



INTERNATIONAL LEAGUE
FOR HUMAN RIGHTS



Joint NGO Commentary on the Proposed Optional Protocol to the Convention Against Torture

An Unprecedented Opportunity to Prevent Torture

At the 57th session of the UN General Assembly in New York (September-December) this year, member States will have the opportunity to take concrete steps to prevent torture by adopting an Optional Protocol to the UN Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment.¹

The proposed Optional Protocol would prevent torture by establishing a system of regular preventive visits to places of detention by independent and adequately mandated international and national bodies of experts. It has already been adopted by the UN Commission on Human Rights and the UN Economic and Social Council early this year and is widely supported by States from all regions of the World.²

How will the Optional Protocol help to Prevent Torture?

1. To whom it would apply

The aim of the Optional Protocol is to assist States Parties to implement their existing obligations to prevent torture under the Convention against Torture. Therefore, the Protocol is an "Optional" Protocol, the provisions of which will only apply to States Parties to the Convention against Torture that eventually choose to ratify or accede to the instrument.

2. Prevention through visits

Most of the existing international treaties have created mechanisms to monitor States Parties' compliance with their treaty obligations, through regular reporting. The Convention against Torture does provide for a specific reactive mechanism allowing the Committee against Torture to carry out visits.³ However, such visits may be conducted only where there are well-founded indications that systematic and widespread torture has been committed and upon acceptance of a visit by the State concerned.

¹ E/CN.4/Res/2002/33.

² The proposed Optional Protocol received 54 co-sponsors at the UN Commission on Human Rights and was adopted by 29 votes for, 10 against with 14 abstentions. At the UN Economic and Social Council the text was adopted by 35 votes in favour, 8 against with 10 abstentions.

³ See Article 20 of the UN Convention against Torture.

In contrast to this traditional reactive approach, the Optional Protocol would establish proactive international and national visiting mechanisms, focussing on prevention through a mandatory system of regular and follow-up visits to any place of detention (Article 1).⁴

The effectiveness of visits to places of detention as a means to prevent torture has been demonstrated by the European Committee for the Prevention of Torture (CPT). The CPT has effectively proven that visiting mechanisms can work constructively with State authorities to prevent torture.⁵ In light of the experience of the CPT, it can be shown that visiting mechanisms have a preventive role for the following reasons:

- They can examine conditions and procedures of detention and make recommendations for immediate improvements;
- They establish a continuing dialogue with detention personnel and authorities;
- They offer practical and moral support for persons deprived of their liberty, particularly to more vulnerable groups of detainees such as; women, children under 18, those detained because of their immigration status or those with mental health problems;
- The knowledge of their existence has a deterrent effect for the detention personnel and authorities.

3. Establishment of an International Visiting Mechanism

Article 2 of the Optional Protocol sets out the requirement for the first pillar of the preventive system, through the establishment of an international visiting mechanism, a "Sub-Committee" of the Committee against Torture, in order to conduct visits to places of detention. The Sub-Committee will be guided by "*the principles of confidentiality, impartiality, non-selectivity, universality and objectivity*".⁶

This Sub-Committee shall consist of 10 independent, multidisciplinary experts, adequately mandated to conduct visits to places of detention within States Parties to the Optional Protocol (Article 5).⁷ These members will be chosen by States Parties, from professionals with experience in various fields relevant to the treatment of persons deprived of their liberty. The members of the Sub-Committee will serve in their individual capacity and shall be independent and impartial.

4. National Preventive Mechanisms

The second pillar consists of a system of regular visits undertaken by national bodies to places of detention. States Parties will be obliged to set up, designate or maintain a national visiting body or bodies, within one year after entry into force of the Optional Protocol or its ratification or accession (Articles 3 and 17). Further, pursuant to Article 17: "*Mechanisms established by decentralised units may be designated as national preventive mechanisms*".

Accordingly, the text provides a flexible approach towards national preventive mechanisms, taking into account varying political structures such as federal systems,

⁴ Article 1 creates an obligation to "establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman and degrading treatment or punishment."

⁵ For further information on the European Committee for the Prevention of Torture please see the CPT's website: www.cpt.coe.int

⁶ Part I, Article 2 (3)

⁷ This number will rise to 25 upon the 50th ratification or accession to the Optional Protocol, Article 5 (1)

as well as the existence of national visiting mechanisms in some States prior to becoming a Party to the Optional Protocol.

In order to ensure the independence and effective functioning of these national preventive mechanisms, pursuant to Article 18, States Parties have an obligation to:

- guarantee their functional independence;
- ensure the members have the required capabilities and professional knowledge;
- make available the necessary resources for them to function effectively.

In accordance with the provisions of Article 24, upon ratification States Parties may make a declaration to postpone temporarily (for a maximum of 5 years) part of the implementation of their obligations either in relation to the international mechanism or the national mechanism, but not both. During this period, a dialogue between the States Parties, Sub-Committee, and national mechanisms will be maintained.

5. Co-operation

The effectiveness of the Optional Protocol as a preventive instrument lies in the principle of co-operation and dialogue, which underscores the provisions of the instrument. States Parties have a general obligation to co-operate with the visiting mechanisms to enable them to carry out visits to places of detention (Article 4). In this respect, the Sub-Committee shall co-operate with States Parties in the arrangements for the visits (Article 13). Both visiting mechanisms shall co-operate with States Parties and persons deprived of their liberty in relation to the handling of confidential information.⁸

The Optional Protocol also provides for co-operation between the international and national preventive mechanisms. In accordance with the various provisions of Article 11, the Sub-Committee shall advise and assist, where necessary, in the establishment of national preventive mechanisms. Once the national mechanisms are in existence, the Sub-Committee shall maintain contact with them and offer training, technical assistance, and other advice or recommendations. The Sub-Committee can also make recommendations and observations to States Parties concerning the strengthening of the national preventive mechanisms. Further, Article 11 also provides for the Sub-Committee to co-operate generally with relevant UN bodies, as well as with other international, regional and national institutions or organisations working to prevent torture.

Lastly, as a Sub-Committee of the Committee against Torture, the international mechanism shall, pursuant to Article 16, submit an annual report to the Committee against Torture and where there is a lack of co-operation with a State Party, the Sub-Committee shall refer the matter to the Committee against Torture.

6. Access and Visits

In accordance with Article 4, States Parties undertake to allow the visiting mechanisms access to "*any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority, or at its instigation or with its consent or acquiescence*" (places of detention).

In relation to the international visiting mechanism, Article 12 provides a general obligation for States Parties to co-operate with and to receive visits by the Sub-Committee. The Sub-Committee shall establish a programme of regular visits, drawn

⁸ Article 16 and Article 21.

up at first by lot (Article 13). If appropriate a short follow-up visit to a regular visit can be proposed.

In accordance with Article 14, in order to enable the Sub-Committee to effectively fulfil its mandate, States Parties undertake to grant it access to all places of detention. A State Party can object to a visit to a particular place of detention only on the urgent and compelling grounds specified in Article 14 (2). During a visit, the Sub-Committee shall be allowed the opportunity to conduct private interviews and be at liberty to choose the places it wants to visit and persons it wants to interview. Further, Article 14 also grants the Sub-Committee access to specific categories of information, limited to the number of places of detention, persons deprived of their liberty and their treatment.

As regards the national visiting mechanisms, Article 19 provides that they shall be allowed to regularly examine the treatment of persons deprived of their liberty. By virtue of Article 20, States Parties undertake to grant the national mechanisms access to all places of detention and similar rights of access to persons and information as the Sub-Committee.

7. Recommendations and Reporting

The Sub-Committee shall communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national mechanism in accordance with Article 16. If requested by the State Party, the Sub-Committee shall publish its report, together with any comments of the State Party concerned. In addition, the Sub-Committee shall present a public annual report on its activities to the Committee against Torture.

Only in the event of a refusal by a State Party to co-operate with the Sub-Committee or to take steps to improve the situation in light of recommendations made, can the Sub-Committee make a public statement without the consent of the State Party. Yet, this step can only be taken after thorough consultations with the Committee against Torture and the State Party concerned.⁹

As regards the national preventive mechanisms, in accordance with Article 19, they can also make recommendations to the relevant authorities following a visit. The State Party and the national preventive mechanism shall, pursuant to Article 22, then enter into dialogue for possible implementation of the recommendations. Further States Parties undertake to publish and disseminate the annual reports of the national preventive mechanisms (Article 23).

8. Funding

Article 25 of the text provides that the expenditure incurred by the Sub-Committee shall be borne by the United Nations. This provision is in line with the UN General Assembly Resolution 47/111, which provides that Treaty Bodies should receive funding from the regular UN budget. This provision will aid the ratification and accession of the instrument by less developed States who, whilst willing to welcome visits by the Sub-Committee, might otherwise be unable to afford the cost if it was restricted to State Party funding.

Further, following the principle of co-operation, Article 26 provides for a Special Fund to be set up to help finance the implementation of the recommendations made by the Sub-Committee. The fund would also help education and technical assistance at the

⁹ See Article 16 (4).

national level, thus concretely providing a means to assist States Parties to implement the provisions of the Optional Protocol.

9. Reservations

Pursuant to Article 30 of the compromise text, no reservations to the text will be allowed.¹⁰ This ensures that the provisions of the Optional Protocol are applied equally amongst States Parties.

Conclusion

The text of an Optional Protocol to the Convention against Torture adopted by the UN Commission on Human Rights and the UN Economic and Social Council, represents a process of consultations and negotiations which have taken place within a UN Working Group, open to all States, over the past decade. This text contains the necessary elements to create effective visiting mechanisms to assist States Parties to the Convention against Torture in implementing their existing obligations to prevent torture.

Our organisations are convinced that the proposed Optional Protocol which will be presented to the member States of the UN General Assembly represents a real and unprecedented opportunity to prevent torture world-wide. We call on all States to support the Optional Protocol and to ensure that it is finally adopted at the 57th session of the UN General Assembly.¹¹

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For more information please contact: dop@apt.ch or visit the APT website: www.apt.ch

¹⁰ See Article 24 for the possibility for States Parties to postpone the implementation of their obligations.

¹¹ Once adopted by the UN General Assembly, the Optional Protocol would then be open for signature and would enter into force upon the 20th ratification.