

# Torture Prevention Network: Themes for planned action

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## Abstract

Efforts to secure better protection of the right to decent treatment for persons deprived of their liberty by the State and, accordingly, their right not to be a victim of torture and other cruel, inhuman or degrading treatment, are being pursued, through international human rights law, using various standards and institutions, both governmental and civil-society-based, at the local, regional and worldwide levels. These standards and institutions are inevitably changing in a gradual and complementary fashion in order to achieve this common goal. The inadequacy of the efforts made to date must not be ignored, especially given the continued use of torture throughout the world. Building a new system for preventing torture under the Optional Protocol to the Convention against Torture and other cruel, inhuman or degrading treatment or punishment (OPCAT),<sup>1</sup> through periodic visits to all places of detention, is a complex process giving rise to both conflict and consensus, and producing new dialectics. In this process, complementarity between the work of international organisations, both regional and worldwide, and that of local institutions and organisations must be strengthened.

## 1. Introduction

An analysis of what has been done in recent years to eradicate or reduce torture and other inhuman treatment reveals that the new paradigm, made up by the plethora of international standards and bodies in the United Nations, has not been entirely effective, though it has sparked the reform of domestic constitutions, basic codes and procedural legislation. Among other problems, the fundamental institutions of the rule of law that bear responsibility in this area have been incapable of halting the use of torture, particularly institutions in the law enforcement, judicial (i.e. judges, prosecutors and defence counsel) and penitentiary fields. Against this background, the lengthy struggle waged by numerous actors to achieve the OPCAT's entry into force calls for all those involved, within the context of their various responsibilities, to think and act in the most effective way possible, both individually and collectively, and to give a full account of their actions.

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<sup>1</sup> OPCAT, adopted by the UN General Assembly, UN Doc. A/RES/57/199, 18 December 2002, entered into force 22 June 2006.

This article begins by identifying the conceptual themes that run through OPCAT and explores a dynamic approach to national preventive mechanisms (NPMs). Next, the mandate of the Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT) is analysed, and the key issues surrounding the creation of a network of bodies specifically designed to prevent torture are reviewed. The article concludes by way of a proposal focused on strategic planning in the context of international human rights bodies.

## 2. The Three Themes

A new system for periodic visits to all places of detention cannot be put into effect without taking account of the mistakes made, and obstacles faced, by international human rights bodies, both worldwide and regionally. In particular, the non-fulfilment of recommendations made by such bodies (especially long-standing lack of compliance despite repetition) must be addressed because this consistently undermines their effectiveness. Progress will involve a focus on dynamic elements in the construction of the new system to prevent torture in order to ensure that it is independent and thus can gather and generate relevant information, while also being an effective actor in inter-institutional endeavours.

### 2.1 *Independence*

The preventive institutions created by OPCAT, the SPT and NPMs must be structured so as to ensure their independence, chiefly through the mechanisms for appointing and removing members. These institutions should employ transparent and open election procedures, and material and human resources should be ring-fenced, to ensure optimal functionality in their key role: to enhance the protection against torture and other inhuman treatment afforded to persons deprived of their liberty by the State.

These structures for building a new preventive system will have various points of tension. Sociological analysis of law enforcement, judicial and penitentiary institutions, for example, reveals that their culture, structure and procedures fall short of human rights standards. There are vast differences between law and practice: between what is formally and officially supposed to happen and what actually happens. This disparity may, in practice, give rise to violations of human rights through actions, omissions or the willingness to turn a blind eye. For example, some States have enshrined the offence of torture in their domestic legislation. However, this does not mean that law enforcement officials have been prosecuted for the offence of torture; in some States, the offence lies on the law books without ever being the subject of a prosecution.

The leadership of such institutions can also have a major impact on their success. An example of the importance of selecting good leaders can be seen in the new Supreme Court of Argentina: as a direct result of its decisions, barriers of impunity represented by the 'due obedience' and 'clean slate' laws have been pulled down.

Proper selection of members of the bodies that comprise the new system for prison visits is essential; such bodies must seek candidates with multidisciplinary and cross-disciplinary knowledge and suitable skills. In reference to the former, this multi- and cross-disciplinary knowledge must involve practical experience of the world behind prison bars. This may not

necessarily be formal knowledge: instead, it is important to consider the importance of the knowledge that former prisoners and their relatives possess. Geographical and gender diversity would likewise help to achieve the desired ends by broadening the subjective knowledge and understanding of the membership as a whole. In terms of gender, it must be noted that female prisoners are often willing to disclose more information, especially information of a sensitive nature (such as whether they have experienced sexual violence while deprived of their liberty) to other women; thus, on visits and other inspections, it is important to consider the composition of the team making the visit. This requires that the membership of the body is diverse enough to afford opportunities to make strategic decisions about the composition of individual teams. To these considerations must be added the preliminary guidelines for the ongoing development of national preventive mechanisms, set out by the SPT in its first annual report;<sup>2</sup> many of these guidelines are relevant to the subject of independence.

## 2.2 *Information*

When independent bodies are focused on human rights, their work will contribute to creating substantial databases relating to the prevention of torture and other inhuman treatment. A body that is independent in terms of culture, know-how and experience will be in the best position to set up databases on different forms of ill-treatment. Good information is indispensable for planning and supporting effective action in this area. For instance, if, in a certain prison, the independent mechanism is identifying a pattern of abuse related to excessive use of force in disciplinary actions against prisoners, from the information gained through many individual cases, it can engage in preventive dialogue with the prison authorities.

The gathering of sound information about ill-treatment will also require accountability of the institutions under scrutiny. An approach that effectively requires institutions to provide access to internal information (e.g. registers) to the body monitoring them, encourages transparency by highlighting timely and appropriate decision-making or lack thereof. This helps to make progress visible, while simultaneously revealing any backsliding in a way that demonstrates where the responsibility for failure or short-coming lies. The opposite approach, in which the details of activities of such bodies are not open to inspection, fosters opacity and ultimately leads to the concealment of all or part of the phenomenon of the use of torture. Lack of scrutiny of registers will mask prolonged incommunicado detention.

It should be noted that bodies which are designed to shed light on human rights violations via promoting the production, gathering, systematisation and dissemination of important information, are often subject to harassment, obstruction and disruption, particularly from the State and its institutions. Thus, there is a need for effective independence to include institutional safeguards that prevent the body's structure and operations from being affected by budgetary cut-backs, staff being dismissed from duty, or similar actions to reduce financial and personnel resources. The evolution from visits being strictly confidential, to NPMs being required to publish and disseminate annual reports, while preserving the confidential nature of certain information, in order to protect those concerned, has been an important step in ensuring that such bodies can function independently. The decisions of the some States visited by States to publish visit reports represents a welcome move from confidentiality to transparency.

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<sup>2</sup> SPT, First Annual Report, UN Doc. CAT/C/40/2, 25 April 2008. Available at [http://www.apt.ch/region/unlegal/SPTAR1\\_en.pdf](http://www.apt.ch/region/unlegal/SPTAR1_en.pdf). Last accessed 19 December 2009.

The abundant and important information available in various local, regional and worldwide databases needs to be compiled and systematised to facilitate its appropriate use in formulating recommendations to prevent torture, and other inhuman treatment, and to aid follow-up activities. However, it is necessary to have suitable structures and know-how, both in the SPT and in the NPMs, to carry out this collection, production and systematisation of sound information to ensure that it is put to strategic use.

### 2.3 *An inter-institutional approach*

Experience shows that weaknesses continue to exist in the current arrangements for visits to places of detention. The main factors behind these weaknesses are the

- (1) shortage of human and material resources;
- (1) lack of clear objectives;
- (2) lack of appropriate training; and the
- (3) duplication and different types of gaps.

In order to overcome these limitations, what is needed is appropriate coordination organised on a sufficiently rigorous basis. Important lessons about coordination can be drawn from other areas (for example, security): these suggest ways to avoid common mistakes and problems, especially those that give rise to situations in which torture or ill-treatment is more likely to occur. Here, training and awareness (of prison staff and police officers, for example) is particularly important. However, who should be involved, and what are the shared objectives should be, is not clear, especially where conflicts of interest are involved. In addition, there is a lack of coordination between related bodies, which are often used as instruments for falsely demonstrating that all is well.

Efforts range from employing a methodology in which everyone operates in an isolated manner to inter-institutional integration in which everyone contributes to the creation of new practices. Failures tend to result from a lack of appropriate institutional machinery and operating regulations. Between these two extremes, lie hybrid options. To be effective, hybrid options must allow all sectors to preserve their distinguishing characteristics and roles while, at the same time, integrating their mandates in order to avoid duplication and gaps in provision. For example, NGOs often assume a vital role in challenging State practices: work to foster cooperation between NGOs and State institutions must simultaneously encourage NGOs to continue to advocate for the development and change of problematic laws and practices that conflict with, or hinder, the NGOs' own institutional goals and objectives.

Coordination is necessary in order to capitalise on the opportunities offered by cooperation. Confusion of roles results in duplication of efforts, which is strategically and tactically unsound, especially 'in a field characterised by a shortage of resources';<sup>3</sup> it also undermines proper accountability. Instead, appropriate interdependence is needed. Interdependence implies cooperation and coordination of bodies with separate goals and objectives: this marries the advantages of pooling resources and combining efforts, while ensuring that the different interests and priorities of the individual institutions and, thus, their willingness and ability to hold other institutions accountable for failures or short-comings are still brought to bear on the complex practical difficulties of preventing torture and other ill-treatment.

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<sup>3</sup> SPT, First Annual Report. See fn.2.

### 2.3.1 *Formalised coordination relations*

While a degree of informality facilitates the free flow of information, it can also jeopardise confidentiality on certain subjects. An informal approach may be adopted on the pretext of ‘getting things done’, thereby bypassing controls and reducing transparency. This approach creates false expectations and erodes trust and, thus, weakens, rather than strengthens, inter-institutional relationships and cooperation.

Carrying out the activities mandated by OPCAT at various levels, in various spheres and among various participants necessitates the establishment of relations of trust, which must be sustained through constant, conscientious and continuous effort. This is essential to defuse tensions, remove confusion in roles and breaks down misconceptions based on a lack of understanding of other institutions and the roles of their staff. The current lack of UN funding for SPT work in direct contact with NPMs, as mandated by the OPCAT,<sup>4</sup> has made the task of establishing relationships of trust between these actions more problematic. To the extent that the SPT has managed to engage with NPMs in regional and other activities, not supported by the UN, this has been crucial for initial building of confidence.

It is crucial to promote and create training opportunities for those who will be responsible for coordinating networks for carrying out periodic visits to places of detention. This training must take into account the need to overcome misunderstandings and mistrust. The SPT, with the invaluable support of the Association for the Prevention of Torture, has taken part in multi-sectoral meetings to build bridges among participants: for example, during missions concerning the NPMs in Peru, Bolivia, Paraguay and Brazil. The pilot exercise in Estonia in 2009, involved the SPT and the Committee for the Prevention of Torture and or degrading treatment or punishment<sup>5</sup> in capacity building work with the NPM; this will lead to a sustained programme under the auspices of the Council of Europe for 2010-2011, and organised by the Association for the Prevention of Torture. Proper inter-institutional cooperation facilitates accountability, since it is apparent who is responsible for what and to whom.

### 2.3.2 *Accountability*

Accountability directly affects the legitimacy of bodies that are guided by this rule. In the case of the NPMs, this can be ensured, among other means, through an appropriate mechanism for appointing members, by proper administration of resources, and via on-going training of members to ensure consistency across visiting teams. For instance, it is important to ensure that all visiting teams exercise fully the right of access to all areas of places where people are deprived of liberty by the State; teams should not merely visit those areas of prisons where the prison management takes them on a guided tour.

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<sup>4</sup> OPCAT, Article 11(b). See fn.1.

<sup>5</sup> A European body similar to the SPT, which was established by the European Convention for the Prevention of Torture and Inhuman or degrading treatment or punishment.

### 2.3.3 *Procedures and Models*

In the search for efficiency and effectiveness, it is sometimes convenient to concentrate on trying to determine the best institutional model to adopt, and thus lose sight of the external or contextual issues that affect cooperation and trust. It is important to build in time to address this: for example, via brainstorming and discussions.

By concentrating on the best model for NPMs (or the SPT) to adopt, in terms of efficiency and effectiveness in carrying out their respective tasks and functions, there is also a risk of ignoring the transparency necessary in the development of trust between the State and civil society. It is vital not to discount aspects that may be unquantifiable (such as the credibility of an existing human rights institution), yet are key to the creation of common ground between the State and civil society and which promote cooperation, reciprocity and interdependence, rather than competition and isolation.

The search for effective theoretical institutional models must not lead to ‘paper NPMs’: a phenomenon often paralleled in judicial, law enforcement and penitentiary fields. Instead, it is important to recognise that, in practice, the actual and possible functions of such bodies may diverge from those that are formally or officially ascribed to them. Failing to recognise the potential for such problems often has a high political cost, not least due to the loss of confidence as a result of the generation of false expectations. An ombudsman’s office which, in the past has enjoyed considerable public confidence in its role in redressing complaints, may not successfully function in practice as a preventive mechanism, despite acquiring that additional role, in theory, by being designated as the NPM.<sup>6</sup>

## 3. The SPT

The task of preventing torture (and other cruel, inhuman or degrading treatment or punishment) by enhancing protection of persons deprived of their liberty necessitates the building of a new system for periodic visits to be carried out by international, regional and national bodies. The role of the SPT, at this groundbreaking stage, is to carry out its functions in a balanced manner in respect of the three conceptual nuclei of its mandate, as laid down in Article 11 of the OPCAT: visits, work with NPMs and cooperation with international, regional and national institutions and organisations.

Unlike other international organisations (which tend to carry out their work via the examination of reports from States and/or via directly handling individual cases and/or via making their own visits of enquiry), the SPT makes recommendations and observations to States Parties concerning public policies for the prevention of torture and other inhuman treatment. Thus, it is vital that the SPT’s activities be guided by effective planning of the new system of periodic visits: these plans must incorporate methods for obtaining and using feedback from a network of NPMs and other international, regional and local organisations working to combat torture. This torture prevention network must be supported and sustained by the broad and intensive efforts of civil society organisations and relevant State sectors. It is not a matter of cleaning the slate and starting again, nor is it a case of ‘more of the same’. The added value of the OPCAT

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<sup>6</sup> See Steinerte and Murray in this volume.

system is to strengthen efforts already being pursued, by many persons and institutions, to combat torture.

The SPT's mandate to carry out visits while interacting, not only with States Parties and NPMs, but also with various institutions, organisations and individuals (able to provide relevant information to the SPT because of their ability to provide relevant information offers an important new direction for work in this field), as does the SPT's freedom to choose the timing and location of visits. The SPT aims to launch a new system of independent periodic visits involving an inter-institutional approach, focused around the provision of information, recommendations and observations designed to strengthen the protection of persons deprived of their liberty against torture and other inhuman treatment.

The greater the visibility of problems and violations, as generated by the various participants, the better the opportunities for achieving change and so preventing future violations. The SPT's mandate, like that of related international, regional and local actors (both within civil society and the State), contains the necessary foundations for new efforts in the field to proceed without undermining existing work. This should help to strengthen the international rule of law.

#### 4. Torture Prevention Network

The social movements that arose in connection with the struggles waged by groups associated with feminism, environmentalism, trade unionism and anti-discrimination, among others, provide examples, with distinctive regional features, of how to bring together diverse sectors. At the same time, there has been a new approach to promoting positive relationships between new social movements and the State: on the one hand, civil society has been invited to become involved in the drafting and implementation of government policies, and, on the other, the State has gained a certain leverage in the way the agendas of civil society are organised. This encourages transparency, the building of relationships of trust, and cooperation between States, their institutions and NGOs. When the State and NGOs can share practical knowledge and experience, and work to bring at least some of their goals and objectives into alignment, they are often able to achieve better practical results in preventing torture and other ill-treatment.

States Parties express their resolve to combat torture and inhuman or degrading treatment through ratifying the OPCAT. However, the OPCAT clearly refers to the need for relations of cooperation,<sup>7</sup> especially in terms of the SPT providing advice and assistance to States Parties in the establishment of NPMs.<sup>8</sup> It is equally important for States to cooperate with the SPT,<sup>9</sup> especially with regard to SPT recommendations and observations about NPMs.<sup>10</sup> Ultimately, effective cooperation will allow the SPT to strengthen the capacity and the mandate of NPMs, so that they may take an even greater role in uncovering and preventing torture. Faced with the challenge of articulating this new prevention network, it is vital to avoid both the false optimism of believing that achieving consensus will not be problematic, and the excessive pessimism of believing that the State will always look for ways to torture.

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<sup>7</sup> See OPCAT, Article 2, para. 4, Article 11(b)(i), and Article 11(b)(iv). See fn.1.

<sup>8</sup> OPCAT, Article 31 and Article 11(c). See fn.1.

<sup>9</sup> OPCAT, Article 11(b). See fn.1.

<sup>10</sup> OPCAT, Article 12. See fn.1.

The development of NPMs, which comprise a mixture of State and civil society members, generates complex relational dynamics, especially with regard to social movements. Allowing greater civil involvement in the management of public affairs entails certain risks, concerning discipline and control that can cause civil actors to question whether or not they should become involved with NPMs. Here, the SPT must help to open up channels for dialogue and cooperation, and work to promote trust and reciprocity, without ignoring areas of tension. For example, if an NPM is composed of a national human rights institution, and also persons who come from NGOs, it is important that the powers of the NPM apply to all members of the team, and are exercised consistently and appropriately by all.

All sectors involved in the prevention of torture will be strengthened through the creation of a cooperative network that is well designed, straightforward and open. However, determining which method to pursue to build strong inter-institutional relationships is far from straightforward. Similarly, there is no single formula for designing an ideal NPM. Instead, this must be determined separately for each specific context, applying the slogan of the new social movements in the environmental field: ‘thinking globally and acting locally’. Care should be taken to avoid rhetoric that falls down in the face of complexities in implementation. Solitary or isolated efforts, which may be attractive in the short term because they involve lower costs, portend the weakening of efforts to prevent torture in the longer term because they often lack sustainability and institutional mechanisms for sharing information and coordinating efforts.

As the new system of preventive mechanisms is constructed and developed, it will be important to keep in mind achievements, failures, progress and set-backs. An important part of this work will involve dismantling or reforming problematic institutions, especially ones predicated on authoritarian principles, and creating new practices and institutions compatible with the culture of human rights. For example, institutions which have previously carried out checks on the principle of legality must reorient themselves to carry out checks on human rights principles; a institution which has previously continued to monitor incommunicado detention in line with existing domestic legal provisions, must now, as an NPM, examine the risks of ill-treatment inherent in incommunicado detention.

## 5. Inter-Institutional Strategic Planning

In addition to the network of NPMs and a multiplicity of local actors, the SPT must work closely in the areas of planning, action and follow-up with the United Nations treaty bodies (Committee against Torture, Human Rights Committee, CEDAW Committee, Committee on the Rights of the Child, etc.) and with the various special procedures (Special Rapporteur on torture, Working Group on Arbitrary Detention, Special Rapporteur on summary executions, etc.), as expressly laid down in article 11 (c) of OPCAT. The SPT must also cooperate with other international bodies (such as the International Committee of the Red Cross) and regional bodies (Inter-American Commission on Human Rights, European Committee for the Prevention of Torture, African Commission on Human and Peoples’ Rights, etc.). Similarly, close ties must be sought with institutions and agencies working in important thematic areas, such as health, and protection of vulnerable population groups: for example, organisations working to combat slavery and trafficking of women.

In order to arrive at an effective understanding of how the SPT may contribute more widely to determining the prevalence of torture, and plan actions to combat it, it is first necessary to

categorise the Member States of the United Nations in terms of whether they have ratified or signed the OPCAT. Second, the SPT must take account of the range of activities undertaken by the various United Nations bodies and special procedures (country reports, complaints in individual cases, field visits and advocacy), supplemented by the activities of regional human rights agencies. Third, the situation in each region, and in each country, must be classified on the basis of the prevalence of the use of torture and other inhuman treatment. Fourth, the SPT must consider the existence and effectiveness of local institutions in each area (region and/or country), especially NPMs, and examine the quality and comprehensiveness of the work that they do. It is only on this basis that the SPT will be able to devise and carry out an effective and wide-ranging set of activities, in accordance with an annual or periodic plan, addressing both worldwide, regional and country-specific issues. Careful analysis of all these factors would allow the SPT to make informed judgements about visiting and other work priorities.

Effective periodic and annual planning of activities to prevent torture requires basic measures of institutional engineering, such as the construction of a forum for coordination among secretariats (or possibly the construction of a single secretariat) which, together with an inter-committee working group and special procedures, would collect and collate all the information relating to the four areas discussed above. In this way, it would be possible to create a dynamic centred on joint work in the evaluation, design and implementation of action plans: this, in turn, would be periodically assessed and redesigned. This would allow the SPT, and the organisations, institutions and bodies it works with, to make effective strategic use of the valuable information that already exists in a dispersed form.

This would allow the SPT to perform its duties in a more rational, strategic and planned manner. In particular, it would impact on the implementation of

- (1) missions to States Parties to visit places of detention, and making or following up recommendations with a shorter or longer timeframe and/or greater or lesser urgency;
- (2) missions to States Parties to provide advice and support in the establishment or upgrading of an NPM; and
- (3) advocacy to foster the signing or ratification of the OPCAT, or to promote the activation of other United Nations and regional procedures (for example, complaints in individual cases), or to report on the need to call for support from various assistance or cooperation funds with regard to the implementation of recommendations to prevent torture and improve conditions in detention.

This would allow the SPT to achieve greater impact in its endeavours, and thus merit its role as a global reference point in the field of prevention of torture.