medical attention should be the same within places of detention as outside. The Ombudsman's Office is making equivalence of health care in places of detention

with that in the wider community a focus in its recommendations. The Ombudsman wants health in places of detention to be dealt with by the social security authorities and not by the Ministry of Justice. They also aim to bring due process for prisoners, in particular with regard to disciplinary action against detainees. The authorities must check this is guaranteed. In addition, the Ombudsman has drafted procedures to be followed by police when there is an abuse against prisoners or allegations thereof.

Costa Rica has one special centre for juveniles and one for juveniles who are reaching the majority of age. It also has a special centre for women, which is located in the capital city, as well as a number of special centres for women in some regional prison establishments. Finally, it also has a special centre for older people. The Ombudsman has drafted a number of standards for these special centres inspired by international standards. Since many authorities are not aware of international standards, the Ombudsman has tried to raise their awareness. In addition, the Office of the Ombudsman has started to visit migrant detention facilities. The Ombudsman Office has dealt with migration as a human rights issue since its inception. However, the issue has not been handled in a proper way by the governments, and the public opinion used to relate migration issues with criminal matters. One recommendation the Ombudsman has made relates to the inhuman conditions in migrant detention centres. This is a grave problem since many migrants must stay there for long periods of time. The Ombudsman has recommended that detained migrants move to a place with better conditions, better medical care and nutrition, separate children from adults and keep families together. Monitoring through visits is a real tool for prevention of ill treatment and torture. All that one needs to do is to keep an eye everyday on how to improve our work. Whether an Ombudsman is or is not an NPM, it will still be an important source of information for the SPT.

Ad hoc presentation by Mr. Francisco Mugnolo

The Argentine Prison Ombudsman (Procurador Penitenciario de la Nación) exists already 15 years. According to Mr. Mugnolo, the Ombudsman's Office seems to meet most of the requirements needed to fulfil its obligations as an NPM, although it has not been appointed as such. The Prison Ombudsman has the following characteristics: its legal basis is a law passed by the Argentine Parliament, which also chooses the person of the Ombudsman through a two-thirds majority. He has a mandate of five years and can be re-elected once. The Ombudsman has ample powers of intervention, immunity, has the power to visit

all federal centres of detention, and has the capacity to bring claims to a court of law. In addition, he may request administrative sanctions against prison functionaries who are mal-functioning. An exclusive function he has is that he can take part in judicial proceedings against the state. In addition, the Office has its own budget, which is fixed annually by Parliament. The Ombudsman can also make law proposals. For example, the last law proposal he presented related to allow women with children to spend their prison time in their homes instead of sending them to prison. The law proposal also provided for allowing the terminally ill to die in their own homes.

The Ombudsman has a staff of 74 persons at his disposal, including doctors in various specialities, psychologists, psychiatrists, social workers and sociologists, and a team to administer the Office's resources. The Prison Ombudsman also has a national observatory of prisons. It is necessary that the information they work with should be very precise, of high technical quality and that allows developing scientific knowledge about the reality of the system it is working with.

Argentina is a federal country. The Prison Ombudsman can only visit people if they are detained in the federal system. The officials of the Prison Ombudsman visit federal prisons every week in the province of Buenos Aires where 70% of the prison population is concentrated. There is a fixed day when correctional officers and inmates know the representatives of the Prison Ombudsman will be present, so they know there is a day that they can be interviewed in absolute confidence where there are no correctional officers or any other presence. In any other given day they will turn up unannounced and this is the day when they carry out inspections. They also go in order to produce a general audit of the prisons, which provides a general overview of the visit. The audit takes between 3 and 7 days. Once a year, Parliament is informed of all their work.

In sum, the problems experienced by the Prison Ombudsman during his visits are similar to those all over the world, with the particular characteristics of the region. Mr Mugnolo takes the view that this is very important; that there is common ground; there is a common base from which the various visiting bodies can start to work together. It is thus possible to establish certain common standards of work.

Mr Mugnolo then presented some personal opinions about OPCAT. Yesterday he said that the Protocol brings a new opportunity to potentialise work with human rights. Within human rights issues it not possible to say there is an end. It is an ongoing process trying to reach the dignity of human beings, and

trying to elevate the culture to ensure dignity without exclusion. It is very important that the OPCAT is successful. In Mr. Mugnolo's opinion OPCAT's success depends on the success that the national system of protection has. The Subcommittee's role herein must be that, as well as visiting countries, it should harmonise, organise, coordinate and offer support to national bodies.

There are three important principles for the NPMs:

- Independence; should be set as recommended by the Protocol,
- It would be important that national bodies should have direct access to the international bodies such as the Subcommittee,
- It is necessary that NPMs have continuous access to places of detention.

With regard to the last point, he observed that very large countries like Argentina have been divided into regions. The Prison Ombudsman has delegations in the various regions where federal prisons have been established. If there is no local contact with the local federal prison, it may be problematic. After 7 years experience as Ombudsman, Mr Mugnolo feels that states should be obliged to respond to the recommendations made by the Ombudsman.

On the subject of the role of civil society, he noted that it needs to be decided which organisations are going to be integrated into the visiting system. It is necessary to establish general principles that allows organisations of civil society be recognised so that no organisation would be excluded in an arbitrary way. An example could be the accreditation system of institutions with consultative status with the UN.

Confidentiality and credibility is the final success of the institutions. Without this, it will be difficult to work with persons who are deprived of their liberty.

Discussion, Questions and Observations:

It was observed that Ombudspersons deal primarily with individual complaints. This prompted the question whether this complaints function could be combined with the OPCAT requirement of entering into cooperative dialogue with the authorities in charge of places of detention. Would officials in places of detention be less likely to admit to problems in their institution because they would worry that it may be used as evidence against them in an individual complaint? Some participants found it difficult seeing how the dialogue approach and the individual complaints approach can marry up successfully. Other

participants observed that this should not always be a problem. For example in Estonia, the nature of the complaints proceedings of the Ombudsman entails that it does not end with a sentence but with recommendations on how the situation can be avoided in future. Recommendations go to the institution in question. In the Estonian experience, it is very rare that there is a breach of criminal law, and in those cases it is recommended to put the case at the disposal of the public prosecutor. In normal cases it is the administrative law that is breached and recommendations are addressed to the institution to alter daily practice. This led to the observation that complaints procedures can also have the same objective as the OPCAT preventive function and may compliment each other. Prisoners are very eager to complain, and this provides also invaluable information.

It was also remarked that Ombudsmen offices are not judicial bodies and their procedures may be very flexible. In Costa Rica, some complaints may be very general and some, very particular. They can recommend disciplinary procedures, including firing an offending official from his post in the case of abuse, but it will depend on the case. It was again observed that the bodies do not have to part as friends but simply have respect for each other. This allows both bodies to interact with each other and helps the Ombudsman to point out the mistakes and problems.

Nevertheless, questions remained. It was asked whether it is made clear in some way to an official that they are telling you something in the cooperative context and what is the likelihood they will cooperate and be honest about the problems in their institution if they feel it might result in a friend being prosecuted? How will they know they are talking to an Ombudsman in a cooperative context? A participant observed that officials in places of detention also complain to the Ombudsman about their own working conditions during the visits. The confidence and respect that the Ombudsmen imparts allows it to approach both officials and persons deprived of their liberty. The Ombudsman can also keep the source of information confidential. Another participant recognized that there could be an overlap between the confidentiality and credibility of the body. If one follows a particular route by addressing a systemic problem in favour of the prisoners, and then follows another route resulting in a finding in favour of the institution's staff members, nobody could accuse the visiting body of favouritism since it is simply addressing the objectives that it set out to do. In the Guatemalan experience, it was remarked that the Ombudsman has the prerogative to deal with its cases as it deems necessary. So he can use confidentiality or present a case to a public prosecutor as the circumstances dictate. Sometimes he will warn the officials that the information they provide

could result in prosecution, but also that the information will remain confidential. To one participant, this discussion led her to believe that in the light of what had been described by the Ombudsman representatives, it would be impossible to divorce the two roles. The main point is that the body has to be credible; it has to establish its independence, and be accepted by all sides.

Another problem that was acknowledged and which should be taken into consideration by the NPMs and the SPT was the issue of ethical standards. What should an NPM do if in the course of its visits it encounters sufficient evidence for a crime based on the confidential information received from prison officials? This made it clear that it is a difficult issue, which was apparently not foreseen in the OPCAT. The real question is how to deal with the two seemingly contradictory mandates. It was then observed that these two functions or mandates might not be too contradictory. There is the danger of being too territorial. The visiting body will gather information from persons deprived of their liberty. Complaints will usually be dealt with in a different way, and will not be adjudicated by the same body.

Another concern that was brought up in this context was whether persons sitting in Ombudsmen offices or national human rights institutions should take part in politics and how politics play a role in the appointment of Ombudsmen. In one of the first meetings of the South African Human Rights Commission, for example, it was resolved that everyone who sat in the body would refrain from public participation in politics. With regard to the appointment of its members, even though the law requires a 'special majority' in making an appointment, all appointments so far have been made by consensus. It was observed that political impartiality is very important. In some countries the Ombudsman has the right to begin constitutional review proceedings so he/she has to look impartial too. However, in other countries such as Kenya, even though the law provides for the dissociation with politics, party politics has nevertheless crept in at the appointments stage of the national human rights institution. It is a reality.

The workshop then discussed the question of what happens in a country where there is a plethora of NPMs and there is competition between them, for example, if they are in disagreement but must still cooperate or collaborate in dialogue and report back to the SPT. Must there be a split report if there is disagreement between national NPMs? It was observed that the CPT and the SPT belong to a new generation of monitoring bodies. They are not report proceeding bodies. They are operational bodies working in the field, which will receive information from all types of sources. The CPT has experienced receiving contradictory reports. However, all information is interesting since it is part of a

picture. One has to find a way to sift through the information and find out what is the reality of the situation. There is, however, no substitute for going and engaging people face to face and find out what their position really is. If they perceive an issue relating to impartiality, there is no bar to saying so. One will always be faced with unpleasant situations. The thing to do is to point out what is positive and working well, but one cannot shy away from the controversial issues. It is necessary to express one's observations based on factual findings. This includes commenting on the process by which bodies are constituted.

The subject of penal reform and the tremendous increase in prison population around the world was then briefly discussed. It was observed that states are not really responding to this problem and there is not sufficient awareness of the problems or of the low cost alternatives available. The UN Working Group in Arbitrary Detention pointed to an increase in the prison population in the developed world and the extended use of pre-trial detention. This has in part to do with the response to 9/11 but it is a trend that started even before that. It is also tied up with the privatisation of prisons as this itself sets up a demand for prisoners. In this regard, the OPCAT may help to deal with all the fake excuses states come up in respect of this problem once the NPMs are in place.

The final remarks made during the workshop related to the issue of perfection versus pragmatism in relation to the functions of the NPM. It was observed that much of the discussion was leaning towards perfection as opposed to the pragmatic alternative. Is the real question 'how it does it' or 'what it does'? It may be that in the early stages the focus on the 'what it does' is more important than the 'how it does it'. This could, however, establish a problem of precedents in which what happens in one country with regard to NPMs is used to justify what occurs in their own. There is a difficulty in achieving a balance and might provide a case where too much knowledge of what is acceptable elsewhere could be dangerous. In addition, much of the discussion related to the Ombudsmen had been about the visits to prisons. But what about policing, and other places such as mental health institutions, etc.? There are a whole host of places that apparently fall outside of the mandates of bodies that could be considered as future NPMs. The future discussion should be about the realistic possibility of expanding their mandate so that they will also embrace these other places of detention as required by the OPCAT. In addition, this relates to the discussion of whether to create a new body to function as an NPM or use an already established one. There is a danger that the latter situation might end up

with the UK 'problem', in which existing bodies are being designated without regard to how this will work out in practice.

It is important in this regard that there should be an international overview that analyses the existing national bodies, which need to be efficient. So the way NPM are appointed has to be an issue for the SPT to discuss. The SPT has to deal with all oversight institutions, the courts, the public prosecutors, etc. All are part of the preventive machinery in a real sense.

Workshop II

Interaction with Other International and Regional Mechanisms

19 April, 2007

Presentation by Prof Leila Zerrougui

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/zerrougui.doc>

Presentation by Mr Zdenek Hajek

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/hajek.doc>

Discussion, Questions and Observations:

Following the presentations by Prof. Zerrougui and Mr. Hajek, one of the first issues debated during the discussion of workshop II dealt with confidentiality, which was brought up by Mr. Hajek during his presentation. Some concern was expressed that confidentiality between the SPT and the states as required by article 16 of the OPCAT would undermine cooperation between the SPT and other international bodies such as the CPT. If interpreted too strictly, it would mean that the SPT would not be able to share its information or cooperate with other international bodies. It was observed that confidentiality was intended to protect the relationship between the states and the treaty body and is not meant to protect the victim. The practice of international monitoring bodies shows, however, that confidentiality is overrated, except with regard to data protection. The practice of the CPT in this regard was put forward: Although the CPT is still formally bound by confidentiality, state parties are allowing the CPT to publish its reports more frequently. Confidentiality is difficult to obtain, but it works to help build confidence. With regard to NPMs, confidentiality helps to protect the victim.

The fact that the CPT has been allowed by state parties to make its reports public moved some participants to observe that the SPT should consider a similar path. It was also observed that currently, a number of members of the SPT are also members of the CPT. This means that in practice, these members will have access to information under both bodies even if it is confidential to one. A lack of cooperation between bodies due to the inability to exchange information could lead to a collapse of the system. It was argued, although not everybody agreed

on this point, that only the report needs to be confidential. All other information could be shared between the bodies. This debate brought up the question whether there was a difference between recommendations and observations, and the reports regarding the issue of confidentiality. It would appear that Article 16 does not talk about cooperation between the SPT and other bodies, and during the drafting of the article no thought was given to the distinction between reports, recommendations and observations. However, it would seem obvious that since some members of the SPT are also members of the CPT, there is the possibility of some sort of information exchange.

Another question was brought up regarding confidentiality. Although the confidentiality of reports can facilitate openness and cooperation with the states, it was not clear what would happen if following the recommendations made in a confidential report no progress was booked. It was pointed out that under the CPT practice, such situations would lead to a public statement made by the CPT and the issue would be discussed at the high level talks after a final meeting with the state. The CPT usually plays fast and loose with the issue of confidentiality. Although confidentiality used to be important in the early years of the CPT (even CPT members would remain anonymous to protect confidentiality), it is no longer an issue. Only the reports dealing with Russia are currently confidential and in spite of this, it is easy to work out what is dealt in them. This is due to the fact that the standards applied by the CPT are well known. Published and available standards allow others to identify the issues that are discussed within a confidential report. Publishing a report is actually anti-climatic. Nonetheless, confidentiality should not stand in the way of cooperation. Confidentiality of the reports does not prevent NGOs from knowing what is discussed in them. The SPT should therefore encourage cooperation with NGOs and not inhibit their work.

It was, however, argued that the issue of cooperation is easily solved if one does not talk too much about it. One may risk waking up a sleeping dog. The advantage of confidentiality, at least from the CPT perspective, is that it helps to ameliorate problems in countries that are difficult without them losing face. Confidentiality makes it possible to discuss difficult issues and establish communication. On the other hand, one should not underestimate the value of issuing a public statement as the CPT does.

To some it became apparent that confidentiality could make the cooperation with open procedures such as those of the non-treaty bodies more difficult. Although the outcome of a particular mission could be confidential, it was argued that the whole process should not be entirely confidential. The progress booked by the CPT on public and open reports could be a good practice for the

SPT to emulate. This, at least should be the position with regards to European state parties to the OPCAT, who are already exposed to the practice of the CPT. It was suggested that this may encourage other states to accept open reports. This however, must be done carefully to dissipate any impressions that (Western) European countries are pushing the rest to behave in a certain way.

In any case, it was emphasized that in states with a weak rule of law, the lack of publication of reports would result in no progress. On the other hand, non-treaty monitoring bodies like the Working Group on Arbitrary detention could benefit from working together with the SPT in countries that do not want to cooperate with the Working Group due to the openness. It was suggested that all available information should be at the disposal of all the bodies that can help to improve a particular situation. The main question that remains is how to share this information and through which procedures. Confidentiality is not a problem as such since one can work with it. Rather, it is a question of how to work with it.

The issue of sharing information between bodies remains, however, a thorny one. The CPT had proposed to share reports to the CAT in the early 1990s, but the response from state parties was not positive. Some states will never be bound by the OPCAT. It was emphasized that confidentiality as it is understood now, has nothing to do with how it was understood in the 1980s.

The discussion then shifted to between standards that will be applied by the different international bodies involved in torture prevention. Questions were raised with regard to the danger of the applicability of different standards by different bodies. Although it is desirable to have one set of standards for every situation, it would be difficult to implement the same standards to varying national situations. One has to set out priorities. It was observed that the CPT had gradually adopted a set of standards throughout its practice, and the question was raised whether the SPT could apply these as well. Aside from the fact that the use of CPT standards by the SPT would be seen as inappropriate, it was observed that even European standards are not always consistent. The CPT has also had to deal with different cultural and economic realities in the various countries of the Council of Europe and has had to take those into account at the moment of making recommendations. The European Prison Rules developed by the CPT have not always been consistent and are in need of revision.

Since it would be awkward for the SPT to adopt CPT standards, it was argued that maybe the CPT should change some of its standards to be consistent with the SPT's. In addition, it was suggested that the question is not about which standards have to be applied, but about the framework of prevention: this should

be the standard. There should be a common visiting method that could be used in the same manner during visits. It is a question of standard approach.

A differentiation was made between procedural standards and substantive standards. Although the SPT will need procedural standards, it will also have to develop substantive standards. With regard to the latter, there is the problem that on the one hand one should not be too prescriptive due to the differences between states, but on the other there are inescapable basic norms. The SPT will have to deal with UN norms. It was pointed out that there are hard and soft law standards, and in addition there are humanitarian standards that have been developed by the UNDP or UN Habitat. Since it would be too difficult to sum up all current UN standards, the main challenge is to find out which standards are relevant and implement a working method for these. There is also the problem of interpretation of standards. States do not always agree with a treaty body's interpretation of a treaty. It is however important to distil all those various standards which cohere around the preventive approach of torture. Specialist bodies such as the SPT must draw on the relevant standards that are unique to their own mandate. In the light of this discussion, one participant suggested that the SPT should start with the basic standards and take its time with the controversial ones. It should, however, not be afraid of the latter: it should start to work with UN standards and on the ground see how to work with the controversial issues and whether it is necessary to deal with them.

The workshop also briefly paid attention to the problem of coordinating visits between the preventive bodies such as the SPT and the CPT. The SPT will have to decide by lottery which country to visit first. It was discussed whether the SPT should wait for the CPT to decide which countries in Europe it will visit before taking a decision on the matter. However, a participant countered, that the best way to cooperate would be for the CPT to yield to the SPT's plans. In any case both organizations should prevent visiting the same country within a year to avoid losing credibility. Duplication of work from preventive monitoring bodies can be useful in human rights: it can be beneficial if other eyes also take a look at a particular situation. However, there is the risk that the SPT and the CPT give mixed signals, which would also hurt their credibility. It was noted, in this regard, that the relationship between the SPT and the CPT should be complementary. For example, following a visit by the CPT to a particular country, the SPT could after a couple of years visit the same place of detention that the CPT had examined and in which the latter had identified problems. It could also visit places that were not covered by the original CPT visit. This would fall within the remits of Article 13 (4) of the OPCAT with regard to 'follow-up' visits. However, the question remained

who can decide on this. In addition it was pointed out that although the initial visits by the SPT may not be ad-hoc, the wording of Article 13 (4) provides the possibility of doing ad-hoc follow-up visits.

Turning to the issue of the relationship between the SPT and the CAT, several participants wanted to know whether there was a hierarchical relationship between both bodies (hence the name Subcommittee). It was noted that there is no hierarchical relationship: in fact the character and roles of both bodies are different: the CAT has a different style of work dealing with periodic state reports and individual complaints, and the Convention Against Torture puts an emphasis on the prohibition of torture. On the other hand the SPT is a preventive body with a much more practical approach. There are, of course, some commonalities to both bodies, but their relationship should be viewed as one between brother and sister not mother and child. It was asked whether it was proper for the CAT to make recommendations about NPMs when dealing with state reports. No objections were raised and it was stated that the CAT should use its influence to support the creation of NPMs.

The drafting history of the OPCAT reveals that the idea of a preventive body carrying out visits to places of detention was a bridge too far for many countries. Once the CAT was adopted, prevention was revisited and this would lead to the idea that it should come in the form of an optional protocol to the CAT. The idea was to create a real subcommittee composed of members of the CAT itself. This idea, however, was ditched due to the different nature of the work of the bodies, but the name of the subcommittee stuck and was carried over to the drafting of the OPCAT.

The workshop briefly touched upon the subject of the cooperation between the SPT and other special mechanisms such as the UN Working Groups and Special Rapporteurs. It was observed that the SPT could benefit from a close relationship with the Working Group on Arbitrary Detention. The Working Group carries out 3 to 4 visits a year and could share information or put an agenda together with the SPT. In the past, the Working Group has carried out visits to countries which had been subjected to a visit by the CPT. The Working Group went there with a copy of the CPT's report in hand and tried to find out whether the recommendations of the CPT had been implemented and also visited other places where the CPT had not been. Vice versa, the Working Group could benefit from the SPT: for example, the Working Group cannot return to a state after a visit, whereas the SPT can build upon the recommendations provided by the Working Group when it visits that place. The key word here is complementarity, and it was remarked that it will be interesting to find out how other mechanisms,

such as the regional ones, will have to adapt to the SPT. Inevitably, there will have to be mutual adaptation.

A final topic discussed during the first day of the workshop dealt with the relationship between SPT and NGOs. Article 11 (c) of the OPCAT states that aside from cooperating and working together with international or national human rights institutions, the SPT has to also engage civil society. Although NGOs can be a source of information, it is not the only one. How can the SPT interact with elements of civil society bearing in mind the issue of confidentiality? Drawing from the CPT experience, it was observed that NGOs are important interlocutors for CPT. The SPT should, thus also meet with NGOs. With the CPT, NGOs provided information, but the CPT did not openly share this with NGOs. NGOs were not addressed by the CPT's reports. It was observed that this is necessary to protect the NGOs, which as sources of information are vulnerable. Directly mentioning NGOs in reports could put them at risk.

20 April, 2007

Presentation by Mr Leonardo Hidaka

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/hidaka.doc>

Presentation by Mr Mumba Malila

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/malila.doc>

Discussion, Questions and Observations:

During the second day of discussion on workshop II, the debate was centred on issues of coordination between the SPT and other international and regional monitoring mechanisms performing similar functions. At the start of the discussion some general reflections were made. First of all, the question was posed regarding the room that a body like the SPT will require in order to evolve. How much room will governments leave for evolution? Regional bodies such as the Special Rapporteur on the Rights of Persons Deprived of Liberty of the Inter-American Commission and the Special Rapporteur on Prisons and Places of Detention in Africa from the African Commission Coordinating have been able to evolve. How will this be factored into the SPT. In the second place, there is the

question of constructive dialogue versus a more judicial approach. How can the SPT build confidence with governments? The UN is in this regard more politically charged than regional bodies. A final point of reflection is how to work jointly on the implementation of preventive measures and how to follow-up on them. States can dispute the recommendations made by preventive bodies, so how can the latter work on this?

The possibility of collaborative efforts between bodies was discussed. The possibility of establishing formal links or carrying out joint visits by various mechanisms became topic of heated debate. Although there are ongoing discussions about the possibilities of carrying out joint visits, the issue is very problematic, in particular with regard to the terms of reference needed for the visit and also practical issues. For example, what happens if a body gets permission to visit a country, but another one does not? The UN Special Rapporteur on Torture has been discussing the possibility of joint efforts and co-operation initiatives with the African Commission's Rapporteur as well as with the Rapporteur of the Inter-American Commission. A joint visit, together with a joint report would give the mission more credence. However, as already stated, there are practical issues to consider. For example, the Special Rapporteur of the Inter-American system already has standing invitations to various countries in the region. The UN Special Rapporteur would have to get a formal invitation before joining in. On the other hand, there are experiences of missions carried out together with UNICEF, which was facilitated by the fact that both bodies shared the same personnel. In addition, the terms of reference used by the Inter-American Commission are very similar to those used by the UN. However, a potential negative aspect of joint visits with joint reports would be that there would be no other body to follow-up on these. Two or more different mechanisms visiting a particular state at different times could carry out a follow-up and build on earlier conclusions.

It was pointed out that the collaboration efforts between UN and other regional mechanisms are mainly focused on the exchange of publications and awareness of the work of others. In the field, the UN Special Rapporteur has tried to fill in the gaps left by visits of the regional bodies. There has also been collaboration between human rights defenders, the Inter-American Commission and the UN Special Rapporteur. However, it is believed that a lot of the collaboration with regional bodies will be with the NPMs. It would appear that the Inter-American Commission has already started engaging in NPM processes, for example in Mexico.

Some experiences of the African Commission's Special Rapporteur were shared: for example the Special Rapporteur has carried out 16 visits to States since 1996. It has encountered some resistance from states. Since it is a diplomatic arrangement, some governments accept, while others are more reluctant and create excuses to prevent the visit. This was the case, for example, of Zimbabwe, to which the Special Rapporteur on Prisons, the Special Rapporteur on Human Rights Defenders and the Special Rapporteur on Internally Displaced Persons wanted to carry out a joint mission. The government of Zimbabwe had stated that they could come, just 'not now'. Sometimes political persuasion may be needed.

The discussion turned briefly to the issue of whether designating existing NHRIs could be regarded as the proper way of establishing NPMs. It was observed that NHRIs (sometimes?) have a mandate to visit places of detention. Governments are usually reluctant to duplicate institutions, thus it may be that NHRIs could be the best alternative to fulfil the role of NPMs, at least for the time being. What happens if NHRIs are not independent as required by the OPCAT? This question prompted the remark that even independent institutions may have difficulties visiting prisons. Here a role for the SPT was envisaged in that it could comment to the government about the lack of independence of its NPMs. For NHRIs to be effective NPMs, it was argued, will depend on the national context: how independent and effective have they been in practice? What is the public perception of these bodies?

The relationship between the SPT, NPMs and other organizations of civil society was then brought up. It was observed that it is important for the SPT to not only have contact with NPMs, but also with NGOs working in the field. This would help the SPT get additional information about the real situation on the ground and get other views and perspectives. The question whether NGOs should be a part of the NPM was brought up. It was argued that NGOs need to maintain a certain distance from the NPM and even monitor its activities.

Returning to the issue of possible joint missions or joint efforts between SPT and other international bodies, the question was brought up how Article 13 of the OPCAT could fit herein. Article 13 allows the SPT to compose a roster of experts for carrying out visits. Would it be possible that experts from other international monitoring bodies be recruited this way? This would not mean a joint mission, but it would provide experience and expertise as well as circumventing problem of confidentiality. It was observed that during the drafting of the Article 13, no consideration was given to the possibility that members of having the same members in different bodies. This is an issue of cooperation.

There may be constraints with regard to the terms of reference in particular with respect to special procedures; less so for treaty bodies. Having the same or similar mandate does not mean one can work jointly. However, where there is a will, there is a way. There are creative ways of going around this. For example, joint reports may not be feasible, but their findings could be written together and joint missions could be referenced. This approach would also help for the terms of reference: writing letters referring to each other can be used to obtain permission for a joint visit.

Some examples of joint visits by special procedures mechanisms were then discussed. The Working Group on Arbitrary detention has already done a number of joint visits, for example to Australia. It was observed that it is not always easy to do them together. For example, the report on Australia was done separately. This may be problematic if reports differ. To avoid this, joint visits need coordination in report writing. There was also the example of the request of 5 UN special procedures mechanisms requesting to visit together Guantánamo Bay prison. Only three special procedures out of the five that had requested to visit together the prison were actually invited to do so. This led to long discussions, whether to accept the visit for only three mechanisms or reject in favour of the five. In the end it was decided to reject the proposal and write a joint report on Guantánamo without carrying out the actual visit.

The necessity of cooperation between monitoring mechanisms was acknowledged. The question was how to implement this. There is a need for common practices and coordination. The question was posed whether the UN Secretariat could not come up with a coordination initiative. This would involve additional resources and the SPT would have to be able to follow-up on this issue. A way of approaching this would be to coordinate joint meetings of the monitoring mechanisms. As always, there is the question whether there are sufficient resources to carry out this. The SPT is a new and unique body and there will be new budgetary demands on it. The SPT needs support from everyone, it should state what it needs to do and the UN should find the resources to do this. It was observed that states will be happy if the SPT coordinates its activities with other mechanisms. States will appreciate any effort to enhance the SPT's effectiveness. There is a need to set up meetings with state parties in which the SPT can request for additional funds. Without this type of dialogue, work will be problematic. There are now only 34 state parties, which are committed. It means that they are ready to help the SPT. In five years time when the more states have joined the OPCAT, it will be more difficult to be so flexible. Finally, it was pointed out that the SPT had been invited to the joint treaty bodies meeting in June 2007.

Workshop III

Subject-specialist

19 April, 2007

Opening of the Workshop by the Chair, Mr Andreas Mavrommatis

Mr Mavrommatis opened the workshop by underlining that the most important provision is the absolute prohibition on torture and the absolute prohibition on sending someone back to a country if there is a real risk of torture, Article 3 UNCAT. It was thus noted that there is substantive law for the OPCAT, the UNCAT, and that in the process of implementation of OPCAT, the UNCAT must be taken as the basis. There is also a need to pay heed to the CPT and the inter-American system etc, but all the main questions must turn first to the UNCAT and then to the other procedures. Therefore the contact with the CAT from the SPT would be welcomed.

Presentation by Mr Eric Svanidze

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/svanidze.doc>

Discussion, Questions and Observations:

The question of the rights of the internal secret services and intelligence authorities of military to arrest or otherwise deprive people of their liberty was raised. More specifically, it was asked how the CPT has been dealing with such instances.

In practical terms the CPT had encountered instances where the secret service of a country is acting as a formal law enforcement body. The main difficulty in such cases was the denial that any persons are being detained and one possible avenue in such cases is the inspection of the detention files which may show discrepancies. Similarly it was explained, that often arguments, like, that the deprivation of liberty is only for a short period of time for the purposes of question, were advanced, which can be overcome by asserting that the body has the right to inspect any place of detention, irrespective of how long persons are being held there. To this end it was particularly underlined that full use should be made of the wide mandate to visit any place of detention provided by the OPCAT by both the SPT and NPM.

The issue concerning the extra-territorial application of OPCAT was raised and in particular it was asked what are the legal obligations of the army of a state party to OPCAT- is it legal for such army to take the decision to transfer prisoners of war to a country which is not a party to OPCAT, wouldn't this constitute a breach of its obligations.

In general terms, the OPCAT may have extra-territorial application and these are instances when the issue of 'effective control' may arise- due to the fact that states parties to the European Convention for the Prevention of Torture were in effective control of some parts of Iraq, the CPT were able to visit the places of detention there. However, in the specific scenario when prisoners of war or others are transferred to the military detention place, which is not in control of a state party to OPCAT, neither NPM nor SPT will have a mandate to visit such a place. It was however suggested that the argument of *non-refoulement* could be advanced against such a transfer of persons to a state which not a party to OPCAT: after all UNCAT imposes absolute prohibition to transfer a person to a place where there exist a threat of torture.

The issue of house arrests was raised next and it was asked as to whether private residences can be subjected to visits by NPMs and SPT, especially if Article 4 of the OPCAT requires that a place of detention is to be under 'jurisdiction and control' of a state party. It was argued that these still constitute places of detention and should therefore be subjected to visiting. However it was noted that difficulties may arise in practical application and the lack of experience of conducting such visits by the existing monitoring mechanisms was highlighted.

Similarly the difficulties that arise in cases of state succession were discussed- CPT had encounter various problems when, for example, entering military bases in Ukraine which were under Russian control. However it was noted that ad hoc arrangements can be made, for example, CPT had entered in special agreements with the NATO which had allowed them to visit various places of detention in the territory of former Yugoslavia. It was also highlighted that the CPT has taken very strong stance in the past: either to be allowed to go to any place of detention it wishes to or refuse to go to the country at all.

Presentation by Ms Alice Edwards

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/edwards.doc>

Discussion, Questions and Observations:

The discussion session started with the issue of the definition of torture. It was noted that various UN bodies have adopted slightly different definition of torture, for example, the Human Rights Committee has adopted slightly broader definition than CAT. It was noted that there is nothing preventing the SPT from developing the definition further, but at the same time it was underlined that OPCAT is intrinsically linked to the UNCAT and therefore the definitions of torture should not be contradictory. Therefore SPT could make use of other norms of international law and not necessarily redefine torture, but develop it further.

The discussion then turned to the visiting of places of detention by the SPT and the division between regular and ad hoc visits was mentioned. It was noted that the prospective policy of the SPT on these is not yet clear. The practical issues were examined: SPT has serious lack of resources and there is no indication of an increase. In reality this means that at the moment there is one SPT member to two/three countries. The resources are such that every state party is unlikely to be visited more than once every five years or so. This factor, combined with the fact of how geographically large some states parties are, effectively means that some places of detention may escape the visit of the SPT all together. Therefore the role of NPMs is of paramount importance and these bodies should ensure that each place of detention in their respective countries is visited at least once a year. The problem of monitoring places of detention between these visits will remain though – how to manage and have control over what is happening to inmates.

The SPT, on the other hand, in order to be most efficient, needs a level of flexibility to be able to react to the inevitable and various changes in circumstances. There are limited resources for follow-up and therefore establishing good links with the NPMs is essential. This however in itself may pose certain difficulties- how to build links with organisations in far away countries. Moreover, since there are 34 states parties at the moment, this means that some countries will not be visited by the SPT for some years, while the NPMs will start to work there. The challenge is to develop the cooperation between the SPT and the NPMs as soon as possible. Therefore the system put in place by OPCAT should not be perceived as two column system, the SPT and the NPM as there must be close links between the two.

Turning to the issue of which countries should be visited, the possibility of choosing countries by lot was not welcomed; the need for striking a balance between the geographical and political reasons was underlined. However at the

same time warnings were issued so as the choice made by the SPT would not appear biased and/or would not duplicate the work carried out by other bodies. The possibility of conducting joint visits with other bodies was mentioned, however there could be instances when such a possibility would be prevented by the issues of confidentiality.

The question was raised as to whether the SPT would welcome visits from NPMs and it was noted that this certainly could be an interesting option for the purposes of training. However in reality this may be difficult due to budgetary limits of both the NPMs and the SPT. The possibility of international human rights NGOs acting as facilitators of such meetings was highlighted.

Turning to the specific case of refugee centres, it was questioned whether the SPT will have real ability to monitor these types of places of detention due to its limited budget. It was noted that the default position is to visit prisons and to be looking at issues of torture, but it was warned that ill treatment is not confined to prisons only and may take different form, for example, is it inhuman treatment to provide refugees with smaller food rations than the minimum determined by the World Health Organisation.

20 April, 2007

Presentation by Dr Hans Draminsky Petersen

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/peterson.doc>

Discussion, Questions and Observations:

The issue of doctors' independence was discussed first of all. The need for professional and functional independence was underlined, noting the difficulties that may arise in cases when doctors belong to the same institution against which the allegations of ill treatment have been made.

The discussion then turned to the issue of patient confidentiality and it was noted that whilst doctors have to report on ill treatment, they also must preserve the independence of the detainees. Although it is not hard to instruct doctors to fill in a protocol, it is harder when the detainees do not want to make an allegation. It was thus suggested that when there is a desire not to make an allegation there needs to be a more analytical approach about supervision of injuries and doctors should be taking careful examination of any injuries to

provide the means by which to say that ill treatment has occurred within the system, even if no specific allegations are being put forwards.

The point about the use of photography in monitoring ill treatment was raised and an example of an asylum seeker from the Northern Cyprus who was denied asylum by the UK Home Office on the basis that they believed that the wounds were self inflicted was provided. In this instance there were photos taken when the wounds were new and these showed evidence of evidence from being held down. In response the person was granted asylum. Unfortunately it was discussed that use of photography is not as widespread but should be promoted. Similarly it was suggested that taking blood tests could be beneficial to monitor ill treatment.

The discussion returned back to the big dilemma of the fear of retribution, which makes inmates unwilling to report abuse. It was noted that there might be no safe avenues of reporting ill treatment in the institution and doctor may be visit the institution infrequently, like once a week. The utility of documentation is, therefore, only truly effective when it is used as early as possible. This in turn leads to the issue of the confidentiality of medical files- most commonly these can only be access by NPMs when an express consent of the patient is given. Thus access to medical information and the data protection were underlined as serious challenges to monitoring mechanisms. In practical terms this means that if one wishes to use an individual case of ill treatment, there is a need to have the informed consent of the detainee. Additionally however, one can just show a sample of certain activity. There is not necessarily a need to use names but can give results through tables and figures. However a need to have a clear policy was highlighted.

Presentation by Dr Andres Lehtmets

Abstract

<http://bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/lehtmets.doc>

Discussion, Questions and Observations:

First of all the question was raised as to whether there is a need for specialist NPMs to visit psychiatric institutions. This was noted as a big challenge, but it was agreed that it is very important that NPMs visit these types of institutions, even though in these cases NPMs would not have powers to review detention as it might be in more 'traditional' places of detention, like police

stations. It was highlighted that in these instances there is no need for a panel of psychiatrists as other medical backgrounds can also be useful. The problem places are the long term institutions, which are often isolated, there is not enough interest from the outside world and abuse and ill treatment can be overlooked. It was suggested that including an ex-patient on the visiting team might be beneficial. Monitoring teams in general should include persons from a variety of different backgrounds but the confidentiality of these visits needs to be considered.

The discussion then turned to the medical aspects of treatment and it was suggested that the use of medication is often considered as almost a 'magic stick', however using medication as an ultimate tool to control behaviour should be criticised. Similarly the importance of registering and documenting the use of restraints was underlined and it was suggested that the use of these should be reviewed by an outside body.

The issue of balancing state's views as opposed to those of a monitoring mechanism was raised. It was asked how to deal with the situations when a monitoring mechanism might concluding that certain treatment amounts to an ill treatment, whilst the relevant institution and authorities may disagree. The key to this situation was said to be dialogue and it was underlined that when there exists a difference in opinion, clear communication and open dialogue are essential. However warnings were issued against blanket approaches- the particularities of each country as well as of each institution must be taken into account when monitoring is carried out.

The discussion then once again turned to the issue of confidentiality. It was noted that the SPT and NPMs would clearly need access to all medical records and documentations, which in practice may prove to be difficult. There were examples provided when the existing monitoring mechanism, like the CPT have encountered real problem with accessing medical files. Thus whenever possible consent must be sought. It was also suggested that such documents as hospital audits can prove helpful since these at times do not contain patient data and while these reports are not usually published, they are used internally.

However, turning back to the issue of consent, the problem of legal safeguards and legal capacity of a person was raised. Is asking for a signature sufficient? In psychiatric institutions especially such problems as the legal incapacity of a person may arise. Thus the role for relatives and the interaction with appointed guardians was underlined. The problem though may arise as often the directors of the institutions operate as appointed guardians, which may pose certain difficulties.

Concluding Observations by Prof Rachel Murray

In her concluding observations Prof Murray noted that there are a lot of expectations upon the SPT, some of which are unrealistic. For example, there is the expectation that the SPT can do everything and yet much will also depend on the other systems that are already in place. She called for a more realistic approach and for more clarity in the role of the SPT and the NPMs. To this end, Prof Murray noted that there is a need to build upon what already exists: standards, visits, information sharing and finding out what is 'out there'. Institutional support needs to be flexible and coordinated.

At the same time, she noted that nothing is 'set in stone', even the OPCAT itself and there are different interpretations concerning ratification, designation, the rules of procedure. So it is all an ongoing process and should be taken as such.

Concluding Observations by Prof Malcolm Evans

In his concluding observations Prof Evans noted the need for knowledge of the issues in order to grow in understanding and to be able to assist others. It is important to be aware of the relationships between the SPT, the NPMs, the CAT and other mechanisms and bodies etc. Overlaps and contradictions can occur between the various bodies, but the main thing is that these mechanisms are able to work together and are not fearful of repetition. There is sometimes an expectation of perfection and it needs to be established what can actually be done in realistic terms.

Prof Evans warned against exaggerating the challenges and noted that the issue of applicable standards, for example, is certainly huge and important one, but can be easily overdone.

Prof Evans concluded by stating that it is important to reflect on what is happening in terms of the discussions and debates about combating torture and even if the process initiated by the OPCAT would stop tomorrow, the Conference has been a significant achievement precisely because it has generated debate about the issues surrounding the OPCAT.

3. Conference Agenda

Thursday April 19, 2007

9:00-9:30: Arrival, registration and coffee

Opening of the conference **Prof Rod Morgan**

Plenary Session: Torture Prevention and OPCAT

9:30- 10:40- General introduction to the conference topic, giving insight into the problem. **Prof. Malcolm Evans & Prof Rachel Murray**

Moderator: Malcolm Evans

Presentation by **Dr Silvia Casale**

Presentation by **Ms Claudine Haenni-Dale**

Coffee break 10:40- 11:00

Plenary Session: Continued: Implementation of OPCAT

11:00- 12:30

Moderator: Rachel Murray

Presentation by **Mr Jens Færkel**

Presentation by **Mr John Kissane**

Presentation by **Prof Lovell Fernandez**

Lunch 12:30-14:00

Breakdown in sessions: 14:00- 17:00 with coffee break from 15:30 – 15:45

Standard setting and NPM's	Special Procedures and Other International Instruments	Subject-Specialist: medical, psychiatric, refugee, military.
<p>Chair: Dr Silvia Casale</p> <p>Presenters:</p> <ul style="list-style-type: none"> • Dr Jonathan Beynon (NPMs and standards to be used by them) • Dr Leon Wessels (criteria applicable to NPMs: OPCAT and Paris Principles) 	<p>Chair: Mr Mumba Malila</p> <p>Presenters:</p> <ul style="list-style-type: none"> • Prof Leila Zerrougui (Relationship between SPT and Special procedures of UN) • Mr Zdeněk Hájek (role of SPT and relationship with CPT) 	<p>Chair: Mr Andreas Mavrommatis</p> <p>Presenters:</p> <ul style="list-style-type: none"> • Mr Eric Svanidze (monitoring places of military detention: lessons for SPT) • Ms Alice Edwards (applicability of OPCAT re refugee issues)

Wine reception 17:30- 19:00

Friday April 20, 2007

Sessions 9:30- 10:45; Coffee break 10:45- 11:00; Sessions: 11:00-12:30

Standard setting and NPM's	Special Procedures and Other International Instruments	Subject-Specialist: medical, psychiatric, refugee, military.
Chair: Dr. Leon Wessels Presenters: <ul style="list-style-type: none">• Mr Alejandro Rodriguez (national mechanisms and visits to the places of detention- Guatemala experience)• Ms Mel James (Penal Reform International); (criteria applicable to NPMs; role of NPMs)	Chair: Ms Claudine Haenni-Dale Presenters: <ul style="list-style-type: none">• Mr Leonardo Hidaka (relationship between the SPT and the IACHR/rapporteur on prisons)• Mr Mumba Malila (relationship between SPT and regional bodies: Special Rapporteur on Prisons and Conditions of Detention in Africa of the African Commission on Human and Peoples' Rights)	Chair: Dr. Jonathan Beynon Presenters: <ul style="list-style-type: none">• Dr Hans Draminsky Petersen (SPT and the medical aspects)• Dr Andres Lehtmets (applicability of OPCAT re psychiatric issues)

Lunch 12:30- 14:00

Plenary: Reports from the Workshops 14:00- 14:45

Moderator: **Prof Malcolm Evans**

Reports from Panels I (**Silvia Casale and Leon Wessels**) and II (**Mumba Malila and Claudine Haenni-Dale**)

14:45: 15:00 Coffee break

Plenary Session: Reports from the Workshops Continued and Conclusion

Moderator: **Rachel Murray**

15:00- 16:00

Report from Panel III (**Andreas Mavrommatis and Jonathan Beynon**)

Conclusion of the Conference: a presentation by **Prof Rachel Murray and Prof Malcolm Evans**.

4. List of Participants

Speakers:

Beynon, Jonathan (ICRC)

Casale, Silvia (President of the SPT, also a member of the CPT; United Kingdom)

Edwards, Alice (University of Nottingham)

Færkel, Jens (Ministry of Foreign Affairs, Kingdom of Denmark)

Fernandez, Lovell (University of Western Cape, South Africa)

Haenni-Dale, Claudine (UNHCHR)

Hájek, Zdeněk (Member of both the SPT and CPT, Czech Republic)

Hidaka, Leonardo (Human Rights Specialist for the IACHR's Rapporteurship on the Rights of Persons Deprived of Liberty)

James, Mel (Penal Reform International)

Kissane, John (Department of Constitutional Affairs, United Kingdom)

Lehtmets, Adres (Vice-President of the CPT, Estonia)

Malila, Mumba (special Rapporteur on Prisons and Places of Detention in Africa, member of the African Commission on Human and People's Rights)

Mavrommatis, Andreas (President of CAT, Cyprus)

Morgan, Rod (Professor Emeritus of the University of Bristol)

Petersen, Hans Draminsky (Vice-President of the SPT, Denmark)

Rodriguez, Alejandro (Chief Legal Adviser of the Guatemalan Ombudsman Office)

Svanidze, Eric (Human Rights lawyer, expert/former member of the CPT, Georgia)

Wessels, Leon (Commissioner to the South African Human Rights Commission)

Zerrougui, Leila (Algerian Supreme Court judge, Chairperson-Rapporteur of the UN Working Group on Arbitrary Detention)

Invitees:

Barrett, Vaughan (Scottish Prisons Complaints Commission)

Boer, Bert de (Dutch Penitentiary Service)

Carroll, Sherman (Med. Found. for Rehab. Torture Victims)

Carver, Richard (Oxford Media Research)

Coriolano, Mario Luis (SPT, Argentina)

Definis Gorjanovic, Marja (SPT, Croatia)

Delaplace, Edouard (APT)

Dickson, Brice (Queens Univ. Belfast)

Egan, Suzan (Irish Human Rights Commission)

Eller, Kaarel (adviser to the Chancellor of Justice in prison and criminal law, Estonia)

Evans, Malcolm (University of Bristol)

Ferstman, Carla (Redress)

Gerez, Claudia (APT)

Grady, Kate (University of Bristol)

Green, Sarah (Mental Disability Advocacy Center)

Hagens, Mireille (Leiden University)

Hallo de Wolf, Antenor (University of Bristol)

Harvey, Colin (Queens University Belfast)

Hillman, Alison (MDRI)

Jefferson, Andrew (RCT)

Jenkins, Jo (National Council for Independent Monitoring Boards UK)

Kellett, Mike

Kelly, Thobias (University of Edinburgh)

Korljan, Edo (SPT Secretariat, UN)

Layden, Catherine (FCO Rule of Law and Europe Team HRs Group)

Long, Debbie (AI)

MacMillian, Leanne (Medical Foundation for the Care of Victims of Torture)

Mageean, Paul (Northern Ireland Com. on Administration Of Justice)

Malkani, Bharat (University of Bristol)

Mariotte, Jean-Marie (FIACAT)

Maughan, Tim (University of Bristol)

McLean, Norman (Secretariat Independent Monitoring Board UK)

Mohochi, Sam (Executive Director Independent Medico-Legal Unit Kenya)

Morales, Mercedes (CAT Sec OHCHR)

Mugnolo, Francisco (Procuración Penitenciaria de la Nación Argentina)

Murphy, Mary (Director, Penal Reform International South Caucasus Reg. Office)

Murray, Rachel (University of Bristol)

Niyizurugero, Jean-Baptiste (APT)

Ojala, Harri (Finnish Parliamentary Ombudsman Office)

Owor, Maureen (University of Bristol)

Peddie, Brian (Scottish Executive)

Pollard, Matt (APT)

Pringle, Matthew (APT)

Reé Iverse, Dorrit (RCT)

Reynolds, Christine (University of Bristol)

Rodríguez, Kathya (Special Protection Director; Ombudsman Office of Costa Rica)

Rytter, Therese (RCT)

Simkin, Sue (National Council for Independent Monitoring Board UK)

Skordas, Achilles (University of Bristol)

Steinerte, Elina (University of Bristol)

Streater, Olivia (Centre for the Study of Violence and Reconciliation, South Africa)

Tremblay, Philippe (APT)

Trimble, Vickie (University of Bristol)

Uhl, Robert-Jan (OSCE Office for Democratic Institutions and Human Rights)

Van Zyl Smit, Dirk (University of Nottingham)

Vandova, Vesselina (Senior Lawyer, INTERIGHTS)

Watson, James (University of Bristol)

Williams, Brian (University of Bristol)