



# Torture Prevention: Deconstructed

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and how well do we do it in South Caucasus?'

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# The Optional Protocol to the UN Convention Against Torture (OPCAT)- a different human rights treaty

- ‘Traditional’ human rights treaties: provide for substantive rights and oblige states parties to achieve a certain result in their domestic systems, like to ensure that people are not deprived of their liberty in an arbitrary fashion or that due process is followed in the court of law.
- OPCAT- a different human rights treaty:
  - Main obligation of states parties: establishment of an independent monitoring mechanism, an NPM;
  - Contains no new substantive rights and does not seek to provide redress for breach of any substantive rights;
  - Raison d'être: pre-empt the occurrence of a breach of most fundamental human right: freedom from torture.

# Prevention: what does it mean for the purposes of OPCAT?

- Is ‘prevention’ defined in OPCAT?
  - Article 1: visits undertaken with the aim ‘to *prevent* torture and other cruel, inhuman or degrading treatment or punishment’;
  - Article 2: ‘A Subcommittee on *Prevention* of Torture’ is to be established;
  - Article 3: states are to set up, designate or maintain ‘national *preventive* mechanisms’.
- Para 5 of the Preamble: ‘effective *prevention* of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures’.

# Prevention and Convention Against Torture (CAT)

- Para 3 of Preamble to OPCAT refers to Articles 2 and 16 of CAT which ‘oblige each State Party to take effective measures to *prevent* acts or torture and other cruel, inhuman or degrading treatment or punishment in any territory under its jurisdiction’;
- Meaning of ‘prevention’ in CAT: General Comment No 2 on the Implementation of Article 2 of the CAT:
  - Absolute prohibition of torture through legislative, administrative, judicial or other actions;
  - Must make the offence of torture punishable and ensure that all parts of state’s governments adhere to the definition of torture as per CAT;
  - Educational measures: work with the law enforcement officials and population in general.

# Preventive mandate: the SPT and NPMs

- *Preventive visits to places of deprivation of liberty: how does this affect the approach utilised by the visiting team?*
  - Pro-active engagement: regularity of visits;
  - Holistic approach;
  - Follow-Up process.
- Preventive mandate entails more than just visiting, be it preventive visiting: missions v. visits.
- What else?
  - Work with the legislative framework: specifically mentioned in Article 19 (c ) of the OPCAT;
  - Preamble, para 5: other measures, like education of the population (publication of reports) and work at the policy level.

# Prevention as a legal obligation to states parties to OPCAT

- International Court of Justice in the case *Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*:
  - Obligation to prevent is distinct from obligation to protect;
  - Obligation to prevent is a free-standing legal obligation upon states parties, however it's content depends on the treaty in question;
  - Obligation to prevent is not an obligation of result but rather one of conduct, it is a positive obligation and requires states to take active measures.
- General, free-standing obligation to prevent not established, but UN Convention Against Torture and it's obligation to prevent specifically mentioned by the ICJ as example of other human rights treaties where obligation to prevent exists.

## Other International and Regional Tribunals and the obligation to prevent

- International Criminal Tribunal for the Former Yugoslavia (Furundzija case): *'States are bound to put in place all those measures that may pre-empt the perpetration of torture'*;
- European Court of Human Rights (Osman case): *'they [the authorities] failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'*;
- Inter-American Court of Human Rights (Velasquez-Rodriguez case): *there is a legal duty to take reasonable steps to prevent human rights violations.*

# Elements of prevention as a legal obligation of states

- **Positive obligation:** states are to be seen to have done everything in their powers to prevent certain acts from occurring; no obligation of result. This obligation rests not only with the 'accused' state, but also with other states which are to be seen to have done everything in their power to prevent acts occurring in other countries.
- Clearly **free-standing legal obligation** that can entail **state responsibility** under international law.
- Prevention and torture: **prevention is the overarching concept** which entails, *inter alia*, both the prohibition of torture as well as protection of everyone against torture and other forms of ill-treatment: clear from the ICJ and CAT practice.

# The obligation to prevent in OPCAT

- OPCAT does not set out a clear definition of obligation to prevent;
- However such an obligation is clear under the provisions of CAT and especially so given the prevention can be a free-standing legal obligation upon states parties, entailing state responsibility under international law;
- OPCAT provides one way of how states could comply with their obligation to prevent. **It concretises the obligation to prevent as it sets out clear preventive framework:**
  - to establish an NPM;
  - to provide the NPM with the necessary resources and powers;
  - to cooperate with the NPM and the SPT.
- Preventive visiting: essential part of the preventive mandate, but OPCAT is not only about preventive visiting, it entails much more and involves not only the work of the NPMs and the SPT, but puts clear obligations upon states.